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Reserved

Index
In
Nithari Judgement

CAPITAL CASE No. - 5183 of 2017
With
CAPITAL REFERENCE No. 10 of 2017

Surendra Koli ……..Appellant

Versus

State through Central Bureau of Investigation …….Respondent

With

CAPITAL CASE No. - 4404 of 2017
With
CAPITAL REFERENCE No. 10 of 2017

Moninder Singh Pandher ....Appellant

Versus

Central Bureau of Investigation and another …….Respondent

CAPITAL CASE No. - 5183 of 2017

With

CAPITAL REFERENCE No. 10 of 2017

Surendra Koli .....Appellant

Versus

State through Central Bureau of Investigation .....Respondent

Counsels for Appellant:- Sri Yug Mohit Chaudhary assisted by Ms. Payoshi Roy and Sri Siddhartha Sharma, Ms. Mary Punch (Sheeba Jose) and Sri Mohd. Kalim.

Counsels for Respondent:- A.G.A., Sri Amit Mishra, Sri Gyan Prakash, Sri Jitendra Prasad Mishra and Sri Sanjay Kumar Yadav.

With

CAPITAL CASE No. - 4404 of 2017

With

CAPITAL REFERENCE No. 10 of 2017

Moninder Singh Pandher ....Appellant

Versus

Central Bureau of Investigation and another .....Respondent

Counsels for Appellant:- Manisha Bhandari, Omkar Srivastava, Syed Mohammad Nawaz, Dhruv Chandra, Shashwat Sidhant, Ayush Jain, Mohd. Abdullah Tehami and Shivam Pandey

Counsels for Respondent:- A.G.A., Sri Amit Mishra, Sri Gyan Prakash, Sri Jitendra Prasad Mishra and Sri Sanjay Kumar Yadav.

Hon'ble Ashwani Kumar Mishra,J.
Hon'ble Syed Aftab Husain Rizvi,J.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Accused appellants Surendra Koli S/o Shankar Ram Koli (hereinafter referred to as 'SK') and accused Moninder Singh

Pandher s/o Sampooran Singh (hereinafter referred to as 'Pandher') have been tried in Sessions Trial No. 440 of 2007, arising out of CBI FIR No. RC 2(S)/07-SCB-I/DLI, under Sections 302, 364, 376 r/w 511, 201 IPC and Sections 302 r/w 120B, 376/511 r/w 120B and 201 r/w 120B IPC, respectively and convicted in the aforesaid sections vide judgment dated 24.07.2017. Accused SK is sentenced to death alongwith fine of Rs. 10,000/- under Section 302 IPC with a direction to hang the accused till death, subject to confirmation by the High Court; life imprisonment alongwith Rs. 10,000/- fine under Section 364 IPC; 10 years rigorous imprisonment alongwith Rs. 10,000/- fine under Section 376 r/w 511 IPC and seven years rigorous imprisonment alongwith fine of Rs. 5,000/- under Section 201 IPC. Default sentence has also been awarded for non-payment of fine of six months under Section 302 IPC, four months, each, in respect of offences under Section 364, 376 r/w 511 and Section 201 IPC; whereas accused Pandher is sentenced to death alongwith fine of Rs. 10,000/- under Section 302 r/w 120B IPC with a direction to hang the accused till death, subject to confirmation by the High Court; 07 years rigorous imprisonment alongwith Rs. 10,000/- fine under Section 376/511 r/w 120B IPC and 07 years rigorous imprisonment alongwith fine of Rs. 5,000/- under Section 201 r/w 120B IPC. Default sentence has also been awarded for non-payment of fine of six months under Section 302 r/w 120B IPC, four months, each, in respect of offences under Section 376/511 r/w 120B and Section 201 r/w 120B IPC.

2. The court of sessions has forwarded the judgment dated 24.07.2017, alongwith records of the proceedings, for confirmation of death sentence under Section 366 Cr.P.C. The confirmation proceedings have accordingly been registered as

Reference Case No. 10 of 2017. Jail Appeals are also filed by accused SK and Pandher, which are registered as Capital Criminal Appeal Nos. 5183 of 2017 and 4404 of 2017 respectively. The reference proceedings and the capital criminal appeals arising out of the judgment dated 24.07.2017 have been heard together and are being disposed of by this common judgment. In order to protect identity of the unfortunate victims of Nithari incident, their names are being anonymized.

The Nithari Incident

3. Nithari is a village abutting Sector-31 of NOIDA, in District Gautam Buddh Nagar of Uttar Pradesh. It suddenly became infamous for its missing children and caused massive uproar in the country. Various complaints were lodged in respect of such missing children by their parents/guardians which included the complaint of one Nand Lal, father of a young girl namely L, who too had gone missing on 07.05.2006 and a complaint was lodged with Police Station Sector-20, Noida. An application under Section 156(3) Cr.P.C. was filed by the informant on 24.08.2006 against Moninder Singh and Surendra residents of D-5, Sector-31, Noida for registration of FIR against them. The Chief Judicial Magistrate, Gautam Buddh Nagar ordered registration of first information report in respect of missing girl L on 27.09.2006. It is pursuant to this direction that Case Crime No. 838 of 2006 was registered at Police Station – Sector-20, NOIDA, under Section 363, 366 IPC on 07.10.2006.

4. It transpires that progress of investigation in the case was not satisfactory and consequently, a grievance was raised before this Court relating to tardy process of investigation in the case and consequently, directions came to be issued for the

investigation in Case Crime No. 838 of 2006 to be pursued with expedition. In compliance of such directions, orders were issued by the Superintendent of Police for constituting special team to investigate the case. Dinesh Yadav, Dy. S.P., Noida, was to lead this special team. It is during investigation of the case that role of accused Surendra Koli (SK) surfaced and the police took him in custody on 29.12.2006. Accused SK purportedly confessed to the killing of the missing girl L and claimed to have chopped her body into pieces and dumped her head and slippers in the enclosed gallery behind House No. D-5, Sector–31, NOIDA, while other body parts were thrown in the public drain passing in front of the house. Accused SK allegedly volunteered to lead the police party to the particular spot in enclosed gallery behind House No. D-5, Sector-31, NOIDA where he had concealed the body parts of missing girl L and her other belongings. The police party alongwith accused SK came to the spot and as per the prosecution, on his pointing out, the skull and other body parts of L was recovered. While accused SK was at the place of recovery i.e. the enclosed gallery behind House No. D-5, Sector-31, NOIDA, also confessed to the killing of other missing women/children, in a similar fashion, and fourteen more skulls were recovered on his pointing out from the same enclosed gallery where digging had already started. A recovery memo (Exhibit Ka-16), to such effect, was drawn on the dictation of Dinesh Yadav (PW-40) to Sub-Inspector Chhote Singh (PW-28) which is duly exhibited during trial and is on record.

5. Ex.Ka.16 records that while the skull has been concealed beneath the surface in the enclosed area behind House No. D-5, Sector-31, NOIDA, the other body parts of L was discharged in the drain flowing in front of the house. Accused SK also

confessed to have hidden the knife used in the offence and offered to get it recovered. A mud stained knife was later recovered on the pointing out of SK from below a water tank kept on the roof of House No. D-5, Sector-31, Noida (Ex.Ka.17). A yellow Kurti, white Salwaar and a pair of slippers was also recovered from a yellow plastic (Ex.Ka.50). During the course of cleaning of drain in front of the House No. D-5, Sector-31, NOIDA, recoveries were also made of bones, bangles, slippers, etc., vide (Ex.Ka.18). On 5.1.2007 also certain recoveries were made of suspected stains, kitchen knife, Aari (iron blade), etc. The accused SK was also taken to Gandhi Nagar in Gujarat for conduct of various scientific tests (polygraph test, narco analysis test, brain mapping etc.) and the reports obtained from these tests have also been relied upon to implicate the accused SK.

6. For better appreciation of prosecution case, we consider it expedient, at the outset, to refer to the site plan, prepared by the Investigating Officer and exhibited as Paper No. Ka-74. Rough layout plan of ground floor of House No. D-5 as well as of the first floor has also been prepared in RC 2(S)/07-SCB/DLI. House No. D-5 situates on the main road and sewer drainage passes between the road and the boundary of House No. D-5. On one side of House No. D-5 is House No. D-4 whereas on the other side is House no. D-6. House number D-6 incidentally belongs to a doctor who apparently was a suspect in a case of organ trade (kidney transplant). Behind House No.D-4, D-5 and D-6 there is a service lane, which is blocked by boundary from all sides. On the one side of it is the boundary of house number D-5 and D-6 while on the other side of this service lane, behind House No. D-5, D-6 is the 5 ft. high boundary wall of U.P. Jal Nigam. Height of boundary is admitted

to be about 25 ft. behind house number D-5. It is from this enclosed gallery that biological remains (skulls, bones and skeleton etc.) have been recovered.

7. Main gate of House No. D-5 is on the left of the plot and has an open drive way leading to the servant room at the end. This drive way is used for parking of car, etc. There exists a drawing room, three bed rooms, dinning room, toilets, etc. on the ground floor. There is also a kitchen and store adjoining the drawing room. There is a open courtyard behind the constructed portion on the ground floor which has a spiral iron staircase for the servant room on the first floor attached to a toilet. There is, however, no space for courtyard behind the servant room. The attached bathroom on the first floor has a window which opens in the enclosed service lane.

8. Page 914 of the paper book contains the site plan (Ex.Ka.74), which is proved by PW-40. Place 'A' is shown in the site plan, which situates in the enclosed gallery behind House No. D-6 from where bones have been recovered. A-1 and B are the other spots in the enclosed gallery behind House No. D-5 from where bones and clothes have been recovered. Point A-1 and B shown in the enclosed gallery behind House No. D-5 however, are abutting House no. D-6, from where most of the recovery of bones/skeleton are made. No recovery of skeleton or bones etc. are shown from enclosed gallery behind the servant room or the toilet in the servant room. The width of the enclosed gallery/service lane is specified as 3½ ft. The enclosed gallery from which recoveries are made are outside the boundary of House No. D-5 and D-6 as is clearly admitted to the investigating officer (PW-40) in his testimony. The area from which recovery has been made is shown as service lane and according to PW-40 this land belongs to Noida and not to

Pandher, who owned House No. D-5.

9. All the recoveries are either made from the enclosed service lane which is shown in the map as no man's land or from the sewer drainage situated beyond the boundary of House no. D-5 and D-6. None of the recovery of skull, bones/skeleton is made from within the House No. D-5. The only recovery from within the House No. D-5, Sector 31, Noida is that of two knives and an axe, which admittedly are not used for committing the offence of rape, murder etc. but are alleged to have been used for cutting the body parts after the victims were strangulated to death.

10. Seven member team from Forensic Science Laboratory, Agra inspected House No. D-5, Sector-31, Noida for blood stains, human remains etc. but except for a blood spot of unknown origin in the bathroom sink and pipe, no other biological or forensic material was found from the house. The enclosed gallery behind House No. D-5 and D-6, Sector-31, Noida was photographed and preliminary examination of blood stains was conducted and maps of rooms etc of House No. D-5, Sector-31, Noida was prepared. Various items were seized from the house including portions of a pink mattress, a yellow bed-sheet and sofa mattress. A semen stain of unknown origin was found on sofa mattress which has not matched with the accused SK. The enclosed gallery was also dug up and bones, clothes and soil etc were seized.

11. Considering the gruesome killings of helpless women and children of Nithari and the gravity of offence the ongoing investigation in the case was transferred to Central Bureau of Investigation on 09.01.2007. The C.B.I. took over the ongoing investigation of Nithari cases on 11.01.2007. FIRs previously

lodged were re-registered by the CBI and the custody of accused SK was extended from time to time by the concerned magistrate. Accused SK also made disclosure on 13.1.07 at CBI office regarding the spot of killing and disposal of bodies and recoveries of chappals etc from the enclosed gallery behind House No. D-5, and D-6, Sector-31, Noida and the Jal Board residential quarters.

12. The C.B.I. ultimately produced SK on 28.02.2007 for recording his confession before the court of ACMM, Patiala House Courts at New Delhi. On the directions of learned ACMM the confession was recorded by the Metropolitan Magistrate, Delhi on 1.3.2007, under Section 164 Cr.P.C. Accused SK confessed to have raped and killed the victims and also disclosed the manner in which he disposed of the victim's bodies. C.B.I. also conducted various scientific tests on the accused SK and based upon the confession, recovery of incriminating material under Section 27 of the Indian Evidence Act, 1872 (hereinafter referred to as 'the Act of 1872') and the scientific tests conducted in the case ultimately submitted charge-sheets in all 16 cases before the concerned Magistrate.

13. As per the prosecution, Moninder Singh Pandher lived in House No. D-5, Sector 31, NOIDA and would often call sex workers and cavorted with them. Watching Pandher cavorting with sex workers triggered an automaton state for the accused SK, who enticed the victims on one pretext or the other; immobilized them; attempted or raped the victim and then killed them by strangulation. He then took their dead bodies to the servant's bathroom on the upper-floor of the house No. D-5, Sector-31, Noida and cut the body parts of the dead victims and eat some part of torso, and throw the skull and clothes,

etc., partly in the enclosed space/gallery behind House No. D-5 and discharged rest of the body parts in the drain flowing in front of the house.

14. Trials were conducted in 16 cases of Nithari killings. The accused appellants were acquitted in three cases of victims Pushpa, Harsh and Max by the Court of Sessions, while in respect of remaining 13 cases the accused SK has been sentenced to death. In one of these cases of victim 'XYZ' the death sentence has been affirmed by this Court in Criminal (Capital) Appeal No. 1475 of 2009, corresponding to Reference No. 3 of 2009, by a co-ordinate bench of this Court on 11th September, 2009. The judgment of this Court in 'XYZ''s case has been affirmed by the Supreme Court in Criminal Appeal No. (s). 2227 of 2010, decided on 15.2.2011, with summary dismissal of appeal.

15. Separate and distinct trials have been held by the court of Sessions in 12 remaining cases and the accused SK has been sentenced to death by the Court of Sessions in all 12 cases. In two, out of these 12 cases i.e. cases of victim A and C the other accused namely Pandher has also been sentenced to death by the trial court. In remaining 10 cases co-accused Pandher has been acquitted, except in Sessions Trial No. 439 of 2007, wherein Moninder Singh Pandher has been convicted under Section 3 and 5 of Immoral Trafficking (Prevention) Act, 1956 by the trial court. Thus aggrieved, 12 appeals have been preferred by accused SK against his conviction and death sentence while co-accused Pandher has filed two appeals against his conviction and death sentence. The present appeal relates to victim A.

Disappearance of victim A

16. According to the prosecution case, the first informant in the present case namely, Jatin Sarkar S/o Bhanu Sarkar R/o Village Nithari made a written report stating that his daughter A, aged 20 years, is married and has a son of one and a half years who was with the informant. On 5.10.2006, Aleft the house for work but did not return. Efforts were made to search her, but she could not be traced. On 29.12.2006, the first informant came to know that behind House No. D-5, Sector 31, Noida, skull, bones and skeleton of missing women and children as well as their clothes have been found. It is then that he came alongwith his wife Vandana Sarkar and could identify the Salwar Suit and Slippers of his missing daughter A. It became apparent that owner of house No. D-5, Sector-31, Noida i.e., Moninder S/o Sampooran Singh and his servant Surender @ Satish Koli had called his daughter to the house and after sexually assaulting her has hidden her body beneath the soil behind his house. Since no previous information was given to police, as such, a request was made to register a case and take legal action. On the basis of such report, Case Crime No. 1025 of 2006 was registered at Police Station – Sector 20, Noida, under Sections 364, 376, 302, 201, 120B IPC at 3.25 am on 30.12.2006. The distance of police station was about 2.5 km. Later, investigation of the case was transferred to C.B.I. and the FIR was re-registered as RC No. 2(S)/2007 against the accused SK and Moninder Singh Pandher. However, only accused SK has been charge-sheeted under Sections 302, 364, 376 r/w 511 and 201 IPC. Co-accused Moninder Singh Pandher was later summoned under Section 319 Cr.P.C. and has also been convicted and sentenced to death.

17. The prosecution version is essentially based upon detailed

confession made by accused SK, as well as alleged recovery of body parts etc., on his pointing out, immediately after his arrest on 29th December, 2006 and on subsequent dates. The recovery and confession both have been relied upon by the courts below to send the accused to the gallows. Similarly, complicity of co-accused Moninder Singh Pandher has also been found in two out of 12 cases in eliminating the deceased.

18. It is in the above background that we are called upon to examine the evidence on record of this case to determine the question as to whether the prosecuting agency i.e. CBI herein, has been able to establish the guilt of the accused appellants beyond reasonable doubt and whether this case falls in the category of rarest of rare case thereby meriting extreme punishment of hanging for the accused.

19. Charges have been framed against the accused SK under Sections 364, 376 r/w 511 IPC, 302 and 201 IPC by the concerned court on 4.6.2007. The charges have been explained to the accused SK, who has denied the accusations made against him and has demanded trial.

Documentary evidence of prosecution

20. Prosecution has relied upon following documentary evidence in support of its case:-

Sr. No.	Details of the Record	Name and Number of the witness testifying in support of the document	Exhibit No.
1	Disclosure Statement Paper No 30 A/1 to 9 accused Surendra Koli dated 13-1-2007	P.W. -2 Ashwani Singh	Ext ka - 1
2	Copy of inquest report dated 13-1-07 Paper No 31A/1 to 7	P.W. –2 Ashwani Singh	Ext ka - 2
3	Copy of search seizure memo dated 12-1-07 Paper No 39A to/ 1 to 7	P.W. –3 Satish Chandra Mishra	Ext ka - 3
4	Copy of search- seizure memo	P.W. –3 Satish Chandra	Ext ka - 4

	dated 13-1-07 Paper No 34A/ 1 to 8	Mishra	
5	Copy of search- seizure memo biological material dated 15-1-07 paper No 37A/1 to 2	P.W. -4 Mukesh Kumar	Ext ka - 5
6	Copy of search- seizure memo biological material dated 16-1-07 paper no 38A/ 1 to 2	P.W. -4 Mukesh Kumar	Ext ka - 6
7	Copy of the letter sent by AIIMS, Delhi for forwarding the medical report to DIG/CBI, paper no 46A/1	P.W. -5 Dr. DK Sharma	Ext ka - 7
8	Copy of Psychological assessment report of the accused Surendra Koli paper No 46A/3	P.W. -6 Dr. Mamta Sood	Ext ka - 8
9	Copy of the report by experts of AIIMS related to bones and other material dated 15.3.2007 paper no 48A/1 to 172	P.W. -7 Dr. Manish Kummad	Ext ka - 9
10	Copy of forensic report by Experts in AIIMS related to bones and other materials dated 16.3.2007, paper no 49A/1	P.W. -7 Dr. Manish Kummad	Ext ka - 10
11	Copy of the letter sent by AIIMS, New Delhi to CBI related to forwarding of the report dated 16-3-07, paper no 51A/ 1to 13	P.W. -7 Dr. Manish Kummad	Ext ka - 11
12	Expert's report of AIIMS dated 17-3-07 paper no 50A/ 1 to 91	P.W. -7 Dr. Manish Kummad	Ext ka - 12
13	Copy of Disclosure statement by accused Surendra Koli dated 18-1-007 paper no 32A/ 1	P.W. -8 Virendra Singh Dagar	Ext ka - 13
14	Copy of inquest report- recovery dated 18-1-2007 paper no 33A/ 1 to 3	P.W. -8 Virendra Singh Dagar	Ext ka - 14
15	Copy of letter from SPCBI dated 3-2-07 paper no 21Ka/1	P.W. -9 Dr. Sanjay Lalwani	Ext ka - 15
16	Copy of recovery memo of 15 human skulls dated 29-12-06 paper no 12A/ 1 to 2	P.W. -10 Pappu Lal	Ext ka - 16
17	Copy of recovery memo of knife dated 29.12.06 paper no 11A/1	P.W. -10 Pappu Lal	Ext ka - 17
18	Copy of recovery memo of human bones dated 31.12.06 paper no 13A/1	P.W. -10 Pappu Lal	Ext ka - 18
19	Copy of confession statement of Surendra Koli under section 164 of CrPC paper no 72A/ 24	P.W. -11 MM Sri Chandra Shekhar	Ext ka - 19
20	Copy of letter from the Director of CDFD, Hyderabad dated 13-3-07 paper no 92A/ 11	P.W. -12 Dr. Nandi Naini Madhusudan Reddy	Ext ka - 20
21	Copy of receipt of DNA report by CDFD vide letter dated 13-3-2007 paper no 92A/ 12 to17	P.W. -12 Dr. Nandi Naini Madhusudan Reddy	Ext ka - 21

22	Copy of receipt of memo of various reports by Dr S Lalvani dated 19-3-2007 paper no 92A/ 12 to 17	P.W. -12 Dr. Nandi Naini Madhusudan Reddy	Ext ka - 22
23	List of collection of blood samples of various alive people/ claimants paper no 92A/ 28 to 30	P.W. -12 Dr. Nandi Naini Madhusudan Reddy	Ext ka - 23
24	List of DNA profiles of alive people/ claimants paper no 92A/ 31 to 36	P.W. -12 Dr. Nandi Naini Madhusudan Reddy	Ext ka – 24/1 and 24/2
25	Copy of report of DNA profiles of alive people/ claimants tallied with the DNA profiles of dead bodies page no 92A/ 37 to 45	P.W. -12 Dr. Nandi Naini Madhusudan Reddy	Ext ka - 25
26	Copy of Idefication(sic) paper no 92/46	P.W. -12 Dr. Nandi Naini Madhusudan Reddy	Ext ka - 26
27	Copy of FIR no registered at Sector 20, Noida dated 30.12.06 paper no 83/ 1 to 3	P.W. -14 Gangadhar Sharma	Ext ka - 27
28	Copy of letter by CJM, Gautambuddha Nagar to Director FSL, Gujarat for narco test, lie detector test of accused Surendra Koli dated 3.1.07 paper no 79 A	P.W. -15 Dr. SL Vaya	Ext ka - 28
29	Copy of letter of assent by Surendra Koli for narco test dated 8.1.07, paper no 80A	P.W. -15 Dr. SL Vaya	Ext ka - 29
30	Copy of letter of assent by Surendra Koli for narco test dated 9.1.07, paper no 81A	P.W. -15 Dr. SL Vaya	Ext ka - 30
31	Copy of letter sent by MSNL, Gandhi Nagar, Gujarat to CJM, Gautam Buddha Nagar in context of the reports of accused Surendra Koli and Moninder Singh pandher dated 2-1-07 paper no 28A/ 1 to 120 Psychological Assessment Report of Moninder Singh Pandher & Surender Koli dated 11.09.07 Polygraph Report of Moninder Singh Pandher and Surender Koli dated 11.09.07 Narco Analysis Report of Moninder Singh Pandher and Surender Koli dated 11.09.07 Brain Electrical Oscillation Signature Profile Report of Moninder Singh Pandher and Surender Koli dated 11.09.07 Comprehensive Forensic Report dated 11.09.07	P.W. -15 Dr. SL Vaya	Ext Ka – 31 Ext Ka – 31/1 Ext Ka – 31/2 Ext Ka – 31/3 Ext Ka – 31/4 Ext Ka – 31/5

32	Identification form of Jatin Sarkar, CDFD Hyderabad paper no 92A/ 47 and the copy of Letter from FSL addressed to CJM, Gautambuddha Nagar dated 22-1-07 paper no 83A	P.W. -16 Gaurav Verma	Ext ka - 32
33	Identification form of Bandana Sarkar CDFD Hyderabad paper no 92A/48	P.W. -16 Gaurav Verma	Ext ka - 33
34	Identification form of Sonu Sarkar CDFD Hyderabad paper no 92A/47	P.W. -16 Gaurav Verma	Ext ka - 34
35	Copy of recovery memo of knife dated 11-1-07 paper no 16A/1	P.W. -17 Durga Prasad	Ext ka - 35
36	Copy of order by CJM Ghaziabad dated 07-4-07 for identification of articles by the family members paper no 90A	P.W. -18 Smt Sapna Mishra, JM CBI	Ext ka - 36
37	Copy of letter sent by DIG, UP Police to Director FSL Agra dated 3-1-07 for sending a team, paper no 27 A/12	P.W. -19 AK Mittal	Ext ka - 37
38	Copy of letter dated 3.1.07 sent by joint Director, FSL Agra to AK Mittal, Assistant Director FSL, Agra ordering for site inspection paper no 27A/ 11	P.W. -19 AK Mittal	Ext ka - 38
39	Copy of order of Assistant Director FSL, Agra to form a team for the inspection of D-5 *Kothi* dated 20-1-07 page no 27A/10	P.W. -19 AK Mittal	Ext ka - 39
40	Report of the proceedings regarding the articles recovered during the inspection of D-5 done by FSL, Agra on 4-1-07 paper no 27A/ 5 to 7	P.W. -19 AK Mittal	Ext ka - 40
41	Copy of the report of the proceedings regarding the articles recovered during the inspection of D-5 done by FSL, Agra on 6-1-07 paper no 27/A 8 to 9	P.W. -19 AK Mittal	Ext ka - 41
42	Copy of the letter sent by Assistant Director FSL, Agra to SSP, Gautambuddha Nagar, paper no 27A/2	P.W. -19 AK Mittal	Ext ka - 42
43	Copy of the letter from CJM, Gautambuddha Nagar to SFL dated 4-1-7, Agra for examining the questionnaire, paper no 23A/1	P.W. -19 AK Mittal	Ext ka - 43
44	Copy of the letter from SP/CBI to Director FSL, Agra regarding returning of the material dated 12.1.07, paper no 25A/1	P.W. -19 AK Mittal	Ext ka - 44
45	Copy of the letter dated 1.2.07 from	P.W. -22 Dr. Rajendra Singh	Ext ka - 45

	SP/CBI to Director FSL, New Delhi regarding sending of the articles/items for examination paper no 45A/ 1 and 2		
46	Copy of the report from CFSL, New Delhi to SP/CBI sent on 15.3.07, paper no 69A/ 1 to 7	P.W. -22 Dr. Rajendra Singh	Ext ka - 46
47	Copy of the report of the AIIMS regarding arms dated 23.8.07 paper no 73 Kha/ 3 to 25	P.W. -22 Dr. Rajendra Singh	Ext ka - 47
48	Copy of the report of the AIIMS regarding arms dated 23.8.07 paper no 73 Kha/ 26 to 28 Drawings of Weapon Drawings of Weapon Drawings of Weapon	P.W. -22 Dr. Rajendra Singh	Ext ka – 48 Ext ka – 48/1 Ext ka – 48/2 Ext ka - 48/3
49	Copy of the letter from Dr TD Dogra, HoD AIIMS to SP/CBI regarding expert opinion about the arms dated paper no 73Kha/2	P.W. -22 Dr. Rajendra Singh	Ext ka - 49
50	Copy of property seize register paper no 114 kha/ 1 to 79 and original recovery memo of slipper, clothes etc of A dated 29.12.06 paper no 19A/1	P.W. -23 Ramesh Haldhar and PW – 29 S.I. Jagat Singh Bisht	Ext ka - 50
51	Copy of issue register of CBI *Maalkhana*, New Delhi, paper no 113 kha/ 1 to 26	P.W. -29 Jagat Singh Bisht	Ext ka - 51
52	Copy of the forwarding letter dated 19.2.07 sent from CFSL, New Delhi to SP/CBI regarding lie detector report paper no 54 A/1	P.W. -30 SK Chaddha	Ext ka - 52
53	The copy of the lie detector report dated 15-2-2007 submitted by CFSL, New Delhi paper no 54 A/ 2 to 12	P.W. -30 SK Chaddha	Ext ka - 53
54	Copy of report no CFSL – 2007/B – 0088 dated 16.3.07 page no 56A/ 1 to 2	P.W. -30 SK Chaddha	Ext ka - 54
55	Copy of the report no CFSL – 2007/ B-0088 dated 12.3.07 addressed to SPCBI, paper no 58A/1 to 2.	P.W. -30 SK Chaddha	Ext ka - 55
56	Copy of the report no. CFSL – 2007/ B-0088 dated 28.2.07, paper no 59A/1 to 2, addressed to SPCBI.	P.W. -30 SK Chaddha	Ext ka - 56
57	Copy of the report no CFSL – 2007/ B-0088 dated 16.03.07, addressed to SPCBI, paper no 59A/1 to 2.	P.W. -30 SK Chaddha	Ext Ka - 57
58	Copy of the report no. 5/07 of serology division, SFSL, Delhi,	P.W. -30 SK Chaddha	Ext Ka – 58

	dated 8-3-07, paper no 68/1 and 2		
59	Copy of the report No. CFSL – 2007/B-0088 dated 16.3.07 addressed to SPCBI, paper no 70A/ 1 to 2	P.W. -30 SK Chaddha	Ext ka – 59
60.	Copy of report No. FSL- 2007/B-0088 dated 08.03.07 of serology division, C.F.S.L. Delhi, Paper no. 71A/1.	P. W.-30, S.K. Chaddha	Ex. Ka-60
61	Copy of Ration card register, paper no.-176Kha/3	P. W.-32, Shiv Kumar Tyagi	Ex. Ka-61
62	Copy of affidavit of Surnedra Koli for ration card. Paper no. 176Kha/4.	P. W.-32, Shiv Kumar Tyagi	Ex. Ka-62
63	Memo of Production/seizure dated 12.03.07, paper no. 176Kha	P. W.-32, Shiv Kumar Tyagi	Ex. Ka-63
64	Copy of Malkhana Register of C. B. I., paper no.- 185Kha	P. W.-35, S.I. Ramkishan Atri	Ex. Ka-64
65	Original copy of seizure memo dated 15.01.07 of Inspector Layakram in relation to take two photograph of A Sarkar, Paper No. 9A/1	P. W.-36, Inspector Layakram	Ex. Ka-65
66	Copy of disclosure statement of the accused Surendra Koli in relation to murder of L, A, Paper No. 29A/1	P.W.-37, A. S. I.- R. P. Sharma	Ex. Ka-66
67	Copy of the site-map of ground floor of D-5 Kothi, Paper no. 36A/1 and 2	P. W.-37, A. S. I.- R. P. Sharma	Ex. Ka-67
68	Copy of the letter dispatched to C.B.I. Director dated 24.01.2007 by S.P. C.B.I. in relation to opinion about clothes, Paper No. 55A/1.	P. W.-38, V. K. Mahapatra	Ex. Ka-68
69	Copy of report No. F.S.L.- 2007/B-0081 dated 08.03.07 of Serology division, C.F.S.L. Delhi, Paper No. 61A/1	P. W.-38, V. K. Mahapatra	Ex. Ka-69
70	Copy of report No. F.S.L.-2007/B-0081 dated 8.3.07 of biological division of Delhi, Paper No. 61A/1 and copy of F.S.L.-2007/B-0081 dated 16.3.07, Paper No. 62A/1 to 3	P. W.-38, V. K. Mahapatra	Ex. Ka-70
71	Copy of report no. F.S.L.-2007/B-0124 dated 08.03.07 of biological division of Delhi, Paper No.-61A/1 and copy of F. S. L.-2007/B-0081 dated 16.3.07, Paper No. 65A/1 to 6	P. W.-38, V. K. Mahapatra	Ex. Ka-71
72	Copy of X-ray report dated 5.2.07 in relation to biological determination, paper no. 52A/1 to 81	P. W.-39, Dr. Chitranjan Behra	Ex. Ka-72
73	Original site-map prepared by Police on 1.1.07 in reference to recovered articles related to the deceased A Sarkar, Paper No.- 20A/ 1.	P. W.-40, Dinesh Yadav	Ex. Ka-73

74	Copy of site-map prepared by police on 6.01.07 in relation to recovery of bones and clothes, Paper No.-21A/1.	P. W.-40, Dinesh Yadav	Ex. Ka-74
75	Copy of Site-map prepared by police on 6.01.07 in relation to recovery of knife, Paper No.-17A/1.	P. W.-40, Dinesh Yadav	Ex. Ka-75
76	Copy of letter sent by S.O. Dinesh Yadav to D.I.G./C.I. dated 24.01.07, Paper No. 26A/1	P. W.-40, Dinesh Yadav	Ex. Ka-76
77	Copy of site-map prepared by police on 01.01.07 in relation to recovery of the deceased L's Purse and SIM, Paper No. 15A/1	P. W.-40, Dinesh Yadav	Ex. Ka-77
78	Copy of letter sent to F.S.L. Agra by C.J.M. Gautam Buddha Nagar on 4.1.07 for chemical examination, Paper No. 42A/2 to 5	P. W.-40, Dinesh Yadav	Ex. Ka-78
79	Copy of order dated 28.2.07 passed by A.C.M.M. Patiala House Court Delhi, Paper No. 208Kha/2.	P. W.-41, M. S. Fartyal	Ex. Ka-79
80	Copy of application dated 28.2.07 submitted by I.O. for recording the statement under section 164 Cr.P.C., Paper No. 209Kha/1.	P.W.-41, M. S. Fartyal	Ex. Ka-80
81	Copy of application given by the accused Surendra Koli to S.P./C.B.I.to record the statement, Paper No. 210Kha.	P. W.-41, M. S. Faryatal	Ex. Ka-81
82	Copy of order dated 01.3.07 passed by A.C.M.M. Patiala House Court Delhi, Paper No. 211Kha/3.	P. W.-41, M. S. Faryatal	Ex. Ka-82
83	Copy of order dated 01.3.07 passed by A.C.M.M. Patiala House Court Delhi, paper no.- 212Kha.	P. W.-41, M. S. Faryatal	Ex. Ka-83
84	Copy of order dated 02.3.07 passed by A.C.M.M. Patiala House Court Delhi, Paper No. 213Kha.	P. W.-41, M. S. Faryatal	Ex. Ka-84
85	Copy of F.I.R. No. 2(s)/07 under sections 364, 376, 302, 201 of IPC dated 10.01.07, Paper No. 6A/1 to 7.	P. W.-43, Nirbhay Kumar	Ex. Ka-85
86	Copy of letter dated 12.1.07 sent by J.D./F.S.L. to S.P./C.I. In relation to returning the articles related the case, Paper no. 25A/2 and 3.	P. W.-43, Nirbhay Kumar	Ex. Ka-86
87	Original seizure memo dated 13.1.07 of F.I.R. in case diary by Deputy S.P., A.G. Kaul in Crime no. 1025, Paper No. 35A/1.	P. W.-43, Nirbhay Kumar	Ex. Ka-87
88	Copy of letter dated 14.1.07 addressed to Director of AIIMS by S.P.C.B.I. for forensic examination	P. W.-43, Nirbhay Kumar	Ex. Ka-88

	of bones, Paper No.- 40A/2.		
89	Copy of details of material recovered from D-5 , Sector-31 enclosure-1, dated 14.1.07, is Paper No. 40A/3 to 8.	P. W.-43, Nirbhay Kumar	Ex. Ka-89
90	Copy of letter dated 16.1.07 addressed to Director of AIIMS by S.P.C.B.I. for forensic examination of bones, paper no.- 41A/1 to 8.	P. W.-43, Nirbhay Kumar	Ex. Ka-90
91	Copy of letter dated 17.01.07 addressed to Director of AIIMS by S.P.C.B.I. for forensic examination of bones, Paper No. 42A/1.	P. W.-43, Nirbhay Kumar	Ex. Ka-91
92	Copy of letter dated 17.1.07 addressed to Director of AIIMS by S.P.C.B.I. for forensic examination of bones, Paper No. 43A/1 to 2.	P. W.-43, Nirbhay Kumar	Ex. Ka-92
93	Copy of letter dated 20.1.07 addressed to Director of AIIMS by S.P.C.B.I. for forensic examination of bones, Paper No. 44A/1 to 3.	P. W.-43, Nirbhay Kumar	Ex. Ka-93
94	Copy of list of seizure memo of recovered articles from D-5 , sector-31 enclosure-1, dated 1.2.07, is Paper No. 45A/3.	P. W.-43, Nirbhay Kumar	Ex. Ka-94
95	Copy of application dated 20.3.07 dispatched to Director of AIIMS by S.P.C.B.I. to seek the opinion, Paper No. 73A/1 to 2.	P. W.-43, Nirbhay Kumar	Ex. Ka-95
96	Copy of questionnaire enclosure-1 dated 20.3.07 prepared by Nirbhay Kumar A.S.P./C.B.I. to seek the opinion of experts, paper no.-73A/3.	P. W.-43, Nirbhay Kumar	Ex. Ka-96
97	Copy of questionnaire enclosure-5 dated 1.2.07 prepared by Nirbhay Kumar A.S.P./C.B.I. to seek the forensic opinion, paper no.-45A/14 to 19.	P. W.-43, Nirbhay Kumar	Ex. Ka-97
98	The charge-sheet filed by the investigating officer of C.B.I., paper no.- 4A/1 to 24.	P.W.-43, Nirbhay Kumar	Ex. Ka-98
99	Copy of receipt memo dated 19.1.07 prepared by Inspector Prasad Shrivastava, paper no.-79A/ 1 to 7.	P.W.-43, Nirbhay Kumar	Ex. Ka-99
100	Copy of receipt/seizure memo dated 20.1.07 prepared by Inspector C.B.I. Ajay Singh, paper no.-80A/1.	P.W.-43, Nirbhay Kumar	Ex. Ka-100
101	Copy of receipt/seizure memo dated 20.1.07 prepared by Inspector C.B.I. Ajay Singh, paper no.-81A/1.	P. W.-43, Nirbhay Kumar	Ex. Ka-101
102	Copy of receipt/seizure memo dated 19.3.07 prepared by D.S.P., C.B.I.	P.W.-43, Nirbhay Kumar	Ex. Ka-102

	U.K. Goswami, paper no.-47A/1.		
103	Copy of G.D. no. 25 dated 29.12.06 of P.S.- Sector-20, Noida, paper no.-256Kha/4.	P.W.-44, Rajveer Singh	Ex. Ka-103
104	Copy of G.D. no. 43 dated 29.12.06 of P.S.- Sector-20, Noida, paper no.-256Kha/7.	P.W.-44, Rajveer Singh	Ex. Ka-104
105	Copy of G.D. no. 49 dated 29.12.06 of P.S.- Sector-20, Noida, paper no.-256Kha/8.	P.W.-44, Rajveer Singh	Ex. Ka-105
106	Copy of G.D. no. 6 dated 30.12.06 of P.S.- Sector-20, Noida, paper no.-256Kha/10.	P.W.-44, Rajveer Singh	Ex. Ka-106
107	Copy of G.D. no. 12 dated 30.12.06 of P.S.- Sector-20, Noida, paper no.-256Kha/22.	P.W.-44, Rajveer Singh	Ex. Ka-107
108	Copy of G.D. no. 26 dated 30.12.06 of P.S.- Sector-20, Noida, paper no.-256Kha/37.	P.W.-44, Rajveer Singh	Ex. Ka-108
109	Copy of G.D. no. 35 dated 31.12.06 of P.S.- Sector-20, Noida, paper no.-256Kha/39.	P.W.-44, Rajveer Singh	Ex. Ka-109
110	Copy of G.D. no. 43 dated 31.12.06 of P.S.- Sector-20, Noida, paper no.-256Kha/40.	P.W.-44, Rajveer Singh	Ex. Ka-110
111	Copy of G.D. no. 25 dated 06.1.07 of P.S.- Sector-20, Noida, paper no.-256Kha/47.	P.W.-44, Rajveer Singh	Ex. Ka-111
112	Copy of G.D. no. 44 dated 06.1.07 of P.S.- Sector-20, Noida, paper no.-256Kha/50.	P. W.-44, Rajveer Singh	Ex. Ka-112
113	Copy of G.D. no. 48 dated 06.1.07 of P.S.- Sector-20, Noida, paper no.-256Kha/51.	P.W.-44, Rajveer Singh	Ex. Ka-113
114	Copy of G.D. no. 30 dated 11.1.07 of P.S.- Sector-20, Noida, paper no.-256Kha/59.	P.W.-44, Rajveer Singh	Ex. Ka-114
115	Copy of G.D. no. 44 dated 12.1.07 of P.S.- Sector-20, Noida, paper no.-256Kha/66.	P.W.-44, Rajveer Singh	Ex. Ka-115
116	Copy of G.D. no. 34 dated 12.1.07 of P.S.- Sector-20, Noida, paper no.-256Kha/69.	P.W.-44, Rajveer Singh	Ex. Ka-116
117	Copy of report of inspection of Kothi no. D-5 Noida dated 20.1.07 submitted by F.S.L. Agra, paper no.-27A/3 to 4.	P.W.-19, Dr. A. K. Mittal	Ex. Ka-117
118	Copy of receipt memo dated 20.1.07 of articles received from Sector-20, Noida by Prasad Shrivastava, paper no.-55A/2 to 4.	P.W.-45, S. I. Surendra Pal Singh	Ex. Ka-118

Oral evidence of prosecution

21. Oral evidence in the form of testimony of prosecution witnesses are adduced by the prosecution in support of its case. Description of prosecution witnesses, as also the substance of their testimony, are extracted hereinafter:-

PW.No.	Name	Role
1	Anita Haldar	Purnima's mother. Testified that when her daughter, Purnima asked Koli for flowers from the garden of D5 he had told her to come in and take them.
2	Ashwini Kumar Singh	Panch to Koli's disclosure on 13.1.07 at CBI office regarding spot of killing and disposal of bodies and recoveries of chappals etc from the open space between D5, D6 and Jal Board residential quarters. Co-panch Manoj Nonia.
3	Satish Chandra Mishra	Panch to seizure of sofa, cushion, etc from D-5 and bones and biological material from the open space between D5, D6 and Jal Board residential quarters, and the drain on the main road facing bungalow numbers D1-D6 on 12.1.07 and 13.1.07. Panchnama dt 13.1.07.
4	Mukesh Kumar	JCB operator who cleaned the drain on the main road facing bungalow numbers D1-D6 and took out debris on 15.1.07 and 16.1.07.
5	Dr. D.K. Sharma	AIIMS Doctor. Proved Psychological Assessment report of Koli dt. 24.7.07.
6	Dr. Mamta Sood	Asst. Prof, AIIMS. Proved the Forensic Psychiatric Assessment Report of Koli and affirmed that he was fit to stand trial.
7	Dr. Manish Kummath	ESL AIIMS. Witnessed seizure of samples of sofa, cushion, etc from D-5, and bones and biological material from the open space between D5, D6 and Jal Board residential quarters, and from the drain on the main road facing bungalow numbers D1-D6 on 12.1.07, 13.1.07, 15.1.07 and 16.1.07. Proved AIIMS forensic reports dated 15.03.2007, 16.03.2007 and 17.03.2007.
8	Virendra Singh Dagar	Panch to S.27 recovery of axe on 18.01.2007 at Koli's instance.
9	Sanjeev Lalwani	Assistant Professor, AIIMS. Received letter dt 3.2.07 from CBI to videograph Koli's demonstration of how he cut the bodies. Proved report dt. 23.8.07 regarding analysis of knives and axe recovered at Koli's instance.

10	Pappu Lal	Father of F[victim in CC 7426/10]. Panch to S. 27 seizures of skulls and bones on 29.12.06, 31.12.06 from the open space between D5, D6 and Jal Board residential quarters, and from the drain on the main road facing bungalow numbers D1-D6.
11	Chandrashekhar	Metropolitan Magistrate, Patiala House, New Delhi. Recorded Koli's confession dt. 1.3.08.
12	Nandineni Madhusudan Reddy	CDFD Hyderabad did DNA tests and matched profiles of bones with relatives of victim.
13	Kanika Haldar	Employer of victim, who saw her last on 5.10.2006 and identified her clothes.
14	PC Gangadhar Sharma	Recorded FIR on 30.12.06.
15	Dr. S.L. Vaya	Addl. Director, FSL, Gandhinagar conducted Narco- Analysis, Polygraph, Brain Oscillation tests and prepared a Forensic Report of Koli.
16	Gaurav Verma	Addl. City Magistrate, Lucknow proved AIIMS Identification forms of the parents of victim from whom blood samples were taken for DNA profiling.
17	Durga Prasad	Father of Arti (victim in CC 4196/2010). Panch to S. 27 recovery of knife on 11.1.07 at Koli's instance.
18	Sapna Mishra	SJM, CBI, Ghaziabad before whom clothes were identified by family members on 7.4.07.
19	Dr. A.K. Mittal	FSL Agra. Examined D5 from 4.1.07 to 6.1.07, seized various household articles from D5 and bones from D6. Issued Report on FSL articles seized and handed over articles to CBI.
20	Manoj Kumar	Saw a human hand in the open space between D5, D6 and Jal Board residential quarters in March 2005 while playing cricket.
21	Surendra Singh	Informed Noida Police of the human hand in the open space between D5, D6 and Jal Board residential quarters in March 2005.
22	Dr. Rajendra Pradhan Singh	CFSL, Delhi. Went to spot on 12.1.07, 13.1.07, 15.1.07, 16.1.07 and witnessed seizure of bones, clothes, etc from the open space between D5, D6 and Jal Board residential quarters, and from the drain on the main road facing bungalow numbers D1-D6. On 18.1.07 witness to s27 recovery of axe from bushes at the instance of Koli. Examined knives and axe recovered u/s 27 and filed reports dt 15.3.07 and 23.08.07.
23	Ramesh Haldar	Witnessed identification of victim's clothes by her parents on 29.12.2006.

24	Pratima Haldar	Domestic Worker. Testified that Koli had called her inside D-5 to do domestic work but she refused.
25	Purnima Haldar	Testified that when she asked Koli for flowers from the garden of D5 he had told her to come in and take them.
26	Ajay Singh	Inspector, CBI. Received seized property from FSL, Agra and deposited it with the CBI.
27	Sahastra Pal Singh	SI, witness to seizures from drain on the main road facing bungalow numbers D1-D6 on 31.12.06.
28	Chote Singh	SI (SSP Ghaziabad), witness to Koli's arrest and to recovery and seizure of human skull, clothes etc from the open space between D5, D6 and Jal Board residential quarters on 29.12.06.
29	Jagat Singh Bisht	SI, CBI. Proved CBI Malkhana register.
30	Dr.A.K. Chaddha	Part of expert Committee which visited the spot on 12.1.07 and 13.1.07 and proved the Forensic Reports submitted to the CBI.
31	Vandana Sarkar	Mother of victim, identified the clothes of the victim and deposed that Koli and Pandher confessed to the crime before IO, Dinesh Yadav, on 29.12.06, which he recorded in the Case Diary.
32	Shiv Kumar Tyagi	Clerk at District Supply Office. Presented papers relating to Koli's ration card.
33	Subhash Kashyap	PCO Owner who sold SIM cards to Koli.
34	Daulat Ram	Assisted Koli with his ration card application.
35	Ram Kishan Atri, SI	Delivered sealed articles to CFSL Chandigarh (Ex. Ka. 64).
36	Layak Ram	SI. Proved seizure of photos of deceased from her family on 1.03.2007.
37	R.P. Sharma	ASI, CBI, Delhi. Witness to disclosure statement dt. 11.1.07 re manner of killing by Koli.
38	Dr. B.K. Mahapatra	Senior Scientific Officer, CFSL. Proved the forwarding letters and forensic reports.
39	Dr. Chitranjan Behera	Asst. Professor, Forensic Medicine, MAMC. Proved the AIIMS forensic report regarding examination of seized bones and skulls.
40	Dinesh Yadav	Deputy S.P and IO, Sector 24 PS. Arrested the accused, supervised recovery done on 29 and 30.12.2005. Took the Appellant to Gandhinagar for Narco-test.
41	M.S. Pharthyal	Inspector, CBI. Proved Accused's application

		for confession, IO's forwarding letter dated 28.2.07, application for copy of CD and transcript and orders of Court regarding recording of confession.
42	Ramesh Prasad Sharma	Worked in D-6 and mentioned a faint smell that would sometimes come from the open space between D5, D6 and Jal Board residential quarters.
43	Nirbhay Kumar	SP, CBI. IO.
44	Rajvir Singh	Proved GD entries of Sector 20 Noida Police Station, Gautambudh Nagar for 29.12.06, 31.12.06, 6.1.07, 11.1.07 and 12.1.07.
45	Surendra Pal Singh, SI	Prepared S. 27 memorandum and seizure panchnama of knife dt. 11.1.07 at Koli's instance.
46	A.K. Kaul	IO, CBI.
DW 1	Pan Singh	Driver
DW 2	Mohd. Ishrat	Project Engineer, Noida
DW 3	R.K. Singh	Nodal Officer Airtel Limited, New Delhi

Statement of accused under Section 313 Cr.P.C.

22. Incriminating material adduced during trial by the prosecution has been confronted to the accused appellant SK, for recording his statement under Section 313 Cr.P.C. In reply to Question No. 6 regarding his arrest the accused SK has stated that on 27.12.2006 co-accused Pandher alongwith his driver Pan Singh (DW-1) had brought him from his native village in Uttaranchal and left him at the police station, Sector-20, Noida. On 28.12.2006, he was taken out of the police station and was not brought back. Accused has denied his implication in the case/offence and has claimed that he was tortured and that his nails were extracted, his genitals were burnt and petrol was put in his anus. He offered to get himself medically examined to prove his allegations. The accused SK also claimed that he was extended other tortures and the C.B.I. got his statement recorded on the threat that his children are in the CBI custody. Fearing for life of his children

the accused claims to have made confession to the magistrate. Accused has also stated that police and CBI got his signatures on blank pages and that no recovery was made from him or on his pointing out. He has emphatically claimed that he has been falsely implicated. Similarly, accused Pandher has stated that he has been falsely implicated and neither he has committed any offence, as alleged, nor any recovery has been made on his pointing out.

23. Statements were recorded later also of accused wherein he denied his arrest on 29.12.2006 and instead reiterated that on the asking of police he had come to police station on 27.12.2006 and was dropped at the police station by Pandher in his car. Accused SK has denied having made any statement about beheading L and that his signatures were obtained on blank pages. Accused SK has also denied that he was taken to House No. D-5. He has also denied that any recovery was made on his pointing out. He has also denied the prosecution case with regard to his alleged disclosure made facilitating the recovery of knife etc. He has also denied having made any disclosure statement. Accused SK has also stated that he was never taken to House No. D-5, nor the knife was recovered on his pointing out. In reply to Question No. 62 the accused has stated that he has been falsely implicated in order to protect doctor Navin Chowdhary, owner of House No. D-6, Sector-31, Noida and that the recovery has been falsely planted on him.

Defence Evidence

24. The defence has also adduced its evidence of Pan Singh as DW-1, who happened to be the driver of Moninder Singh Pandher. In his examination-in-chief, he has stated that alongwith Pandher Saheb, he had brought SK to Sector 20 Police Station and handed him over to the police whereafter he has not heard anything about him. He has also stated that after he left SK outside the police station he does not know

where accused SK had gone. The defence has also produced Mohd. Ishrat (DW-2), Project Engineer, Noida, who has produced registers to show that drain in front of House No. D-5, Sector 31 was last cleaned between 20.12.2006 to 23.12.2006 and that previously also, drains were cleaned after 15 to 30 days. He has produced Paper no. 272-Kha, which has been exhibited as Kha-1, as per which, the drain was cleaned between 20.12.2006 to 23.12.2006. In his cross-examination DW-2 has stated that the portion of drain in front of House No. D-5 to D-6 is covered and that cleaning of drain by his department is done on open drain and not on the covered drain. He also stated that the drain was cleaned by Safai Mazdoor with the aid of JCB Machines.

25. Defence has also produced R.K. Singh (DW-3), Nodal Officer Airtel Limited, New Delhi. He has produced call records of Phone No. 9810098644 of 28.12.2006 and 29.12.2006. The mobile was in the name of Moninder Singh Pandher. He has certified that on 29.12.2006 at 11:58:34 an sms was sent from registered mobile no. 9350782306. He has proved the call records which has been exhibited as Kha-2. He has admitted in the cross-examination that mobile could be used by a person other than the registered owner.

Chronology of Events

26. In order to appreciate the facts of the cases it would be worthwhile to notice the chronology of events leading to the award of death reference in this case. The chronology placed in a chart during argument by the counsel for the appellants, on which there is no serious objection, is reproduced hereinafter:-

S. No.	Date	Event
1	2004-05	There were repeated complaints of children going missing from Nithari village but no action was taken.
2	Feb 04	Accused Pandher purchased bungalow D5, Sector 31, Noida. He was living there with his wife, Devender Kaur (not examined). Pandher employed a driver Pan Singh (not examined by the Prosecution), driver Satpal (not examined). a gardener (not examined), maid servant Maya Sarkar (not examined) and another servant, Keshav (not examined).
3	July 04	Koli employed as Pandher's servant in D5.
4	30.01.05	Pandher goes to Australia. He returns from Australia only on 14.2.05.
5	8.02.05	Disappearance of 'XYZ' (CC 1475/09).
6	March 05	Boys playing cricket notice a human hand in the open space between bungalows, DS and D6 and the Jal Board residential quarters. Elders in the locality call the police. Police comes to the spot and says there is nothing to worry. The police cover the hand with mud so that it is concealed.
7	15.3.05	J (CC 2/19) goes missing.
8	16.3.05	J's mother (CC 2/19) registers a missing complaint in Sector 20 Noida Police Station.
9	5.4.05	J's father (CC 2/19) registers an FIR No 66/05 in Sector 24 Noida Police Station.
10	4.06.05	Pandher leaves for Bombay on 4.6.05 and returns on 7.6.05.
11	4.06.05	H. (CC 147/13) goes missing.
12	07.06.05	H's father, Mukesh (CC 147/2013) registers a missing complaint in the Sector 20 Noida Police Station.
13	21.6.05	K (CC 4/19) goes missing.
14	23.6.05	K's father Jhabbu Lal registers FIR No 448/05 u/s 363, 366 (CC 4/19) in Sector 20 Noida Police Station.
15	8.4.06	Pandher leaves for Chandigarh and returns on 13.4.06.
16	10.04.06	F(CC 7426/10) goes missing.
17	11.04.06	Missing persons report filed for F(CC 7426/10).
18	5.5.06	Pandher leaves for Chandigarh and returns on 8.5.06.
19	07.05.06	L. goes missing (case pending in the Trial Court).
20	May 06	L's father, Nand Lal, goes to Sector 26 Noida Police Chowki. SI KP Singh sends policemen to D5 and brings Koli for questioning. Koli is subsequently released.
21	June 06	SSP Noida, at the instance of L's father, Nand Lal, directs SI Gajendra Singh to investigate into L's disappearance. SI Gajendra Singh calls and interrogates Koli, Pandher and others, and then releases them.
22	18.07.06	Pandher is in Punjab till the evening of 18.7.06.
23	18.07.06	G (CC 835/11) goes missing.

24	29.06.06	On the complaint of Nand Lal, SSP directs SI Deepak Chaturvedi, SHO, Sector 20 Noida Police Station, who registers a missing report for L.
25	19.07.06	Missing person report is filed for G (CC 835/10).
26	22.07.06	Pandher is in Punjab from 22.07.06 to 30.07.06.
27	24.07.06	E goes missing (CC 2926/17). Her uncle files a missing person report at Sector 20 Noida Police station.
28	24.08.06	L's father, Nand Lal, files a complaint u/s 156(3) CrPC before CJM, Gautambudh Nagar.
29	25.9.06	Pandher is in his office in Sector 2, NOIDA from 11 am to 6:05 pm after which he goes to Faridabad.
30	25.9.06	I (CC 4196/10)) goes missing.
31	26.09.06	Missing person report is filed for I (CC 4196/10) by her father.
32	27.09.06	CJM Gautambudh Nagar orders registration of an FIR on Nand Lal's complaint.
33	05.10.06	Pandher goes to his office at 10 am. Thereafter, he leaves for Dehradun at 1 pm and returns on 14.10.06.
34	05.10.06	A (CC 5183/17) goes missing.
35	07.10.06	On orders of CJM, Gautambudh Nagar, FIR 838/2006 is registered u/s. 363 and 366 IPC against Koli and Pandher in connection with the disappearance of L. Investigation is entrusted to SI Simranjeet Kaur. Pandher is in Uttaranchal from 8.10.06 to 14.10.06.
36	8.10.06	Pandher is in Uttaranchal from 8.10.06 to 14.10.06.
37	12.10.06	C (CC 196/18) goes missing.
38	31.10.06	Pandher leaves for his office in the morning. From there he leaves for Chandigarh and returns on 1.11.07.
39	31.10.06	D (CC 2667/17) goes missing.
40	12.11.06	B(CC 3/21) goes missing.
41	27.11.06	Dy. SP Dinesh Yadav Noida starts investigation.
42	Nov 06	A hand is found during the cleaning of the drain on the main road in front of the row of bungalows D1 - D6.
43	03.12.06	Both the accused are taken for questioning by the Noida police.
44	20.12.06 to 23.12.06	The drain on the main road in front of the row of bungalows DI-D6 is cleaned by the Municipality.
45	25.12.06	Koli goes to his native place on leave.
46	29.12.06 8 to 8:15 am	Koli is arrested in connection with FIR No. 838/2006 u/s 363, 366 IPC concerning the disappearance of L. Koli has disputed this date and led evidence to show that he was arrested two days earlier i.e. on 27.12.06.
47	29.12.06	Shortly after his arrest, Koli allegedly makes a confession which includes a disclosure statement about the killing of L and the location of her dead body. No fard is prepared regarding the making of this disclosure statement or the

		words used. This confessional statement does not mention any rape, nor does it mention any other victims.
48	29.12.06 11:00 am	Pandher is arrested outside D5. When the police and panchas arrive with Koli at D5 they find that digging had already begun in the open space between D5, D6 and the Jal Board residential quarters, and hat a huge crowd, including civilian and media personnel, has collected there. The Panch to the recovery, Pappu Lal (who is father of the victim, Fin CC 7426/10), states that when he was called by the police for this event, he was told that that clothes etc. of the deceased have been recovered and he was required to identify the same.
49	29.12.06	15 skulls, bones, slippers, clothes are seized from the open space between D5, D6 and the Jal Board residential quarters; a knife is seized from below the water tank on the terrace of DS. The clothes seized include a semen stained skirt belonging to I (CC 4196/10) and a semen stained underwear, which on subsequent DNA analysis, do not match the semen found on Koli's blanket. Vandana Sarkar, the mother of victim A (CC 5183/2017) states that when she reached the spot for identification of clothes, she saw that Koli was giving a confessional statement that the IO, Dinesh Yadav was recording and a copy thereof was given to her husband Jatin Sarkar by the IO, Dinesh Yadav. Vandana Sarkar was later threatened by the CBI against producing the copy of the Case Diary before the Sessions Court. As per this confession, Koli allegedly would bring girls for Pandher, and after Pandher had raped them he would tell Koli to do as he pleased with them and dispose of them. Koli would then kill them, sever their heads, and dispose of the bodies.
50	29.12.06	The seized biological material (skulls, bones) are sent for post mortem, but no post-mortem examination report is produced before the trial court though the reports were received by the Police on 4.1.07 and handed over to CBI on 12.1.07.
		Victims' relatives identify some of the clothes.
51	29.12.06 8:15 pm	Both the accused are sent back to the Police Station. Both the accused are taken out of the Police Station for the purpose of production in court. Both the accused are produced before the learned JMFC for the first time for remand. The IO has admitted that the accused were produced before the Magistrate about 30 hours after arrest. As per the Remand Application filed by 10, Pandher and Koli jointly pointed out the place from where 15 skulls were recovered, and the rest of the bodies were still to be found. The learned JMFC's Remand order notes that the joint disclosure of both the accused led to the

		recovery of skulls and police custody was granted for them for two days starting on 31.12.06.
52	30.12.06 3.25 am	Following FIRs are registered by Sector 20 Noida Police Station against Pandher and Koli u/s 363, 366, 376, 302, 201: Victim FIR No 1025/06 A FIR No 1029/06 C FIR No 1028/06 D FIR No 1033/06 E FIR No 1021/06 F FIR No 1022/06 G FIR No. 1032/06 H FIR No 1024/06 I FIR No. 1026/06 B
53	30.12.06 6:30 am	Both the accused are taken out of the Police Station for the purpose of production in court.
54	30.12.06 3:30 pm	Both the accused are produced before the Ld Magistrate for the first time for remand. The IO has admitted that the accused were produced before the Magistrate about 30 hours after arrest. As per the Remand Application filed by 1O, Pandher and Koli jointly pointed out the place from where 15 skulls were recovered, and the rest of the bodies were still to be found. The learned JMFC's Remand order notes that the joint disclosure of both the accused led to the recovery of skulls and police custody was granted for them for two days starting on 31.12.06.
55	30.12.06 19.10 hours	Sector 20 Noida PS receive 16 post mortem reports but these are never produced during any of the trial. C.B.I. has filed these post-mortem reports on an affidavit before this Court.
56	31.12.05	Both the accused are taken into police custody. However, no interrogation or questioning is done on this day.
57	31.12.06	Hair, human bones, bangles, slippers and clothes are seized from the drain on the main road facing bungalows D2 – D6. The accused are not present for this seizure.
58	01.01.07	Permission is granted by the Ld CJM, Gautambudh Nagar on an application to take both the accused for narco analysis to Gujarat. As soon as police custody is obtained after the very first remand, the Accused are sent for Narcoanalysis.
59	04.01.07- 06.01.07	The 7 member team from FSL, Agra forensically inspects D5 for blood stains, human remains, etc but all that is found is a blood spot of unknown origin in the bathroom sink and pipe.
60	04.01.07	The open space between D5, D6 and Jal Board residential quarters was photographed, Benjamin Test (preliminary examination of blood stains) was conducted in D5 and maps of various rooms of D5 were prepared.
61	05.01.07	The FSL, Agra team seizes 25 objects (including a kitchen

		knife from room no. 7) for forensic examination from D5 in the presence of witness, Jhabbu Lal, father of victim K, but nothing incriminating is found.
		Seizure of portions of a pink mattress, a yellow bed-sheet and sofa mattresses. A map of the house was prepared. [A Semen stains of unknown origin are found on the sofa mattress which do not match the semen stains found on Koli's quilt seized subsequently. Pieces of bones and bone ash seized from the furnace in the backyard of D5 were not found to be human bones.
62	05.01.07-10.01.07	Brain mapping, narco analysis, lie detection, psychiatric assessment and polygraph tests are conducted on both the accused in Gandhinagar. As the UP Police had custody of Koli only up till 5 pm on 10.1.07, SSP Gautambudhnagar requests the learned CJM, Gautambudhnagar, for an extension of remand till 12.1.07. CJM grants the same even though the accused was not physically produced before the Magistrate in terms of sec. 167(2)(b) Cr.P.C. which mandates that if accused is in police custody he must be physically produced before the Magistrate for remand.
63	06.01.07	The open space between D5-D6 and facing Jal Board residential quarters is dug up and bones, clothes and soil were seized and a map of the spot prepared.
64	09.01.07	UP government notifies the transfer of all the cases pertaining to Nithari disappearances to the CBI under Sec. 6 of the Delhi Special Police Establishment Act (DSPEA).
65	10.01.07	The Central government issues a notification under Sec. 5 of the DSPEA transferring the Nithari group of cases to the CBI.
66	11.01.07 10-11:00 am	Both the accused are brought back to Noida from Gandhinagar. A knife is recovered by the Noida police from the open space between D5, D6 and Jal Board residential quarters pursuant to a sec. 27 confessional statement by Koli where he states, inter alia, that he would cut off the flesh from the bodies with a knive
67	11.01.07 11:35 am	Information is received by Noida police about the presence of a human hand in the drain on the main road facing bungalows D2 to D6.
68	11.01.07	Following FIRS are re-registered by the CBI. The accused are taken into CBI custody. RC No. 2(S)/07/SCB/DLI — Victim A RC No. 3(S)/07/SCB/DLI — B RC No. 6(S)/07/SCB/DLI — C RC No. 5(S)/07/SCB/DLI — D RC No. 9(S)/07/SCB/DLI — E RC No. 7(S)/07/SCB/DLI — F RC No. 8(S)/07/SCB/DLI — G RC No. 14(S)/07/SCB/DLI — H RC No. 10(S)/07/SCB/DLI — I RC No. 11(S)/07/SCB/DLI — J RC No. 16(S)/07/SCB/DLI — K

69	11.01.07	Accused SK allegedly makes a confessional statement to the CBI stating that he strangulated his victims, and raped the corpses of his victims.
70	11.01.07	The remand application submitted by CBI dt. 11.01.07 in RC 2/S/07.CBI.SCB I (FIR regarding victim, A) states that Koli and Pandher had jointly admitted to kidnapping, raping and murdering A. This stand of prosecution while seeking remand is contrary to the prosecution version to implicate only accused SK.
71	12.01.07	Items sent to FSL, Agra, are deposited in the CBI Maalkhana.
72	12.01.07	A joint team of the CBI, CFSL and AIIMS comprising BK Mahapatra, Dr. Rajendra Singh and others search D5 and seize items from the house including a quilt from Koli's room, samples of cushion and mattress covers from the lobby etc.). DNA profiling of the semen found on the quilt does not match the semen found on the mattress cover, salwar, I's skirt and underwear recovered from the drain and empty space behind D5-D6 between 29.12.06-31.12.06. The wall behind D5 was broken, the open space between D5, D6 and the Jal Board residential quarters was dug up and bones, pieces of bangles, clothes soiled in mud were seized.
73	13.01.07	The abovementioned CBI, AIIMS and CFSL team digs up the open land between D5, D6 and Jal Board compound and seize pieces of bones, clothes, slippers, locks of hair, polythene pouch containing tissues and bones, plastic rope and pieces of bangles. The drain on the main road was dredged and additional clothes, shoes, slippers tissues. muscles and bones were seized. Pursuant to this the search of the open land behind D5, D6 is concluded.
74	13.01.07	Accused SK allegedly makes a confessional statement stating that he would rape or attempt to rape his victims while they were alive and after he would kill them. He shows the places where he committed the crime as well as disposed off the bodies.
75	15.01.07	Dredging of the drain on the main road in front of the bungalows D1-D6 is done by the CBI, in the presence of DSP, AGL Kaul and AIIMS-CFSL team. Additional human remains were seized from the drain.
76	15.01.07	All items and documents of the case were transferred from Sector 20, Police Station to the CBI.
77	16.01.07	More biological material was seized from the drain on main road facing row of houses D1-D6 in the presence of DSP, AGL Kaul. Case property seized thus far was taken to AIIMS for FSL examination. Pursuant to this date no further search of the drains was done.
78	18.01.07	An axe is seized from the front lawn of D5 pursuant to a s. 27 confessional statement by accused SK where he says that he would use an axe to cut the bodies. SI, Rajender

		Singh states that the lawn had been dug up prior to 04.01.07. No blood stains are found on the axe.
79	19.01.07	Other case properties transferred to the CBI.
80	20.01.07	Remaining case properties transferred to the CBI.
81	20.01.07	Preliminary report of FSL, Agra team regarding the recovered items between 04.01.2007-06.01.2007 is sent to the Senior Police Superintendent, Gautambudh Nagar.
82	21.01.07	Case properties are taken to FSL, Hyderabad.
83	22.01.07	Report of the narco analysis and brain mapping tests etc. sent to CJM, Gautambudh Nagar.
84	24.01.07	SP, SJM Gilani requests Director, CFSL, Delhi to analyse the materials recovered till then.
85	25.01.07	IO, MS Phartyal claims that accused SK was badly beaten up by advocates and the public upon being produced in the MM Court, Ghaziabad. No medical report regarding the same js produced nor is the magistrate before whom he is produced informed of the assault. Further, the CBI continue to produce accused SK before the same Court for subsequent remands.
86	29.01.07	Case properties taken to CFSL, Delhi.
87	01.02.07	CFSL, Delhi receives a letter from SP, CBI, along with 1 unsealed and 55 sealed parcels for analysis.
88	02.02.07	Additional City Magistrate, Lucknow is informed that blood samples of parents of victims needed to be collected in his presence.
89	03.02.07	The blood samples of victims' parents are collected at AIIMS for DNA.
90	04.02.07	Accused SK is brought by the CBI to AIIMS where he is shown the seized human remains and other articles. He identifies hair and a hair clip. He also demonstrates how he would cut the bodies. In his Sec. 313 statement, accused SK states that the cadaver shown to him already had black markings which he was asked to trace with a chalk.
91	08.02.07	An application is made by the CBI to the learned CBI Magistrate, Ghaziabad for remanding both the accused to police custody for a further 14 days. The order dt. 08.02.07 is passed by the learned CBI Magistrate stating that remand to further police custody is sought on the ground that "the accused are also required for recovery of the body and personal belongings of the missing woman D". D's clothes were seized during the initial period and were identified by her husband on 29.12.06. The memo of identification of D's clothes by her husband dt. 29.12.06 is marked Exhibit Ka 30 in CC 2667/2017 and the same is corroborated by the evidence of the Sahstra Pal Singh, PW 15 in CC 2667/2017. All the skulls, bones and body parts had been excavated and seized by the police / CBI between 29.12.06 and 16.01.07. No excavations or seizures of body parts were made after 16.01.07. The excavated material was taken for forensic analysis almost immediately after seizure by the team of forensic experts who were present during the seizures. The

		reason given for obtaining further police custody was deliberately misleading and a camouflage for something else. Relying on these misleading statements, the learned CBI Magistrate, Ghaziabad remands both the accused to further police custody till 22.02.07.
92	09.02.07	CDFD, Hyderabad receives skeletons and blood samples from AIIMS. DNA is attempted to be extracted from only a small portion of the human remains / bones sent for analysis. At least 15 separate DNA profiles are extracted. Of these, only 8 match the DNA profiles extracted from the blood samples of the parents of the missing persons.
93	12.02.07	CFSL, Delhi receives a letter from the CBI to give a report on the materials sent to them.
94	13.02.07	The CBI request the Director, AIIMS to conduct psychiatric tests on the accused.
95	20.02.07, 22.02.07 & 23.02.07	Forensic Psychiatric Assessment of both the accused is conducted at AIIMS.
96	22.02.07	Remand Application filed by the CBI before the learned SJM, Ghaziabad, stating that accused SK and Pandher have confessed to raping and killing 'XYZ' (CC 1475/09] The CBI applies for
97	28.02.07	An application is made by the CBI to the learned ACMM, Patiala House Court, New Delhi for recording accused SK's confession u/s 164 Cr.P.C. The application states that accused SK was assaulted by the advocates and public when produced in the Ghaziabad Court on 25.01.07 and prior to that in Ghaziabad District Jail, and he, therefore, faces a grave security threat. The application prays that for the purposes of the confession accused SK be sent to Tihar Jail. The application annexes an undated letter purportedly signed by accused SK addressed to the learned ACMM, New Delhi/CBI Magistrate Delhi stating that he wishes to confess about the manner in which he first killed and then had sex with the victims and prays that he should be presented before the learned ACMM/CBI Magistrate so that he may give a detailed description of his crime. The application is written in formal language using legal terms that a lay person would not be familiar with and that would be beyond the capability of) servant who has only studied up till 7th standard.
98	1.03.07 1.10 pm	A legal aid counsel is appointed and granted five minutes interview with accused SK in the court room itself "in the interests of justice".
99	1.03.07 1:20 pm	The learned ACMM directs the learned MM, Patiala House, New Delhi, to record accused SK's confession u/s 164 CrPC and also to have it recorded on video.
100	1.03.07	The legal aid lawyer is not present during the video recording of the confession. In this confession, accused SK gives a detailed, graphic and highly repetitive account of how he lured, attempted to rape, killed, dismembered, ate

		each of his victims and how he disposed of their bodies. In his confession, he also informs the learned MM that he has been, brutally tortured by the police, that he has been extensively tutored by them and made to memorise parts of his confession pertaining to the names of the victims, the dates and times of their killings, the manner of their killing, etc.
101	1.03.07	After recording the confession, the same is copied onto 4 CDs and the signature of learned MM and accused SK is taken on all 4 CDs. Thereafter, transcription of the confession commences and carries on till 10.15 pm but cannot be completed. accused SK is produced before the learned ACMM, who forwards accused SK to the learned MM for transcribing the confession. Transcription is not completed.
102	02.03.07	Accused SK is produced before the learned ACMM, who forwards accused SK to the learned MM for transcribing the confession. Transcription is not completed.
103	03.03.07	Accused SK is produced before the learned ACMM not by jail officials but by Inspector Rakesh Sharma and the SHO from Tilak Marg Police Station. The Ld. ACMM forwards him to the learned MM and the transcription is completed.
104	08.03.07	The Serology Department, CFSL, Delhi files a report signed by Dr. Singhla.
105	14.03.07	A detailed forensic report, signed by Dr. Rajinder Singh, CFSL, Delhi, regarding the analysis of 13 seized knives is prepared.
106	15.03.07	Another forensic report signed by Dr. Rajinder Singh regarding the knives and axe recovered at accused SK's instance, the material of the clothes seized from the empty space behind D5 and D6 and from the drain on the main road facing the row of bungalows, and whether they would be worn by males or females is prepared by CFSL Delhi.
107	16.03.07	A detailed forensic analysis report signed by Dr. Rajinder Singh, CFSL, Delhi, of the seized material is prepared. The DNA profile of the semen found on the quilt seized from accused SK's bedroom does not match the DNA profile extracted from the clothes recovered from the drain and the open space between D5-D6 and the Jal Board residential quarters.
108	20.03.07	Letter forwarding the 2 knives and an axe seized at accused SK's instance u/s 27 is sent by SP, CBI to the Forensic Department, AIIMS.
109	07.04.07	CBI moves an application before the SJM, Ghaziabad for identification of clothes and items of the victims. Identification is conducted in the court premises. Family members of victims Rima (CC 1475/2009), F(CC 7426/2010), K (CC 4/2091), B(CC 3/2021), G (CC 835/2011), I (CC 4196/2010) identified clothes as belonging to the victims. Father of L (CC 147/2013) is present in court but does not identify any of the clothes. Family members ofE(CC 2926/2017), D(CC 2667/2017) and

		C(CC 196/2018) were not present in court for identification of clothes.
110	13.04.07	Case properties taken to AIIMS for examination.
111	25.04.07	The protest petition of Jatin Sarkar, father of Aand complainant in ST 440/2007, challenging the exoneration of Pandher by the CBI and seeking further investigation against Pandher and the role of Dy. S. P., Dinesh Yadav, is transferred to the court of the learned Sessions Judge, Ghaziabad.
112	11.05.07	The learned Sessions Judge, Ghaziabad dismisses the protest petition holding that Pandher can be arraigned only under sec. 319 CrPC. However, the Court allows the prayer for further investigation against Pandher.
113	04.06.07	Charges under sec. 376, 364, 302, 201, 511 IPC are framed by the learned Court against accused SK in ST 440/2007 (A).
114	16.07.07	Photographs of the victims along with the 19 skulls and skull bones were sent to CFSL, Chandigarh for skull superimposition.
115	23.08.07	An AIIMS report signed by Dr. Rajinder Singh and others states that the injury and cut marks and dismemberment of some of the soft tissue and bones could have been caused by sharp edged weapons such as the forwarded knives and axe.
116	31.08.07	A report by CFSL, Chandigarh is submitted stating that the pictures of L, J, D, E, H and E are likely to be of the same skulls as in Sets No. 1, 4, 6, 12, and 16. The report also notes that human skulls in Sets No. 7, 10 and 13, though fit for comparison did not match any of the photographs. Thus, there is no DNA or skull super imposition match for the skulls in Sets No. 7, 10 and 13, which shows that these skulls do not belong to any of the victims in the present group of cases. Importantly, though the photograph of L (aged 27 years), is found to match with the skull in Set No.1 as per the AIIMS report dt. 15.03.07, the age of the skull in Set No.1 is between 12-18 years. Subsequently, the photographs of missing persons as per missing complaints registered in Sector 24, Noida Police Station were also sent for skull superimposition. Skull Set No. 7 and 13 matched with the photographs of two of these persons (Asha and Basanti). These persons, whose skulls were also found in the open space behind D5 and D6 are not named in accused SK's confession and it is not the case of the prosecution that they were killed by him. It is also not known whether they went missing before or after accused SK started working for Pandher in July 2004. It is therefore clear that persons other than accused SK were involved in the killing and disposing of bodies in the open space between DS-D6 and Jal Board residential quarters, which falsifies the prosecution case.

117	21.11.07	The learned Sessions Judge, Ghaziabad dismisses the CBI's application to cross examine PW 31, Vandana Sarkar in ST 440/2007 (A) and rules that cross examination merely on the ground that she had cast aspersions on the conduct of certain CBI officers was not a just ground.
118	28.11.07	The learned Sessions Judge, Ghaziabad partially allows Vandana Sarkar's application u/s 319 CrPC against Pandher in ST 440/2007 (A) but dismisses the application to make Dy.S.P. Dinesh Yadav also an accused.
119	16.07.08	Charges under s. 376, 302 r/w 120B and 201 are framed by the learned Court against Pandher in ST 440/2007 (A).
120	13.02.09	Accused SK and Pandher are sentenced to death in ST 611/2007 ('XYZ').
121	11.07.09	This Hon'ble Court in CC 1475/2009 ('XYZ') upheld the conviction and sentence of accused SK in ST 611/2007 while Pandher is acquitted.
122	17.12.09	'XYZ''s father, Anil Haldar (complainant in ST 611/2007) files SLP (Crl) No 608/2010 (Criminal Appeal No 513/2011) before the Hon'ble Supreme Court challenging the acquittal of Pandher in CC 1475/2009. The appeal has been admitted and is pending hearing.
123	12.05.10	Accused SK is sentenced to death in ST 850/2007 (I).
124	28.09.10	Accused SK is sentenced to death in ST 696/2007 (F).
125	22.12.10	Accused SK is sentenced to death in ST 740/2007 (G).
126	15.02.11	The conviction and sentence of accused SK in ST 611/2007 ('XYZ') is upheld by the Hon'ble Supreme Court in Criminal Appeal 2227/2010 [SLP (Cri) 608/2010].
127	24.12.12	Accused SK is sentenced to death in ST 494/2007 (H).
128	02.04.13	Mercy Petition preferred by accused SK against the death sentence awarded in the 'XYZ' case (ST 611/2007) rejected by the Governor.
129	20.07.14	Mercy Petition preferred by Koli against the death sentence awarded in the 'XYZ' case (ST 611/2007) rejected by the President.
130	28.10.14	Hon'ble Supreme Court rejects Koli's Review Petition against its order in Criminal Appeal 2227/2010 ('XYZ').
131	28.01.15	Koli's petition (Criminal Misc Writ Petition No. 23471/2014) before this Hon'ble Court wherein the rejection of Koli's Mercy Petition by the Governor and the President was challenged, is allowed and the death sentence passed on him in ST 611/07 ('XYZ') is commuted to life imprisonment.
132	07.10.16	Accused SK is sentenced to death in ST 550/2007 (D).
133	16.12.16	Accused SK is sentenced to death in ST 396/2008 (E).
134	24.07.17	Accused SK and Pandher are sentenced to death in ST 440/2007 (A).
135	08.12.17	Accused SK and Pandher are sentenced to death in ST 739/2009 (C).

136	2.3.19	Accused SK is sentenced to death in ST 524/2008 (J).
137	6.4.19	Accused SK is sentenced to death in ST 930/2007 (K).
138	16.1.21	Accused SK is sentenced to death in ST 931/2007 (B)

Issues framed during trial u/s 354(1)(b) Cr.P.C.

27. The trial court framed following issues for determination under Section 354(1)(b) Cr.P.C.:-

> "1-Did the accused Surendra Koli commit the murder the deceased A with the intention to kill her?
>
> 2-Did the accused abduct the deceased to commit murder?
>
> 3- Did the accused Surendra Koli attempt to sexually assault the victim?
>
> 4- Did the accused Surendra Koli cause disappearance of the dead body and evidence knowingly and having reason to believe?
>
> 5- Did Moninder Singh Pandher raped the victim ?
>
> 6- Was the accused Moninder Singh Pandher involved in the murder of the victim under criminal conspiracy?
>
> 7- Did the accused Moninder Singh Pandher help the accused Surendra Koli in causing disappearance of the dead body and evidence after the murder of victim?"

28. Trial Court has dealt with all issues together while delivering its judgment. The court of Sessions has observed that this is a case of circumstantial evidence and, therefore, chain of events pointing to the hypothesis of guilt attributed to accused has to be connected before the accused SK could be held guilty of the offence alleged against him. The confession made by accused SK before the Magistrate under Section 164 Cr.P.C. has been relied upon as the main evidence to implicate the accused appellant alongwith the alleged recoveries made on his pointing out under Section 27 of the Evidence Act. Testimony of prosecution witnesses have also been relied upon to hold that the accused SK used to lure the girls inside the house and then strangulate and rape them. Reliance has also

been placed upon the testimony of PW-12, as per which, the DNA profile report shows that one of the recovered skeleton on 29.12.2006 is connected to Vandana Sarkar and Jatin Sarkar. Sessions Court has also observed that the confession of accused SK was voluntary as the accused was repeatedly informed that he is not bound to make such a statement. The trial court has referred to oral and documentary evidence and has relied upon the confession of accused appellant SK as well as the recovery allegedly made on his pointing out to return a finding of guilt against the accused SK and Pandher and sentenced them, as per above.

Circumstances relied upon by the court of Sessions to hold the accused guilty

29. As the prosecution case is based on circumstantial evidence, the court below has relied upon following circumstances to hold the accused SK guilty and thereby convict him:-

> "1. Victim A D/o Jatin Sarkar residing at Sector 31 Noida, never returned from work at D-91 and D-100 on 5.10.06.
>
> 2. Koli residing in D-5, Sector 31, Noida, Gautam Budh Nagar during the time period of the incident.
>
> 3. A FIR was registered by victim A's father against Koli and Pandher subsequent to the recovery of and skeletal remains and seizure of victim A's clothes on 30.12.06. Both Koli and Pandher were arrested u/s 364, 376, 302, 120B and 201 of IPC.
>
> 4. On 29.12.06 Koli made a disclosure statement u/s 27 Evidence Act subsequent to which bones and skulls are recovered from the open space between D5, D6 and Jal Board Compound and a kitchen knife is recovered from the terrace of house no. D5.
>
> 5. Whilst in police custody, on 29.12.06, Koli confessed to luring and killing women and children before PW31 (mother of victim A) and her husband.
>
> 6. The victim A's clothes, seized from the open space between houses no.D5, D6 and Jal Board Compound is recognized by her mother (PW31) and employer (PW13).

7. Koli habitually lured the women and girls walking past D-5 either by promising treats or offers of domestic work.

8. The DNA extracted from a skull and some of the bones seized in this case match the DNA of victim A's parents.

9. Recovery of a kitchen knife on 11.1.07 and an axe on 18.1.07 pursuant to s.27 statement made by Koli.

10. Koli's confession u/s. 164 Cr.P.C."

Arguments in support of appeal

30. On behalf of the accused appellant SK the conviction and sentence is assailed by contending that there is no evidence of accused SK ever being seen with the victim A, let alone evidence of Abeing last seen alive with accused SK. It is also urged that in the confession made by accused SK, there is no reference to victim A and, therefore, the confession cannot be relied upon against the accused in the present case. It is also argued that confession is neither voluntary, nor is true and is otherwise recorded in complete disregard of the procedural safeguards stipulated under Section 164 Cr.P.C. and, therefore, the confession is bad in law.

31. General principles for evaluating admissibility and evidentiary value of confession under Section 164 Cr.P.C. has been emphasized with the aid of various judgments in order to contend that such retracted confession is judicially viewed with suspicion. It is also urged that confession has to be read as a whole and if even a part of confession is tainted, the taint attaches to each part of the confession. It is then argued that the Court must conclude whether confession is voluntary or true. It is argued that burden of proving voluntariness of confession is upon the prosecution and that the prosecution has failed to discharge such burden in the present case. Argument also is that there is no evidence to show as to how, when, to whom and in what circumstance the accused first

expressed his willingness to confess; giving of warning by magistrate or voluntariness of confession is not conclusive in this case; the accused has been tortured and; therefore, the fear induced of torture would not be dispelled. It is then urged that where accused is tortured, he would also be told about the questions likely to be put to him and the answers to be given by him. It is further argued on behalf of the appellant that the allegation of torture ought to have been inquired into by the concerned magistrate, which is not the case here. Learned counsel has emphasized the role of court in playing affirmative role in unearthing objective evidence forming the backdrop of retraction. The accused ought to be given benefit of doubt in such matters. An inverse presumption ought to be drawn from absence of materials which could form the reason of retraction. The court is also required to consider the circumstance on record which casts doubt on the voluntary character of confession.

32. Sri Yug Mohit Chaudhary, learned senior counsel for the appellant has emphasized the prolonged and unexplained police custody of SK prior to his confession as a material circumstance to reject the confession as involuntary.

33. As per prosecution SK was arrested on 29.12.2006 and was in police custody till he made the confession on 1.3.2007 i.e. an uninterrupted period of 60 days. It is urged that the prolong and excessive police custody prior to making of confession, by itself sufficient to hold the confession as involuntary. It is urged that SK has only passed Class – VII and, therefore, had virtually no legal knowledge and in the absence of legal aid, he was kept absolutely in dark about his rights during investigation and remand. The accused was also not allowed to meet any other person, family member or

friend, for 60 days. Argument is that this circumstance in itself is sufficient to hold the confession inadmissible.

34. It is argued that it is the prosecution's case that on his arrest on 29.12.06 SK gave a detailed confession to the police. Thereafter on the same day he gave another detailed confessional statement at the crime scene leading to recovery of further bones, clothes, knives belonging to other victims. It is also the case of the prosecution that on 3.1.2006 SK was sent for narco analysis for which he is said to have given his consent and once again he made a detailed confessional statement. It is also the case of the prosecution that SK had made two further confessional, statements on 11.1.07. The investigation in the case was largely over by 18.1.07. No evidence has been adduced which was obtained after 18.1.07. In spite of his having allegedly confessed to the police on the very first day, and repeatedly thereafter at great length, but accused SK was surprisingly not produced before the Magistrate to record his confession for about 1½ months though the investigation in this case was complete for all practical purposes. It is further submitted that the prosecution has provided no explanation for this delay nor explained what the police was doing with SK. In fact, further remand to police custody was obtained on false statements. A perusal of the remand applications and orders dated 8.2.07 and 22.2.07 show that SK's police custody was sought by the CBI on the pretext of recovering the body parts and clothes of victims D and 'XYZ' as well as identification of the same. However the skulls and clothes of these two victims had been recovered and identified on 29.12.06 and 3.1.07 itself. Argument is that the obvious inference therefore is that 2 months of excessive police custody preceding the confession was required for three reasons: (a) to

torture the accused and break his will so that he agrees to submit; (b) give time for the torture injuries to heal; and (c) give time to make the accused memorise the entire confession which was tailored to suit the recovery evidence and which was embellished with sensational and perverted details so that the reader's critical senses be numbed and he feels a sense of revulsion against the accused.

35. Learned counsel then submitted that SK allegedly was arrested on 29.12.2006 and he also made his detailed confessional statement, yet no further investigation was made apart from recovery of skulls. The Investigating Officer made an application to take SK for FSL and Narco Analysis instead of taking steps to verify the confession and collect corroborative evidence.

36. Sri Chaudhary has extensively read out the confessional statement of SK in order to submit that his confession contained repetition and, therefore, clearly suggested that he was tutored. Accused SK has also stated clearly in his confession that he was tutored on vital aspects of confession i.e. names of victims, the time, method, manner of killing, etc. On eighteen separate occasions accused SK has stated that he cannot remember facts as were being uttered by him. He has also stated that the police made him memorize the names of victim and that all the names were told to him by the police. It is also argued that the continued police custody apparently was utilized to coerce SK into memorizing facts, etc., and the consequential confession is thus involuntary.

37. In the confession, accused SK stated that UP Police ne ‘ratwaya’ regarding the names, times and manner of killing of the victims. The term 'ratwaya' implies compulsion, coercion

and interference by the police, negates the voluntariness of confession. It cannot be ascertained what is voluntary and true, and what is tutored and false. When there is evidence of tutoring, it is impossible to identify which part of the confession is tutored and which part is genuine. The taint attaches to the entire document.

38. The accused also wrote a detailed letter to the learned trial court dt. 25.11.08 and 16.3.09 stating, in detail, the brutal methods employed by the police. Although these letters were written generally to the trial court which was presiding over a large number of trials involving SK, and not in any specific case, these letters have been included at page 88 in the appeal paper-book of Capital Criminal Appeal No. 4196/2010 and at page 91 in in the appeal paper-book of Capital Criminal Appeal No. 4196/2010. Furthermore, two additional letters dated 1.4.10 and 10.6.11 were written by accused SK to the trial court in connection with ST No. 740/07 and ST No. 494/07 which are included in the paper-book of Capital Criminal Appeal No. 835/11 at page 295 and in the paper-book of Capital Criminal Appeal No. 147/13 at page 347. In the letter dated 16.3.09 he specifically states that he was repeatedly beaten by the police. He further mentions that during police custody he was beaten up and made to sign on several blank pages. In his statement in letter dated 10.6.11 in Capital Criminal Appeal No. 147/13, accused SK specifically requests that he be medically examined as he still bears the scars of the torture meted out to him. Further on 29.3.2010, accused SK wrote a letter detailing the manner in which the CBI tortured him, threatened and coerced him into making the confession. He states that the CBI informed him that his family was in their custody and if he did not confess, as per their say, they would

leave the family to the mercy of the frenzied mob who were baying for his blood.

39. Sri Chaudhary highlighted that the hand written application of accused SK is addressed to the learned ACMM, New Delhi and the SJM, CBI, Delhi. SK in his confession categorically admits to having no knowledge of the name of the Court where he has been produced. Had SK indeed addressed the application to the ACMM, New Delhi, he would have also known the Court in which he was being produced to record his confession. Additionally, prior to 28.02.2007, SK was being produced before the learned CJM Ghaziabad. Hence, it is extremely unnatural that he would, on his own address his letter to the ACMM, New Delhi. This further strengthens his claim that he wrote the letter on the CBI's coercion.

40. Learned counsel also pointed out that the learned ACMM had directed that before accused SK is handed over to DG (Prisons) Tihar, he be medically examined. Contrary to the learned ACMM's order, no medical examination of the accused is done prior to handing him over to Tihar prison authorities. The only medical report furnished is the one by the Jail Hospital on 1.3.07 which too is not proved by producing the doctor. Accused SK was produced for recording his confession on 28.2.07 after 60 days of uninterrupted police custody. It was therefore crucial that a medical examination was conducted on 28.2.07, prior to transferring him to judicial custody to ensure that the request to record a confession was not coerced by the CBI. The CBI's failure to conduct a medical examination, despite the Court's categorical order, is extremely suspicious and gives rise to an adverse inference u/s 114(g) of the Act of 1872. This medical report on 1.3.07 has a noting to the effect that 'No fresh injuries were seen’. This in itself implies the

presence of older injuries on accused SK’s person and affirms his submission of being tortured by the police. If older injuries were present on accused SK’s body, they should have been described, and their ages and causes ascertained. In his letter to the learned Sessions court, accused SK categorically stated that whenever the CBI took him for medical examination they pressurised the doctor into not mentioning any of the accused's injuries. The medical officer, who is the only person who could have proved the medical report dated 1.3.07 or testified to the nature of SK’s injuries has not been examined. Suppression of this crucial testimony leads to an adverse inference u/s 114(g) Evidence Act.

41. Learned counsel has further argued that CBI cannot absolve itself of its responsibility of proving voluntariness of confession on the ground that allegation of torture is against U.P. Police and not CBI. In his confession, SK mentions that he was induced by torture to confess regarding 2-3 photos. The exact number of photos for which he was tortured has not been clarified. The Magistrate should have immediately stopped the recording of the confession and asked him about the torture (how, where, why, by whom, etc). The Magistrate should have then sent the accused for medical examination. In the absence of any clarification, we cannot today draw an inference that the torture was only for 2-3 photos.

42. It is further submitted that after having spent 60 days in police custody the appellant was given only 5 minutes of legal aid. He was also not given any medical assistance. Further the I.O. was called into the room and made to state the allegations against the appellant before the recording of the confession and was directed to wait outside the room throughout the period of the recording. During the writing of the transcript the

appellant was handed over to the I.O. at the end of every day for production before the learned ACMM. Thus not only were no active steps taken to fully remove the impression of torture, the recording of the confession in the presence of the police and handing over the appellant to the I.O. reiterated the threat of torture.

43. The circumstance of filing application at Delhi for recording of confession under Section 164 Cr.P.C. is also highlighted, inasmuch as, the CBI itself had produced SK before the CBI Magistrate Ghaziabad on 8.2.2007 and 22.2.2007, much after the alleged incident of violence in Ghaziabad Court on 25.1.2007 and, therefore, reason for moving the application at Delhi stands falsified.

44. It is submitted that it is the CBI's case that SK was badly beaten up by the advocates and public when he was produced in the Ghaziabad Court on 25.1.07 and therefore faced an absolute security threat and danger. However, the CBI did not report the assault on accused SK to the Magistrate before whom he was produced on 25.1.07. Further, the CBI did not produce any medical treatment papers corresponding to the said incident nor did they take any steps to provide accused SK with any additional security. Moreover, not only did the CBI not mention the assault on accused SK to the Magistrate on 25.1.07, they did not breathe a word regarding a security threat to Magistrate subsequent to the day of assault. The first mention of this threat is made only before the ACMM, New Delhi, in the IO's application for recording his confession filed on 28.2.07. The failure to mention the grave security threat and a vicious physical assault on accused SK by advocates of the court to the Magistrate is extremely suspicious. The complete absence of any material corroboration of these

incidents of violence can only have the following plausible explanations: i) that the incident never took place and CBI is offering false reasons to produce accused SK before a Magistrate of their choice; ii) that the CBI has used this false statement to explain any injuries that may have been found on SK's body in the medical examination or in case SK's body was inspected by the Magistrate. If before confessing, SK was facing a threat at Gaziabad jail, as claimed by the CBI, this threat would have increased manifold after his confession. It is therefore inexplicable why, immediately after completion of the confession accused SK was shifted back to Gaziabad Jail and no threat was apprehended.

45. On behalf of accused the circumstance of police presence during confession has also been highlighted in order to contend that confession was not voluntary.

46. After identifying SK the learned Metropolitan Magistrate had specifically directed the IO, M.S Phartyal to wait outside the video-conferencing room. SK was well aware that the very IO who had tortured him was close at hand and would have been under the constant threat and fear of the IO. By asking the IO to wait outside during the recording of the confession, the learned Magistrate effectively continues the control of the CBI over accused SK. In these circumstances any statement given by the accused cannot be voluntary and no reliance may be placed on the same.

47. It is clear that the CBI was waiting outside the video conferencing hall in Patiala House where SK's confession was recorded and transcribed, was producing him before the learned ACMM and taking him to Tihar jail every day for the duration of the confession proceedings. Crucially the confession

was signed only at the end of the third day on 3.3.07 and was therefore not complete till then. Aware, that CBI officials were waiting outside the room and were taking him to Tihar jail at the end of every day, accused SK would naturally feel that he was in the custody of the CBI and be mentally pressurised and threatened by their presence. In these circumstances any statement made by accused SK cannot be said to be voluntary and free from coercion or duress.

48. Evidence on record has been highlighted on behalf of accused in order to submit that the safeguards contemplated under Section 164 Cr.P.C. has been fully bypassed; the accused was not informed of reason of judicial custody/detention period; no effective/meaningful legal aid was given; illegal instructions were issued by learned ACMM to Metropolitan Magistrate; non-application of mind by learned Metropolitan Magistrate while recording the statement; the learned Magistrate did not ask SK about the duration of police custody; no action taken by Magistrate on complaint of torture; essential responsibility of recording statement under Section 164 Cr.P.C. has clearly been abnegated by the Magistrate, who appeared as PW-11.

49. The Metropolitan Magistrate, PW-11 did not comply with the mandatory requirements of being satisfied that the confession is being made voluntarily. A perusal of the confession itself reveals that he did not arrive at a conclusive finding that the accused is confessing voluntarily but proceeded on the basis of the assumption that it was voluntary. The recording of the confession is initiated not on the basis of a concrete finding of voluntariness but an assumption.

50. Memorandum required by sub-section (4) of Section 164

Cr.P.C. was actually made two days later; memorandum was not in accordance with Section 164 Cr.P.C.; violation of Section 164(6) Cr.P.C. and 281 (3) Cr.P.C.

51. Next submission advanced on behalf of the appellant is that the confession of SK was not properly proved.

52. A reading of s. 164 CrPC makes it clear that the section envisages a written contemporaneous record of the accused's confession as only a written document can be contemporaneously recorded, signed and have a memorandum. While the 2009 amendment to the section 164 Cr.P.C. allows for audio- video recording of confession in addition to the primary written record and not as a substitute for the written recording. Further the amendment came into effect much after SK’s confession was recorded.

53. In the present case the prosecution has adduced the audio-video recording as the primary evidence of accused SK's confession u/s 164 CrPC. This falls foul of S. 164 CrPC as the section does not permit for an audio-video recording to be the primary proof of an accused's confession. Further the audio-video recording has not been signed by either the accused SK or the recording magistrate PW-11. Furthermore, no memorandum as mandated u/s 164 CrPC has been appended to the audio-video recording or dictated by the magistrate at the end of the audio video recording. Thus, the audio-video recording of SK’s confession does not comply with the mandate of S. 164 CrPC. That the original memory chip of the video camera used to record the confession would constitute primary proof of the same. This chip has not been produced in court. Whilst a copy of the confession has been adduced through a CD, the same is not accompanied by a Section 65B certificate.

Further the memory chip which is the primary document was not sent to the trial court as mandated by s. 164(6) CrPC. Thus, the CD of the confession Article No. 53 does not constitute lawful proof of SK's confession.

54. Accused SK did not receive any proper legal aid when his confession was recorded. It was only when he was asked about the confession during trial that he retracted the same. It is precisely because of this that retractions at the stage of s. 313 Cr.P.C. are also taken into consideration while rejecting a confession.

55. As mentioned above, it has to be shown that the confession is both true and voluntary, and that the Court must inquire into the truth of the confession only after it reaches an affirmative conclusion about its voluntariness. The truth of the confession is adjudicated by seeing whether it fits into the rest of the evidence adduced by the Prosecution. If it is found that any aspect of the confession is contradicted by any proved fact, the entire confession has to be rejected. Confession must be shown not only to be true but also to be in consonance with the probabilities of the prosecution case on material points.

56. In the present case, the confession is contradicted on material and significant aspects by the other prosecution evidence placed during the trial.

57. On behalf of the appellant it is also claimed that changing and conflicting versions were put-forth by the prosecuting agency, to suit its convenience. Such shifting stands were in keeping with the stage of investigation and the materials allegedly collected by them. Argument is that the developing story put-forth by the prosecution from 29.12.2006 to

1.3.2007 is not of SK but is a progressive narrative concocted by the investigating agency.

58. Sri Chaudhary also submits that there is no independent corroboration of murder, rape or cannibalism attributed to the accused appellant nor there exists any corroboration of the alleged confession itself. He also submits that the events mentioned in the confession are highly improbable. It is further urged that the confession has been coerced and concocted to save the actual culprit of the offence since the actual accused is a powerful person. He also submits that SK hails from a very poor dalit family based in Mangru Khal Village in Uttarakhand and he came to Delhi as a migrant labour looking for work. Accused dropped out of his school because of poverty and has an old ailing mother, wife and two kids to take care of. He also has no previous criminal history.

59. It is highly improbable that SK, who was a mere servant drawing a salary of Rs. 2500 and who had been working for Pandher only for 1.5 years, would have the courage and confidence of using his employer's house for such criminal acts while the house was occupied and used by his employer.

60. Learned counsel for the appellant has also invited attention of the Court to report of the Ministry of Women and Child Development, Government of India, under its mandate for the protection and safety of children had constituted a high level committee of seasoned bureaucrats to investigate into allegations of large scale sexual abuse, rape and murder of children in the Nithari village of Noida. The report's conclusions casts doubt on the prosecution theory about the motive for this offence and state that having embarked on its hypothesis the police has not investigated the possibility of organ trade as the

motive for the offence. The doubt expressed by the Expert Committee in its Report receives support from the fact that the very adjacent house (D-6) was occupied by a doctor who had been charged in a case of organ trade. This fact was known to the investigating agencies as is seen from the evidence of Investigating Officer.

61. So far as the circumstance relating to disclosure statement dated 29.12.2006 being admissible under Section 27 of the Evidence Act is concerned, it is submitted that disclosure and recovery of skulls and bones are not admissible under Section 27. It is also submitted that the statement attributed to SK dated 29.12.2006 has not been proved. It is also alleged that panchnama dated 29.12.2006 (K-16) is fabricated and anti-dated.

62. It is submitted that as per the panchnama dated 29.12.06 (Ka 16) SK alone confesses to having killed L leading to the consequent recovery of human bones. However as per the remand application dated 30.12.06 submitted by IO, PW 40, as well as the attendant remand order dated 30.12.06 the recovery of skulls on 29.12.06 was consequent to a joint disclosure made by both the accused SK and Pandher.

63. These two versions are wholly incompatible and contradictory and could not have existed at the same time. Had panchnama dated 29.12.06 (Ka 16) existed at the time of the remand it would have surely been placed before the learned Magistrate along with the case diary and other papers relating to the investigation, in light of the learned Magistrate could have never passed an order observing that the disclosure was jointly made by both accused. This clearly shows that the panchnama dated 29.12.06 (Ka 16) did not exist up until the

passing of remand order dated 30.12.06.

64. Various circumstances have been highlighted in order to submit that the prosecution has not even orally proved the contents of the disclosure statement. No independent person otherwise witnessed the disclosure statement.

65. It is the prosecution's case that the contents of SK’s disclosure statement has been orally proved by two witnesses PW-40 (Dinesh Yadav) and PW-28 (Chote Singh). However, a perusal of their testimonies makes it clear that their evidence contradicts each other on the contents of SK’s disclosure statement as well as the time, manner, and place of recording the same which have been enumerated below. The stark contradictions and variance in their evidences renders the same unbelievable. Thus, the the contents of the disclosure statement have not been proved by either of the two police witnesses.

66. The panch witness, PW-10 Pappu Lal has deposed that when he reached the spot along with the police and SK, excavation of the spot where the biological material etc. were recovered was already in progress. This clearly indicates that police were already aware that the bones and clothes of missing persons would be found in the open space behind D5 and D6 and facing the jal board compound. It is an impossible coincidence that the panch to the recovery of L's skull was, Pappu Lal PW-10, who just so happens to be the father of another victim girl, F. This is only possible if the police already knew about the existence of various skulls and body parts in the relevant places, and arranged the seizures to be conducted before the father of another missing child.

67. It is urged that the police and public were well aware of the presence of human bodies in the open space between D5, D6 and Jal Board Compound and in the drain on the main road facing houses D1-D6. Therefore, this evidence is not a discovery u/s 27, and hence neither admissible nor incriminating. it cannot be said that either this circumstance is firmly established, or that it is incompatible with the innocence of the accused and the guilt of another person.

68. It is also submitted that recovery made from a public place cannot be said to be in the exclusive possession/control of accused. It is further argued that seizures made do not corroborate disclosure statement.

69. Recovery of kitchen knife on 29.12.2006 is also challenged on the ground that time and manner of recovery is redundant with inconsistencies. The recovery of kitchen knife on 11.1.2007 and an axe on 18.1.2007 based on the alleged disclosure of SK under Section 27 from the open place behind the house and from the lawn in front of open space. It is also alleged that the house had been thoroughly searched by police and CBI earlier and, therefore, subsequent recovery cannot be relied upon. No bloodstains, etc., were found on the knives and axe nor the forensic report shows any blood etc on it. No material/evidence is produced to show that the knives or the axe were used in committing the offence. The identity of victim is also questioned in the context of DNA report on the ground that her age is stated to be 20 years; whereas in the DNA report the age is shown as 12-18 years. Even the mother of victim i.e. PW-31, has not testified that her blood sample etc. was collected.

70. So far as the circumstance relating to recognition of

clothes of victim Ais concerned, it is urged that the description of clothes is made after the seizure of clothes and not before it. This circumstance, therefore, would not be of much relevance. It is further argued that the prosecution evidence that SK habitually lured women inside House No. D-5 is also not reliable, inasmuch as, no untoward activity on part of the accused was reported. No prior complaint was otherwise made. The witnesses were brought by CBI later in violation of Section 171 Cr.P.C. It is also stated that the fact of SK offering employment to domestic workers cannot be viewed unnatural as requirement of replacement would be necessary whenever the maid went on leave etc.

71. Learned counsel has further argued that re-enactment of the manner in which bodies were cut by SK before the medical panel has rightly been disbelieved by the court below though it was relied upon by the prosecution. Admittedly accused was in CBI custody and any confession made during police custody would be barred and, therefore, has rightly not been relied upon. The mere fact that police personnel withdrew for sometime would not nullify the evidentiary value of confession in police custody. The right of accused to fair trial is also alleged to have been violated on account of following reasons:-

(i) Improper and inadequate questions under Section 313 Cr.P.C.

(ii) Incriminating evidence not put to SK.

(iii) Incorrect/misleading questions put to accused.

(iv) Compound/composite questions put to accused.

(v) Questioning of accused under Section 313 Cr.P.C. improper, inadequate and defective and has thereby prejudiced the accused.

72. Arguments have also been elaborately made for the

previous adjudication in 'XYZ''s case not to have any bearing on the present case. Argument, thus, in this regard shall be extensively read with. It is also submitted that previous judgment cannot act as evidence in the subsequent trial. Question, as to what exactly constitutes a precedent, has also been addressed. Argument is also advanced on the issue whether previous judgment in 'XYZ' would constitute issue estoppel for reception of evidence with respect to confession under Section 164 Cr.P.C and recovery under Section 27 of the Evidence Act.

73. Sri Chaudhary has also addressed the Court on the role of High Court in confirmation proceedings under Section 366 Cr.P.C. as also the right of accused to a fair trial.

Arguments on behalf of the prosecution (CBI)

74. On behalf of CBI Sri Jitendra Mishra, Advocate alongwith Sri Sanjay Kumar Yadav have placed heavy reliance on the previous judgment of this Court in the case of 'XYZ' as well as the judgment of Supreme Court in said case. It is contended that findings returned by this Court and the Supreme Court with regard to confession of accused SK as well as recovery are not open to examination nor a contrary view can be taken in the matter. Sri Mishra has taken the Court through the evidence on record to submit that the fact with regard to recovery of bones, skull and other body parts in front of House No. D-5, Sector – 31 or behind it has to be viewed in light of the confession made by accused before the Magistrate. The confession as well as statement of the concerned Magistrate Sri Chandra Shekhar has been highlighted in order to emphasise that in fact it was the accused who had committed the offence of rape and murder. Evidence on the aspect of recovery has

also been highlighted on behalf of CBI. Scientific evidence etc has also been highlighted to urge that the confession and recovery is also corroborated by such scientific evidence and, therefore, the finding of court below to hold the accused guilty is merited from the evidence brought on record by the CBI during trial. Sri Mishra has also attempted to give a counter narrative to the arguments advanced by Sri Chaudhary on various aspects which shall be dealt with at the time of analysis of evidence. Sri Mishra has also placed reliance upon judgment of the Supreme Court in State of Tamil Nadu Vs. Kutty, 2001 (6) SCC 550 (Para 9 to 12) in support of the confession. Reliance has also been placed upon the judgment of the Supreme Court in State of Maharashtra Vs. Damu Gopinath Shinde, 2000(6) SCC 269 on the aspect of confession. On the aspect of confession learned CBI Counsel has also placed reliance upon the Supreme Court Judgment in Ahmed Hussein Vali Mohammed Saiyed Vs. State of Gujarat, (2009) 7 SCC 254. Heavy reliance is placed upon Gauhati High Court Judgment in Hem Chandra Nayak Vs. State of Assam, 1989 Crl.L.J. 2058.

75. Observations of the Supreme Court have also been relied upon in the case of Jamiludin Nasir; Aftab Ahmed Ansari @ Aftab Ansari Vs. State of West Bengal, 2014(7) SCC 443 on the aspect of confession. Reliance has also been placed upon the judgment of the Supreme Court in Shankaria Vs. State of Rajasthan, 1978 (3) SCC 435 as well as the judgment of the Supreme Court in Ghanshyam Das Vs. State of Assam, 2005(13) SCC 387.

76. It is in the context of rival submissions made on behalf of the appellant and the prosecuting agency that the confirmation proceedings as well as appeal filed by the accused are required

to be adjudicated.

77. We have already noticed the background in which village Nithari, situated in Noida, suddenly acquired notoriety for its missing children, mainly girls, for sometime. One of the cases lodged in respect of such missing children was Case Crime No. 838 of 2006, Police Station – Sector 20, Noida in respect of missing girl L. Directions were issued by this Court for investigation in the case to be accorded primacy. Consequential orders were passed by the Senior Police Officers and ultimately investigation was entrusted to a special team led by Dinesh Yadav, Dy. Superintendent of Police (PW-40). Accused SK was arrested on 29.12.2006 and he purportedly confessed to killing of missing girl L. SK then took the police to an enclosed gallery behind House No. D-5, Sector 31, Noida where he had kept her body parts and other articles. On the pointing out of SK the skull and other body parts of L were recovered. SK also confessed to killing of other missing children. It is at this stage that news spread in and around Nithari that body parts and clothes worn by missing children are found behind House No. D-5.

78. Coming to know of it, parents of missing girl A came to the House No. D-5 and identified the clothes worn by their missing daughter. A complaint was registered against the accused SK and Moninder Singh Pandher on 30.12.2006 being Case Crime No. 1025 of 2006.

79. Jatin Sarkar has lodged the complaint on the basis of which Case Crime No. 1025 of 2006 was registered on 30.12.2006. Jatin Sarkar, however, has not been produced in evidence. It is the other parent of missing girl A namely Vandana Sarkar W/o Jatin Sarkar, who has appeared as PW-31.

She has deposed during trial that she was living in Sector 31, Noida, for the last 17-18 years alongwith her son Sonu Sarkar, daughter A and her husband Jatin Sarkar. Missing girl A also had a son namely Amit Sarkar who was also residing in the same house with PW-31. A went missing on 5th October, 2006 and was not found. She was about 20 years of age then. The missing girl A was working in a bungalow of Sector 30. Bungalow No. D-5 of Sector 31 was on the way to the place where A used to go for work. The missing girl was working in the house of one Kanika Haldar. On 5th October, 2006, A left home at 7.00 am. At about 1.30 in the afternoon, she finished her work and left the place of her work but did not reach home. The witness has identified her daughter from her photograph which has been exhibited as 10A/1. This photograph is on record as material exhibit 33. The deceased was wearing white salwar and yellow kurta and had put on rubber slippers. The witness alongwith her husband had gone to the police station to register missing report of her daughter. She has then stated that she came to House No. D-5, Sector 31 with her husband after hearing that bones and clothes of missing children were found. Bones and clothes of the deceased were also recovered and identified by her. She also claims that she had put her thumb impressions on such recovery. Exhibit-Ka-50 has been read out to the witness, who then asserted that the documents of recovery are same which were prepared in her presence at House No. D-5, Sector-31 and that she had identified the clothes of her daughter which had been recovered from that place. The clothes worn by her daughter had been given by Kanika Haldar for whom the deceased was working as domestic help. The clothes and rubber slippers have also been identified. The salwar of deceased was identified and marked as material exhibit 10 while kurta was marked as material exhibit 11 and

slippers were marked as material exhibit 34.

80. PW-12 Dr. Nandineni Madhusudan Reddy, Staff Scientist, Laboratory of DNA Finger Printing Services, CDFD, Hyderabad has proved the DNA test report (Ex.Ka.15), as per which, the blood sample of Vandana Sarkar (PW-31) and Jatin Sarkar matches the DNA Profile of skeleton remains of their daughter A.

81. PW-13 Kanika Haldar, R/o House No. D-91, Sector-30 has also been produced and has stated that the deceased A was working for the last four years in her house. The deceased was doing domestic work of sweeping the floor and cleaning the utensils etc. Deceased had come to her house on 5.10.2006 at about 10.00-10.30 in the morning and after seeing T.V. Serial Kumkum, she left about 12.30-1.00 pm. She has also identified the clothes worn by the deceased which were produced as material exhibit 10 and material exhibit 11. She has also verified that on the last day when she came for work the deceased had worn these clothes.

82. From the evidence on record, it is, therefore, established that the deceased A was residing in Sector 31/Nithari and had lastly gone for work to the House of PW-13, Kanika Haldar, and that she left the house of Kanika Haldar at about 1.00 in the afternoon on 5.10.2006. Having left the house of Kanika Haldar, the deceased A never returned home. Her skeleton as well as clothes have been recovered from an enclosed space behind House No. D-5, Sector-31. The DNA report as well as the recovered clothes goes to show that the deceased A was done to death and her clothes and skeleton etc. had been recovered from the enclosed space behind House No. D-5, Sector-31. The prosecution, therefore, has clearly proved that

while returning from work the deceased A went missing and ultimately her clothes and skeleton have been found from the enclosed space behind House No. D-5, Sector – 31.

83. The finding of the trial court that prosecution has proved that victim A D/o Jatin Sarkar was residing at Sector-31, Noida and she never returned from House No. D-91 to D-100 where she had gone for work on 5.10.2006 is not in issue. The fact that accused SK was residing in House No. D-5, Sector-31, Noida during the time when the incident occurred is also not in issue. It is further not in dispute that subsequent to recovery of skeleton remains and the seizures of victim A's clothes on 30.12.2006, the first information report was lodged with U.P. Police. Accused SK was also arrested under Sections 364, 376, 302, 201, 120B IPC. The fact that clothes worn by deceased A were seized from enclosed open space behind House No. D-5, D-6, Sector-31 and Jal Board Compound and recognized by her mother (PW-31)and employer (PW-13) are also not in issue. The fact that DNA extracted from a skull and some of the bones seized in the present case matched the DNA of victim A's parent is also not in issue. The above circumstances are not disputed and would go to show that victim A had gone to work on 05.10.2006 but she never returned. Her clothes and body parts were found from the enclosed space behind House No. D-5 and D-6, Sector-31, Noida is also established. The DNA report shows that some of the bones recovered had matched with the parents of victim A. Circumstances that the victim A had not returned from work or that her body parts were found behind House No. D-5 and D-6, Sector-31, Noida in itself cannot be treated incriminatory against the accused appellant SK. No further discussions are thus required in respect of the above circumstances. Other evidence/circumstances relied

upon by the prosecution to implicate the accused SK i.e. recovery under Section 27 of the Act of 1872, confession of accused SK made under Section 164 Cr.P.C. etc are the bone of contention between the parties and thus requires determination in this appeal.

Issues arising in this appeal

84. The issues that survive/arise for consideration and determination in this appeal are the admissibility of circumstances, noticed hereinafter, to implicate the accused appellant:-

> "(i) The legality and admissibility of disclosure statement made by accused SK on 29.12.2006, as well as recoveries distinctly made pursuant to it of biological materials (skull, bones and skeleton) and clothes etc of the victim ?
>
> (ii) Whether accused SK habitually lured women and children walking pass D-5, Sector-31, Noida either by promising offers of domestic work or offering eatables/treats etc ?
>
> (iii) Whether recovery of a kitchen knife on 11.1.2007 and an axe on 18.1.2007 pursuant to disclosure statement made by accused could be read in evidence under Section 27 of the Act of 1872.
>
> (iv) Admissibility of the confession of accused made under Section 164 Cr.P.C."

85. The evidence on record of the present case, is therefore, required to be minutely examined in order to determine as to whether the circumstances, noticed above, are proved against the accused appellant on the strength of evidence led during trial by the prosecution, or not?

86. The prosecution case heavily relies upon the circumstance of disclosure statement by the accused on 29.12.2006 as well

as recovery of bones, skulls, clothes, knife, etc. under Section 27 of the Evidence Act. The prosecution evidence on the aspect of disclosure and the recovery is, therefore, taken up at the outset.

87. Circumstances relating to recovery of body parts of deceased alongwith the clothes worn by her alongwith her rubber slippers have been heavily relied upon by the prosecution and accepted by the court of Sessions to hold the accused guilty of the charges levelled against him. This circumstance is allegedly proved on the basis of evidence relating to:-

(i) information received from accused while in custody of the police officer;

(ii) recovery of body parts etc. on the alleged pointing out of accused SK.

Law on recovery u/s 27 of the Act of 1872.

88. Before embarking upon evaluation of prosecution evidence on the above circumstance, we may gainfully refer to the law applicable on the subject under reference. Chapter -II of Part 1 of the Indian Evidence Act, 1872 contains provisions relating to the relevancy of facts. Section 17 of the Act defines admission as a statement, oral or documentary or contained in evidence form, which suggests any inference as to any fact in issue or relevant fact, made by any of the persons, and under the circumstances, mentioned hereinafter. Confession is then referred to in Section 24 of the Act. Though it is not specifically defined in the Act of 1872, but is generally understood of same genus but with distinct attributes. A confession lawfully

recorded and admissible can sufficiently prove the guilt of the maker. In contrast, an admission may fall short of it though it may remain an incriminating fact. Section 24 ordains that confession caused by inducement, threat or promise would be irrelevant in criminal proceedings in the situation specified in the section. Section 25 states that no confession made to a police officer shall be proved as against a person, accused of any offence. Confession by accused while in custody of a police officer, unless it is made in the immediate presence of a Magistrate, also cannot be proved in evidence against the maker.

89. Section 27 begins with a proviso and states that when any fact is deposed to as discovered, in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information as relates distinctly to the fact thereby discovered may be proved, whether it amounts to a confession or not. What is taken out of the purview of Section 24 and 25 of the Act, by virtue of Section 27 of the Act, is the information that leads distinctly to the discovery of a fact which is thus made admissible in evidence.

90. Ingredients to attract Section 27 are by now, well-established. The prosecution in order to secure admissibility of evidence under Section 27 will have to prove that the confessional statement has resulted in discovery of a fact which was previously not known. The making of confessional statement by the accused and discovery of fact, previously unknown, would thus have to be proved.

91. The scope of Section 27 of the Act of 1872 as also its necessary ingredients is no longer *res-integra*. In a series of

judgments beginning from the celebrated decision of Privy Council in Pulukuri Kotayya v. King-Emperor AIR 1947 PC 67 till the recent decision of Supreme Court in Boby Vs. State of Kerala, 2023 SCC OnLine SC 50, as reiterated in Rajesh & Anr. vs. State of Madhya Pradesh 2023 SCC OnLine SC 1202 it is consistently held that Section 27 provides an exception to the prohibition imposed by the preceding provisions and enables certain statements made by an accused in police custody to be proved. The discovery of fact has to be shown to be a consequence of information received from a person accused of any offence, in the custody of a police officer, and thereupon so much of information, as relates distinctly to the fact thereby discovered may be proved.

92. In Boby (supra) the Supreme Court has meticulously scanned the previous judgments on the subject, beginning from Pulukuri Kottaya (supra) to observe as under:-

> "27. As early as 1946, the Privy Council had considered the provisions of Section 27 of the Evidence Act in the case of Pulukuri Kotayya v. King-Emperor. It will be relevant to refer to the following observations of the Privy Council in the said case:
>
> "The second question, which involves the construction of s. 27 of the Indian Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms. [His Lordship read ss. 25, 26 and 27 of the Evidence Act and continued :] Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. *The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and there upon so much of the information as relates distinctly to the fact thereby discovered may be proved.* The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact

discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. On this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity, would all be admissible. If this be the effect of s. 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to s. 26, added by s. 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A.", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

[Emphasis supplied]

28. It could thus be seen that Section 27 of the Evidence Act requires that the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to the said fact. The information as to past user, or the past history, of the object produced is not related to its discovery. The said view has been consistently followed by this Court in a catena of cases.

29. This Court, in the case of Chandran v. The State of Tamil Nadu5, had an occasion to consider the evidence of recovery of incriminating articles in the absence of record of the statement of accused No. 1. *In the said case also, no statement of accused No. 1 was recorded under Section 27 of the Evidence Act leading to the recovery of jewels*. The Court found that the Sessions Judge as well as the High Court had erred in holding that the jewels were recovered at the instance of accused No. 1 therein in pursuance to the confessional statement (Ex. P-27) recorded before PW-34 therein. It will be relevant to refer to the following observations of this Court in the said case:

"36. ……Thus the fact remains that no confessional statement of A-1 causing the recovery of these jewels was proved under Section 27, Evidence Act….."

30. *It is thus clear that this Court refused to rely on the recovery of jewels since no confessional statement of the accused was proved under Section 27 of the Evidence Act*.

31. It will also be relevant to refer to the following observations of this Court in the case of State of Karnataka v. David Rozario:

"5. ……This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. *The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence*. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. *It is now well settled that recovery of an object is not discovery of a fact envisaged in the section.* Decision of the Privy Council in Pulukuri Kottaya v. Emperor [AIR 1947 PC 67 : 48 Cri LJ 533 : (1946-47) 74 IA 65] is the most-quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (See State of Maharashtra v. Damu [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088 : 2000 Cri LJ 2301]……"

[Emphasis supplied]

32. A three-Judges Bench of this Court recently in the case of Subramanya v. State of Karnataka7, has observed thus:

"82. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:

"27. How much of information received from accused may be proved.—

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

83. *The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.*

84. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the *first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the*

> *discovery panchnama as contemplated under Section 27 of the Evidence Act.* If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."
>
> 33. *This Court has elaborately considered as to how the law expects the IO to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. In the present case, leave aside the recovery panchnama being in accordance with the aforesaid requirement, there is no statement of Boby (accused No. 3/appellant herein) recorded under Section 27 of the Evidence Act.* We are, therefore, of the considered view that the prosecution has failed to prove the circumstance that the dead body of the deceased was recovered at the instance of Boby (accused No. 3/appellant herein)."
>
> (emphasis supplied)

93. Necessity of proving the exact words uttered by the accused and proving the contents of discovery panchanama are emphasized by the Supreme Court in Ramanand alias Nandlal Bharti Vs. State of Uttar Pradesh, 2022 SCC OnLine SC 1396. In para 54 to 56 of the report, the Supreme Court has been pleased to hold as under:-

> "54. *The reason why we are not ready or rather reluctant to accept the evidence of discovery is that the investigating officer in his oral evidence has not said about the exact words uttered by the accused at the police station.* The second reason to discard the evidence of discovery is that the investigating officer has failed to prove the contents of the discovery panchnama. The third reason to discard the evidence is that even if the entire oral evidence of the investigating officer is accepted as it is, what is lacking is the authorship of concealment. The fourth reason to discard the evidence of the discovery is that although one of the panch witnesses PW-2, Chhatarpal Raidas was examined by the prosecution in the course of the trial, yet has not said a word that he had also acted as a panch witness for the purpose of discovery of the weapon of offence and the blood stained clothes. The second panch witness namely Pratap though available was not examined by the prosecution for some reason. Therefore, we are now left with the evidence of the investigating officer so far as the discovery of the weapon of offence and the blood stained clothes as one of the incriminating pieces of circumstances is concerned. We are conscious of the position of law that even if the independent witnesses to the discovery panchnama are not examined or if no witness was present at the time of discovery or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer

> must be treated as tainted and the discovery evidence unreliable. In such circumstances, the Court has to consider the evidence of the investigating officer who deposed to the fact of discovery based on the statement elicited from the accused on its own worth.
>
> 55. Applying the aforesaid principle of law, we find the evidence of the investigating officer not only unreliable but we can go to the extent to saying that the same does not constitute legal evidence.
>
> 56. The requirement of law that needs to be fulfilled before accepting the evidence of discovery is that by proving the contents of the panchnama. The investigating officer in his deposition is obliged in law to prove the contents of the panchnama and it is only if the investigating officer has successfully proved the contents of the discovery panchnama in accordance with law, then in that case the prosecution may be justified in relying upon such evidence and the trial court may also accept the evidence. In the present case, what we have noticed from the oral evidence of the investigating officer, PW-7, Yogendra Singh is that he has not proved the contents of the discovery panchnama and all that he has deposed is that as the accused expressed his willingness to point out the weapon of offence the same was discovered under a panchnama. We have minutely gone through this part of the evidence of the investigating officer and are convinced that by no stretch of imagination it could be said that the investigating officer has proved the contents of the discovery panchnama (Exh.5). There is a reason why we are laying emphasis on proving the contents of the panchnama at the end of the investigating officer, more particularly when the independent panch witnesses though examined yet have not said a word about such discovery or turned hostile and have not supported the prosecution. In order to enable the Court to safely rely upon the evidence of the investigating officer, it is necessary that the exact words attributed to an accused, as statement made by him, be brought on record and, for this purpose the investigating officer is obliged to depose in his evidence the exact statement and not by merely saying that a discovery panchnama of weapon of offence was drawn as the accused was willing to take it out from a particular place."
>
> (emphasis supplied)

94. Reliance has been placed by Sri Chaudhary, learned counsel appearing for the accused on a judgment of the Supreme Court in H.P. Administration Vs. Shri Om Prakash, (1972) 1 SCC 249 to submit that the Supreme Court has cautioned that Section 27 is vulnerable to accused and that the courts have to ensure that the police do not pass of a instance

of seizure as being a discovery made pursuant to the disclosure made by the accused. Para 8 and 15 of the report are relevant in this regard and are reproduced hereinafter:-

> "8. ……..But at the time when these seizures were made the part played by the accused if any was not known, and if at all PW 2, PW 8 and PW 13 who were witness to the Panchnama had not been cleared from suspicion. *We are not unaware that Section 27 of the Evidence Act which makes the information given by the accused while in custody leading to the discovery of a fact and the fact admissible, is liable to be abused and for that reason great caution has to be exercised in resisting any attempt to circumvent, by manipulation or ingenuity of the Investigating Officer, the protection afforded by Section 25 and Section 26 of the Evidence Act. While considering the evidence relating to the recovery we shall have to exercise that caution and care which is necessary to lend assurance that the information furnished and the fact discovered is credible.*
>
> 15. We then come to the recovery of the Second February of pant, the account books and the vouchers. These, however, cannot in our view be relied upon because PW 28 had information relating to them which had been furnished by the accused more than 24 hours before and the description given by him was such that they could have been discovered. At any rate the long delay does not lend assurance to the discovery. It appears from the application made on February 2, to the Magistrate that the accused was arrested on February 1, 1967, and at his instance and from his possession one sweater, one coat and one blanket blood stained, have been recovered and in addition one blood stained warm pant, one duster, one bag containing 5 registers are still to be recovered on the pointing out of the accused but the remand of the accused is due to expire at 1 p.m. and accordingly it was requested that a further remand for 7 days be given and the accused made over to the police and orders be passed. The accused is alleged to have given the information that he had hid them under the stone slab near Krishna Nagar Ganda Nala which he had thrown away in the sewage and which he said will point out and get them recovered. The recovery itself is under Ext. P-7, to which PW 2, PW 13 and Manohar Lal, PW 14 who was picked up on the "rasta" when he was summoned by the constables are witnesses. According to PW 14 the Thanedar was going ahead and went down to the Nala, when the constable summoned him and he went there. He further says that the Thanedar sent a constable down. The accused had a talk with Thanedar. The constable took out from below a stone slab five registers in a bag, the accused was standing on a stone. At this stage the prosecutor sought permission to cross-examine the witness and it was given. In the cross-

> examination he denied having signed the Memo at the spot and said that he had signed it at the Thana. He also said it was incorrect to suggest that the Memo was read over to him and he signed it. Whether the articles recovered were planted at the place from where they were alleged to be recovered or not as suggested by the learned Advocate for the accused, the evidence referred to certainly goes against the prosecution version that the account books, vouchers and the pant were recovered at the instance of the accused. *The police appears to have known the place from where these articles were alleged to have been recovered and therefore it cannot be said that they were discovered as a consequence of the information furnished by the accused*."
>
> (emphasis supplied by us)

95. On behalf of the appellants reliance is also placed upon para 13 of the judgment of Supreme Court in State of Haryana Vs. Ram Singh, 2012 (2) SCC 426. Supreme Court in State of Himachal Pradesh Vs. Jeet Singh, 1999(4) SCC 370 has held that to invoke Section 27, the concealment and exclusive knowledge of maker must be established before protection of Section 27 could be claimed.

96. It is in the context of the above settled principles of the law that the prosecution evidence is required to be considered.

Analysis of evidence on the aspect of arrest of accused, disclosure by him and the recovery

97. We have carefully examined the evidence brought on record of the present proceedings for confirmation of death reference and appeals of the accused, with the able assistance of Sri Yug Mohit Chaudhary, learned Senior Counsel for the accused appellant and Sri Jitendra Mishra for the CBI. The prosecution case is that the investigating officer of the Case Crime No. 838 of 2006 under Section 363, 366 IPC relating to victim L during investigation saw the accused SK and arrested him. The accused was going on a Rikshaw. He was arrested

around 8.30-9.00 in the morning. Although people were moving on the road, yet, none from public was made a witness.

98. It is admitted fact on record that no arrest memo was prepared regarding arrest of accused SK. The evidence of prosecution relating to arrest of SK consists only of the oral testimony of two police officers namely Sri Dinesh Yadav, Investigating Officer (PW-40) and his colleague of police team Sri Chottey Lal, Sub-Inspector (PW-28). Their testimonies are relevant both in respect of arrest of accused SK as also in respect of their interrogation, wherein he (accused SK) allegedly made a disclosure.

99. Though PW-40 and PW-28 are consistent about the time and place of the arrest of accused SK i.e. around 8.30-9.00 in the morning on the main road but their version on material aspects is starkly inconsistent.

100. PW-40 has stated that accused SK jumped off the Rikshaw and fled but the version of PW-28 is not so dramatic on this aspect. PW-40 moreover states that the confessional statement of accused SK was recorded first at police outpost at Sector 26 and then in the police station, but PW-28 states that confessional statement was recorded at the place of arrest itself i.e. on the road and not at the police outpost or at the police station. The specific utterances of these witnesses i.e. PW-40 & PW-28, made during the trial, in Hindi, are extracted hereinafter to demonstrate their inconsistent version:-

> "पी०डब्लू ० -40 दिनेश यादव से बहलफ़ जिरह
>
> X X X X
>
> जिरह वास्ते सुरेन्द्र कोली द्वारा श्री एस० एस० शिशोदिया न्यायमित्र मैंने इस केस की कोई विवेचना नहीं की गयी। मैं 838/06 धारा 363, 366 सम्बन्धित गुमशुदा L की विवेचना कर रहा था। अभियुक्त सुरेन्द्र को मैंने सर्व

प्रथम चौकी 26 सैक्टर 26 नोएडा के पास रोड पर दिनांक 29-12-06 को देखा था और गिरफतार किया था। गिरफतारी के समय मुलजिमान सुरेन्द्र रिक्शा से जा रहा था। सुरेन्द्र कोली को सुबह 8.30, 9.00 बजे के करीब गिरफतार किया था रोड पर और लोग भी आ जा रहे थे। मैंने जनता का कोई गवाह नहीं बनाया था। मुलजिम सुरेन्द्र कोली रिक्शा से कूदकर भागा था और रिक्शा वाला भी चला गया था। सुरेन्द्र कोली का इकबालिया बयान चौकी 26 व थाने पर लिया गया था। बयान मैंने अपनी टीम के साथ लिया था बयान मेरे पेशकार ने मेरे बोलने पर लिखा था । पूछताछ के दौरान कोई जनता का व्यक्ति मौजूद नहीं था । इकबालिया बयान में सुरेन्द्र कोली ने निठारी के कई बच्चों के कत्ल की बात स्वीकारी थी जिसमें A भी शामिल थी जिसका विवरण थाने 20 के रोजनामचा आम में अंकित किया गया था। मैंने सी० बी० आई० को बयान दिया था उसमें कई बच्चों के कत्ल होने की बात कही थी और जी०डी० में इसका विवरण अंकित है जो सी० बी० आई० को सौंपी गयी थी।

सुरेन्द्र कोली बयान लेने के बाद उसके द्वारा बरामदगी कराने के उद्देश्य से डी0-5 सैक्टर 31 नोएडा हमराह फोर्स सैक्टर थाना 20 प्रभारी एस०ओ०जी० व अन्य स्टाफ के साथ गया था। 29-12-06 को डी0-5 कोठी पर लगभग 11.00 दिन में पहुँचे थे और देर रात तक वहां रहे थे। उस दिन की सभी बरामदगी की लिखा पढी मेरे सामने हुयी थी। मृतक बच्चों के सामान की बरामदगी हुयी थी उसमें से बच्चों के माता पिता द्वारा बच्चों के सामान की शिनाख्त की गयी थी। A के सामान की शिनाख्त उसके माँ बाप द्वारा मेरे समक्ष नहीं की गयी थी । मुलजिम सुरेन्द्र कोली दिनांक 30-12-06 को समय शाम 4.00 बजे सी०जे०एम० गौतम बुद्ध नगर की अदालत में पेश किया गया था क्योंकि कानून व्यवस्था की स्थिति के कारण दिन में पेश करना सुरक्षा की दृष्टि सम्भव नहीं हो सका था मैंने मौके का नक्शा बनवाया था। अधिकांश खोपड़िया डी0-5 के पीछे गैलरी से बरामद हुयी थी। यह गैलरी डी0-6 के पीछे तक एक्सटेन्डेड है। हमने डी-6 कोठी की भी तलाशी ली थी। डी-6 कोठी डा० नवीन चौधरी की कोठी है। घटना के समय डा० नवीन चौधरी विदेश में थी मुझे यह भी पता लगा था कि डा0 नवीन चौधरी का नाम गुर्दा काण्ड में आया था। मैं सी0 बी0 आई 0 के विवेचक को 01 मार्च को अपना बयान दिया था। यह कहना गलत है कि बरामदगी फर्जी दिखायी हो और विवेचना गलत तरीके से की गयी हो। यह भी कहना गलत है कि अभियुक्त की निशा देही पर बरामदगी ना हुयी हो ।

X X X

जिरह वास्ते मोनिन्दर सिंह द्वारा श्री देवराज सिंह एड 0 यह बात सही है कि अभियुक्त मोनिन्दर सिंह को गिरफतार करने के बाद पुलिस के साथ डी0-5 कोठी के बाहर पुलिस के साथ छोड दिया गया था। यह सही है कि 29-12-06 को मोनिन्दर सिंह की निशान देही पर कोई बरामदगी नहीं हुयी थी। और यह भी सही है कि दि० 30-12-06, 31-12-06 को भी मोनिन्दर सिंह की निशान देही पर कोई बरामदगी नहीं हुई थी ।"

पी०डब्लू ० -28 छोटे लाल से बहलफ़ जिरह:-

"……आपसे पूछताछ गिरफतारी स्थल पर की गयी थी । यह पूछताछ दिनेश यादव ने करीब दो घंटे तक की थी। सी०ओ० साहब ने पूछताछ लिखा पढी की थी। उन्होंने स्वयं लिखा पढी की थी। मुझे ध्यान नहीं है कि सी०ओ० साहब ने लिखा पढ़ी अपने पेशकार महेश चन्द्र शर्मा से करायी हो

। लिखा पढ़ी पुलिस चौकी मे नही हुई थी बल्कि गिरफतारी स्थल पर की गयी थी। हमलोग लगभग 10.30 बजे गिरफतारी स्थल से मकान नं० डी-5 सेक्टर 31 नोएडा के लिए चले थे और वहां करीब 15 मिनट में पहुंच गये थे। गिरफतारी स्थल से सीधे डी-5 मे आये थे, चौकी या थाने होकर नही गये थे।" (emphasis supplied by us)

101. What is surprising to note is that PW-40 stated specifically that the peshkar (staff) of PW-40 had noted the disclosure made by accused SK, on his dictation, but a contrary version is made by PW-28 who stated that all writings (paper-work) was done by PW-40 himself. No such disclosure statement has nevertheless been produced, much less exhibited or proved by the witnesses.

102. The place where such disclosure was made is also not proved and the only two police witnesses of fact, in this regard, have come out with distinct versions that are mutually inconsistent.

Arrest

103. On the point of arrest we may refer to the statement of accused under Section 313 Cr.P.C, as also the testimony of defence witnesses Pan Singh (DW-1). The accused SK and DW-1 have stated that the accused SK was brought from his home in Uttaranchal to Noida on 27.12.2006, on the instructions of police. The accused was dropped at the police station Sector-20 by DW-1 on 27.12.2006 and the accused was not seen thereafter. The testimony of DW-1 is specific in that regard. No suggestion is given to the witness DW-1 that his statement is false or wrong as would be seen from his testimony, reproduced later.

104. In additional statement of accused SK, recorded under Section 313 Cr.P.C., he has clearly stated as under in reply to

question no.6:-

> ''दिनांक 27.12.2006 को पंधेर साहब मुझे अपने ड्राइवर पान सिंह के साथ थाने छोड़कर आये थे और दिनांक 28.12.06 को मुझे पुलिस वाले थाने के बाहर ले गये फिर दुबारा थाने नहीं लाये।''

105. Again in the additional statement of accused SK while replying to question no.4, the accused has stated as under:-

> ''गलत है क्योंकि मैं 27.12.06 को पुलिस के बुलाने पर थाने गया था व पंधेर साहब मुझे अपनी गाड़ी में थाने छोड़ आये थे।''

106. DW-1 Pan Singh was working as driver with Moninder Singh Pandher (owner of House No. D-5, Sector 31) and has been produced by the defence to prove that accused SK was handed over to police of Police Station- Sector-20, Noida on 27.12.2006 in order to contradict the prosecution case of arrest of accused SK on 29.12.2006. The testimony of DW-1 is short and thus extracted hereinafter:-

> "शपथपूर्वक बयान किया कि:-
>
> दिनांक 27.12.2006 को मैं व पंधेर साहब, सुरेन्द्र कोली को सैक्टर 20 नोएडा थाने में पुलिस को सौंपकर आये थे उसके बाद सुरेन्द्र कोली को मैने नहीं देखा। मैने सुरेन्द्र कोली के बारे में कोई शिकायत नहीं सुनी।
>
> X X X X
>
> जिरह वास्ते PP CBI
>
> मैं थाने के बाहर सुरेन्द्र कोली को छोड़ आया था उसके बाद सुरेन्द्र कोली कहा गया मुझे नहीं मालूम। सुरेन्द्र कोली को पुलिस ने गिरफ्तार किया नहीं किया और कब किया मुझे नहीं मालूम।"
>
> (emphasis supplied)

107. The specific case of defence is that accused SK was handed over to police at Police Station Sector-20, Noida on 27.12.2006. The defence witness Pan Singh who claims to have dropped SK at police station has not been challenged/questioned by the prosecution and no question is posed to him in regard to his version of having dropped

accused SK at Police Station on 27th December, 2006.

108. As against the specific defence case of accused SK being taken in police custody on 27.12.2006, the prosecution case about arrest is not very inspiring. We may at this stage refer to the testimony of PW-40 who claims to have arrested accused SK on 29.12.2006. In his examination-in-chief PW-40 has stated that he saw the accused for the first time on 29.12.2006 near Police outpost at Sector 26. However, in his cross-examination PW-40 has admitted that he had interrogated accused SK for the first time on 3.12.2006. His version that accused SK was seen for the first time on 29.12.2006, or was got identified by the informer, is thus inconsistent and contradictory.

109. PW-40, moreover, has not disclosed anything about the interrogation made from accused SK on 3.12.2006 or the information elicited from him during such interrogation. The prosecution version about arrest of accused SK on 29.12.2006 at 8.30-9.00 am therefore seems doubtful.

Disclosure Statement

110. The prosecution witnesses on the aspect of disclosure made by accused SK is also inconsistent. We have already noticed that no written disclosure statement has been placed on record. The prosecution witnesses PW-40 and PW-28 come up with different version of the place where the disclosure statement was made by the accused SK. The prosecution witnesses of disclosure made by accused SK namely PW-40 and PW-28 admit that no independent person was associated during the arrest, interrogation or even during the recording of disclosure statement.

111. The prosecution has failed to place on record any reason or justification for not associating an independent witness for recording the disclosure statement. As per PW-28 the disclosure was made by accused at the place of his arrest which is a busy road connecting Atta market in Noida to ONGC. It is admitted to prosecution witnesses that people were moving on the road and therefore presence of independent witnesses at the place of interrogation was not in doubt. It is also not the case of prosecution that any independent person was approached to witness the recording of disclosure and such independent person declined to act as a witness.

112. Requirement of proving the information received from the accused in custody as also the manner of its recording is well settled. It is by now well settled that the investigating officer must draw a panchnama in the presence of two independent witnesses and the exact information disclosed by the accused in custody must be proved. The consistent decisions on the point right from Pulukuri Kotayya (supra) to Ramanand @ Nandlal Bharti (supra), Boby (supra) and the recent decision of Supreme Court in Rajesh (supra) makes it imperative for the investigation to follow the procedure of not only drawing and proving the panchnama (disclosure statement) but also prove the exact contents of the information furnished by the accused while in custody.

113. In the facts of the case neither any panchnama (disclosure statement) is drawn in the manner specified in law nor is produced during trial or proved. The contents of the information allegedly furnished by the accused SK is also not recorded or proved. In its absence we cannot rely on the prosecution case of receiving information from accused SK for acceptance of such evidence under Section 27 of the Act of

1872.

114. The investigating officer of this case namely Dinesh Yadav was Deputy Superintendent of Police, Noida and was expected to be aware of the elementary procedures required to be followed for recording the disclosure statement (Panchnama) or proving its contents, as also of proving the exact information received from the accused in custody particularly in a serious and sensational case of this kind where multiple murders were being confessed by the accused. The other police witness Chottey Singh (PW-28) was also a Sub-Inspector and expected to be aware of such basic procedures. The non-recording of disclosure statement (panchnama) in the presence of an independent witness as well as the failure to prove the contents of information disclosed by accused SK is a serious lapse which has neither been explained during trial nor during the course of hearing of the present appeal.

115. Non-recording of disclosure statement (panchnama) has exposed the prosecution case to a serious risk. What exactly was the disclosure made by accused SK is not known. Neither the specific words spoken by him are placed on record nor even the substance thereof is proved.

116. PW-40 and PW-28 have stated that disclosure statement was recorded. If it was so, as is alleged by the prosecution witnesses, there is no reason why was it not produced and exhibited during the trial. PW-40 has, during cross-examination stated that the disclosure statement was got recorded in the case diary but the case diary is neither got exhibited nor was it proved by any of the prosecution witnesses. Even otherwise the law required the disclosure statement (panchnama) to be prepared in the presence of two independent witnesses and its

recording in the case diary would not suffice particularly when the contents of information are otherwise not proved.

117. Our attention has been invited to Exhibit 103-Ka which is the GD entry. It shows that the entry has been made at 11.20 PM on 29.12.2006 in respect of day's investigation and does not contain a contemporaneous recording of the disclosure statement of accused SK. The case diary also is not shown to record the contents of the disclosure statement attributed to the accused SK.

118. The only recorded text of the alleged disclosure made by accused SK is contained in the recovery memo exhibited as Ka-16. The memo is extracted hereinafter:-

> "फर्द बरामदगी पन्द्रह मानव खोपड़ी व हड्डियाँ, निशादेही अभियुक्त (कागज फटा) उर्फ सतीश कौली सम्बन्धित मु0 अ 0 सं0 838/2006, धारा 366/376/302/201/120 बी आई.पी.सी. थाना सैक्टर-20 नोएडा:-
>
> आज दिनाँक 29-12-2006 को मैं दिनेश यादव क्षेत्राधिकारी नगर प्रथम नोएडा विवेचक मुकदमा उपरोक्त व हमराह एस.ओ.जी. टीम के एस.आई. विनोद पाण्डेय, एस.आई. छोटे सिंह व एस. आई श्री एस०पी० सिंह, एस.आई. श्री गजेन्द्र सिंह, एस.आई. श्री देवेन्द्र कुमार, एस.आई. श्री कमल सिंह, सी/ विनोद कुमार, सी/ सुधीर कुमार, सी/ राजेश कुमार, सी/ प्रजन्त, सी/ रवीन्द्र, सी/ अलमुद्दीन मय सरकारी गाड़ी टाटा स्पेशियो के अभियुक्त गिरफ्तार शुदा सुरेन्द्र उर्फ सतीश कोली एस०/ओ० शंकर राम कोली निवासी मगरूखाल थाना जोली खाल जिला अल्मोड़ा (उत्तरांचल) हाल D-5 सैक्टर 31 निठारी, नोएडा ने पूछताछ पर अपने जुर्म मुकदमा उपरोक्त का इकबाल करते हुए बताया कि मैंने जो L की हत्या करके उसका सिर काटकर मकान के पीछे दो दिवारो के बीच खाली जगह की मिट्टी मे खोपड़ी दबा रखी है, व उसके बाकी हिस्से को मकान के सामने नाले में डाल दिया था, मकान के पीछे खाली जगह में कुमारी L की चप्पलें भी मैंने दबा दी थी, जिस चाकू से मैं गर्दन काटकर सिर अलग करके मकान के पीछे खाली जगह में दबाता था व गर्दन के नीचे का हिस्सा मकान के सामने नाले मे डाले थे वह चाकू भी D-5 सैक्टर 31 नोएडा मकान के अन्दर मैंने छिपा कर रखा हुआ हैं, उपरोक्त सभी बताये गये खोपड़ी, चप्पल, कपड़े व नाले से हड्डियां साथ चलकर में बरामद करा सकता हूँ। अभियुक्त सुरेन्द्र कोली को थाने से बरामदगी निशा देही अभियुक्त पर बरामदगी की उम्मीद में साथ लेकर घटना स्थल पर आते समय सूचना के थाने से आधार पर अभियुक्त मोहिन्दर सिंह उर्फ सुरेन्द्र सिंह एस०/ओ० सम्पूर्ण सिंह मकान मालिक D-5 सैक्टर 31 नोएडा को उपरोक्त अभियोग

के अन्तर्गत नियमानुसार गिरफ्तार करने के बाद घटना स्थल D-5 सैक्टर 31 नोएडा पर आये। मौके पर जनता की अत्यधिक भीड़ होने के कारण शान्ति व्यवस्था की दृष्टि से D-5 के बाहर अपने हमराह फोर्स से एस.आई. विनोद पाण्डे एस.आई. श्री सुरेन्द्र पाल सिंह, एस.आई. श्री गजेन्द्र सिंह, एस.आई. श्री (कागज फटा) सी/अलीमुद्दीन, सी/सुधीर को छोड़ा गया व (कागज फटा) व अभियुक्त सुरेन्द्र कोली को अपनी हिरासत में तथा अभि0 मोहिन्दर सिंह को हमराह से बाहर मकान के छोड़े गये पुलिस बल के सुपुर्द किया गया व जनता के गवाह सर्व श्री राम किशन एस०/ओ० चतर सैन निवासी पानी की टंकी ग्राम निठारी थाना सैक्टर 20 नोएडा, व श्री पप्पू लाल एस० ओ० श्री मुन्ना लाल निवासी जरगाँव थाना बनियाठेर, जिला मुरादाबाद हाल ग्राम निठारी थाना सैक्टर 20 नोएडा को मकान के बाहर से मकसद बताकर साथ लिया गया। अभियुक्त सुरेन्द्र कोली ने आगे-2 चल कर घूम कर पानी की टंकी के अन्दर से परिसर में होकर D-5 के मकान के पीछे दो दिवारों के बीच की खाली जगह पर आकर प्राधिकरण की बनी दिवार पर सीढ़ी मंगवाकर अभियुक्त ऊपर दिवार से खाली जगह में कूद कर नीचे आया और हम लोग भी सीढ़ी से चढ़कर अभियुक्त के साथ-साथ खाली जगह में पहुंच गये। अभियुक्त सुरेन्द्र कोली ने आगे-2 चलकर D-5 मकान की छत के ऊपर बने सर्वेन्ट रूम में खाली जगह की तरफ बनी खिड़की के सामने खाली जगह से मिट्टी को खोदकर एक मानव खोपड़ी स्वयं निकाल कर दी व बरामद कराई व खोपड़ी को खोदकर निकालते समय एक जोड़ी चप्पल भी निकली जिन्हें देखकर अभियुक्त ने L का होना बताया। चप्पलों की फर्द अलग से तैयार की गई। खोपड़ी बरामद कराने के उपरान्त अभियुक्त ने बताया कि अब मैं जो भी खोपड़ियाँ (सिर) काटकर इस खाली जगह की मिट्टी में दबाये है, उन सब खोपड़ियो को भी मैं स्वयं खोदकर व बताकर D-5 के पीछे खाली जगह करीब साढ़े बारह मीटर की मिट्टी में दबी हुई कुल 15 मानव खोपड़िया व मानव नर कंकाल दो बण्डल अपनी निशादेही पर बरामद कराये। बरामद खोपड़ियों व हड्डियों के दो बण्डलो के अलग अलग पंचायतनामा भरकर उनके पोस्ट मार्टम कराने के थानाध्यक्ष सैक्टर 20 को निर्देशित किया। इस खाली जगह में पड़े बरामद कपड़ों की फर्द व उनकी पहचान पीड़ितों से अलग कराई जा रही है। मकान के अन्दर मुल्जिम द्वारा बताया गया चाकू व पर्स की की बरामदगी की कार्यवाही अलग से की गई। फर्द मौके पर मेरे द्वारा उ 0 नि० छोटे सिंह को बोल-बोलकर लिखाकर फर्द को पढ़कर सुनाकर फर्द पर हमराही कर्मचारी व जनता के गवाहान की गवाही कराई गई।

ह० सुरेन्द्र कोली ह० अपठनीय ह० अपठनीय ह० अपठनीय

एसआई एस आई 29-12-06

ह० पप्पूलाल ह० अपठनीय 29-12-06

नोट:- अभियुक्त सुरेन्द्र उर्फ सतीश कोली को निशादेही पर बरामद कराई गई, मानव खोपड़िया व हड्डियों की नकल देकर प्राप्ति के हस्ताक्षर कराये जाते हैं।

ह० सुरेन्द्र कोली ह० अपठनीय

29.12.06”

119. The above document is not a disclosure statement (panchnama) as is required in law inasmuch as Ex.Ka.16 is

apparently drawn not at the time of making declaration of providing information but much after the recovery itself was made. This document otherwise does not specify the time, place or manner in which the disclosure statement was made by accused SK. Ex. Ka-16 merely shows that accused SK confessed to murdering of victim L and of concealing the skull in the open space enclosed by boundary behind the house and throwing other parts in the drain/nala flowing in front of the house. He also confessed to concealing of the knife inside the house and volunteered to the recovery of such items. On this information the accused was brought to house no. D-5 alongwith police force. Interestingly, the disclosure made by accused SK, as recorded in Exhibit Ka-16, on the basis of which accused SK was brought to the place of recovery (enclosed gallery behind house no. D-5, Sector-31, Noida) did not contain any reference to the other 15 skulls or body parts hidden at the spot in question.

120. No confession was even made, till then, about killing of other missing children or recovery of their body parts as per Ex.Ka.16, which is the only document of prosecution referring to disclosure/information leading to recovery under Section 27 of the Act of 1872.

121. Exhibit Ka-16 further shows that accused SK alongwith police party entered the enclosed space behind the house by using stairs through the wall of the authority and allegedly dug out a human skull. While such digging a pair of slippers was also found and the accused asserted that it belonged to L. A separate memo was prepared in respect of recovery of slippers.

122. In case the recovery memo (Ka-16) is taken on its face value it merely refers to the disclosure by accused regarding

murder of L and concealing her skull at the place of recovery. The disclosure by accused SK didn't extend to skulls of other missing children having been concealed at such spot, or for its recovery, which was the reason for taking accused SK to the place of recovery.

123. Ex. Ka-16 shows that the accused SK after getting the skull of L recovered from the enclosed place behind the House No. D-5 informed that he had concealed other skulls also, in the same enclosed gallery, and dug out 15 other human skull and skeletons in respect of which inquest was prepared and sent for postmortem.

124. Strangely no inquest or postmortem reports are exhibited during the trial. The postmortem reports are filed before this Court alongwith an affidavit by CBI without any attempt made to prove such materials either by complying with Section 391 or 367 Cr.P.C. Absolutely no reasons are disclosed for not producing such evidence during the trial by the prosecution and adverse inference would have to be drawn against the prosecution for not producing such material during trial.

125. So far as the recovery of skull of victim L is concerned, the skull recovered allegedly of L is not proved as that of L since the DNA report in respect of the victim has not matched. Thus the only disclosure made i.e. Ex.Ka.16, prior to his brought to the place of recovery is not proved in terms of Section 27 of the Evidence Act.

126. The recovery of other 15 skulls during digging of the earth for recovery of victim L can at best be a case of seizure of 15 skulls etc., and in the absence of any prior disclosure made by the accused SK, in that regard, it cannot be treated to

be an evidence saved under Section 27 of the Act of 1872.

127. The testimony of PW-40, moreover, is contradicted on the aspect of disclosure made by accused SK vide Ex. Ka-16, inasmuch as PW-40 claims that accused SK had in fact disclosed about concealing of 15 skulls during his disclosure statement, pursuant to which he took accused SK to the enclosed place behind the House No. D-5 for recovery, whereas Ex. Ka-16, drawn on the dictation of PW-40 himself, only refers to the murder of L and recovery of her skull from the open place behind House No. D-5 without any reference to the other 14 skulls.

128. In the absence of any disclosure statement (panchnama) of accused SK, prepared in the presence of two independent witnesses, and proved by way of oral testimony of attending witnesses, it would not be open for the Court to believe the prosecution case regarding making of disclosure statement by the accused leading distinctly to the recovery of skull and other body parts of 15 missing persons, including the victim A from the place of recovery.

Similarly, other confessional statements of accused SK allegedly made before UP Police or CBI fail to qualify the test laid down in law inasmuch as all such confessional statements neither have been recorded in the presence of two independent witnesses nor any panchayatnama is drawn in the manner required by law. The contents of such confession are also not proved in the manner specified in law. Subsequent confessions, claimed to have been made by accused SK before the police or the CBI are thus equally fallacious and cannot be relied upon.

Recovery

129. Any recovery to be admissible in evidence, by virtue of Section 27 of the Act of 1872, would have to be backed by a proper disclosure statement and panchnama of accused SK. Once it is found lacking, the recovery looses much of its sheen. The evidence of recovery in this case is Ex.Ka.16. It is the recovery memo of 15 human skulls dated 29.12.2006 and has been proved by the independent witness Pappu Lal (PW-10). PW-10 has also proved Ex.Ka.17 and Ex.Ka.18. Ex.Ka.17 is the recovery memo of knife recovered on 29.12.2006. Ex.Ka. 18 is the recovery memo of human bones recovered on 31.12.2006 pursuant to disclosure made by the accused SK on 29.12.2006. Since these three recoveries have only one independent witness to prove, therefore, we are required to examine the testimony of witness Pappu Lal. Pappu Lal lives in servant quarter of D-2 Sector-31. He has proved Ex.Ka.16 and Ex.Ka.18. As per him he was called upon by the police and his signatures were obtained on the memo of recovery. In the cross-examination, PW-10 has stated that he has six children apart from his wife in his family. PW-10 has lost his daughter, namely, victim Fin nithari killings. He is the only person, who has been produced to prove the recovery. As per the witness his daughter disappeared in April, 2006 and he had lodged a missing report on 11.04.06. From 11 April till 29, December, 2006 he did not came across any information about his daughter having gone missing from the same area. As per the witness he was called by police on 29.12.06. When he reached the House No. D-5, there were large number of people already present there. The drain in front of house D-5 was covered. This witness has specifically stated that when he reached the place of occurrence he found that the excavation/digging was already going on. His statement reads as under:-

"जब मै पहुंचा पहले से खुदाई चल रही थी।"

130. He has also admitted that when he arrived at house, there were large number of people already present there.

131. It is the case of the prosecution itself that when the police reached House No. D-5 on 29.12.06 a large crowd had already gathered there, and fearing a law and order situation the police had deputed personnel to control the mob. The Panch witness Pappu Lal states that when he reached the spot a large crowd was standing there. The presence of people in such large numbers, at the place of recovery indicates that it was public knowledge that bones were present in the space behind D-5.

132. The panch witness, PW-10 Pappu Lal has deposed that when he reached the spot along with the police and accused SK, excavation of the spot where the biological material etc. were recovered was already in progress. This clearly indicates that police were already aware that the bones and clothes of missing persons would be found in the open space behind D5 and D6 and facing the jal board compound.

133. It is too much of an coincidence that the panch to the recovery of L's skull was, Pappu Lal PW-10, who just so happens to be the father of another victim girl, F. This is quite probable that the police already knew about the existence of various skulls and body parts at the relevant places, and arranged the seizures to be conducted before the father of another missing child.

134. It is the case of the prosecution that accused SK was arrested based on the information given by a secret informant. The I.O. PW-40, states that he had informed the entire police force of PS Sector 20 Noida, PS Nithari police outpost, as well

as the SOG team to be present for the arrest. Thereafter the entire arrest force proceeded to House No. D5 for the recovery. It is an admitted position that accused SK had been cooperating with the investigation since 3.12.06. Thus the presence of such a large force was entirely unnecessary and unwarranted. It is probable that the force was summoned not for the arrest of the accused, or because the IO was apprehensive of accused SK fleeing but because the police were aware that the subsequent recovery of such a large number of bones and skulls and clothes of missing children would lead to a law and order problem and large force would be necessary for crowd control.

135. It is argued that the police and public were well aware of the presence of human bodies in the open space between D5, D6, Sector-31, Noida and Jal Nigam Compound and in the drain on the main road facing houses D1 to D6. Therefore, this evidence is not a discovery u/s 27, and hence neither admissible, nor incriminating. It cannot be said that either this circumstance (discovery of bodies u/s 27) is firmly established, or that it is incompatible with the innocence of the accused and the guilt of another person.

136. On the strength of evidence referred to above, the possibility of police and public being aware of the presence of human bodies in the enclosed service lane behind House No. D-5, D-6 and Jal Nigam Compound and in the drain on the main road facing House No. D-1 to D-6 cannot be ruled out. This is particularly so as evidence has been placed to show that biological materials were found at the same spot earlier also. This aspect shall be taken up, separately, a little later. For attracting Section 27 of the Act, concealment and exclusive knowledge must be established by the prosecution.

137. In Makhan Singh Vs. State of Punjab AIR 1998 SC 1705 the Supreme Court examined the issue of recovery of a dead body from an open field. The Court found that recovery was not from a place about which knowledge could be attributed only to the accused. In that context, the Court observed as under in para 14 of the judgment:-

> *"14…… It cannot therefore, be said that the place from where the bodies were recovered was such a place about which knowledge could only be attributed to the appellant and none else. Since the exclusive knowledge to the appellant cannot be attributed, the evidence under Section 27 also cannot be said to be a circumstance against the appellant."*

138. We have carefully analyzed the evidence both on the aspect of making of this disclosure statement by the accused SK and the consequential recovery vide Ex.Ka.16 to Ex.Ka.18 and do not find it safe to rely upon the prosecution evidence to hold the circumstance of disclosure by the accused and alleged consequential recovery as admissible against the accused. It is not necessary to reiterate that neither there is any disclosure statement (panchnama) produced during trial nor it is proved and the oral evidence of prosecution witnesses PW-28 and PW-40 are not consistent. The statement of PW-40 is contradicted by Ex.Ka.16 on material aspects. In light of the law settled by the Supreme Court, we, therefore, have no hesitation in holding that the prosecution has not succeeded in proving the circumstance of disclosure and consequential recovery against the accused appellant.

139. Circumstance of recovery of kitchen knife on 29.12.06 as well as recovery of kitchen knife on 11.01.07 and axe on 18.01.07 rests on the disclosure statement of accused accused SK, which again is not inspiring. Existence of kitchen knife or axe are common in a house. All these recoveries are made

from the House No. D-5 one after the other. The prosecution has also placed reliance upon recovery of kitchen knife allegedly recovered on the pointing out of accused on 29.12.06. This recovery is alleged to be distinctly in consequence of the disclosure statement made by the accused. We have already disbelieved the prosecution case on the aspect relating to making of disclosure statement. Once that be so, the recovery of knife cannot be read as a circumstance against the accused under Section 27 of the Evidence Act. The recovery of knife otherwise is evident with inconsistencies, inasmuch as PW-40 has stated that knife was seized from the terrace of D-5 whereafter the skeleton remains were recovered from the gallery. However, the other prosecution witness on the aspect of recovery, namely, Sub-Inspector Chhotey Lal PW-28 has stated that they proceeded straight to the gallery for recovery of skull and has said nothing about the recovery of knife. The knife had no blood stains on it. No forensic report has found existence of blood on the knife. Mere recovery of a knife from the house cannot be treated to be an incriminating fact in light of the observations made by the Supreme Court in Baksheesh Singh vs. State of Punjab (1971) Vol 3 SCC 182 wherein the court observed as under in para 8:-

> *"8. Therefore the only incriminating evidence against the appellant is his pointing the place where the dead body of the deceased had been thrown. This, in our opinion, is not a conclusive circumstance though undoubtedly it raises a strong suspicion against the appellant. Even if he was not a party to the murder, the appellant could have come to know the place where the dead body of the deceased had been thrown. Further, as mentioned earlier, at the bank of the river where the dead body was thrown into the river, there were broken teeth and parts of the human body lying. Hence anyone who saw those parts could have inferred that the dead body must have been thrown into the river near about that place."*

140. In the absence of any forensic evidence linking the knife

to the crime, the mere recovery of a kitchen knife otherwise cannot form any admissible evidence to implicate accused appellant. Sri Chaudhary has placed reliance upon para 16 of the Supreme Court judgment in Anter Singh vs. State of Rajasthan (2004) 10 SCC 657 to submit that the recovery is wholly unreliable.

141. In Anter Singh (supra) the Supreme Court relied upon the judgment of Privy Council in Pulukuri Kottaya and Udai Bhan vs. State of U.P. AIR 1962 SC 1116 to summarize the ingredients of Section 27 of the Act of 1872 in following words:-

> *"16. The various requirements of the section can be summed up as follows:-*
>
> *(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.*
>
> *(2) The fact must have been discovered.*
>
> *(3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.*
>
> *(4) The person giving the information must be accused of any offence.*
>
> *(5) He must be in the custody of a police officer.*
>
> *(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.*
>
> *(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."*

142. PW-10, moreover, has admitted that by the time he reached the spot the digging had commenced in the enclosed gallery. It would thus have been difficult for PW-10 to have witnessed the seizure of knife. The knife was also not shown to

PW-10 for identification. There is also no description of size of knife seized in the seizure memo. The prosecution case is that the knife was recovered with mud. This also appears to be improbable as the knife was recovered from concrete platform under the tank on the terrace of D-5. Its nobody's case that the knife was buried or kept in a muddy area. The presence of mud deposit on knife also questions the credibility of its recovery.

143. The other circumstance relied upon by the prosecution against the accused is of recovery of kitchen knife on 11.01.07 and axe on 18.01.07 based on the disclosure made by accused SK under Section 27.

144. It is the admitted position of the prosecution that after 29.12.06, House No. D-5 and the enclosed gallery behind it as well as the surrounding areas were thoroughly searched. Similarly, prior to the seizure on 18.1.07, the Noida police and the CBI had thoroughly searched the premises of the house on 5.1.07, 12.1.07 and 13.1.07. Infact, PW18 categorically admits to searching the exact same area where the axe was found on 4.1.2007 itself.

145. Recovery of an article from a space which is in control of police does not amount to discovery. Thus, when the police had already searched the premises prior to the disclosure and not found any weapon the subsequent recovery becomes doubtful.

146. There is no noting of the knife or axe having blood stains or fragments of flesh, skin or bone on them either in the panchnama or in the deposition of the witness. There is no forensic evidence linking this knife or axe to the crime. In the absence of such evidence the mere recovery of the knife and axe u/s 27 cannot implicate the accused in any way. In any

case, the mere recovery of a kitchen knife can hardly be incriminating.

147. The knife allegedly recovered by UP police on 11.01.07 is proved by the testimony of PW-17 Durga Prasad. He claims that the knife was recovered from behind the house concealed below the electricity pole. It is difficult to comprehend as to how the knife can be recovered by the UP police when the place had been thoroughly searched earlier by them repeatedly. The knife otherwise has no blood stains or fragment of flesh or skin or bone and in the absence of any forensic evidence linking the knife to the crime, the mere recovery of knife cannot constitute any basis to implicate the accused. The mere recovery of axe on 18.01.07 from the lawn in front of House No. D-5 cannot be given much importance as the same site had been earlier searched by the police on 04.01.07 itself. The axe is not shown to have any blood stains or fragment of flesh or skin or bond and there is no forensic evidence linking the axe to the crime. Merely on the strength of recovery of knife and axe, therefore, the accused cannot be implicated.

148. Neither the IO, nor the witnesses to the recoveries of the two knives and the axe depose to the weapons having any blood stains on them. Further neither do the seizure panchnamas mention the presence of any blood stains on any of the recovered knives. While the seizure panchnama for the axe mentions suspicious stains, the forensic report shows that no blood was found on the same. Existence of axe in a garden otherwise cannot be frowned upon.

149. The prosecution case against the accused is primarily based upon the confessional statement of accused SK wherein he has not even alleged to have killed any of the victim either

by knife or by axe. There is no evidence on record to show that any of the victim had been done to death by the accused by the use of knife or the axe. The recovery of knife or axe therefore are not of much significance, otherwise, for such reasons.

150. As per the prosecution the victim had been strangulated by the use of chunni (scarf) which has not been produced in evidence during trial. The knife and axe apparently have been used, by the accused, as per the prosecution, for dissecting the body parts of victim after she had been done to death. The recovery of knife and axe, therefore, do not lend any support to the prosecution case, even otherwise.

Evidence of previous recovery of biological material from the same spot

151. Prosecution has also adduced testimony of Manoj Kumar (PW-20), who was residing in House No. 1, Water Works Compound, Sector 31, Noida. This witness has stated that he was playing cricket with his friends in March, 2005 and the cricket ball fell in the enclosed space (service lane) behind House No. D-5, Sector-31, Noida. PW-20 claims that he jumped the wall in order to find the ball. He saw a human hand with flesh covered in a polythene and he got scared. He found the ball and jumped out of the enclosed service gallery. He informed elders about human hand lying and never ventured to visit that place again. He claims that on enquiry from elders he was informed that police had come and assured that there is nothing to worry. It is after two years of such incident that his statement was again recorded by CBI. In the cross-examination also this witness has remained firm.

152. Prosecution has also produced Surendra Singh (PW-21) who has referred to the incident of March, 2005 when children were playing cricket and their ball fell in the enclosed gallery. The witness has stated that after he returned from duty late in the night he was informed by PW-20 about the incident. PW-21 has asserted that number of persons visited police outpost, Sector 26 and four policemen came to the spot. These policemen jumped the boundary and saw the enclosed space and said that there is nothing to worry about. They claimed that same may be of some animal or someone has thrown it after consuming the flesh. He also stated that the police had put soil and assured that there is nothing to be worried about. It is after two years that his statement has been recorded by the CBI. From the testimony of PW-20 and 21, it is apparent that much prior to the incident in question the residents had seen human hand lying in the enclosed gallery. On the strength of the statement of PW-20 and 21, it is alleged by the defence that existence of human hand at the place of recovery was within the knowledge of the residents and had also been brought to the notice of the police. It is, therefore, urged that the fact about human skeleton lying in the enclosed gallery behind House No. D-5 and D-6 is, therefore, well known to the police and it is not on the basis of any disclosure made by the accused that such recovery has been made from the area.

Circumstance of accused SK luring girls and cutting body parts before experts at AIIMS

153. One of the circumstances relied upon by the prosecution against the accused appellant SK also is that he used to lure women and girls walking past House No. D-5, Sector-31, Noida and would call them inside the house for committing the offence. In order to prove such case, the prosecution has relied upon the testimony of PW-1, PW-24 and PW-13. We have

perused the testimony of three witnesses and none of them have alleged any untoward activity on part of accused at any time or that anything suspicious was done by him or said by him. Statement of none of these witnesses have ever been recorded either by the police or the CBI and no prior complaint was made by them. The fact that accused SK used to offer employment to women and girls passing House No. D-5 is a normal activity as engagement of servants would be natural for managing the affairs of the house. None of the acts alleged by these witnesses can therefore be considered incriminating.

154. Prosecution has also relied upon the circumstance of the manner in which bodies were cut by the accused before the medical panel at AIIMS.

155. This circumstance has not been relied upon by the court of sessions to convict the accused. As per the prosecution the accused SK, while in custody, on 04.02.07 was produced before a medical panel at AIIMS. He was shown the recovered bones on 19 tables and asked about the identification of few of the items even asked to demonstrate the manner in which he cut the bodies. The mean act of the manner in which bodies are cut was also video-graphed.

156. The evidence of prosecution with regard to the manner in which the bodies were cut cannot be given any weight-age as the accused was in CBI custody when he was presented before the AIIMS panel.

157. By virtue of Section 26 of the Evidence Act, any confession made to any person during the police custody would not be admissible unless it is in the immediate presence of a Magistrate.

158. It is well settled that when once an accused is arrested by a police officer and is in his custody and is temporarily left in charge of a private individual, that does not terminate the police custody and the accused shall still be deemed to be in police custody.

159. In Kishore Chand vs. State of Himachal Pradesh, (1991) SCC 1 Page 286, the Supreme Court dealt with the confession made by accused while he was in police custody. The accused was left in the company of a pradhan before whom the confession was made by the accused. The Court disbelieved the prosecution theory of confession having been made voluntarily in para 8 of the judgment which is reproduced hereinafter:-

> *"8. Admittedly PW 10 and the appellant do not belong to the same village. From the narrative of the prosecution story it is clear that PW 27, and PW 10 came together and apprehended the appellant from his village and was taken to Jassur for identification. After he was identified by PW 7 and PW 8 it was stated that he was brought back to Gaggal village of PW 10 and was kept in his company and PW 27 left for further investigation. Section 25 of the Evidence Act provides that no confession made to a police officer shall be proved as against a person accused of any offence. Section 26 provides that no confession made by any person while he is under custody of the police officer, unless it be made in the immediate presence of a magistrate, shall be proved as against such person. Therefore, the confession made by an accused person to a police officer is irrelevant by operation of Section 25 and it shall (sic not) be proved against the appellant. Likewise the confession made by the appellant while he is in the custody of the police shall not be proved against the appellant unless it is made in the immediate presence of the magistrate, by operation of Section 26 thereof. Admittedly the appellant did not make any confession in the presence of the magistrate. The question, therefore, is whether the appellant made the extra-judicial confession while he was in the police custody. It is incredible to believe that the police officer, PW 27, after having got identified the appellant by PW 7 and PW 8 as the one last seen in the company of the deceased would have left the appellant without taking him into custody. It is obvious, that with a view to avoid the rigour of Sections 25 and 26, PW 27 created an artificial scenario of his leaving for further investigation and kept the appellant in the custody of PW 10, the Pradhan to make an extra-judicial confession. Nothing prevented PW 27 to take the appellant to a Judicial*

Magistrate and have his confession recorded as provided under Section 164 of the CrPC which possesses great probative value and affords an unerring assurance to the court. It is too incredulous to believe that for mere asking to tell the truth the appellant made voluntarily confession to PW 10 and that too sitting in a hotel. The other person in whose presence it was stated to have been made was not examined to provide any corroboration to the testimony of PW 10. Therefore, it would be legitimate to conclude that the appellant was taken into the police custody and while the accused was in the custody, the extra-judicial confession was obtained through PW 10 who accommodated the prosecution (sic appellant). Thereby we can safely reach an irresistible conclusion that the alleged extra-judicial confession statement was made while the appellant was in the police custody. It is well settled law that Sections 25 and 26 shall be construed strictly. Therefore, by operation of Section 26 of the Evidence Act, the confession made by the appellant to PW 10 while he was in the custody of the police officer (PW 27) shall not be proved against the appellant. In this view it is unnecessary to go into the voluntary nature of the confession etc."

160. The factual scenario in the present case is similar to the one arising in Kishore Chand (supra) inasmuch as, the accused SK was in custody of CBI when he was produced before the team of doctors at AIIMS, New Delhi. Any confession/statement made by him would clearly be hit by Section 24 to 26 of the Act of 1872.

161. Even otherwise mere drawing of lines on a body does not reveal the fact that accused had the skill and equipment to do the same with a kitchen knife or that in fact he had actually committed such crime.

Circumstances leading to confession of accused

162. The sheet anchor of prosecution case is the alleged confession made by him before the Magistrate under Section 164 Cr.P.C. and has been relied upon as the circumstance/evidence to hold him guilty.

163. Substantial arguments are advanced on behalf of accused

to submit that neither the confession is voluntary nor is it otherwise true. Trial court has held the confession to be voluntary and relying upon it the accused has been awarded death penalty. The circumstances of the case would, therefore, require a careful scrutiny in order to ascertain whether the confession is voluntary or not ?

164. The factual background leading to the recording of confession is enumerated hereinafter:-

(i) Accused SK is arrested in connection with FIR No.838 of 2006, under Section 363, 366 IPC concerning the disappearance of L. on 29.12.2006 at 8.00-8.15 am. The date and time of arrest is disputed, and in view of the defence evidence as also the version of accused under Section 313 Cr.P.C. we have already observed that the arrest of accused is not proved by the prosecution on 29.12.2006.

(ii) Accused is produced before the learned Magistrate, Gautam Buddh Nagar, Noida for the first time for remand. The production of accused is after 24 hours of arrest. The remand application moved by IO Dinesh Yadav (PW-40) on 30.12.2006 is extracted hereinafter:-

"विषयः– अभि० सुरेन्द्र कोली S/O शंकर राम कोली नि० ग्राम मंगरु खाल थाना जोली खाल जि० अलमोडा हाल पता D–5 से० 31 नोएडा थाना से० 20 GBN व मोहिन्दर सिंह S/O सम्पूर्ण सिंह निवासी 1012 से० 27 चन्डीगढ़ हाल निवासी D–5 से० 31 नोएडा PS से० 20 GBN सम्ब०अ०सं० 838/06 धारा 366/302/201/376/120B IPC थाना से० 20 GBN का पुलिस कस्टडी रिमान्ड देने के सम्बन्ध में।

निवेदन है कि अभि०गण उपरोक्त सुरेन्द्र कोली व मोहिन्दर सिंह द्वारा अपने जुर्म का इकबाल किया है व अभियुक्तों की निशादेही पर 15 मानव खोपड़ी व अस्थिया भी बरामद हुई है जब कि इन मानव खोपड़ियों के धड़ बरामद होने शेष है। अतः माननीय न्यायालय से अनुरोध है कि अभि० सुरेन्द्र कोली व मोहिन्दर सिंह उपरोक्त दोनो का 5–5 दिवस का पुलिस अभिरक्षा रिमान्ड स्वीकृत करने की कृपा करें।

रिपोर्ट सेवा में प्रेषित है।"

(iii) The Remand Magistrate at Gautam Buddh Nagar has referred to the request of prosecution for remand of accused SK and Moninder Singh Pandher on the basis of their confessional statement made under Section 161 Cr.P.C., wherein 15 human skulls and skeletons have been recovered on the pointing out of the accused (Surender Koli

and Moninder Singh Pandher). The Magistrate allowed remand of accused SK and Pandher for two days beginning 9.00 am on 31.12.2006 to 5.00 pm on 1.1.2007. The accused was directed to be medically examined prior to police remand and also at the time of return of judicial custody from the police remand.

(iv) On 1.1.2007 the Magistrate allowed ten days remand of accused SK to police custody in the FIR No.838 of 2006 (relating to victim L.).

(v) On 11.1.2007 remand application is submitted by CBI in the FIR lodged regarding the victim A. This application of CBI states that Koli and Pandher have jointly admitted to kidnapping, raping and murdering A. The Magistrate grants police remand to CBI on 25.1.2007.

(vi) The Investigating Officer of CBI M.S. Phartyal claims that the accused is badly beaten up by the Advocates and the public upon being produced in the Ghaziabad Court for remand. However, the Magistrate is not informed of physical assault of accused nor any document relating to medical treatment offered to accused are produced. The Magistrate vide order dated 25.1.2007 in respect of disappearance of missing girl H. allows remand to police custody till 8.2.2007.

(vii) On 8.2.2007 an application is filed by CBI before the learned CBI Magistrate, Ghaziabad for further police remand of accused SK for a period of 14 days. Ostensible ground for such remand is that the accused are needed for recovery of the body and personal belongings of missing women D.

(viii) The defence contends that recovery of skulls, bones and body parts had already been made by the UP Police/CBI between 29.12.2006 and 16.1.2007. No excavations or seizures of body parts are made after 16.1.2007. Clothes of D has already been seized and identified by her husband on 29.12.2006. The memo of identification of D's clothes by her husband dated 29.12.2006 is proved by PW-15 in Capital Case No.2667 of 2017.

(ix) Vide order dated 8.2.2007, the accused was remanded to police custody till 22.2.2007 in case pertaining to victim D.

(x) Again on 22.2.2007 an application for police remand was moved by CBI IO MS Phartyal stating as under:-

"That custodial interrogation of accused Surender Koli is necessary in the proper and just investigation of the case and for recovery of the dead body/body parts and other belongings of Ms. 'XYZ'. Accused Pandher is also required to be interrogated regarding bribing of the police officers and other facilities provided to the police for not conducting investigation against him and his servant accused Surender Koli. Vouchers relating to payments made to police, railway tickets provided to them etc are to be recovered from and

> through accused Moninder Singh Pandher. Accused Surender Koli is to be interrogated regarding the missing 'XYZ' and for making recoveries of the body parts and other belongings of Ms. 'XYZ'. Both the accused are to be interrogated regarding recovery of the skulls, bones and other body parts from the premises with reference to the case of alleged rape, murder of Ms. 'XYZ' since the DNA test report on the skulls etc. recovered from the premises is awaited which will conclusively prove the murder of Ms. 'XYZ' in the premises of accused Moninder Singh Pander and Surender Koli. The accused are also required to be subjected to various scientific tests."

165. On behalf of accused appellant, it is pointed out that the clothes etc. of victim 'XYZ' was already recovered and recognized on 3.1.2007, and therefore prayer for extension of police remand on such ground is wholly arbitrary. Special Judicial Magistrate (CBI) passed an order on the custody application of CBI on 22.2.2007 extending the police remand of accused till 2.3.2007.

166. Interestingly, all orders of Remand Magistrate extending the police remand of accused directed his medical examination to be conducted both, at the time he was taken from the court and again after the CBI remand. However, there is nothing on record to show that such medical examination was conducted of accused.

167. Non production of report of medical examination of accused while in police custody is a serious lapse on part of the investigation. No explanation is furnished for such lapse. The police custody of accused was for almost sixty days and the fact that not even a single medical examination report is produced by the prosecution, despite directions of the magistrate to do so, necessarily leads to adverse inference being drawn against the prosecution.

168. It is in the above context that notice has to be taken of a handwritten application moved by the accused SK before the

court of ACMM, New Delhi, for recording his confessional statement. The contents of handwritten application of accused SK is reproduced hereinafter:-

> "श्रीमान ए०सी०एम०एम० नई दिल्ली
> सी०बी०आई० मजिस्ट्रेट साहब
> दिल्ली
>
> महोदय,
>
> मैं सुरेन्द्र कोली पुत्र स्वर्गीय श्री शंकर राम कोली निवासी ग्राम मंगरूखाल तहरीर मौलियां खाल (जिला अल्मोडा)
>
> निवेदन करता हूँ कि पिछले दो वर्षों के दौरान मैंने म०नं० डी-5 से० 31 निठारी नोएडा में रहते हुए छोटी बचियों, लड़कीयों व औरतों की हत्या कर उनके साथ सैक्स किया है, मैं मेरे द्वारा किये गये हत्या व सैक्स के बारे में आपके सामने विस्तार से बताना चाहता हूँ जिसे मैं अपने मन का बोझ हलका कर सकूँ। आपसे निवेदन है कि महोदय मुझे आपके समक्ष प्रस्तुत होकर इस कांड की विस्तार से ब्यान करने का अवसर दें।"

169. The application of accused has been moved before the court of ACMM, Patiala House, New Delhi in the case of rape and murder of Ms. 'XYZ'. The application moved by CBI requesting the recording of confessional statement of accused dated 28.2.2007 is extracted hereinafter:-

> "1. On the request of Government of UP and on the Notification issued by the Central Govt., in accordance with law, the CBI has taken up investigation of cases relating to the kidnapping of children, abduction of women, rape and murder, disposal of dead bodies etc. in Nithari village by accused Moninder Singh Pandher and Surender Koli of D-5, Sector 31, Noida, Gautam Budh Nagar, UP.
>
> 2. That accused Moninder Singh Pandher and Surender Koli are in CBI police custody remand in the above case.
>
> 3. That accused Surender Koli has expressed a desire to make a true confession of the facts and circumstances relating to the crimes mentioned above committed by him. He has addressed an application to the Hon'ble Court, to this effect, which is forwarded herewith for kind perusal and consideration of this Hon'ble Court.
>
> 4. It is further submitted that accused Surender Koli was

arrested by the NOIDA Police on 29.12.2006 and recoveries of skulls/bones and other belongings of the victims were recovered from the said premises on his disclosure and pointing out and when the accused was lodged in Ghaziabad Jail for a day, he was very badly beaten up by the jail inmates. Further, when the accused were produced in the Ghaziabad Court by the CBI on 25.1.2007, they were badly beaten up by the advocates and the public. Such incidents of security threat to the accused also came to notice when the accused were produced in the Court of CJM, NOIDA, earlier.

5. That there is absolute security risk and danger to the accused in the jail as well as outside from the public or jail inmates etc. If the public or the jail inmates comes to know that the accused is going to make a confession of the true facts, then also there is threat to his safety.

PRAYER

In view of the above facts and circumstances it is humbly prayed that:-

(i) this Hon'ble Court may be pleased to record the confessional statement of accused Surender Koli u/s 164 Cr.PC, as per law.

(ii) if the accused makes a confession statement or not, he may be sent in judicial custody to Tihar Jail with appropriate directions to the Jail Supdt. for providing safety to the accused, in public interest.

It is prayed accordingly."

170. On the basis of application moved by CBI, learned ACMM, New Delhi passed following orders on 28.2.2007:-

"Application has been filed by Insp. M.S. Phartayal, CBI, SCR-III/SCB, Delhi for recording the confession statement of the accused Surinder Koli. The said application is also accompanied by a hand written request of the accused Surinder Koli to the effect that he had been indulging into sex and killing of minor girls and ladies and now in order to lesson the burden on his conscious he wants to make a detailed statement to this effect.

It is submitted that when the accused was lodged in Ghaziabad Jail for a day, he was very badly beaten up by the jail inmates and further when he was produced in the Ghaziabad Court by the CBI on 25.1.07 he was also beaten up by the Advocates and the public.

I have given a personal hearing to the accused in the Chamber. He was in the custody of local police of Ghaziabad from 29.12.06 to 11.1.07 and thereafter in CBI Custody since 11.1.07.

In this background, it is necessary to ensure that the

> accused is voluntarily wanting to make a confession without any influence having remained with the local police and the investigating team of CBI for the last almost two months. In this view of the matter, the accused who has been produced by the Investigating Officer of CBI is directed to be handed over to the Director General (Prisons), Tihar to be kept in some secluded place which may be a Solitary Ward where it shall be ensured that he does not mix up with any person including the other inmates and is isolated from all kind of influences. He is directed to be produced before this court thereafter at 1:00 pm for 1.3.07. Before handing over the accused to the Director General (Prisons), Tihar his medical examination be got conducted.
>
> Similarly, before his production in the court on 1.3.07, his medical should also be got conducted.
>
> The accused shall be personally handed over to the Director General (Prisons) today by the officials of CBI after his medical examination and shall be produced before this court by the Jail Authorities who shall ensure that he is brought to the Court in a separate vehicle.
>
> Needless to say that during the stay of the accused Surinder Koli in Tihar Jail all necessary arrangements would be made by the Prison Authorities to ensure the safety and security of the accused. A copy of this order be given dasti to the IO and one copy be sent to the Director General (Prisons), Tihar immediately through Special Messenger."

171. The Superintendent, Centra Jail, Tihar submitted a medical report before the learned ACMM, New Delhi on 1.3.2007, which reads as under:-

> "Surender Koli S/o Shankar Ram, 31 Yrs, M, Medical Examination is conducted in CJ-I at 11.20 AM, Dated 01.03.2007.
>
> Patient came in CJ-I on 28.02.2007 and his medical examination was done on 28.02.2007.
>
> On examination - patient conscious and oriented and responding to verbal commands and oriented to time, place and person.
>
> Vitals – Pulse – 80/min.
>
> B.P. - 126/76 mm Hg
>
> S/E – Chest B/L Clear
>
> CVS – S1S2 Normal
>
> CNS – Pupils B/L Symmetrical and ictrus to light
>
> P/A – Soft, bowel sound present
>
> No fresh external injury seen.

According to patient puts No History of Addiction

Pt. is fit from medical examination.

Point of view and fit for statement ”

172. The medical examination was conducted at 11.20 am on 1.3.2007. Though it is alleged that medical examination was also conducted on 28.2.2007 but such report apparently has not been placed on record.

173. On 1.3.2007, orders were passed by learned ACMM at different intervals, which are extracted hereinafter:-

“Present: Accused has been duly produced in muffled face by SI Samu, 3rd Bn. Central Jail, Tihar.

Since the accused is not assisted by any counsel, the legal aid counsel attached to this court Ms. Sangita Bhayana has been directed to assist the accused before any proceedings are conducted. The accused has been asked by this court if he wants the assistance of the counsel to which he has stated that he cannot afford a counsel. He has been informed that a counsel from the legal aid can be provided to him, to which he has no objection.

At this stage Ms. Sangita Bhayana Advocate has appeared. She has refused to provide any legal assistance to the accused stating that it is against her conscious.

Under these circumstances, Secretary DLSA is requested to immediately depute a legal aid counsel for the assistance of the accused.

At this stage medical report of the accused has been received. The same be placed on record.

Be awaited.

ACMM/1.3.07

1.10 pm.

Application is taken up again.

This court is informed that no legal aid counsel is available at the moment. It is directed that any legal aid counsel present in the complex attached to any other court should be requested to assist the accused.

At this stage since no legal aid counsel has come. Sh. Gurinder Pal Singh and Sh. Aman Sarin Advocates who are present in the court have volunteered to provide legal assistance to the accused. Now at this stage Sh. Neeraj Aggarwal, legal aid counsel attached to the court of Sh.

Sunil Chaudhary, MM has appeared to assist the accused. In the interest of justice five minutes legal interview is granted inside the court itself.

Be awaited.

ACMM/1.3.07

1.20 pm

Application is taken up

Present: Insp. M.S. Phartayal, CBI SCR-III/SCB, Delhi.

Accused has been produced from Central Jail, Tihar by SI Samu, 3rd Bn., Central Jail, Tihar with Sh. Gurinder Pal Singh, Sh. Aman Sarin and Sh. Neeraj Aggarwal Advocates.

The accused present in the court submits that he wants to make statement. On being asked the accused who is present in the court alongwith his counsels has submitted that he has understood the consequences of his making a statement and is also aware that he is not bound to make any statement but all the same insist upon making the same.

Under these circumstances application of the CBI is being marked to Sh. Chandrashekhar, MM, New Delhi for recording the statement of the accused.

However, keeping in view the peculiar nature of the case, the gravity and sensitivity of the allegations involved, it is directed that in case if the Magistrate proceeds to record the statement it would be only be appropriate in the interest of justice that the statement should be audio recorded and also video graphed.

Before proceeding to record the statement of the accused, the Magistrate shall ensure that the statement is voluntary; accused is free from all kind of influence and pressure; he has been warned of the consequences of the same; he shall also ensure that the accused has not been given any hope of release. The Magistrate shall duly explain to the accused that his statement is being videographed and the audio recording of the same is also being done. It is further directed that after the statement is completed, the copies of the recordings shall be prepared in the presence of the Magistrate and the accused and the original copies of the same shall also be sealed in the presence of the accused. The transcript of the same shall be prepared and got signed from the accused thereafter.

It is desirable that care should be taken while recording of the statement and the same be recorded without any break and if the Magistrate at any point of time feels that the accused is straying from the arena of allegations involved, he would be at liberty to put necessary questions to the accused. Further in case if the Magistrate requires the assistance of Video Operator the same can be taken.

A copy of this order be sent to Sh. Chandershekhar, MM,

> New Delhi immediately. One copy of this order be also sent to the DCP, New Delhi and Incharge Lock Up to make necessary arrangements.
>
> ACMM/1.3.07"

174. Learned Metropolitan Magistrate, Patiala House, New Delhi, accordingly, videographed and audiographed the confessional statement of accused SK. The order passed by the Metropolitan Magistrate dated 1.3.2007 is reproduced hereinafter:-

> "Today an application was marked to me by Ld. ACMM, New Delhi for recording the statement of accused Surender Koli in CBI Case No RC 17(S)/07/SCB-I/Delhi Video graphy and preparing of CD and thereafter recording the same in transcription. The order was received by me after lunch hours. It took some time in the arrangement for recording the statement of accused Surinder Koli through Video Graphy in the office. Video Conferencing room with the apparatus already installed there. The statement of accused Surinder Koli has been video graphed and audio graphed as per direction, however, making transcription of it is taking a lot of time as it is a slow and lengthy process and it is already 10:15 PM and it seems that much more time shall be required for completing the further transcription. It seems that it is not practically possible today therefore accused is required for completion of transcription by 10 am on 2-3-2007 therefore appropriate orders may be passed in this regard.
>
> Today, statement of accused has been video graphed and audio recorded and has been completed and four copies of video graphed CD have been prepared. The original has been sealed in the presence of accused with the signature of under signed and the accused and sealed with the court seal. The other three copies of the CDs are also sealed in the presence of the accused bearing the signature of the undersigned and the accused and the same shall be opened in the presence of accused tomorrow for completing of transcript. Shyam, Video Operator has closed the system in my presence and it ensured that none can have access to it."

175. The accused was then produced before the ACMM on 1.3.2007 pursuant to the order passed by Sri Chandrashekhar, learned Metropolitan Magistrate. The ACMM passed following orders on 1.3.2007:-

> "Present: Accused with SI Samu Murmu, 3rd Bn. DAP.

> Accused has been produced by the order of Sh. Chandershekhar, MM, New Delhi.
>
> As per the report sent by the learned MM the confessional statement has already been videographed and audio recorded, however the transcripts could not be completed, for which the accused is again required to be produced before the concerned MM at 10.00 am on 2.3.07.
>
> In view of the above, he is being handed over to the Director General (Prisons), Tihar to be kept in some secluded place which may be a solitary ward where it shall be ensured that he does not mix up with any person including the other inmates and is isolated from all kind of influences as per the directions dated 28.2.07. The accused shall be brought to the court in a separate vehicle. A copy of this order be given dasti to IO-CBI and SI Samu Murmu, 3rd Bn. DAP for compliance."

176. On 2.3.2007 the accused was produced before the learned ACMM, who directed the accused to be produced before Sri Chandrashekhar, Metropolitan Magistrate, immediately.

177. The work of transcription could not be concluded on 2.3.2007 till 10.55 pm, and therefore the Metropolitan Magistrate passed following orders on 2.3.2007:-

> "Today as per the orders of learned ACMM, Inspector Sajan Singh has produced the accused in the Video Conferencing Room. In the presence of the accused the seal of the one CD was broken and CD was taken out and the work of transcription was initiated. It was continued without break up except for sometime when some food was to be provided to the accused and some remand work was to be done by the Video conferencing. The work of transcription is very lengthy and slow process and it needs several times corrections, therefore it could not be completed till this time, it is already 10:55 PM and still some transcription work is to be done and it seems that it shall not be feasible to do the same today. Therefore, accused is directed to be produced before learned ACCM, for further appropriate orders. Mr. Shaym who is handling the work of operating CD is directed to close the computer and he has complied and it is confirmed that none can access to the computer. CD is again sealed with the court seal bearing the signature of the accused and myself. It is requested to the learned ACMM that necessary directions may be given to the concerned authority to produce the accused tomorrow at 10 am, so that further work of transcription can be completed at the earliest."

178. Learned ACMM passed following orders on 2.3.2007 at

11.00 pm:-

> "Present: Accused with Insp. Sajjan Singh, 3rd Bn. DAP. Accused has been produced by the direction of Sh. Chandershekhar, MM, New Delhi.
>
> As per the report sent by the Ld MM the transcripts could not be completed being lengthy and time consuming. Hence, in this background the accused is again required to be produced before this court at 10:00 am on 3.3.07.
>
> The accused is being handed over to the Director General (Prisons), Tihar to be kept in some secluded place which may be a solitary ward where it shall be ensured that he does not mix up with any person including the other inmates and is isolated from all kind of influences as per the directions dated 28.2.07. The accused shall be brought to the court in a separate vehicle. A copy of this order be given dasti to IO CBI and Insp. Sajjan Singh, 3rd Bn. DAP for compliance."

179. On 3.3.2007 the accused was produced by Inspector Rakesh Kumar alongwith SHO, P.S. Tilak Marg and was directed to be produced before Sri Chandrashekhar, MM for completion of his statement. The order dated 3.3.2007 is extracted hereinafter:-

> "Present: Inspector Rakesh Kumar alongwith SHO PS Tilak Marg has produced the accused Surinder Koli.
>
> He is directed to produce the accused Surinder Koli before Sh. Chander Shekhar, MM immediately for completion of his statement."

180. On 3.3.2007 learned ACMM passed following orders:-

> "Present: Insp M.S. Phartyal, CBI SCR III/SCB/Delhi.
>
> Accused has been produced by Inspector Rakesh Kumar, 3rd Bn. DAP.
>
> The entire transcription has been completed as per the report sent by Sri Chandrashekhar, MM Delhi. Since the accused had made confession, hence he cannot be handed back to the CBI. The I.O. CBI submits that the accused has been arrested and in judicial custody in four other cases i.e. R.Cs. No. 1(S)/07/SCB-I, 2(S)/07/SCB-I, 5(S)/07/SCB-I and 11(S)/07/SCB-I by the order of the concerned Court at Ghaziabad and was on CBI remand in the present case when produced before the court for recording of his statement.
>
> Under these circumstances Director General (Prisons),Tihar

> is directed to produce the accused Surender Koli before the Special Judicial Magistrate, CBI/Duty Magistrate, Ghaziabad at the earliest, for deciding the further custody. Once copy of this order be given dasti to Inspector Rakesh Kumar 3rd Bn. DAP for compliance and one copy be given to Inspector MS Phartyal IO-CBI."

181. An application apparently was moved by Inspector, CBI, MS Phartyal on 1.3.2007 for providing copy of the confessional statement in Audio and Video recording, if any. The other application was then moved by Sri MS Phartyal on 2.3.2007, which came to be allowed. The application was allowed on 3.3.2007. The acknowledgement is made by the Inspector that one transcripted copy running into 48 pages and two CDs. were received by him on 3.3.2007.

Contents of transcription of recorded confession

182. The transcripted version of video and audio recording of confessional statement of accused SK is reproduced hereinafter:-

> "CBI Case No. RC 17(S)/07/SCB-L/Delhi
> U/s 376/302/201 IPC
> State (CRD) Vs. Surinder Koli & Ors.
>
> Confession of the Accused Surinder Koli S/o Shri Shankar Ram Kohli Present Address: D-5. Sector 31. Noida, Uttar Pradesh. Postal Address: Gram Mangroo Khaal, Thana Jaali Khan, Tehsil Molia Khal, District Almora, Uttranchal.
>
> Under Section 164 Cr.P.C
>
> TRANSCRIPTED VERSION AFTER VIDEO AUDIO RECORDING
>
> Today an Order dated 1 March 2007 was passed by learned ACMM and IO Inspector M.S. Phartyal from CBI has appeared and he made some submissions while appearing in my court. I have noted down proceedings in the court and as per the directions of learned ACMM, I have come, thereafter, in the Video Conferencing Room for the purpose of

recording the statement of confession of the accused Surender Koli.

Before, actually recording the statement of the accused, it shall be proper that what ever proceeding has been taken place in my court, shall be readover, so that it should become the part of the statement or the proceedings.

Today IO inspector M.S. Phartyal, CBI SCR-IIUSCB Delhi had appeared in the court. He stated that Accused Surender Koli has been produced today from JC by Supt from Tihar Jail and it has been stated by the 10 that an application for recording of confession statement was moved before learned ACMM on 25-2-2007. The accused was produced there in police custody. learned ACMM sent the accused in JC and directed vide order dated 28-2-2007 with the direction that he should be produced on 1-3-2007 before her. Today, the accused was produced from JC in compliance of the order dated 28.2.2007. Now, an order has been passed, today, and the application for recording the statement of the accused has been marked by the learned ACMM to this court for recording of the confession statement of the accused Surender Koli. He requests that statement of the accused may be recorded. I have considered the submissions and perused the application moved by the 10 which is Mark A. The hand written application in the name of learned ACMM is Mark 'B'. The order dated 28- 2-2007 is Mark 'C' and the order of the learned ACMM passed today is Mark 'D'.

It is observed that offence alleged against the accused Surender Koli are of serious nature and are exclusively triable by the Sessions Court. The case is still at the stage of investigation and the application has been forwarded in this court for recording of confession of the accused. It is observed that learned ACMM has pointed out certain guidelines as safe guards to be observed while recording the statement of confession of the accused. Such are:-

"Before proceeding to record the statement of the accused the Magistrate shall ensure that the statement is voluntarily given. Accused is free from all kind of influence and

pressure. He has been warned of the consequence of the same. He shall also ensure that the accused has not been given any hope of release. The Magistrate shall duly explain to the accused that his statement is being video graphed and audio recorded. It is further directed that after the statement is completed. It is further directed, after the statement is completed, the copies of the recording shall be prepared in the presence of the Magistrate and the accused and the original copies of the same shall also be sealed in the presence of the accused. The transcript of the same shall be prepared and got signed thereafter.

It is desirable that care should be taken while recording the statemem and the same be recided without any break and if the Magistrate at any point of time feels that the accused is straying from the arena of allegation involved. He would be at liberty to put necessary questions to the accused. Further in case the Magistrate requires, assistance of the Vedio Operator same may be taken. I have considered the instructions mentioned in the order",

I have perused the provisions of U/s 164 Cr.P.C and the relevant provisions such as Section 24 and Section 28 etc of the Evidence Act. It seems that it shall be proper, in the present case, to record the statement of the accused U/s 164 Cr.P.C and the same be video graphed also. So that the demeanour of the accused may be reflected and, the manner in which the confession statement has been recorded, can be shown for proper and better appraisal of the trial court. In compliance of the order of learned ACMM passed today. I have given direction to the concerned persons to make arrangements in video conferencing room for recording the statement of the accused.

Now, I have reached in Video Conferencing Room. The accused has been produced by the Jail Authorities and the SI Shamu, third Batallian, Central Jail. 10 will be called just now and he will be asked to identify the accused.

Call the IO.

IDHAR AAYEYE AAP

Now IO!

NAM BOLIYE APNA

M.S. Phartyal Inspector, Inspector M.S. Phartyal is present.

YE KAUN HAI?

Surender Koli Hanji.

INKEY KHILAF KYA HAI?

He has committed certain act of rape and murder at D-5. Nithari, NOIDA.

So do you identify him?

Yes, I identify him

Ok. Kindly leave the video conferencing room and wait outside.

The IO has left the video conferencing room and is waiting-outside.

Before actually recording the statement I have checked that video conferencing room is safe and nobody can see from the outside and you are Shyam? Yes! Shyam is handling the video camera. Now accused Surinder Koli is before me and before I record the statement of the accused he should be put certain question in Hindi. As it has been told to me that accused understand Hindi language only

KYA NAAM HAI AAPKA?

MERA NAM SURENDER KOLI HAI.

OR BHI KISI NAM SE JANTE HAI APKO?

MERA BACHPAN KA NAM SADA RAM KOLI HAI, SADARAM.

SADARAM KOLI HA!

KISI AUR NAM SE BHI JANTE HAI AAPKO?

YAHI DO NAM HAIN MERE.

YAHI DO NAM HAI APKE?

HANJI

ABHI APKO PICHILI RAT TO KO KAHAN RAKHA GAYA THA?, KAHAN THEY AAP? A JO RAT GAI HAI, KAHA THEY AAP? KAHA RAKHA GAYA THA?

MAIN CENTRAL JAIL ME.

CENTRAL JAIL MEIN THAY AAP. HANJI CENTRAL JAIL SE AAP KO KAHA PESH KIYA SEEDHA AAJ?

COURT KA NAM TO PATA NAHI HAI

COURT MAIN PESH KIYA GAYA HAI AAPKO?

COURT KA NAM MUJHE PATA NAHI HAI

ACHHA!

MAIN APKO BATA DON KI MAIN METROPOLITAN MAGISTRATE HOON! JUDGE HOON: AUR APNE APPLICATION LAGANE KI REQUEST KI THI KI MAIN BAYAN DENA CHAHATA HOON. ISLIYE JAHAPAR APNE APPLICATION LAGAI THI, UN JUDGE SAHAB NE WO APPLICATION MEREKO MARK KI HAI, KI MAIN APKA STATEMENT RECORD KARU. HANJI SIR THEEK HAI AUR RECORD KARNE SE PAHLE, MAIN APKO AHA BATANA CHAHATA HU KI AYE APKI APNI MARJI HAI KI AAP APNA BAYAN DENA CHAHATE HAI YE NAHI DENA CHAHATE HAI, KOI BHI ADMI APKO FORCE NAHI KAR SAKTA, KYA MALOOM HAI APKO.

HANJI

KYA MALOOM HAI APKO?

MAIN KISIKE DABAW MAIN AAKAR NAHI KAHANE AYA HOON NAHI KAR RAYE AAP KISI KE DABAW MEIN? OR AGAR AAP APNI MARJI SE HANJI BAYAN HANJI RECORD KARATE HAI TO WO LIKHA JAYAGA HANJI AUR WO BAD MEIN APKE KHILAF BHI PADA JA SAKTA HAI, MALOOM HAI AAPKO?

HANJI

LEKIN PHIR BHI AAP APNEE MARJI SE BAYAN DENA CHAHATE HAI.

HANJI

KYO

KIYONKI MAIN ADALAT KI MADAD KARNA CHAHATA HU, ACHHA! OR KANOON KI MADAD KARNA CHATA HU

HA! ISLIYA KIYONKI MAIN BAHUT GAREEB PARIWAR SE HU HAN! HAN! MERE PASS NA TO CASE LADNE KE LIYA KOI SADHAN HAI OR NA HI GHAR MEIN KHANE KE LIYA SADHAN HAI

NAHI WO EK ALAG BAT HAI. LEKIN AGAR APKO YE SAB CHEEZEY DE JAYE TO ISKA MATLAB HAI KI AAP CASE LADOGE?

NAHEE PHIR BHI MAIN BAYAN JAROOR DUNGA. SACHAI KE SATH HI CHALOONGA

AAP SACH BATANA CHAHATE HO?

SACH BATANE CHAHATA HU

ISLIYA AAP JO HAIN KYA KAHATEY HAIN? AAPNE APPLICATION LAGWAI HAI?

HANJI

ACHHA! MAIN APKO EK BAR PHIR BATA RAHA HU KI AGAR APNA BAYAN NAHI BHI DENA CHAHATE HANJI! COURT MEIN

APNA BAYAN NAHI DENA CHAHATE HO PHIR BHI HAM APKO POLICE KE PASS NAHI BHEJENGE, CHAHE AAP APNI MARJI SE BAYAN DE YA NA DE. YA AAP BAYAN RECORD KARWANA CHAYE YE NA KARWANA CHAYE, KISI BHI HALAT MEIN HUM AAPKO DUBARA SE POLICE KE HATHON MEIN NAHI BHEJENGE. KAHI AISA TO NAHI KI AAP AISA SOCH RAHE HAI POLICE KA DABAW HOGA, POLICE HAME MARENGE, PEETENGE YA KUCHH KAREEGE YA DABAW DALEGI.

"DEKHO ABHI BHI TUM CHAHO TO MUJHSE SAB KUCH KAH SAKTE HO, TUMHE KISI BAAT KA KOI DAR NAHI HAI, JO MAN MAI TUMHARE HAI VO SAB KUCH MUJHE BATA SAKTE HO, KISI BHI BAAT KA DABAV, DAR, KISI NE BHI KAHA HO, AAJ TUMHARE PAAS MAUKA HAI, IS BAAT KO KEHNE KA, THEEK HAL TUM CHAHO TO AGAR KUCH AISA HAI KISI BHI AADMI KA KOI DABAV HAI YA LALAC HAI, TUM MUJHE BATA DO? NAHI AISA KUCH NAHI HAI

KUCH NAHI HAI, TO KYA TUM APNI MARJI SE BAYAN DENA CHAH RAHE HO?

HANJI

TO THEEK HAI TO PHIR BATAIYE? KYA KEHNA CHHAHTE HO? MAI YE KEHNA CHHAHTA HOON, KI MAI 1993 MAIN SCHOOL CHHOD KAR GAON SE APNE JEGIAJI KE SAATH YAHA DELHI MAI AAYA, NOIDA MAIN AYA AUR MAINE US TIME 1993 SE 1998-1999 TAK 646, SECTOR-29 BRIGADIOR ŞAHAB KE GHAR PAR KAAM KIYA, USKE BAAD MAINE JO HAI, KUCHH DIN MAHINA KE KAREEB GHAR GAYA HUA THA, WAHA PEY AAKAR KE 216 SECTOR 29 VAHI KAAM KIYA. HAN! USKE BAAD MAI FIR 2000 MAI MERE SHAADI HUI, USKE BAAD MAI 2000 MAY SHAADI HONE KE BAAD PHIR MAI 225 SECTOR 28 ME MAJOR SWARAN SINGH KE PAAS KAAM KARNE LAGA THA USKE BAAD VAHA SE MAI CHUTTI GAYA HUA THA TO MAJOR SWARAN SINGH NE NAYA AADMI RAKH LIYA THA, AUR MUJHE KAAM PAR NAHI RAKHA, USKE BAAD UNHONE MERE KO 2004 MAIN D-5, SECTOR 31 MAI KAAM PEY LAGAYA. MOHINDER SINGH KE GHAR MAIN, KAM PAR LAGAYA, MOHINDER SINGH DAILY JO HAI MATLAB JAB MADAM HOTI THI TO THEEK REHTE THAI, AUR JAB MADAM NAHI HOTI THI TO VO DAILY CALL GIRLS VAGARAH LE KAR KE AATA THA, ACHAA! TO YE DAILY MATLAB, ISKE DOST BHI KABHI, ISKE DOST BHI AA JATE THE, AUR KABHI YE MATLAB KHUD AKELE HI DO-DO TEEN TEEN LADKIYO KE SAATH RAHTA THA EK BAAR POLICE KI RAID BHI PADI THI GHAR MAI,

KYA UMAR HAI UNKI?

UNKI UMAR HOGI 50-52 50-55 SAAL KI HOGI, MEREKO PATA NAHI HAI KITNEY SAAL KI LEKIN HOGI ITNI KAREEB 50-55 SAAL KI HOGI,

ACHHA!

KYA KAAM KARTE THE?

UNKA JCB KA SERVICE CENTRE HII, D-9, SECTOR 2 MAIN,

THEEK HAI

TO VAHA PE MAI JO HAI KAAM KARTA THA AUR YE JITNI BHI LADKIYA AATI THI MAI UNKO KHANA EANATA THA KHILATA THA INKO DEKH DEKHA KAR MERE KO BHI MERA 10 HAI MATLAB MEIN AKELA THA. TO MERE MAN MAI PRESSUR: BANA SEX KE SEX KARNE KA, USKE BAAD DHEER DHEERE KARKE, MATLAB, DEKHTE DEKHTE MERE MAN MAI, GALAT BHAVNAI AANE LAGI, MATLABKI, GALAT BHAVNAI KYA AAIE MERE MAN MEIN, KEMISE AAL JAISE KI MATLAB MAI KISI JAISE AATE HAI KISI KO MAAROO KATOO, KHOON IS TARAH KI GALAT BHAVNAI MERE MAN MAIN AANE LAGI ACHHA! JO MAI YE LAGATAR AATE REHI JAB MAIN MATLAB APNA MIND BILKUL CONTROL KARNE KI KOSHIS KARTA,

NAHI AAATI RAHI, APNE KAHA KATTON, KHAOON KA MATLAB KYA HAI?

YE MERE MAN MAIN FEELING AATI THI IS TARAH KI,

YE FEELING KYO AATI THI?

YE FEELING MERE MAN MAIN IS TARAH SE AATI THI KI, MATLAB, MERE APNE AAP PE, MATLAB, MAIN ME PATA NAHI KAY PRESSURE IS TARAH KA BANTA THA. ACHHA! JISKI VAJAHA SE YE ISTARAH SE MATLAB MERE MAN MAI AATI THI TO FIR USKE BAAD FIR MAINE PAHLE TO MAIN EK DIN, DO DIN, TEEN DIN CONTROL KARNE KI KOSHISH KARTA THA, JAB MEREKO KUCH PATA HI NAHI RAHTA THA MATLAB KYA HO RAHA HAI, USKE BAAD MAIN, MATLAB, GHAR KE BAHAR JA KAR GATE KE PAAS JAR KAR KHADA HO JAATA THA, JO BHI MERE KO MATLAB LADKI YA AURAT BACCHA JO BHI MILA BULA KAR KE LEKE AA JATA THA

KAHA LE AATA THA?

GHAR KE ANDAR, KOTHI MAIN LE AATA THA, MAIN DARWAJE SE, MAIN DARWAJI SE, KAUN SE KOTHI MAIN?

D-5. SECTOR 31 MAIN

ACHHA! HANJI

MAI GHAR KE AAGE SE NITHARI GAON KE LIYE RAASTA JAATA HAI. ACHHA! AUR VAHI PE MATLAB RASTE MAI HAMARA GHAR HAI, D-5. SECTOR 31 HAI, MAIN VAHA PAR NAUKRI 2000 JULY, 2004 SE NAUKRI KAR RAHA HOON VAHA PAI, TO USKE BAAD FIR MAI GATE PAR KHADA HO KAR AA JATA THA, TO MAIN PURI TARAH SE PATA NAHI HAI, LEKIN 2005 SHURU SHURU KI BAAT HAI. TO JANUARY YA FEBRUARY KI BAT HAI, TO US TIME MAI GHAR PE AKELA HI THA, TO AIK LADKI SECTOR 30 KE TARAF SE NITHARI KI TARAF AA RAHI THI, JO JISKA NAAM DIKHANE PAR AUR BAAD MAI PATA CHALA KI ISKA NAAM 'XYZ' HAI, FIR ISKO KAAM KI LIYE MAINE BULA LIYA ANDAR, USKO ANDAR LAATE HI MAINE, USKO BALA, KI SAMNE SE MATLAB JO HAI, ABHI MADAM AA RAHI HAI, MAI PAISE KI BAAT KARWA DETA HOON, HAN AUR JAISE HI WO ANDAR KO DEKH RAHI THI, MAINE PEECHE SE ISI KI CHUNNI SE ISKA GALA DABA

KAR AUR ISKO BEHOSH KAR DIYA, AUR USKE BAD ISKE SAATH SEX KARNE KA KOSHISH KIYA, AUR SEX KARNE KA. KOSHISH KIYA, THODI DER KOSHISH KARNE KE BAAD, JAB SEX NAHI HO PAYA MERE SE, MAINE GALA DABA KAR ISKO BHI MAR DIYA USI KI CHUNNI SE

ACHHA! KYON MAR DIYA

BILKUL, MAN MAIN ISI TARAH KA PRESSURE BANA THA KI ISKO KAAT KAR KHOON KARKE, ACHHA! TO USKE BAAD TURNAT BAAD ISKO UPAR BATHROOM MAI LE KAR GAYA, USI TIME MERE KO KOI YE NAHI THA KI MATLAB, KABHI KOI GHAR PAR AA JAIGA YA KOI BAAT HO JAIGI, YA KUCH HO JAIGA MATLAB MUJHE IS CHEEZ KA KOI WOI NAHI THA MATLAB PATA HI NAHI LAGA, FIR MAINE USKO UPPAR BATHROOM MAI LE KE CHALA GAYA, UPAR BATHROOM ME LE JAR KAR, NEECHE AYA FIR KITCHEN MAI AAKAR CHAAKOO LE KE GAYA AUR USI TIME ISKO TURANT KAT KAR KE AUR ISKA MAINE BAJU AUR YE SEENE KA AIK PIECE BHI KHAYA THA, ACHHA! HANJI, JO MAINE, GHAR MAI HI MATLAB KITCHEN MAI BANAYA THA

KITCHEN MAI BANAYA THA?

HANJI. AUR JAB MATLAB MATLAB SHAM KO KITNA KHAYA YE MERE KO PURI TARAH SE DHYAN NAHI HAI, SHAM KO JAB MERE KO CHAR PANCH BAJE MATLAB JAB PURE TARAH SE MAN SHANT HUA, USKE BAAD MAINE DEKHA KI MATLAB KI DRAWING ROOM ME HEE ISKE SARE CHAPPAL WAGARAH SAB DRAWING ROOM MAI HI PADI HUI THI TAB TAK, MATLAB, TAB KOI WO NAHI THA, MATLAB ACHHA! JAISE NASHA TYPE KA, MAI KUCHH NAHI KARTA JAISE MAIN DAROO, PAAN, BEDI CIGARETTE GUTKA KUCH BHI NAHI KHATA, ACHAA! TO IS TARAH KA MERA, MERE KO MAN MAI FEELING HOTI THI, KISI KO KATOON KHAOON KAR KE, KI THODE DIN KE BAAD KI BAAT HAI, KAREEB MAHINA BHAR KE BAAD KI BAAT HAI, USKE BAAD USI LADKI KO MAINE SHAAM KE TIME MAIN JITNA KHAYA USKE BAAD, USSE MAN SHANT HO GAYA. AUR USKE BAD MAIN UPPAR BATHROOM ME GAYA UPAR DEKHA, TO BATHROOM ME USKO KAT KE SAB FAILI HUI THI VO. JO MERE KO US TIME KATNE KE TIME KUCH PATA HI NAHI THA KI

MAINE ISKO KYA KIYA HAI KARKE. ACHHA! AUR USKE BAAD FIR MAINE USKO DAR KE MAARE FATA FAT PANNIYON ME BHAR KARKE USKO BATHROOM ME RAKH DIYA AUR DHO KE RAAT KO BAKI UKKO MATLAB GHAR KE PEECHE EK GALLERY HAI, JAHYA MATLAB KOI AA JA NAHI SAKTA HAI, WHA GALLERY MAI FAIK DIYA THA USKO. ACCHA! USKE BAAD MAI, KUCH DIN BAAD KI BAAT HAI KAREEB MAHINA KE KAREEB KI BAAT HAI.

NAHI EK BAT YE BATAON TUMNE KAHA KI KAATOO KAHO KI FEELING HO RAHI HAI, YE KAB SE HO RAHI HAI? YE ABHI MATLAB JAB LADKIYO KO DEKH KAR HOTI THI PAHLE BHI MATLAB LADKIYO KO DEKH KAR BAHUT JY ADA PRESSURE HO KE HUA HAI YE KI JAB MATLAB LADKIYON KA AANA JANA BOHOT JADA SHURU HO GAYA, ACHHA! AUR ISKO DEKH DEKH KAR MATLAB KI, MAI BHL AKELA HOON AUR YE

DO DO. TEEN TEEN LADKIYON KE SAATH ANDAR SAUTA HAI, MAI INKO KHILATA PILATA HOON, ACHHA! ISKI VAJAH SE JO HAI MERE MAN PE PRESSURE PADA MATLAB SEX KA.

ACHHA!

SEX KA PRESSURE TO SAMAJH ME AATA HAI, LEKIN YE KATOON KHAOON KYA?

MAN MAI JO HAI YE HI FEELING AATI THI, THEEK HAI! TO SEX KA JO HAI MAI, BATA RAHA HOON MAI AAPKO KI MAIN SEX KARTA BHI THA YA NAHI US TIME MEIN IS TARAH SE REHTA THA KI MAN MAI MERE CONTROL HI NAHI REHTA THA, ACHHA! TO IS TARAH KA HOTA THA MERE KO, ISI KE BAAD KAREEB EK MAHINE KE BAAD KI BAAT HAI, EK AUR LADKI MATLAB AISE HI SUBEH BAHOOT VO THA DIMAG MAIN FIR SAVERE GATE KE PAS CHALA GAYA US DIN BHI EK AISI HI GORI SI LADKI THI SECTOR TEES KI TARAF SE SECTOR EKATEES NITHARI KI TARAF AA RAHI THI TO MAINE USKO KAAM KE BAHANE PUCHA KI KAAM KAREGI, TO USNE KAHA, HANJI, MAINE KAHA KI AAJAO BAAT KARWAA DETA HOON PAISE KI, USKO BHI YE KEH KAR KE ANDAR LE KAR KE AA GAYA GHAR PAR KOI THA NAHI, JAISE HI USKO DRAWING ROOM MAI LE KAK KE AAYA MATEN DARWAJE SE, USI TIME MAINE USI FIR USI KI CHUNNI SE USKA GALA DABA KAR USKO MAAR DIYA, USKE SAATH BHI SEX KARNE KA KOSHISH JO MERE KO THODA BOHOT MATLAB ANDAJE SE JITNA DHYAN HAI MATLAB KOSHISH KARTA THA SHAYAD SAB KE SAATH HI

TO YE KYA UMAR THI IS LADKI KI?

LADKI KAREEB TERAH CHAUDAH SAAL KI RAHI HOGI, ACHHA!, HANJI TO TERA CHAODAH SAAL KI LADKI THI, USKE BAAD FIR MAINE ISKO BHI MAINE ISI KI CHUNNI SE GALA BABA KAR BEHOSIT KIYA THA, SEX KOSHISH KARNE KE KOSHISH KI JAB NAHI HUA, TO USKO BHI UTHA KARKE, UPAR BATHROOM MAI LE KAR CHALA GAYA, AUR GALA DABA KE ISKO BHI MAAR DIYA, NEECHE KITCHEN MAI AAYA AUR CHHAKU LE KAR KE GAYA AUR ISKO BHI MAINE USI TIME KAAT PEET KAR KE ALAG KAR DIYA, AUR ISKA BHI MAINE SEENE KA EIK PIECE KHAYA THA, BANA KAR KE, US DIN BHI ISI TARAH SE MATLAB RAAT KO ANDHERA HONE KE BAD SHAM KO FIR MAINE JO HAI ISKO BHI PANNIYO MAI BHAR KAR KE BATHROOM MAI DHO DHA KAR KE ISKO BHI MAINE, JO HAI, PEECHE WALI GALI MAI WAHI FAIK DIYA THA,

GALI MAI MATLAB YA?

GHAR KE PECHEY BANDH GALLERY THEE

GALLERY MEIN FANKH DIYA THA?

GHAR KE PECHEY GALLERY HAIN

WO GHAR KE BOUNDARY KE ANDAR HE HAIN? GHAR KE JO CHAR DIWARI HAI?

NAHEIN CHAR DIWARI SE THORA BAHAR HAI MATLAB, LEKIN HAI, GHAR KEE HEE HAI, ENKEY CHAR KEE

GHAR KEE HEE HAIN?

HANJI

ACHHA THEEK HAI!

PECHI JO MATLAB PECHI UPNE EDHAR SE TO COVER KAR RAKHA HAI LOHE KA ANGLE LAGA HUWA HAI ACHHA! PECHEY JO GALI JA RAHI HAI TO WO GALI JO HAIN CHOROO TARAF HAS COVER HAIN WO

ACHHA!

HANJI GHAR KE PUCHEY GALI JO HAI VO, WO GALI PECHEY SE COVER HAIN SAREE.

THEEK HAI!

TO MAIN USKO TO WO KAR DIYA. USKEY KUCH DIN KEY BAD KI BAAT HAI. SUBHAI SAHAB OFFICE CHALEY GAYE TO RAAT KO 2-3 LADKIAN AYEE HUYEE THI INKEY GHAR MEIN. SUBHAY SAHAB OFFICE CHALEY GAYEY. TO MUJHEY BHI YE LOG THAY TO YAHIN NOIDA MAIN HI OR MADAM YAHI THI LEKIN US TIME GHAR PER KOY! NAIN THA KYA NAAM HAI MADAM KA? MADAM KA NAM TO NAHI MALUUM HAI

ACHCHA!

THIK HAI, KIS SAMAI KI BAAT RAHI HOGI YE?

KARIB SHAM TO 4½ 5 BAJE KEY ASSPASS.

ACHHA! NAHIN MAIN PUNCH RAHA HOO KAUN SE SAN MAHINE KUCHH YAD HAIN?

SAN TO 2005 HAIN LEKIN MAHINA DYAN NAHI HAI

ACHHA THEEK HAIN!

TO US TIME MATLAB YE LOG GAYE HUYE THEE GHAR PER NAHIN THA KOI BHI TO 2-3 DIN SE ISEE THARAH SE HO RAHA THA TO US TIME KOI NAHI THA FIR US TIME BHI MEIN BAHAR GATE PER CHALA GAYA. EK LADKI MERE GHAR KE AGEY KHEL RAHL THE NAM PHOTO DEKNEY KEY BAD PATA CHALA KI ISKA NAM L HAIN AUR USKO MEINEY GATE KE PASS ISHARA KARREY BULAYA WO KHEL RAHI THI WAHA GATE KEY BAHAR GATE KE PASS BULAYA USKO OR ISHARA KARKEY USKO BOLA TOPHEY DUNGA TEREKO WO LADKI KAREEB 6-7 SAAL KI RAHI HOGI ACHA TO YE AA GAYE MERE SATH ISKO BHI MAINE LATEY HEE ISKO MAINEY GALA DABAKEY BEHOSH KAR DIYA. USKEY BAD ISKEY SATH BHEE SEX KARNEY KA KOSHISH KIYA SEX MEIN KISHI KAY SATH NAHI KAR PAYA USKEY BAD MAINEY USKA BHI GALA DABAKAR UPPER BATHROOM MEIN RAKH DIYA NECHEY AYA ISKO NECHEY AAKARKEY, SUTLEE KA, BORE KA KATTA THA OR USKO UPPER BATHROOM MEIN LEKAR GAYA OR USMEIN DALKAR KEY BATHROOM MEIN HEE RAKH DIYA. SAAM KO ISKO BHI GHAR KEY PECHEY GALLERY MEIN FAINKH DIYA AUR USKEY KUCHH DIN KEY BAD KEE BAT HAIN KI MAIN CHHUTEE GHAR GAYA HUWA THA TO US TIME MATLAB MADAM FIR CHANDIGARH SHIFT HO GAYI THI, MADAM CHANDIGARH CHALEE GAYEE THI, JUNE KEE BAT HAIN,

USKEY BAD US DIN BHI AYSA HUA, US DIN SAHAB JO HAI, GHAR PE SAHAB AUR MEIN HEE THEE TO SAHAB JO HAI OFFICE CHALEY GAHEY AUR RAT KO US DIN RAT KO BHI LADKI AYEE THI. SUBERY JO HAI MERE MAN MEIN USEE THARAH KEE PHIR 2-3 DIN SEY WAHI MAROO KATOO KHANE WALI PHIR WAHI AA RAHI THI FEELING AA RAHI THI TO MAIN CONTROL NAHI KAR PAYA. EK LADKI MAIN UPPER CHHAT PEY GAYA OR CHHAT PEY SE PANI DEKNEY KE LIYA GAHA THA OR PANI NAHI AA RAHA THA MAIN UPPER CHHAT PER CHALA GAYA DEKHNEY KEY LIYA TABTAK MEINEY DEKHA KI UDHAR EK LADKI AA RAHI HAI, JISKA NAM IYOTI THA WO GHAR PEY PAHELEY BHI GHAR PEY KAPRE WAPREY LENEY KEY LIYEY ATTI THI GHAR PEY. ACHHA! TO DHOBI KI LADKI THI TO PAHELEY BHI HAMAREY GHAR PAR EK DO BAR BHAI BAHAN KEY SATH KAPRE LENEY KEY LIYA AYYEE THI TO MAINEY - USKO AWAZ LAGAKEY USKO KAHA KAPREY LEJA PRESS KEY. TO WO AAGAYEE. AAGAYEE TO MAINEY USKO GHAR KEY ANDAR HEE BULA LIYA OR USSEY PUCHA KI TOO KAYA SE AA RAHI HAI TO USNEY KAHA KI MAIN CHUNI PEEKO KARAKEY AA RAHI HOON TO WO CHUNI PIKOO KARA KEY AA RAHI HOON PHIR USKEY BAD JO HAI USKO MAIN KAHA KAPREY GIN LE. WO KAPRE GINNEY LAGI OR CHUNI USNEY SIDE MAIN RAKH DIYA. MAINEY USEEKEE CHUNI SE USKA GADA DABA KE USKO BEHOSH KAR DIYA. JISKEE UMMAR KAREEB 10-12 SAAL KI THI OR ISKO BHI BEHOSH KAR DIYA AUR USKEY BAD USKBY SATH SEX KARNEY KA KOSHISH KIYA AUR NAI HO PAHA OR USKEY BAD, USEEKEE CHUNI SE USKA GALA DABA KARKEY PHIR USKO UPAR BATHROOM MEIN RAKH DIYA OR BATHROOM MEIN RAKHNEY BAD PHIR NEECHEY AYA OR NEECHEY AA KAR KEY EK KATTA LE KAR KEY GAYA OR KATTA MEIN DAL KAR KEY USKO RAKH DIYA OR SHAM TAK YE WAHI BATHROOM MEIN HI PARI THI. US DIN SAHAB GHAR MEIN THEY, MOHINDER SINGH GHAR PE HE THAY, LEKIN USKO PATA HAIN YA NAHIN YE MEREKO PATA NAHIN HAI USKEY BAD PHIR MAINEY, RAT USKO BHI APNEY GHAR KEY PECHEY KI GALLERY MEIN FANKH DIYA THA ACHHA. OR PHIR USKEY BAD, PHIR KUCH DIN KEY BAD, GHAR ME PHIR, KUCH DIN PHIR BEECH MEIN KAM WAM CHAL RAHA THA OR ISKEY DOST KA LADKA AYA HUWA THA

KIS THARAH KA KAM CHAL RAHA THA? YEE MISTRY WAGARAH KA KAM CHAL RAHA THA GHAR MEIN.

KAYA BAN RAHA THA

REPAIRING WAGARAH HO RAHEE THI GHAR MEIN OR UPPER EK KAMRA BANA THA CHHAT PEY EK.

ACCHA!

TO US TIME MATLAB INKA DOST KA LADKA BHI AAYA HUWA THA YEE USKEY SAMNEY MATLAB LADKIYA NAHI LEKEY AYYE TO JITNEY DIN MATLAB LADKA YAHA GHAR PAR RAHA TO UTNEY EK BHI DIN LADKI NAHI LEKEY AYA TO UTNEY DIN MERA MAN BILKUL CONTROL SEE, THORA THORA KARKEY MATLAB CONTROL HO GAYA. MAN SHANT HO GAYA USKEY BAD PHIR JAISE HEE LADKA CHALA GAYA, USKEY

BAD PHIR ISNEY 2-2, 3-3 LADKIYA PHIR LANA SHUPU KAR DIYA.

KAUN, KYA NAM THA US LADKEY LA JO WAHA AYA THA?

USKA NAM THA SABI KHAN

SABI KHAN ?

HANJI

KAUN HAI WO?

YEE ENKEY FRIEND KA LADKA, FRIEND KA LADKA HAIN. HASAN KHAN KA?

HASAN KHAN KA?

JO MATLAB LUCKNOW MAIN RAHATEY HAIN OR YAHA INKEY PASS ATEY JATEY RAHTEY HAIR OR TO VO LADKA YAHA PAR USTIME MATLAB BAHAR JANEY KEY LIYA KAHI BHI JAHA PAR WO PADTA HAI WO, WAHA JANEY KEY LIYA KAGAJ WAGAJ LANA RAHE THAY YE MERE KO PATA NAHI HAI

HOON!

TO US TIME, WO YAHA PAR 5-6 MAHINEY RAH KE GAYA

HOON!

ITNEY DIN TAX YAHA LADKI NAHI AYEE TO MERA BHI MAN BILKUL SHANT RAHA.

HOON! ACHHA

TO USKE BAD.

TO KUCHH DIN BAD YE PHIR LADKIYA LEKEY ANA SURU KAR DIYA ISNEY.

HOON! HOON!

(At this stage it is found that already it is 10.15 PM and making transcription of the videography is taking a lot of time. It is slow and lengthy process and it seems that much more time is required for continuing and completing the further transcription which is not possible today. Therefore, the work of transcription is stopped here and the computer is shut down and CDs are sealed with the court seal in the presence of accused and accused is directed to be produced before learned ACMM New Delhi for further appropriate orders with request that he should be produced on 2.3.2007 for further continuation of the transcription work.

RO & AC

Chandra Shekhar
Metropolitan
Magistrate Patial
House Courts,
New Delhi 1.3.2007

A separate order mark ‘E’is also passed and the same is given to the IO for production the accused before L.d ACMM,

New Delhi for appropriate further orders.

Chandra Shekhar
Metropolitan Magistrate
Patiala House Courts,
New Delhi 1.3.2007

2.3.2007

An order Mark 'E' was received alongwith order dated 2.3.2007 Mark 'G' and the accused is produced by Inspector Sajan Singh as per directions of learned ACMM, New Delhi

In presence of accused the seal of one CD is broken, CD is taken out and the transcription work is further initiated:

USKEY JATEY HEE PHIR SE LADKIYA ANEE SURU HO GAI.

PHIR MERE KO PHIR VAHI PRESSURE BANNA SHURE HO GAYA MERE KO, PAHLE JAISI HALAT HONE LAGI PHIR MAIN APNE AAP KO CONTROL TO BOHOT KARTA THA LEKIN FIR NAHI HO PATA THA KYONKI ISKO DEKH DEKH KAR MERE KO MATLAB BAHOT TENSION SA HO JATI THI DIMAG MAI, AUR FIR VAHI HALAT MERI HONE LAGI, AUR PHIR SHAM KO EK DIN SHAAM KO ITNA WO THA MAIN LADKI SAMAJH KE EK LADKE KO HI UTHA KAR LE AYA ANDAR. ITNA PRESSURE THA DIMAG MEIN TO USKO OTHAKARKE LE AYA SHAM KO KARIB SADE PAANCH CHAI BAJE KE ASS PASS KI BAAT HAI AUR JAB USKO LE AAYA ANDAR, USKA MAINE NAAK MUH DABAYA, AUR USKO MATLAB BEHOSH KAR DIAYA, BAAD MAI MAINE USKI SALWAR KHOLI TO PATA CHALA KI YE LADKA HAI, PHIR MAINE USKO DEKHA KI MAINE USKA NAAK MUH DEKHA, PAR HAATH LAGAYA TO DEKHA KI VO PAHLE HI MAR CHUKA THA, ACHHA. PHIR MAI USI TIME USKO BATHROOM ME LE KAR GAYA.

TO YE SAB JO NAAK MUH DABANE WALI BATENY HAIN KAHA KARTE THEA TUM?

SAB CHEESZ MAI GHAR KE ANDAR DRAWING ROOM MAI HI KARTA THA AUR KAT PEET TO VAHI GHAR KE ANDAR HI BATHROOM BANA HUA THA EK SEDIYO KE PASS

KAUN SA NEECHE YA KAHA PAR?

JO MARTA PEETTA THA WO DRAWING ROOM MEIN UPAR NEECHE JO DRAWAJE SEE ENTER KARTE HI DRAWING ROOM MAI. JO MATLAB BATHROOM HAI VO UPAR MAT LAB KI SEEDHIYA CHADH KAR KE THORA UPPAR HAI

ACHHA!

HANJI, TO EK HARSH NAM KE LADKE KO LE AYA MEIN. TO WO MAR CHUKA THA. TO MAN ME KAFI TEJ BHAWNAYE HO RAHI THI MEIN USI TIME UPPAR BATHROOM MEIN LE KE GAYA USKO BHI MAINE CHAKOO SE KATA OR USKO BHI MAINE KAAT PEET KAR SARA ALAG ALAG KAR DIYA AUR MERE KO PURI TARH DHYAN NAHI HAI LEKIN, MERE KO SHAYAD JAHA TAK HO RAHA HAI KIYONKI MAINE TO MUJHEY DHYAN HAI MAINEY SHAYAD USKA KALEJA KHANE

KI KOSHISH KI HAI YA KALEJA KAYA HAI, PURI TARAH MEREKO ITNEE TEJ VO HO RAHI THI KI MAN MEIN MERE KO PATA HI NAHI HAI MATLAB BAD MEIN JAB MAN SHANT HUWA TAB PATA LAGA KI MAINE YE SAB IS TARAH SE KAR RAHA RAKHA HAI ISTARAH KI HALAT HO GAI THI MERI

MATLAB JIS SAMAY TUMEY? TUM YE KAHANA CHAHATE HO KI JIS SAMAI TUM YE KAM KARATE THEA US SAMAI TUMEH PATA NAHI LAGTA THA?

JIS SAMAI MAIN KAAM KARTA THA, PURI TARAH NORMAL REHTA HI NAHI THA.

ACHHA!

US SAMAI AYSEE HO JATA THA JAISE NASHE MEIN KAM KAR RAHA HOON. TO MATLAB JIS KE GHAR PE MAIN KAAM KAR RAHA HOON JAHA JAHA BHI MAINE KAAM KIYA HAI SABKO PATA HAI KI MAINE, KUCHH BHI NASHA WAGARAH AUR TO AUR KABHI BEEDI CIGRETE BHI NAHI PEE HAI AAJ TAK, TO YE TO BAHUT DOOR KI BAT HAI, ACHHA. IS TARAH KA MERE KO HO JATA THA.

KITNI DER BAD YE SHANT HOTA THA MAN?

KAM SE KAM DO GHANTA DHAI GHANTA, TEEN GANTA ITNA CHAR GHANTE BHI LAG JATE THAY ACHHA! AUR KABHI KABHI DO DO TEEN TEEN DIN TAK PRESSURE BANTA HI REHTA THA. IS TARAH KA MERE KO HOTA THA.

KIS CHEEZ SE SHANT HOTA THA MAN?

APNE AAP HI SHANT HO JATA THA, JAISE KI MATLAB KI MAIN KOI KAM KAR LIYA USSE KYA PATA KYA TASALLI HOTI THI, PATA NAHI KYA HOTA THA MERE KO MUJHE ISKA VO NAHI HAI. ACHHA! TO MATLAB MAN TAB MERA SHANT HO JATA THA,

KYA TUM YE KEHNA CHAHTE HO KI TUM, KISI KO UTHA LETE THE, YE BACCHE KO UTHA LE TE THI, NARTE THE KATTEY THE, USKE BAD VO SAB KAR NE KE BAAD TAB MAN APNE AAP SHANT HOTA THA?

HAN TAB MAN SHANT HOTA THA MERA

YE KEHNA CHAHTE HO? HOON ACHHA!

TO ITNA PRESSURE BAN JATA THA MERE MAN MEIN TO USKE BAAD FIR JAB KUCH DIN KE BAAD KI BAAT HAI FIR DOPAHAR KE KAREEB AISE HI EK DIN DOPAHAR MAI KAREEB BARAH EK BAJE KE AAS PAAS KI BAAT HAI TO EK FNAAM KI LADKI HI VO VAHI PAR KAAM KARTI THI, THODA SA HAMARE GHAR SE AAGE JA KAR KE, VAHA PAR CHOWKIDARI KARTE HEIN WAHAPAR USKO BHI, US LADKI KO BHI MAINE PAHLE HI DEKHA HUA THA, AATI JATI RAHTI THI EK DIN MAINE USKO BULA LIYA DOPAHER KE TIME MEIN PHIR MEINE USKO BATAYA JAB MAI TERE LIYE KHILONA LAYA HOON, USNE BOLA DIKHAU KAHA HAI AUR USKE BAAD JAB MEIN ISKO GHAR KE ANDAR LE AYA, AUR DUSTING KE KAPDE SE ISKA GALA DABA KAR KE ISKO BEHOSH KAR DIYA AUR ISKO ISKE PAJAMA KHOL KAR KE

ISKE SATH BHI SEX KARNE KI KOSHISH KIYA LEKIN SEX NAHI HUWA, USKE BAAD ISKO MAR KAR KE UPAR BATHROOM MAI RAKH DIYA, AUR BATHROOM MEIN RAKHNE KE BAAD NEECHE AAYA AUR NEECHE SE AA KAR KE EK KATTA LE KAR KE GAYA KATTE YE HAMARE JO HAIN AUR CHANDIGARH SE ATTA AATA THA KATTO MEIN CHANDIGARH MEIN GHAR HAI SARDAR JI KA TO WAHA, YE JATE REHTE THE, KATTO MAI ATTA AATA THA, TO ISLIYE KATTE GHAR PARE HOTE THEA TO MAIN MATLAB USKO DAAL KAR RAKH DIYA BATHROOM MAI, HOON! HOON! ISKE BAAD RAAT KO USKO BHI SHAM KO MATLAB KAR KE PEECHEY GALLARY MAI FAIK DIYA, ACHHA! USKE FIR USI DIN KI BAAD KI BAAT HAI, MATLAB MUSHKIL SE MAHINA DIN PANDRAH DIN BEES DIN MAN KO CONTROL KAR PAATA THA BAS, IS SEE JYADA NAHI HOTA THA FIR DUBARA VAHI FIR HO JOTA THA, TO IS TARAH SE YE HOTA RAHA MERE SATH, FIR KUCH DIN KE BAAD KI BAAD KI BAAT HAI,

NAHI EK BAAT YE HAI ABHI TUM KAHATE HO KE VO SAB LADIES LADKIYA VAHA AATI THI, TO TUM TO TUMHARA KAAM TO SIRF UNKO KHANA KHILANA HI THA, USKE BAAD FIR MAN KHARAB KYO HOTA THA,?

SEX KI JAGRITI KYONKI MAIN GHAR ME MAIN AKELA MAIN BHI GHAR MAIN HOON UNKO BANA RAHA HOON, KHILA RAHA HOON, IS TARAH KA HAI KARKE

KYA TUM UNKO DEKHTE THE?

HANJI MAIN DEKHTA TO LADKIYO KO GHAR PAR.

HAAN, KE GHAR MAIN DO DO TEEN TEEN, LADKIYA EK ADMI KE LIYA OR ENKE DOST BHI AATE THE

DOST KA NAAM?

JO GHAR MAI AAYA JAYA KARTA THA VO AVNISH PRATAP HAI, AVNISH PARTAP HANJI YE JCB KA HI KOI HAI AFSAR, MUJHE PAT NAHI KYONKI, GHAR MAI AATA JATA HAI LEKIN OFFICE ME MAIN JATA NAHI HOON MAIN BOHOT KAM JATA HOON, THEEK HAI YE DONO HI JYADA SAATH REHTE THE GHAR MAI JAB POLICE KA JIS DIN RAID PADI THI GHAR MAI, POLICE ENKO PAKARKE LE GAI THI, DO LADKIYO KE SAATH AKELA SO RAHA THA SARDAR JEE, TO US DIN JAB POLICE PAKAD KAR LE GAI THI POLICE RAAT KO DO DHAI BAJE, USDIN BHI AVNISH GHAR MAI HI THALEKIN AVNISH PARTAP DOOSRE KAMRE MEIN SO RAHA THA SARDAR DO LADKIYO KE SAATH AKELA HI SO RAHA THA GHAR MAI TO ISIKO LE KE GAI THE, VO DUSRE KAMRE MAI AKELA SO RAHA THA ACHHA! AUR VO RAAT MAI HI USKO PAISE VAISE DE KAR YA PATA NAHI KAISE, VO RAAT KO HI VAPAS GHAR AA GAYA THA, ACHHA! HANJI, TO ISI TARAH MATLAB MERE MAN MAIN ISI TARAH KI VAJAH SE JYADA PRESSURE BANA, WO ISI WAJAH SE BANA HAI, NAHI TO MAIN PAHALEY BHI BOHOT JAGAH KAAM KIYA HAI MATLAB PANCH PANCH CHAI CHAI SAAL MAINE, KOTHIO MAIN KAM KIYA HAI, AUR SHURU SE JAB MAI AAYA HOON KOTHIYO MAI HI KAAM KAR RAHA HOON, USKE SIRF DAID SAAL HI MAINE, JAB KAAM KUCH NAHI THA MERE PAAS, TABHI MAINE BAHAR MATLAB

REHDI ROOHDI DYARE WHYARE KA KAAM KIYA HAI MATLAB AUR BAAKI MATLAB MAINE SHURU SE HI KOTHIYO MAI HI KAAM KIYA HAI AUR KAHI BHI MAINE MATLAB AAJ TAK PEHLE BHI MERE MATLAB, KOI IS TARAH KI KOI VO NAHI HUA

AGAR MAIN IS TARAH KA KARTA TOO JINHONE MERE KO INKE GHAR PAR LAGAYA THA MAJOR SWARAN SINGH NE UNKE GHAR PAR MAINE SAAL DAID SAAL KAAM KIYA HAI HOON AGAR MAIN INKE GHAR PE KAHI BHI AIK RUPAY KI BHI HERA PHERI KARTA TO MATLAB YE MERE KO APNI GADI MEIN BITHAKAR UNKE GHAR KAM PAR LAGA KAR NAHI AATE ACHHA! HANJI TO MAI MATLAB IN CHEESO SAI MAI BOHO JYADA DARTA THA, YE SAB KARNE SE KI MAI AIK GARIB AADMI HOON KAL KO KOI BAAT HO GAI TO IN CHEEZO SAI BOHOT ZYADA DARTA THA, KYONKI MAI TO APNE GHAR MAI HI MERE KO TO DO PAISE MILTA HAI USI SE MAIN APNE GHAR KHUSHI SE CHALA LETA HOON, AUR BAAD MAI USKE ALAVA MERE PAAS NA TO KHETI HAI AUR NA MERE GHAR HAI AISE HI LAKDI PATHAR KO LEKAR JHOPDI PITAJI NE BANA RAKHI HAI US TIME, BEES PACCHIS SAAL PEHLE KI, VAHI HAI USKE ALAWA MERE PAAS KUCH HAI BHI NAHI HAI, MERA BILKUL HI KACCHA PARIVAR HAI, TO MAI YAHA PAR AANE KE BAAD, MERI ZINGDGI PURI TARAH SE BARBAD HI HO GAI HA, TO USKE BAAD FIR MAI FKE BAAD FIR EK LADKI AUR PUSHPA NAAM KI LADKI THI, NAAM MEIN PHOTO DEKH KAR KE NAAM KO SAB MERA YE POLICE NE RATVAYA HAI, UP POLICE NE.

KYA RATVAYA HAI?

YE MATLAB JAB UP POLICE NE JAB MEREKO PAKDA THA US TIME MEIN MATLAB KI INHONE MERE KO YE SAARE PHOTO DEKH DEKH KAR SAB KA INKA NAAM WAGARAH INHONE HI HAI MATLAB KI ISKA YE NAAM HAI, ACHHA! YE TIME WAGARAH KA AUR IS TARAH KA LEKIN TIME KA TO MERE KO ABHI PATA ABHI BHI NAHI HAI PATA, YE BATAYA THA MAI BHOOL GAYA,

TO YE LADKI SUBAH TO PHOTO TUM KAISE PAHCHANTE HO HANJI

PHOTO KAISE PAHCHANTE HO?

YE MERE KO POLICE WALO NE BATAYA HAI SARI, SARI PHOTO, US TIME TO MERE KO PURE TARAH SE NASHE TYPE KA REHTA THA. TO MERE KO KUCH PATA HI NAHI CHALTA THA, JO MAI AAPKO BATA RAHA HOON KI MAIN UNKE SAATH SEX KARNE KA KOSHISH KARTA THA, ISKA BHI MERIKO PURI TARAH SE PURI TARAH SE ANDAAZA NAHI THA KI MAIN KARTA THA, MAIN KOSHISH KARTA HI THA. JAHA TAK KI HAI KI MERA MATLAB ANDAZA HI THA PAR MARTA MALZAROOR THA

MERE KEHNE KA MATLAB YE HAI KI TUM JIN BHI BACCHO KO LAATE THE, YA LADKIYO KO LAATE THE, HANJI, UNKA PHOTO KAISE PAHCHANTE HO? PHOTO?

KISI KISI KA MATLAB?

JAISE MATLAB. SHAM KI TIME MAN SHANT HO JATA THA MATLAB AU SHAAM KO JAB RAKHA HOTA THA BATHROOM MAI KATTA PITTA AUR - SHAM KE ALAWA TO FIR HOTE THE TO PATA LAG JATA THA KI IS TARAH SE HUA HAI MATLAB KI POLICE WALON NE, BATAYA KE YE KAAM VAAM VALI HAI, TO WO MATLAB INHONE MERE KO BATAYA KE HAAN YE KAAM VALI AURAT YE HAI, YE KAR KE

NAHI TO JIN BHI BACCHO KO YA AURTO KO TUMNE MARA HAI YA KAATA HAI JAISE KI TUMNE ABHI BATAYA HAI HANJI TO VO LOG TUMHE, TUM UN LOGO KO PAHLE SE JANTE THE?

MAIN KISI KO PEHLE SE NAHI JANTA THA, JO MAI PEHLE SE JANTA THA VO MAINE AAPKO BATA DIYA HAI, KAUN KAUN? KI MAI LAGBHAG MAI THOD THODA SA AIK TO MAI, K NAAM KI LADKI KO JAANTA THA, AIK DO BAAR PEHLE BHI APNE BHAI BEHNO KE SAATH KAPDE LENE HAMARE GHAR MAI AAI HAI ACCHA! AUR AIK JO HAI HAMARE GHAR KE AAGE SE AATI JATI HAI, EK FNAM KI LADKI THI, JO MAINE JISKA NAANA JI DO NUMBER MAI KAAM KARTE HAI VO CHAUKIDARI KARTE HAI VAHA PE BAS INKE ALAWA AUR KISI KO NAHI JANTA INME SE.

ACHHA!

HANJI.

THEEK HAI!

BAAKI YE JO BHI NAM WAGARAH MAIN BATA RAHA HOON YE SARE MAIN YE SAARE NAAM MERE KO JO HAI PHOTO DEKH DEKH KE HE MATLAB POLICE WALON NE BATAYA HAI, POLICE WALON NE BATAYE HAI?

HANJI, NAAM SHAYAD. YE NAAM HAI AUR YE MATLAB PHOTO TO JAB MAIN SHAAM KE TIME JAB FAIKTA THA JAB MAN SHANT REHTA THA DEKHTA THA, TAB JA KAR KE TO MERE KO THODA THODA DHYAN THI TO PHOTO MAINE BATAI HAI KI YE MAINE KIYA HAI KARKE.

HAAN, NAHI YE BAAT TO THEEK HAI KI TUMHE NAAM PEHLE NAHI PATA HONGE? HANJI LEKIN JO PHOTO POLICE WALE TUMHE DIKHATE THE UNKO, DEKHNE KE BAAD TUMHE YE SAMAJH MAI AA JATA THA KI TUMNE IS AURAT KE SAATH YA IS BACHE KE SAATH YA IS LADKI KE SAATH INKO MAARA HAI YA KAATA HAI,

THODA THODA DHUNDLA DHUNDLA YAAD THA MERE KO ISLIYE MAINE UNKO BATAYA HAI UNKO

DHUNDLA DHUNDLA YAAD THA IS LIYE BATAYA?

ISLIYE BATAYA HOON SAHAB ACHHA! ISI LIYE MAINE YAHA BHI SARA BAYAN YAHA KI HANJI YE MAINE KIYA HAI YE SARA MAINE KIYA HOON, KYONKI SHAAM KE TIME JAB MAN, JAB MAI FAIKTA THA TO US TIME MAN SHANT HI REHTA THA, ACHHA! JYADATAR MAN US TIME SHANT HI RAHA HAI KYONKI KABHI KABHI YE HUA KI JAB MAIN USI TIME, MATLAB UTHAYA MAINE AUR PEECHHE GALARY MAI FAIK DIYA LEKIN, KABHI KABHI MAN THODA SHANT HUA

THA THODA THODA MATLAB JAB PHOTO VO JAB CHEHRA DEKHA DALTE TIME, MATLAB PANNI MAI BHAR KAR DALATA TIME JAB MAIN, DALTA THA UNKA HOON HOON JAB INKO KATTA THA PANNI MAI BHAR KE DALTA THA, TAB JA KAR KE MUJHEY JO HAI DHUNDLA DHUNDLA YAAD HAI YAAD HAI, MAINE SAARA UNKO BATAYA, AUR PHOTO DEKHA KAR HANJI YE HAI, ACHA, THEEK HAI! JISME SE DO TEEN PHOTO AISI THI MATLAB USME SE MERE KO KAAFI TORTURE KIYA AUR TAB JA KAR KE MATLAB JO INHONE MERE KO KABOOL KARVAI THI, ACCHA! BOHOT JYADA TORTURE KIYA GAYA THA MERE KO, ACHHA TO JISKI VAJAH SE UNHONE MERE KO YE DO TEEN PHOTO JO HAI MATLAB ISME SAI KUCH WO KARVAI THI, JO MAINE YAHA CBI MAI AAKAR MANA KAR DIYA KI AAP CHAHE KUCH HI KAR LO LEKIN YE MAINE KIYA HI NAHI HAI,

ACHHA!

TO ABHI AGAR AAPKO HAM VO PHOTO DIKHAI JAYE TO VO BATA SAKETE HO KAUN KAUN SI LADKIYO, YA AURTO YA BACCHOO KE SAATH AAPNE KIYA HAI, UNKO MAARA HAI KAATA HAI, YA JO BHI APNE BATAYA UNKE BAARE MAI? HANJI PEHCHAAN SAKTE HO?

HANJI, SEX KIS KIS KE SAATH KIYA HAI ISKA NAHI BATA PAUNGA KYONKI MAI US TIME CONTROL MAI NAHI REHTA THA, THEEK HAI! LEKIN AGAR PHOTO DEKH LOONGA TO PEHCHAAN JAOONGA ACHHA!

HANJI,

AUR KYA BATA RAHE THE BATAIYE?

AUR ISKE BAAD FIR EK PUSHPA NAAM KI LADKI THI, HAAN, YE SUBERE KE KAREEB AATH NAU BAJE KE KAREEB KI BAAT HAI, TO YE SUBERE 30 KI TARAF MATLAB, NITHARI GAON KI TARAF SE 30 SECTOR KI TARAF KAAM PE JA RAHI THI, HOON ISKI UMR KAREEB 11-12 SAAL KE RAHI HOGI, TO 11-12 SAAL KI LADKI THI, KAAM PAR JA RAHI THI SECTOR 30 KI TARAF TO ISKO MAINE. TO ISI TARAH SE PRESSURE THA MAN MEIN, MAINE ISKO BULAYA AUR KAHA KAAM KAREGI IS NE KAHA, HANJI. TO ISKO MAINE KAHA MAI ANDAR AAJA MAI PAISE KI BAAT KARWA DETA HOON, ISKO MAI ANDAR LE AAYA OR ANDAR LEKAR KE AA GAYA. SATH HE SATH USKO MAINE USEE TIME MAINE ISKO DUSTING KE KAPRE SE ISKA BHI GALA DABA KAR KE OR ISKO BHI MATLAB BEHOSH KAR DIYA OR ISKAY BAD BHI SEX KARNE KA KOSISH KIYA. KOSHISH KARNE KE BAD NAHI HO PAYA JAB TO USEE TIME MAINEY USEE KAPRE SE GALA DABA KARKEY USKO UPPER BATHROOM MEIN RAKH DIYA BATHROOM MAIN RAKHNEY KEY BAD MAIN NECHEY AAYA, NECHEY AA KARKEY EK KATTA LE GAYA OR ISKO BHI BANDH KARKEY KATTE MEIN UPPER BATHROOM MAIN RAKH DIYA. SAREY DIN YE BATHROOM MAIN PARE RAHI OR SAM KO MATLAB MAINEY ISKO GHAR KE PECHEY FENKH DIYA THA OR USKEY BAD EK HARSH NAM KA LADKA THA JISKO MAINEY LADKI SAMAJH KARKEY BULA LIYA THA. EK DIN DOPAHAR MAIN DO DHAI BAJE KE ASS PASS KI BAT HAIN. MAINE ISKO BULAYA, AUR CHOCKLETE DONGA YE

KAHKARKE MAIN ISKO ANDAR LEY AAYA OR ANDAR LANE KE BAD MAINE ISKA BHI NAK MU DABAKARKE ISKO BHI JO HAI BEHOSH KAR DIYA ISEE TARAH SE MATLAB BEHOSH KAR DIYA. AUR BEHOSH KARNEY KE BAD JAB ISKA BHI MAINEY KAPRA KHOLA TO YE BHI LADKA THA. ISKO BHI MAIN USEE TIME BATHROOM MAIN LEKARREY AUR USKO BHI MAINE KAPRE WAPRE KHOLKARKEY MAINE OR USKO BHI KAT KARKEY OR WAHI MATLAB CHHOR DIYA AISAY HI OR YE BHI MAIREKO DYAN NAHI KI MAINEY KOI KISI KA PEES KHATA THA BHI YA NAHI BHI KHATA THA YA KHALI MAN MAIN FEELING HI AATI THI, YA HAKIKAT MAIN MAINEY KHAYA HI HAIN KISI KA. LEKIN JO DO LADKIYO KA MAINEY SHUROO MAINEY BATAYA HAIN KI HA MAINEY KHAYA HOON ISLIYE KYONKI MERA MAN SHANT HOTA THA TO SABSE PEHLE LADKI KO KIYA THA TO USKA CHAPPAL DRAWING ROOM MAIN HE RAH GAYE THE, TO WO MEREKO TAB JAKAR DHYAN AYA KI MAINEY USKA BANA HUWA COOKAR ME DEKHA THA, JAB MAN SHANT HUWA TO MAINE DEKHA KI MAINEY USKA COOKAR MAIN MEAT BANAYA HUWA HAIN.

ACHHA!

HANJI

TO ITNA MATLAB PARESHAN HO JATA THA MERE DIMAG MAIN KOI WAHI NEHI RAHTA THA MATLAB IS TAHAR KI HALAT THI MERI. TO USKE BAD JAB MAINEY MEX KO MARA TO USKO BHI FIR USKO BHI KAT PEET KAR WAHI BATHROOM MEIN RAKH DIYA. BAD MAIN USKO NEECHEY AYA, PANNIYA LE KARKEY GAYA OR BHARKAR KEY WAHI RAKH DIYA AUR FIR BATHROOM DHO DIYA. USKEY BAD, USKEY MAINEY KAPRE UTHAI, KAPRE THEY AUR JUTEY THAY USKEY PAHENEY HUYE, DOOSRE TYPE KE WO PAHNEY HUYE THAY USNEY, SAR USKA UTHAYA OR GHAR KE PECHEY FENKH DIYA OR BAKI UDHAYA USKO OR GHAR KE AGEY AISEE NALI HAI AUR NALI MEIN DAL DIYA. ACHHA!, ISKEY DO TEEN DIN KE BAD KI BAT HAIN, EK L NAME KI CALL GIRL THEE, JO HAMARE GHAR MEIN AKSAR BAHUT MATLAB MATHAB ATTEE RAHATI THEE. SARDAR KE PASS KAI BARI MATLAB KAI BAR. RAT BITANEY KE LIYA AAYEE HUWI THI WAHA PAR TO ATTEE JATEE RAHATEE THI YE, PHIR NA JANEY KYA HUWA. RAT KE TIME MAIN HI MATLAB YE DONO DRAWING ROOM BAITH KAR KEY YE DAROO PE RAHE THE, TO KITCHEN MAIN SEE JO CALL GIRL AATEE THI WO KITCHEN MAIN NAHI ATTEE THI OR DRAWING ROOM OR BED ROOM MAIN HEE IDHAR HI GHOOMTI RAHTI THI GHAR MAIN MATLAB JO BHI LADKIYA, TEEN CHAR LADKIYA EKKHATTI LATA THA, YEE GHAR MAIN DISCO BHI KARTE THE MATLAB APNA MUSIC LAGA LIYA OR LACHTE RAHTE THE TO MAIN INKO MATLAB KOI CHEES BANAKAR KEY KHILATE PILATE RAHATA THA OR INKO DEKHTA REHTA THA MATLAB TO IS TAHARA SE JO HAI MATLAB MERA MAN MAIN PURA PRESSURE BANTA THA. MAINE ISKO L KO JO HAI AAYEE HUWEE THI KITCHEN MEIN AAYEE TO MAINE YE KAHKARKE ISEY PHONE NUMBER LAY LIYA THA KI MAIN TUJHSE KIS PARTY SE BAT KARWANI HAI. TOO TU APNA NUMBER DE JA, TO ISNEY MEREKO APNA APNA NUMBER DE DIYA TO MAINE USKO PHONE KAR KE BULAYA TU USNE

KAHA ABHI TO MAI KAHI GAI HUI HOON. TO ABHI TO NAHI AA SAKTI, KAL AAONGI. TO MAINE KAHA THEEK HAI, BUS ITNA KAH KAR KE MAINE PHONE RAKH DIYA, USKE BAAD DUSRE DIN JAB SHAAM KO JAB YE AAI TO SUBAH SE HI MAI VAHI DO TEEN DIN SE HO HI RAHA THA, DO TEEN DIN SUBAH SE BOHOT ZYADA PRESSURE BANA HUWA THA. JAB MATLAB YE LOG KAHIN CHALE JATE THE TO AYA BHI CHHUTEE MAR JATE THI TO GHAR MAI KAAM KARNE WALI AA JATI THI

KYA NAAM THA USKA?

USKA NAAM MAYA HAI, VO BHI KABHI KABHI BEECH BEECH. MAI MATLAB MAHINE MAI, AIK DO CHUTTI KARTI THI VO BHI, US DIN BHI JAHAN TAK HAI KI MAYA BHI AAI THI YA NAHI AAI THI YA MAYA AAA KAR KE KAAM KAR KE CHALI GAI THI, KYONKI YE KAREEB CHAR SADECHAR BAJE KE KAREEB AAI THI GHAR PE, AUR JAB MAINE ISKO JAB YE GHAR KE ANDAR ENTER KIYO TO USI TIME, ISI KI CHUNNI SE MAINE ISKO DRAWING ROOM MAIN ATE HEE EKDUM SE GHUMA KAR KE NEECHE GIRA DIYA MATLAB, JAB NEECHE GIRANE KE BAAD ISKO BEHOSH KAR DIYA AUR BEHOSH KAR NE KE BAAD ISKO ISKE SAATH SEX KARNE KE KOSHISH KIYA, MUJHE LAGTA HAI JAHA TAK HAI ISKE SAATH MAINE SEX KIYA HAI. ACCHA!, PAR SACH KYA HAI VO MERE KO PURI TARAH SE DHYAN NAHI HAI PAR MERE KO YE HAI KI MAINE ISKE SATTH SEX KIYA HUOON KARKE USKE BAAD FIR MAINE ISKO BHI GALA DABA KE PURI TARAH SE MAAR DIYA AUR ISKO UTHA KAR UPAR BATHROOM ME RAKH DIYA AUR BATHROOM MAI RAKHNE KE BAAD ISKO BHI MAINE KAAT PEET KAR KE VAHI CHOOD DIYA AUR YE KYA HAI NEECHE SE AAKAR KE PANNNI LE KAR KE GAYA, AUR PANNI ME DAL KAR KE ISKO RAKH DIYA, PANNIYO MAI DAL KAR RAKHNE KE BAAD, SHAAM KO ISKO BHI FIR MAINE ISKA SER AUR KAPDE AUR CHAPPAL AUR ISKE HAATH MAI AIK PURSE THA LAL SE RANG KA JISME 30-32 RUPAY THE JO MAINE 30-32 RUPAY AUR ISKA MOBILE JO HAI, MOBILE THA ISKE HAATH MAI.

WO MOBILE MAINE USME APNE NAM SE SIM CARD DAL KAR KE ISKA MOBILE USE KIYA HAIN AUR ISKO MAINE JO HA ISKE KAPRE AUR CHAPPAL JO HAI PECHHE FENK DIYA THA AUR BAKI ISKO BHI GHAR KE AGE DAL DIYA THA USKE BAD DAS YA GYARAH TARIKH KI BAT HAI NAND LAL GHAR PE AYA EK DIN, ISKE BAP KA NAM NAND LAL THA.

KAUN SE MAHENE KI ABHI KAH RAHE HO NA? DAS GYARAH RAEEKH KI BAT HAI KOI MAHINA?

MAY KI BAT HAI, YE MAY KI BAT HAI. HAA MAY 2006 KI BAT HAI, YE TO NAND LAL JO HAI MATLAB ISKO JO HAI BAP HAI MATLAB WO CHAR PANCH DIN KE BAD JO HAI GHAR PE PATA KARNE KE LIYE GHAR PAR AYA TO WO YAHA AISE KAM SE AYEE THI. YAHAN ANE KE LIYA BOL KE GAI THI KYONKI USKO PATA THA KI YE AISE KAAM KARTE HAI AUR LEKIN USNE POLICE KO BATAI THA KI MATLAB YE NAUKRI KE LIYA WAHA GAI THEE JAB KI USKO YE PATA THA KI WO AISEE KAM KE LIYA, AUR AISAY KAAM KARTEE HAI MATLAB

HAMARE PASS AYEE THEE, USNE ATTE HI MERE SE PUNCHHA KI WO YAHA AAEE THI AUR WO SAHAB KA MOBILE NUMBER WO LIKH KAR LEKE AYE THEA WO EK KAGAJ PAR HOON HOON! AUR MERE KO KAHA KI IS NUMBER PAR PE PHONE GAYA THA AUR MATLAB JO HAI YAHA BOL KAR GAI HAI AUR YE NUMBER DEKAR GAI HAI AUR YE KAHA HAI KI IS NUMBER SE PHONE AYA HAI AUR MERE KO WAHA JANA HAI MATLAB WO YAHA AYEE THEE AUR CHAR PANCH DIN HO GAYE HAI JO ABHI GHAR NAHI GAI HAI AUR KAHA BHEJHA HUWA HAI USKO HAME PHONE NUMBER AUR ADDRESS DE DO WAHA KA. HUM APNE AAP USKO YAHA LE AYANGEY. TO USKO MAINE PAHLE HEE MAR DIYA THA LEKIN MAINE UNKO BHI NAHI BATAYA AUR POLICE KO BHI NAHI BATAYA. SIRJI ACHHA! ACHHA! FIR USKE BAD KUCHH HI DIN KE BAD KE BAD KI BAAT HAI FIR EK G NAM KI LADKI THEE JISKI UMAR CHAR SE BARAH SAAL YA BARAH TERAH SAAL RAHI HOOGE, BARAH TERAH SAAL KE KAREEB KI THI TO WO SECTOR TEES KI TARAF SE DOPAHAR KO DUS GYARAH BAJE KI BAAT HAI GYARAH BARAH BAJE KI BAAT HAI, WO TEES SECTOR KI TARAF SE EKATEES KI TARAF AA RAHI THEE TO MAINE USKO BULAYA KAHA KAAM KAREGE USNE KAHA HANHI TO FIR MAIN PAISE KI BAAT KARNE KE LIYA ANDAR LEKAR AA GAYA AUR PAISE KI BAAT KARNE KE LIYE ANDAR LE AYA

PANI PIYOGE KYA? PEELO, PEENA HAI TO?

TO USKO MAIN PAISE KI BAAT KARNE KE LIYE ANDAR LE AYA THA. HOON! HOON! AUR THORA THORA DHUNDHLA DHUNDLA USKA CHEHARA YAAD THA ISLIYE USE MATLAB POLICE KO BATAI THA KI HAA YE LADKI HAI KARKE JAB UNOUNNE MERE KO PHOTO DIKHAI THEE, KARKE NAAM KA MERE KO PATA NAHE THA, NAAM TO MERE KO KISI KA BHI YAAD NAHI. NAAM MERE KO SARE UNNONE HI BATAI HAI PHOTO MERE KO THORI THOKI DHUNDLI YAAD THI TO MAINE BATAYA KI HA MAINE IS TARAH KI HAI FIR USKE BAD MEIN US LADKI KO BHI UPPAR BATHROOM MEIN LEKAR GAYA TO USEE TIME MAINE KAT PEET KAR KE BATHROOM MEIN KAKH KAR CHHOR DIYA AUR NEECHE AYA AUR PANNIYON MEIN LEKAR KE GAYA AUR PANNIYO MAIN DAL KAR USKO BHI AUR BHAR KE WAHI BATHROOM MEIN WAHI RAKH DIYA. AUR RAAT KO USKO BHI MATLAB JO HAI USKO BAKI TO GHAR KE AAGE NALI MEIN DAL DIYA AUR SIR KAPRE AUR CHAPPAL YE GHAR KE PEECHE KO US GALLERY MEIN DAL DIYA AUR BATHROOM SAAF KAR DIYA

(At this stage it is already 10.55 PM. The work of transcription is very lengthy and slow process and it needs several times corrections, therefore it could not be completed till this time and still some transcription work is to be done and it seems that it shall not be feasible to do the same today. Therefore, accused is directed to be produced before Ld. ACCM, for further appropriate orders. Mr. Shaym who is handling the work of operating CD is directed to shut down the computer and he has complied and it is confirmed that none can access to the computer. CD is again sealed with the court seal bearing the signature of the accused and myself.)

RO & AC

Chandra Shekhar
Metropolitan Magistrate
Patiala House Courts,
New Delhi 2.3.2007

In this regard a separate order was passed and was given to the IO for producing accused before Ld. ACMM. Same is Mark 'H'

Chandra Shekhar
Metropolitan Magistrate
Patiala House Courts,
New Delhi 2.3.2007

03.03.2007

Today order dated 2.3.2007 which is mark 'J' and order dated 3.3.2007 which is mark 'K' is received from the court of Ld. ACMM, New Delhi and accused is produced by Inspector Rakesh Kumar alongwith SHO PS, Tilak Marg. The seal of the CD is broken in presence of accused and the work of transcription is initiated further:-

AUR KUCHH DIN BAAD KI BAAT HAI DOPAHAR KE KAREEB BARAH EK BAJE KE KAREEB KI BAAT HAIN EK CHHOTEE SEE GANJI SEE LADKI THEE JISKA NAM PHOTO DEKHNE KE BAAD PTA CHALA KI USKA NAAM I HAI AUR USKA NAAM I HAIN, USKO BULAYA MAINE AUR YE KAHKAR KE KI MATLAB KI MEIN TERE KO CHOCELETE DOONGA. WO AA GAYEE. USKO KAHA KI ANDAR AAKE DOONGA. ANDAR AA GAYEE. ANDAR LE AYA USKO DUSTING KE KAPRE SE USEE TIME USKA GALA DABA DIYA AUR GALA DABAKAR USEE BEHOSH KARKE USKEY SATH BHI SEX KARNE KA KOSHISH KIYA AUR SEX KARNE KA KOSHISH KIYA. USKE BAD SEX NAHI HUWA AUR USKO BHI UTHAYA MAINE AUR UPPAR BATHROOM MEIN RAKH KE AA GAYA AUR BATHROOM MEIN RAKHNE KE BAD FIR MEIN JAB NEECHE AYA AUR NEECHE AA KAR KE CHAKOO LE KAR KE GAYA AUR PANNI LE GAYA AUR USEE TIME USKO KAT PEET KARKE MAINE PANNIYON MEIN DAL KAR KE MAINE RAKH DIYA AUR PANNIYON MEIN DAL KAR RAKH DIYA AUR USKE BAAD USKO BHI RAAT KO SIR KAPRE AUR CHAPPAL USKE GHAR KE PEECHHE GALEERY MEIN FENK DIYA AUR USKO BHI BAKI GHAR KE SAMNE WALI NALI MEIN DAL DIYA THA TO FIR USKE BAAD KUCHH DIN BAD KI BAT HAI EK NEPLAI TYPE KI EK LADKI THI TO MATLAB SECTOR TEES SE EATEES KI TARAF JA RAKHI THEE. SUBAHRE SADE AATH NAU BAJE AAS PASS KI BAAT HAI TO USKO BHI MAINE AISEY HI BULA DIYA, USKO MAINE PAHLEY EK BAR WAHI NITHARI GAON MEIN KISI CHAWMIN WALON KE PASS WAHI PEECHEE GHAR KE PEECHHE WALI GALLERY MEIN CHAWMIN KI DUKAN HAIN WAHA CHAWMIN KI DUKAN PE USKO PEHLE EK DIN KHARE DEKHA THA TO USEE MAINE YE PUNCHHA KI KYA TOO CHAWMIN WALE KI BETI HAI KYA. TO USNE KAHA HANDI. MAINE KAHA CHAWMIN MANGANI HAI AUR CHAWMIN MANGANI HAI, USKE BAD FIR ANDR AAJA PAISE LEJA, WO ANDAR AA

GAYEE, ANDAR AATE HI MAINE PEECHHE PEECHHE USKE AYA AUR DUSTING KE KAPRE SE USKA BHI GALA DABAKE USKO BHI SEX MARJE KA KOSHISH AUR NAHI HO PAYA. USKE BAD USKO BHI GALA DABAKAR KE MAAR KE UPPAR BATHROOM MEIN RAKH DIYA AUR USKO BHI MATLAB USSEE TIME KAAT PEET KE UPPAR BATHROOM MEIN AISEE HI CHHOR DIYA MATLAB JAB BATHROOM MEIN KATA HUWA RAHATA THA TO MATLAB KABHI KABHI SHAM KE ADE PANCH CHAI BAJE TAK BHI AISEE HI PADI PADI RAHTI THI. BATHROOM MEIN FIR JAB MAIN KAAT PEET KAR AISEY HI KYONKI JAB MATLAB MAN SHANT HOTA THA USKE BAD TAB JAKAR KE TAB MATLAB DYAN HOTA THA KI KUCHH MATLAB JAB BATHROOM GAYA TAB DYAN HOTA THA KI KUCHH MATLAB JAB BATHROOM GAYA TAB DYAN ARYA AISA HOTA THA ACHHA !. TO MAINE UPPAR BATHROOM MEIN RAKHA KAAT PEET KAR KE UPPAR RAKHA HUWA THA FIR MAIN NEECHHEY AA KAR KE PANNIYON WANNIO MAIN DAL KAR KE LEKAR KE GAYA UPPAR AUR PANNIYON MEIN DAL KAR KE USKO BHI AUR BHAR KE RAKH DIYA AUR RAAT KO USKO BHI ANDHERA HONE KE BAAD USKE KAPRE AUR CHAPPAL AUR SIR YE SAB MAINE GHAR KE PECHHE FENK DIYA THA. AUR BAKI USKO BHU GHR KE AAGEE NALI ME DAL DIYA THA. FIR KUCHH DIN KE BAD KI BAAT HAI, EKEWO!ENAHI EK AURAT THI, USKO MAINE DOPAHAR KO KAREEB DAID DO BAJE KE AAS PASS KI BAAT HAIN, TO DAID DO BAJE KI BAAT HAI, MAINE USKO KAAM KE LIYE BULAYA AUR YE KAHKE ANDAR LE AYA KE ANDAR AJA MAIN TERE PAISE KI BAAT KARWA DETA HOON WO JAISE HI ANDAR AAYEE AUR ANDAR AATE HI MAINE USKE PEECHHE PEECHHE AA RAHA THA AUR USEE KI CHUNNI SE USKO BHI GALA DABA KARKE USKO BHI GALA DABA KARKE USKO FIR EK DUM SE NEECHHE FIR MATLAB CHUNNI SE JHAPAT KAR KE USKO PEECHEY NEECHE GIRA DIYA AUR USKO CHUNNI SE PEECHHE NEECHE GIRANE KE BAD USKO BEHOSH KAR DIYA. BEHOSH KARNE KE BAAD USKE SAATH BHI SEX KIYA YA NAHI YE MERE KO PURI TARAH SE DHYAN NAHI HAI. LEKIN SEX KARNE KI KOSHISH MAI KIYA HOON YE DHYAN HAI MERE KO MAINE SEX KARNE KI KOSHISH KI HAI KAR KE TO, USKE BAAD FIR MAINE USKO KAPRE PAHNAI AUR VAISE HI UTHA KAR KE UPPAR BATHROOM MAI LE KAR KE CHALA GAYA, AUR MATLAB US TIME MAIN ITNA PRESSUE REHATA THA KI MERE KO YE BHI NAHI HIMMAT MATLAB SAMAJH NAHI AA RAHA KI ITNI BHARI AURAT KO UPAR BATHROOM MAIN KAISE LE KAR KAB CHALA JATA THA MAI AB SOCHTA HOON MAIN IS CHEEZ KO US TIME MERE KO IS CHEEZ KA PATA BHI NAHI LAGTA THA, MEIN UPPAR UTHAKE KAISE LE KE CHALA JATA THA TO MATLAB YE HAI KI MATLAB YAHI DHYAN HAI KI KANDHE PAR RAKH KAR LE JATA THA ISLIYE MAINE BATAYA MAINE KI MAI KANDHE PAR LE JATA THA HANJI.

DEKHO YE SAB KANE KE BAAD YAAD KAISE AA JATA THA SAM KI TUMNE KYA KIYA HAI YE SAB YAAD KAISE AAA GAYA?

KYA CHEEZ.

JAISE MATLAB YE HAI KI MATLAB MAN SHANT HO GAYA

JAISE MAINE UPAR BATHROOM MEIN KAAT PEET KAR RAKHA HUA HAI TO PANNIYON ME MAIN MATLAB BAD MEIN BHARTA THA JAISE, MAINE JAISE YA USI TIME BHAR LIYA PANNI BHARE HUWI RAKH LEE MATLAB SHAM KE TIME MEIN BATHROOM MAIN FELA HI RAHTA THA VAISE HI, TO AISE HI MATLAB SAB PADA HAI TO USKE BAD SHAM KO JAISE HI BATHROOM GAYA DOPAHAR KE BAD KYONKI WO US SE KARNE KA VAHI BATHROOM THA MERA ACHHA! TO MAIN BATHROOM GAYA JAISE TO WAISE MAI DO GHANTE MAIN DHAI GHANTE MAI, GHANTA BHAR MAIM MAN SHANT HO GAYA TO EKHA MATLAB UPPAR MAINE AISE HALAT KAR RAKHI HAI TO AB JAKAR KE MATLAB PANNIYON MAI BHAR KAR RAKH DETA THA ACHHA! TO IS TARAH MATLAB THODA THODA MATLAB JO HAI HEI CHEHRA TO CHEHRA TO MATLAB KHAS TOOR PE CHEHRE KA DHUNDLA DHUNDLA YAAD HAI TO MAIN BATA RAHA HOON, SEX KARTA THA YA NAHI KARTA THA, KOSHISH BHI KARTA THA YA NAHI KARTA THA, YE NAHI KARTA THA, KOSHISH BHI MARTA THA YA NAHI MARTA THA, YE NAHI MERE KO POORI TARAH SE YAD HAI LEKIN MAINEYE BATA RAHA HOON KI MAIN SEX KI KOSHISH KARTA THA ISLIYE BATAYA HAI KARKE, USKE BAAD FIR MAIN USKO BHI MAINE UTHA KAR KE BAHTROOM MEIN LE GAYA AUR KAAT KAR KE RAKH DIYA USKE BAD FIR MAINE PANNIYON MAI BHAR KR USKO BHI AUR RAKH DIYA, SHAAM KO ANDHERA HONE KE BAAD USKO BHI SIR USKEY AUR KAPDA CHAPPAL MAIN SAB GHAR KE PEECHHE FENK DIYA GALLERY MAI AUR BAKI UTHA KAR KE USKO BALTI MAI DAL KE NAALI MAI DAL KAR AA GAYA AUR USKE KUCH DIN BAAD KI BAAT HAI USKE BAAD AIK AUR AURAT THI, VO BHI SAFAI WALI THI SUBERE KI BAAT HAI KAREEB AATH SARE AATH, NAU BAJE KI BAAT HAI KE AAS PAAS KI BAAT HAI, SECTOR TEES SE EKATEES KI TARAF SE NITHARI GAON KE TARAF AA RAHI THI USKO MAINE POOCHHA KAAM KAROGI TO ISNE KAHA, HANJI, ISKO HI WAISEE HI PAISE KI BAAT KARWANE KE LIYE ANDAR LE AAYA ANDAR LANE KE BAAD FIR MAINE ISE JAISE HI YE ANDAR AA GAI AUR USEE TIME FIR ISI KI CHUNNI SH JHAPAT KAR ISKA GALA DABA KAR KE, ISKO BHI NEECHE GIRA DIYA AUR GALA DABA KE BEHOSH KAR DIYA ISKO. BEHOSH KARNE KE BAAD ISKE SATH BHI SEX KIYA, SEX KARNE KE BAAD ISKA GALA DABA KAR KE AUR UPPAR BATHROOM MAI LE GAYA, AUR ISKO BHI KAAT KARKE BATHROOM MAI RAKH DIYA AUR NEECHE AAYA AUR PANNIYON MAI BHAR KAR AUR RAKH DIYA VAHI BATHROOM MAI AUR BATHROOM SAAF KAR DIYA AUR RAAT KO ANDHERA HONE KE BAAD ISKO BHI MAINE, KAPRA CHAPPAL OR SIR ISKE GHAR KE PEECHE FAIK DIYA THA GALLERY MAIN AUR BAAKI JO HAI, GHAR KE AAGE NALI MAI DAL DIYA THA, USKE BAAD USKE KUCH DIN BAAD KI BAAT HAI EK DNAM KI AURAT THI, YE HAMARE GHAR MAI PAHALE BHI PAANCH CHHAI MAHINE KAAM KAR KE GAI HUI THI AUR KAAM KAR KE GAI HUI THI, EK DIN YE SECTOR KI 30 KI TARAF SE AA RAHI THI, KAHA SE AA RAHI THI YE NAHI MERE KO MALOOM SECTOR TEES SE NITHARI GAON KI TARAF AA RAHI THIM, AUR YE PEHLE KAAM KAR KE GAI HUI THI ISKA BACHA HUWA THA ISLIYEY KAAM CHHOOD KAR KE CHALI GAI THIM, USKI JAGAH MEN MATLAB USKI JAGAH MEIN EKENAAM KI AURAT NE KAAM

KIYA MAHINA DAIR MAHINA AUR USNEY CHHOOD DIYA USKE BAAD FIR MAYA KAAM KARNE LAG GAYEE. USKO TIME NAHI THAEKO. VO SECTOR 30 MAI KAHIN PE HOSTEL MAI KAAM KARTI HAI, ACHHA! JI SIR! TO USKI JAGAH MEINENE KAAM KIYA, DKI JAGAH US DIN WO POOCHHNE KE LIYE AAYEE TO MATLAB KAAM PAR KAB SE AAON MAI AUR USKE BAAD JAB VO AAI TO MAINE USEE TIME ANDAR BULAYA KI AAJA CHAI WAI PEE KE CHALE JANA AUR YE KEH KAR USKO ANDAR LE AYA, ANDAR LAATE HI MAINE USKO FIR USI KI CHUNNI SE USKO USKO BHI GALA DABA KAR BEHOSH KAR DIYA AUR BEHOSH KARNE KE BAAD, BEHOSH KARNE KE BAAD USKE SSATH BHI SEX KIYA. AUR SEX KARNE KE BAD USKO TO MATLAB KAPDE PEHNA KAR KE USI KI CHUNNI SE USKA GALA DABA KAR KE USKO MAAR DIYA. AUR UPAR BATHROOM MEIN LE JAA KAR KE RAKH DIYA. AUR BATHROOM MAI LE JAA KAR RAKH DIYA AUR KAAT PEET KAR KE CHHOD DIYA AUR USKE BAAD USKO BHI NEECHE AAYA AUR PANNIYON MEIN, PANNIYON KO LEKAR KE GAYA AUR ISKO BHI PANNI MAI ISKO BHAR KAR BHAR KAR BATHROOM MAI RAKH DIYA AUR RAAT KO USKA BHI SIR, KAPDA AUR CHAPPAL GHAR KE PECHHE FENK DIYA THA AUR BAAKI USKO BHI NAALE MAI DAAL DIYA THA, USKE BAAD AIK BNAAM KI LADKI THI, JISKEE UMAR KAREEB ATTHARAH SE BEES SAAL KI THI, ATTARAH SE BEES SAAL KI WO LADKI THI EK. TO SUBERE KE SADE AATH NAU BAJE KE AAS PAAS KI BAAT HAI TO WO SECTOR 31 KI TARAF SE TEES SECTOR KI TARAF JA RAHI THI TO SECTOR TEES KI TARAF JA RAHI THI AUR MAINE USKO SUBAH USKO AAWAI LAGA KAR BULAYA KI, KAAM KAREGI USNEY KAHA HANJI, MAINE KAHA AAJAO PAISE KI BAAT KARWA DEETA HOON, YE KAHKAR USKO ANDAR LE AYA AUR ANDAR LAANE KE BAAD MAINE USEE KI USI KI CHUNNI SE, JAISE HI VO ANDAR AAI AUR MAINE USEE KI CHUNNI SE USKA GALA DABAR KAR KE USKO BEHOSH KAR DIYA, USKE BAAD USKE SAATH SEX KARNE KA KOSHISH KIYA, AUR USEE KI CHUNI SE USKA GALA DABAKAR KE USKO MAAR DIYA, FIR USKEY BAD USKO BHI UPAR BATHROOM MAI LEB JA KAR KE AUR. KAAT KAR KE VAHI RAAKH DIYA AUR BAD ME USKO PANNIYON MAL BHAR KAR KE BATHROOM MAI RAKH DIYA AUR RAAT KO FIR USKE SIR KAPDE AUR CHAPPAL YE SAB GHAR KE PEECHE FAIK DIYA THA AUR BAKI USKO BHI GHAR KE AAGE NAALI MAI DAL DIYA THA, ISMEI SE KUCH LOG TO AISE HAI JO MATLAB KI JAISE KI MATLAB KABHI KABHI AISEY BAHOOT BAR HUWA MATLAB JAISEY KABHI SARDAR MATLAB BODY UPPAR BATHROOM PADI HUWI HAI KATEE HAI YA SABOOT HAI YA JAISE BHI HAI SARDAR GHAR MEIN HAI AUR SARDAR GHAR MEIN AA GAYA. USKE BAD MAINE FIR FENKA HOON AND KYONKI WO MATLAB JO HAI LADKIYON KE SAATH EK DUM WO JO HAI LADIYON KE SAATH WO GHAR PE AAKEY WO BILKUL WO HO JATA THA. KYA KAHTE HAI USKO MATLAB MAST RAHTA THA MATLAB LADKIYON KE SAATH HI WO SAB BHI DAROO WAROO PEETI THI LADKIYA BHI DAROO WAROO PEETI THI YE BHI BEER WAGARAH PEETA THA AUR INKO MATLAB ISKEY GHAR PER RAHTI THI KAYEE BARI YE AISEY HUWA HAI MATLAB YE GHAR PER AA GAYA HAI AUR BATHROOM MEIN BODY PADI HUWI HAI JO MAINE BATAYA THA EK I NAM KI LADKI THI

US DIN BHI YE GHAR MEIN THA US TIME NAHI THA GHAR PE LEKIN US TIME BHI YE GHAR YEE THA MATLAB OFFICE GAYA HUWA THA, YE USKE BAAD YE GHAR PER AA GAYA AUR JO L KA MOBILE JO MAI USE KAR RAHA THA TO ISKO MERE SE BHI NAHI PUCHHA KI YE MATLAB MOBILE TERE PASS KAHAN SE AAYA YA KAISE AYA, YA TO ISKO MOBILE KE BARE MAI JANKARI THI KYONKI L JAB USKE PASS AATI THI TO MOBILE TO SAATH MAI HI REHTA THA USKE, TO HUM DONA EK HI CHARGER SE MATLAB MOBILE CHARGE KARTE THE MAI BHI APNA MOBILE USEE SEE CHARGE KARTA THA AUR SAHAB BHI APNA MOBILE USEE CHARGER SE MATLAB CHARGE KARTE THEE MAIN UNEEKA CHARGER USE KARTA THA AUR DRAWING ROOM MEIN KARTA THA ACHHA! TO SAHAB NE MATLAB MOBILE DEKHA HUWA THA. MOBILE MERE PASS LEKIN UNHOONEY KABHI MERE SE YE NAHI PUUCHHA KI TERE PASS YE MOBILE KAHA SE AYA AUR NA HI MAINE UNKO YE BATAYA KABHI KI YE MOBILE JO HAI L KA HAI TO SARJI YE HAI KI MATLAB MAIN YE SACHAI BAYAN KARNE KA MATLAB ISLIYA HAI KI AAP MERE LIYE COURT BHI HAI, JUDGE BHI HAI, SUB KUCHH AAP HI HAI MERE LIYE MAIN ISLIYE SACH SACH BATAYA KI TAKI MERE KO MATLAB JO HAI SACHAI SE JO HAI SACHAI KE RASTE PER JO CHALUNGA TO SHAYAD TO KUCHH NA KUCHH RIYAHAT BHI MIL SAKTI HAI AUR JO AAP KAHA RAHE HAI KI MATLAB JO HAI YE BAYAN DENE SE SAJAI MAUT BHI MIL SAKTI HAI TO MUJHE JO BHI MATLAB HAI SACHAI KE RASTE PER CHALNE SE CHAHE JO BHI SAJA HOGI MUJHEY MANJOOR HAI AUR MAIN BAHUT GAREEB PARIWAR SE HOON MERA

HA YE BATAO KI YE KEHTE HO KI ITNI JALDI TUM KAHTE HO KI MAI KAAT LETA THA, SUBKUCH AUR YE KAISE SAMBHAV HAI KI TUMNE PAHLE ISKA MATLAB TUMNE PAHLE BHI KUCHH KIYA HAI YA JANTE THE IS BARE MAI KI KAISEY KATNA HAI AUR KAISE NAHI KATNA?

SIRJI

IS SEE PAHLE MAINEY KABHI KUCHH NAHI KIYA THA ACHHA! IS SEE PAHLE KABHI KAHI BHI KUCHH BHI NAHI KIYA, KAHI BHI AAJ TAK NA TO KABHI MAI KISHI KE CHORI KE KISHI BHI ILZAM MEIN AAJ THAN POLICE KE PASS GAYA HOON NA PAKRA GAYA HOON NA MAIN POLICE KE BARE MEIN MERI ITNI JANKARI THEE SUNA HAI MATLAB KI KOI GALAT KAAM HOTA HAI TO POLICE USAY PAKADTI HAI, SAJA MILTI HAI, CBI KEY BARE MAI SUNA HAI LEKIN ABHI TAK MUJHE PATA NAHI THA KI. CBI KYA CHEEZ HOTI HAI

AB KUCHH AUR KAHANA CHAHATE HO?

KAHANA YAHEE CHAHATA HOON SIR MERE LIYE TO SAB KUCH AAP HI HAI

THEEK HAI!,

HANJI,

NAHI KUCH AUR BATANA CHHAHTE HO? MAINE KAHA

PATA NAHI BUS SIR BASJI YE JO HAI MAINE SACCHAI

BAYAN KAR DI HAI

JO KUCH TUM JANTE THE VO TUMNE BATA DIYA HAI, YA KUCH AUR BHI BAAKI HAI BATANE KE LIYE?

SIR JITNA MUJHE YAAD THA UTNA MAINE SAB KUCH BATA DIYA HAI.

ACHHA! AUR BAAKI AB JO BHI HOGA KYONKI KI MAI TO MERE BIBI AUR BACCHE HAI UNKA MERE ALAWA IS DUNIYA MEIN AUR TO KOI HAI NAHI SATH PESATH (60-65) SAAL KE MAMMI HAI AUR, EK BACCHHA HUWA HAI ABHI JANUARY LAST MAI HUA HAI,

THEEK HAI BUS

WO SAB CHEEZE NAHI BAAS YE JANNA CHAHTE THAY KI JO TUM KUCH KEHNE AAI HO VO TUMNE KAH DIYA HAI YA NAHI? HANJI BUS YE CHEEZ AB HO GAI HAI

YE CHEEEZ COMPLETE HO GAI HAI AB ISKO BANDH KAR DIYA JAI?

THEEK HAI JAISEE APKI ICHHA

ACCHA!

The statement of the accused Surinder Koli has been completed and it has been audio graphed and video graphed and the cassettes are required to be scaled as per the direction of the learned ACMM, and transcription shall be made, thereafter the proceedings are ended here. The necessary certificate as per law and the memorandumi shall be given while writing the transcription.

Chandra Shekhar

Metropolitan Magistrate
Patiala House Courts,
New Delhi 3.3.2007

(As the Statement of the accused has been Video Graphed and Audio Gruphed and it was stated at the end of the Videography that the Memorandum and Cenificate shall be given at the time of Transcription). The same is given as under:-

MEMORANDUM

I have explained to accused Surender Koli that he is not bound to make any confession and that if he does so any confession it may be used as evidence against him and during the Video Graphy whatever the accused stated in his confession statement was given by the accused was voluntarily. Moreover the accused Surender Koli

remained present always during the work of transcription since 1-3-2007 to 3-3-2007 till the whole work is being completed and he has heard and seen the recording several times and has tried to clarified certain words and sentences by his own without even asking by me. It seems that whatever he has stated is by his free will. Moreover, during the Video Graphy and aforesaid transcription I have also asked several times and on 3-3-2007 A morning and on 3-3-2007 in morning and at the end of the proceedings also that even at this stage if he wants to refuse from his confession or if he wants to say anything he may do so. However he has stated that whatever he wanted to say he has already said and he has told the truth.

Whatever, has been recorded above the same was done in my presence and on my dictation and hearing and was readover to accused Surender Koli and it has been admitted by him to be correct and it contains the full and true account of the statement made by him.

Chandra Shekhar

Metropolitan Magistrate
Patiala House Courts,
New Delhi 3.3.2007

CLARIFICATION

Due to inadvertence it has been stated by me during Video Graphy that Video Cassettes are prepared but infact the video CDs are prepared therefore the word Cassettes may be read as CDs.

CERTIFICATE

It is certified that the above recorded proceedings have been recorded by me truly and correctly and nothing to been added, subtracted or concealed therefrom and it is a true and full account of the proceedings. The proceedings were continued since the time it was marked to me in 1-3-2007 to 3-3-2007 till 09:00 PM continuously except for breakage for taking meals only, during lunch hours. In completing the proceedings two Stenographers, namely, Shri Praveen Singhania

and Shri Kripal Singh Sajwan, who were deputed for this specific purpose have completed the work diligently and industriously and one Shri Shyam Jaiswar has industriously assisted me in completing the proceedings

The annexures which have been mentioned in the proceedings are Marked from Mark A to Mark L. There is no such document as Mark I. Proceedings are completed and the same are comprised 48 pages.

The two CDs and one copy of the transcription be given to the IO Inspector M.S. Phartyal, CBI SCR-III/SCB Delhi, as per his request vide application Mark L, against a proper receipt for the purpose of further investigation and the Two CDs are kept on record which are duly sealed with the court seal and bearing the signature of accused and myself. Ahlamd is directed to seal the above said proceedings with the court seal and sent to the court of Ld. ACMM, Patiala House Courts, New Delhi, at the earliest.

The accused is directed to be produced before Ld. ACMM. Patiala House Courts, New Delhi, immediately, for further appropriate orders.

(Chandra Shekhar)

Metropolitan Magistrate
Patiala House Courts,
New Delhi 03.03.2007"

Retraction of confession by the accused

183. The records further reveal that accused SK retracted his alleged confession during the course of trial itself by sending repeated letters to the court concerned. The first letter on record has been filed in Capital Case No. 4196 of 2010 and is at page 88 of the paper book, which is reproduced hereinafter:

"मैं सुरेन्द्र कोली s/o शंकर राम कोली ग्राम मंगरुवाले 25.12.06 को सप्ताह भर की छुटटी लेकर घर गया था 26.12.06 को मोनिन्दर पंधार का ड्राइवर सतपाल मेरे घर गया और मोनिन्दर ने बुलाया है और दिनेश यादव को कु० पायल के बारे में कुछ पुछताछ करनी है और मैं इसी गाड़ी से तेर को परसों घर छोड़ जाउगा कहकर ले आया 26.12.06 को हम

मोनिन्दर के ओफिस डी 9 सै0 2 पहुंचे उसी दिन 27.12.06 को हम साम साढ चार या पाँच बजे ऑफिस पहुंचे 27.12.06 को मोनिन्दर अपने डाइवर पानसिंह के साथ मुझे लेकर सै0 20 थाने गया और साढ़े पांच छः बजे के करीब थाने छोड़कर आ गया उसके बाद पुलिस ने मे साथ वह सलूक किया जो में आज भरी अदालत में बयान नही कर सकता इसलिए में लिखित में द रहा हूँ।

1- मे मान्य न्यायलय से प्रार्थना करता हूँ कि में बहुत ही गरीब व सीधा साधा इनसान हूँ में मात्र 2500 रू० तनखा पाने वाला इतने बड़े अपराध के बारे में सोच भी नहीं सकता क्योंकि में कोई भी कमाने वाला नहीं है मेरे बच्चों का मेरे सिवा खिलाने वाला कोई नही है

मेने हमेशा बड़ी मेहनत व सावधानी से काम कि कि मे गरीब हूं मेरा कोई नही है मेने कुछ नहीं की मेरे साथ बहुत बड़ा अन्याय हो रहा है। मेरे को मेजर सोहन सिंह जो कि मोनिन्दर पधेर का दोस्त है डी 5 सैक्टर 31 में 24.7.05 को लगाया था। मोनिन्दर पंधेर पुलिस द्वारा कौलगर्ल के साथ पकड़ा गया था उसके बाद पुलिस का घर आना जाना लगा रहा में एक नौकर होने के कारण यह भी नही पूछ सकता था कि घर पुलिस क्यों आती है साहब में निदोष हूँ मेरे को टोरचर करके झुटा फसाया गया है नवम्बर में निठारी का नाला साफ किया गया था उसी दौरान डी 6 सेक्टर 31 के गार्ड रूम के नीचे से कुछ हड्डिया निकली थी जो वहा डी 5 सैक्टर 31 की तरफ को आ गयी वही ह्ड्डी पुलिस ने L की है कहकर मुझे कबूल करने का कहा जो की नन्दलाल की लड़की थी और नन्दलाल रात को कभी कभी मोनिन्दर के घर छोड़कर आता था वही लडकी नन्दलाल ने बंगाल या फिर कही ओर भेज दी ताकि वह मोनिन्दर पढेर से पैसा ले सके और मोनिन्दर के खिलाफ कम्पलेंट लिखा दी और पुलिस ने गरीब आदमी हैं सोच कर मई 2005 से लेकर अब तक मरे को काफी उत्पीड़न किया है बाद में उन्होने मेरो को इस तरह उतपीड़न कीया की जो मेरे वरदास स बाहर हो चुकी थी में बयान नही कर सकता इसलिए लिखकर दे रहा हूँ।

पुलिस पहले तो मारती रही पर मुझे कुछ मालूम न होने के कारण से मना करता रहा मगर पुलिस ने कुर्सी पर बाँधकर मुह मे पानी डाला बीजली के सोट दिये उल्टा लटका दिया गुदा में पेट्रोल डाल दिया लींग में आग लगा दी पैरो के नाखुन पलास से उखाड़ दिये और भी यातना दी गयी फिर पहले L का और बाद में सात गुमसुदा बच्चों का मामला मेरे पर लगा दिया में गरीब हूँ मेरी कही भी कोई सुनवाई नहीं है मैं मजदूर मजदूरी करने वाला इतना बड़ा क्राइम कैसे कर सकता हूँ और अभी किसी के घर में रहकर मे चाहता हूँ कि मेरे साथ पूरा इन्साफ हो यही आस लगाये में आपके सहारे

हूँ अगर आपको भी यही लगता है कि यह सही है तो मुझे सख्त से सख्त सजा देना जो की आज तक किसी को भी नही मिली हो अन्यथा मेरे साथ पुरा इन्साफ हो में न्यायलय के उपर पुरा भरोसा करता हूँ कि मुझे न्याय जरूर जरूर मिलेगा

वैसे भी में पूरा परिवार घर व बच्चे सब कुछ खो चुका है मेरे पास कुछ भी नही है में तो अपना केस भी नही लड़ सकता मेने जो कमाया वह परिवार का भी पूरा नही पड़ता था।

आज मेरे होते हुए भी मेरे बच्चे यतीम व बेसहारा जी रहे है । मेरा न्यायलय से अनुरोध है कि मेरे व मेरे बच्चों के साथ पुरा इन्साफ हो ।

ह० सुरेन्द्र कोली

25.11.08"

184. The next letter at page 117 of Capital Case No. 4196 of 2010 is dated 16.3.2009 and is extracted hereinafter:-

"मे सुरेन्द्र कोली s/o शंकर राय कोली ग्राम मंगरुखाल 25 12.06 को सप्ताह भर की छुट्टी लेकर घर गया था 26.12.06 को मोनिन्दर पंढर का ड्राइवर सतपाल मेरे घर गया और यह कहकर की मोनिन्दर ने बुलाया है और दिनेश यादव ने पायल के बारे में कुछ पूछताछ करनी है और इसी गाड़ी से में परसो तेरे को घर छोड़ जाऊँगा कहकर ले आया 27.12.06 को हम दोनो मोनिन्दर के ऑफिस डी 9 सैक्टर 2 नोएडा पहुचे 27.12.06 को ही मोनिन्दर अपने डाइवर पानसिंह के साथ मुझे लेकर थाना सैक्टर 20 गया और साढे पाँच छः बजे के करीब छोड़कर उसके बाद पुलिस ने मेरे साथ बदसलूक किया जो आज भरी अदालत में बयान नही कर सकता इसलिए लिखित में दे रहा हूँ।

में मान्य न्यायलय से प्रार्थना करता हूँ कि मैं बहुत ही गरीब सीधा साधा इन्सान हूँ में मात्र 2500 प्रति माह तनख्वा पाने वाला इतने बड़े क्राइम के बारे में सोच भी नहीं सकता क्योंकि में गरीब हूँ मेरा कोई भी कमाने वाला नही है मेरे बच्चों का मेरे सिवा भरण पोषण करने वाला कोई नहीं है मैंने हमेशा बड़ी मेहनत व सावधानी से काम किया कि में गरीब हूँ मेरा कोई नहीं है। मेने कुछ नही किया मुझे फसाया गया है मेरे साथ बहुत बड़ा अन्याय हो रहा है मेरे को मेजर सोहन सिंह जो कि मोनिन्दर पढेर का दोस्त है डी 5 सैक्टर 31 में 24.7.05 में काम पर लगया था। मोनिन्दर पंढर पुलिस द्वारा कौलगर्ल के साथ पकड़ा गया था उसके बाद पुलिस का घर आना जाना लगा रहा में एक नौकर होने के कारण यह भी नही पुछ सकता था कि पुलिस घर क्यों आती है, में निर्दोष हूँ मुझे फसाया गया मुझे टोचर कर कर के खाली कागजो पर

दस्तखत कराये गये थे उसके बाद उनमें क्या लिखा मुझे कुछ नहीं मालूम मेने जब समाचार पत्र पढ़े तब पता चला की मुझ पर क्या दिखाया जा रहा है नवम्बर में निठारी का नाला की सफाई हुई थी सफाई के दौरान नाले में डी 6 सैक्टर 31 के गार्ड रूम के नीचे से कुछ हड्डियाँ निकली थी तो दूसरे दिन इस बात की चर्चा बड़ी तेजी से फैल गयी तो मुझे भी इस बात का पता चला क्योंकि सफाई कर्मचारियों ने डी 5 सैक्टर 31 के आगे का लोन तोड़कर नाले मे जाने का रास्ता बनाया था इसलिए वह डी 5 सैक्टर 31 की तरफ बहाकर आ गयी वही हड्डियाँ पुलिस नेL की है कहकर मुझ मार मार कर कबूल करने को कहा जो कि नन्दलाल की लड़की था और रात को कभी-2 मोनिन्दर पंढेर के घर छोड़कर जाता था वही लडकी नन्दलाल ने अपने गाँव बंगाल व फिर कही और भेज दी ताकी वह मोनिन्द पढेर से पैसा ले सके और उसने मोनिन्दर पदर के खिलाफ कम्पलेंट लिखा दी और पुलिस ने गरीब है सोच कर मोनिन्दर को छोडकर मुझे फसाकर मई 2006 से लेकर अब तक सारे गुमसुदा का केस मेरे पर लगा दिया बाद में उन्होंने मेरे का तरह-तरह से उतपीडन कीया और जब बरदास से बाहर हो गया तब भी मेने बयान नही दिया क्योंकि मुझे कुछ पता नहीं था तो उसको बाद पुलिस ने क्या किया मे नहीं बता सकता इसलिए लिख कर दे रहा हूँ।

पुलिस पहले तो मारती रही पर मुझे कुछ मालूम न होने क कारण मे मना करता रहा मगर पुलिस ने कुर्सी पर बांध कर मुँह में पानी डाला बीजली का करन्ट लगाया उल्टा लटका दिया गुदा में पैट्रोल डाल दिया लींग में आग लगा दी पैरो के नाखुन उखाड़ दिया और भी यातना दी

फिर पहलेL और बाद में सारे गुमशुदा बच्चो का मामला मेरे पर लगा दिया मेरी कहीं भी कोई सुनवाई नही हुई ये मजदूर मजदूरी करने वाला इतने बड़ा अपराध के बारे में सोच भी नहीं सकता वह भी मालिक के रहते किसी के घर पर सीबीआई ने मोनिन्दर पंढेर को हर बार बाहर दिखा रखा है जब की वह घर न ही रहता था इस बात की गवाह उसके घर में काम करने वाली आया है। जिसको सी.बी.आई ने डारा धमका कर भगा दिया है। वह इस बात की भी गवाह है कि मेने कुछ नहीं किया है। में चाहता हूँ कि मेरे साथ पुरा इंसाफ हो यही आस लगाये में आपकी सहारे हूं अगर आपको भी यह लगता है कि मे दोसी हूँ तो मुझे कड़ी स कड़ी सजा दी जाय नही तो मुझे इसाफ दिये जाने की महती कृपा करे मुझे न्यायालय पर पूरा भरोसा है कि मुझे न्याय जरूर मिल जी।

नही तो इस बात की जाँच के लिए एक गुप्त कमेटी का गठन किया जाय और सच्चाई को जानने की कृपा करे। वैसे भी में पुरा घर परिवार बच्चे सब कुछ खो चुका हूँ मेरे पास कुछ भी नहीं है मे तो अपना केस भी नही लड सकता मेने जो

कमाया वह परिवार का ही पुरा नही पडता था आज मेरे रहते हुए भी मेरे बच्च यतीम व बेसहारा जी रहे है मेरा न्यायालय से अनुरोध है कि मेरे व मेरे परिवार के साथ अन्याय नही बल्की न्याय हो।

अतः मेरी रीमॉड के दौरान सारी स्थीती देखने के बाद भी लोवर कोर्ट मुझे हर बार 14-14 दिन की रीमॉड पर भेजती रही क्योंकि मेरे को हर बार एक ही धमकी मीलती थी कि अगर कार्ट मे मुँह खोलेगा तो तेरे बच्चों को पब्लिक के हवाले कर देंगे उसका क्या अन्जाम होगा इसका जिम्मेदार तु खुद होगा इसलिए में कोई कोर्ट मे या इससे कुछ नही कह पाता था।

ह० सुरेन्द्र कोली
16.3.09"

185. There is yet another letter on record of Capital Case No. 835 of 2011 at page 295 of the paper book dated 1.4.2010 is also on record. In addition to his statement recorded under Section 313 Cr.P.C. where the accused specifically alleged torture at the hands of the police and CBI for extracting his confessional statement. Accused has also submitted his written statement under Section 313 Cr.P.C., which is on record of Sessions Trial No. 494 of 2007 and is extracted hereinafter:-

"सफाई कथन अ०धारा 313 सीआर०पी०सी द्वारा सुरेन्द्र कौली अभियुक्त:-

महोदय,

1. यह कि उक्त अपराध में प्रार्थी को झूठे साक्ष्य तैयार कर अभियुक्त बनाया गया है।

2. यह कि दौरान जांच अभियुक्त के गुप्तांगो को जलाया गया तथा गुदा में पैट्रोल डाला गया, नाखून उखाड़े गये तथा दबाव बनाया गया कि जैसा जाच एजेंसी चाहती है वैसा ही कथन किया जाये।

3. यह कि मेरे द्वारा कभी भी कोई रिकवरी नहीं कराई गयी मेरे से केवल जांच अधिकारीयो ने समय समय पर कोरे कागजो पर हस्ताक्षर कराये गये थे उनमें क्या लिखा है मुझे नहीं पता ना ही मुझे उन्की कोई प्रति दी गई और ना ही मुझे कभी पढ़कर सुनाये गये।

4. यह कि सी०बी०आई० में मुझ से कहा था कि तेरा सारा परिवार हमारे कब्जे में यदि हमारे कहे अनुसार बयान नहीं

दिये तो तुम्हारे परिवार को जनता के हवाले कर मरवा देंगे। मैने इस दबाव में आकर सी०बी०आई० के द्वारा बताये गये कथनानुसार ही उक्त बयान कराये जबकि मेरा उक्त घटना से कोई सम्बन्ध नहीं रहा।

5. यह कि दिनांक 22.02.07 को मेरा चौदह दिन का रिमांड सी०बी०आई० ने लिया था दिनाक 1.03.2007 को मेरा 164 का बयान गया कराया गया जबकि मैं विधिक रूप से मै पुलिस हिरासत में था।

6. यह कि मेरे शरीर पर जांच एजेंसी द्वारा जो चोटे पहुंचाई गई है उनका डाक्टरी मुआयना कराया जा सकता है जांच एजेंसी द्वारा जलाये निशान मेरे गुप्ताग पर आज भी मौजूद है।

7. यह कि दिनांक 22.02.2007 को मेरा रिमांड लिये जाने के दौरान सी०बी०आई० द्वारा लगातार एक सप्ताह तक मेरा 164 का बयान करने का रिहल्सर कराया गया था तथा यह भी बताया गया था कि मुझे किस प्रकार से बयान दर्ज कराना है? सी०बी०आई० ने ही मुझपर दबाव डालकर 164 का बयान दिलवाया था जबकि 164 में दिये गये अंकित बयान मुझे कोई ज्ञान नहीं रहा।

8. यह कि सी०बी०आई० द्वारा सम्बन्धित मजिस्ट्रेट को पहले ही प्रश्नावली प्रदान कर दी गई थी जिसके आधार पर मुझसे सवाल पूछे जाते थे और उस कक्ष में सी०बी०आई० के अधिकारी मौजूद थे, उन्हें कैमरे से बचाया जाता था।

9. यह कि सी०बी०आई० वाले जब मुझे एम्स ले कर गये थे तो वहा पर मौजूद डाक्टर डोगरा ने काले निशान लगाये थे तथा सीबीआई द्वारा कहा गया था कि इन्ही काले निशानों के उपर तुम भी लगा दो जिसकी विडयोग्राफी तैयार की गई थी।

10. यह कि जांच अधिकारी दिनेश यादव एवं अन्य पुलिस वालो ने मुझे बहुत प्रताडना दी थी तथा समस्त फर्जी कार्यवाही की।

दिनांक :- 10/6/11

अभियुक्त

सुरेन्द्र कौली"

186. It is in the context of the above referred material on record that we are required to examine the question as to whether accused SK had voluntarily made confession and whether his confession is true for being relied upon as evidence to implicate the accused.

Law on Confession:-

(i) Confession is viewed with circumspection

187. On behalf of appellants, it is argued by Sri Chaudhary that confession of an accused is viewed with suspicion as possibility of such confession having been procured in an improper manner is largely seen. In Mst. Bhagan Vs. State of Pepsu, AIR 1955 Pepsu 33, the Court has been pleased to observe as under in para 8:-

> "(8) There is no eye-witness to the murder. Prosecution case entirely rests on the circumstantial evidence and confessions made by the convict. If the judicial confession is voluntary then this is a very strong piece of evidence connecting the appellant with the crime.
>
> In order to make such confession relevant under S. 24, Evidence Act it must be shown that it was made voluntarily by the person accused of an offence. So to base conviction on such a confession the court must satisfy itself that it was voluntary and true. Unfortunately in this country It appears to be well known that the police are in the habit of extorting confessions by illegal and improper means. Confessions obtained in this manner must be excluded from evidence as it is not safe to receive a statement made by an accused person under any influence of fear or favour. I am inclined to the view that the burden of proving the voluntary nature of the confession lies on the prosecution; at any rate the onus, if on accused, is very light.
>
> Section 24, Evidence Act reads as follows:
>
> "A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage of avoid any evil of a

> temporal nature in reference to the proceedings against him".
>
> The word 'appears' indicates a lesser degree of probability than the word 'proof as defined in S. 3 of the Act. It was designedly used by the legislature in the interest of the accused. More often than not, accused is alone in police custody when he is induced or threatened to make a confession. In such cases it is well high impossible for him to adduce positive proof in support of such inducement, promise or threat offered to him by the police. Section 24, therefore, does not require positive proof of improper inducement etc., to justify its rejection. A well grounded suspicion based on facts and surrounding circumstances, therefore, is sufficient to exclude confessions from consideration. It is entirely for the Court to decide whether the confession was voluntarily made and was not the result of inducement, threat or promise."

188. In Nagraj Vs. State of Tamil Nadu, (2015) 4 SCC 739, the Supreme Court has observed as under in para 16:-

> "16. We also think that it was incumbent on the High Court to deal with the so-called confession in detail. It is far from unknown that confessions are extracted from an accused under myriad threats, including his own physical safety. We must hasten to clarify that a reading of the judgment does not immediately reveal whether the conviction of the accused by the courts below was predicated on his alleged confession."

189. Similar observations have been expressed by the Supreme Court in Arup Bhuyan Vs. State of Assam, (2011) 3 SCC 377 in paras 4 & 5, which are reproduced hereinafter:-

> "4. Confession is a very weak kind of evidence. As is well known, the widespread and rampant practice in the police in India is to use third-degree methods for extracting confessions from the alleged accused. Hence, the courts have to be cautious in accepting confessions made to the police by the alleged accused.

> 5. Unfortunately, the police in our country are not trained in scientific investigation (as is the police in western countries) nor are they provided the technical equipments for scientific investigation, hence to obtain a conviction they often rely on the easy short cut of procuring a confession under torture."

190. Sri Chaudhary has laid emphasis upon the observation made by the Supreme Court in D.K. Basu Vs. State of West Bengal, (1997) 1 SCC 416, wherein the Court made observations in paragraphs 18, 24 and 29, which are reproduced hereinafter:-

> "18. However, in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third-degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the rule of law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.
>
> 24. Instances have come to our notice where the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and the arrested person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury

caused on the body of the arrestee has sometimes resulted in his death. Death in custody is not generally shown in the records of the lock-up and every effort is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officers because of ties of brotherhood. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting in death, as the police lock-up where generally torture or injury is caused is away from the public gaze and the witnesses are either policemen or co-prisoners who are highly reluctant to appear as prosecution witnesses due to fear retaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody, it is difficult to secure evidence against the policemen responsible for resorting to third-degree methods since they are in charge of police station records which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal. *State of M.P.* v. *Shyamsunder Trivedi* [(1995) 4 SCC 262 : 1995 SCC (Cri) 715 : (1995) 3 Scale 343] is an apt case illustrative of the observations made by us above. In that case, Nathu Banjara was tortured at police station, Rampura during the interrogation. As a result of extensive injuries caused to him he died in police custody at the police station. The defence set up by the respondent police officials at the trial was that Nattu had been released from police custody at about 10.30 p.m. after interrogation on 13-10-1981 itself vide entry Ex. P/22-A in the Roznamcha and that at about 7.00 a.m. on 14-10-1981, a death report Ex. P/9 was recorded at the police station, Rampura, at the instance of Ramesh Respondent 6, to the effect that he had found "one unknown person" near a tree by the side of the tank wriggling with pain in his chest and that as soon as Respondent 6 reached near him, the said

> person died. The further case set up by SI Trivedi, Respondent 1, in charge of the police station was that after making a Roznamcha entry at 7.00 a.m. about his departure from the police station he (Respondent 1-Shyamsunder Trivedi) and Constable Rajaram respondent proceeded to the spot where the dead body was stated to be lying for conducting investigation under Section 174 CrPC. He summoned Ramesh Chandra and Goverdhan — respondents to the spot and in their presence prepared a panchnama Ex. P/27 of the dead body recording the opinion therein to the effect that no definite cause of death was known.
>
> 29. How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third-degree methods during interrogation."

191. Reliance has been placed by CBI upon judgment of the Supreme Court in State of Tamil Nadu Vs. Kutty, 2001 (6) SCC 550 in order to contend that confession is reliable in the facts of the present case. Para 9 to 12 of the judgment are relied upon which are reproduced hereinafter:-

> *"9. There seems to be no dispute regarding the fact that Indira Kumari and her daughter Rani Padmini were murdered in their apartment and quite possibly on the morning of 15-10-1986. We are skipping that aspect because the prosecution has successfully proved the involvement of A-1*

Jebaraj with the murders of the two ladies as he was convicted and sentenced for it by two courts after concurrently holding that the prosecution has proved the case against him beyond all doubt and that verdict became final. Hence the only question now, in this appeal, is whether A-2 Lakshmi Narasimhan had also joined A-1 Jebaraj in murdering the two ladies.

10. If the confession recorded by the Judicial Magistrate as from A-2 cannot, for any reason whatsoever, be used by us, it would be an exercise in futility for the State to endeavour for reversal of the order of acquittal with the help of the remaining evidence. So we would first consider and decide whether we can rely on that confession.

11. The Judicial Magistrate who recorded the confession of the second accused in Ext. P-66 had written down the statement running into several pages containing very many vivid details. The narration included how A-2 started working as a watchman in the house of the deceased, how A-1 Jebaraj injected the idea of taking away the huge amount of cash kept with the deceased, how the three accused jointly prepared the plan to kill the two ladies to pave the way for burglary and how they executed their designed scheme etc.

12. Learned Judges of the High Court declined to act on the said confession mainly for two reasons. First is that the confession was retracted by the maker thereof and second is that the recovery of articles was made prior to the confession. We may state at the outset itself that both reasons are too insufficient for overruling the confession."

192. The judgment of Supreme Court in the case of State of T.N. vs. Kutty (supra) was delivered in peculiar facts of its own where independent evidence existed on record to corroborate the confession of accused. Para 21 of the judgment takes note of such evidence and the same is extracted hereinafter:-

"21. But there are quite a number of other

circumstances which would lend assurance to the court about the facts contained in the judicial confession made by the second accused. The very fact that he was working as a watchman employed by the ladies remains undisputed. If so, his disappearance from the scene on 16-10-1986 onwards and his absconding till 3-11-1986 are circumstances effectively corroborating the confession. A large number of articles belonging to the deceased were recovered at his instance. His finger impression was found on the door of the kitchen of the house. If the finger impression of the cook was found on the door of the kitchen, we would have declined to use it as a piece of corroboration in the present case because of the role which a cook has to perform in the culinary wing of the house. But the place of a watchman of the house is normally outside the house, if not outside the gate of the compound itself. How could the finger impression of the watchman get affixed inside the kitchen? In the absence of any explanation as to how the finger impression of A-2 had appeared on the door of the kitchen of the house, we can safely treat that also as an incriminating circumstance against that accused."

(emphasis supplied by us)

193. Reliance has also been placed upon the judgment of the Supreme Court in State of Maharashtra Vs. Damu Gopinath Shinde, 2000(6) SCC 269 in order to contend that challenge to voluntariness of confession is misplaced. In State of Maharashtra vs. Damu (supra) the confession of accused was relied upon by the court of Sessions to convict the accused as it had also led to recovery etc. The High Court took a different view which was not approved by the Supreme Court. The argument that confession was induced by the police was rejected after noticing the facts of the case, particularly the considerable time gap between the police custody and the confession. This would be apparent from the following observations of the Court in Damu (supra):-

"4. The Investigating Officer (PW42) has not explained how he knew that Balu Joshi(A-4) was willing to make a confession to him. Learned judges draw an inference like the following:-

"If the circumstance, that the Police Station is adjacent to Sub-Jail, Newasa, is taken into consideration, then an inference can very well be drawn that nobody but Police contacted Balu Joshi(A-4) and Police informed mr. Suryawanshi(PW 44) that the accused was willing to make confessional statement."

We have considered the above reasons and the arguments addressed for and against them. We have realised that those reasons are ex facia fragile. Even otherwise, a Magistrate who proposed to record the confession has to ensure that the confession is free from police interference. Even if he was produced from police custody, the Magistrate was not to record the confession until the lapse of such time, as he thinks necessary to extricate his mind completely from fear of police to have the confession in his own way by telling the magistrate the true facts.

In fact, A4 (Balu Joshi) remained in police custody only till 26.4.1995 and the confession was recorded only on 25.5.1995, which means, there was an interval of almost a full month after he was removed from police custody to judicial custody.

The geographical distance between the two buildings - sub-jail and the police station - should not have been a consideration to decide the possibility of police exerting control over a detenue. To keep a detenue in the police fear it is not necessary that the location of the police station should be proximal to the edifice in which the prisoner is detained in judicial custody. In many places judicial courts are situated very near to police station houses, or the offices of higher police officers would be housed in the same complex. It is not a contention to be countenanced that such nearness would vitiate the independence of judicial function in any

manner."

(emphasis supplied)

194. The aforesaid judgment of Supreme Court in Damu (supra) is also in the facts of its own where the plea of influence by police was found untenable since the confession itself was made after a month of police custody. Such is not the case here.

195. On the aspect of confession learned CBI Counsel has also placed reliance upon the Supreme Court Judgment in Ahmed Hussein Vali Mohammed Saiyed Vs. State of Gujarat, (2009) 7 SCC 254. We do not find the judgment to be of much relevance in the facts of the present case as the judgment in Ahmed Hussein (supra) was in respect of confession made before the authorities under Terrorists and Disruptive (Prevention) Act which permits reliance on such confessions, which is not the case here.

196. Observations of the Supreme Court have also been relied upon in the case of Jamiludin Nasir; Aftab Ahmed Ansari @ Aftab Ansari Vs. State of West Bengal, 2014(7) SCC 443 on the aspect of confession. Para 21 to 23 of the judgment in Jamiludin Nasir (supra) contains the observations of the Court on the aspect of confession and are therefore reproduced hereinafter:-

> *"21. Going by the prescriptions contained in Section 164 CrPC, what is to be ensured is that the confession is made voluntarily by the offender, that there was no external pressure particularly by the police, that the person concerned's mindset while making the confession was uninfluenced by any external factors, that he was fully conscious of what he was saying, that he was also fully aware that based on his statement there is every scope for suffering the conviction which may result in the*

imposition of extreme punishment of life imprisonment and even capital punishment of death, that prior to the time of the making of the confession he was in a free state of mind and was not in the midst of any persons who would have influenced his mind in any manner for making the confession, that the statement was made in the presence of the Judicial Magistrate and none else, that while making the confession there was no other person present other than the accused and the Magistrate concerned and that if he expressed his desire not to make the confession after appearing before the Magistrate, the Magistrate should ensure that he is not entrusted to police custody. All the above minute factors were required to be kept in mind while recording a confession made under Section 164 CrPC in order to ensure that the confession was recorded at the free will of the accused and was not influenced by any other factor. Therefore, while considering a confession so recorded and relied upon by the prosecution, the duty of the Sessions Judge is, therefore, to carefully analyse the confession keeping in mind the above factors and if while making such analysis the learned Sessions Judge develops any iota of doubt about the confession so recorded, the same will have to be rejected at the very outset. It is, therefore, for the Sessions Judge to apply his mind before placing reliance upon the confessional statement made under Section 164 CrPC and convince itself that none of the above factors were either violated or given a go-by to reject the confession outright. Therefore, if the Sessions Judge has chosen to rely upon such a confession recorded under Section 164 CrPC, the appellate court as well as this Court while examining such a reliance placed upon for the purpose of conviction should see whether the perception of the courts below in having accepted the confession as having been made in its true spirit provides no scope for any doubt as to its veracity in making the statement by the accused concerned and only thereafter the contents of the confession can be examined.

22. Keeping the above prescription of Section 164 CrPC in mind, when we examine the answers of Nasir to Questions 1 to 18 we find that PW 97 explained to appellant Nasir that his confession should be voluntary and that whether he was really making it on his own. Appellant Nasir also specifically stated that nobody including the police, enticed him to make the statement, that no third degree method was applied on him by the police for making his

confession. PW 97 also made it clear to him that he was not a police officer, that he is a Magistrate of a court, that he was not under any compulsion to make a statement, that if he withdraws from his offer to make the confession he will not hand him over to the police and that he will be sent back to the jail. After explaining all the above when he asked the appellant Nasir about his desire to make the confession, Nasir stated that he still wanted to give his statement by adding that he was not able to bear the pain of his conscience and wanted to get rid of it. He also stated that he was brought from the jail, that the previous night he was only staying in the jail, that he had absolutely no fear in his mind and that he wanted to depose on his own accord. In Question 11, the Magistrate while stating that Nasir was free to make his statement, mentioned that such statement might ultimately lead to his conviction and might attract either a life sentence or even capital punishment and even after explaining to that extent, when PW 97 asked him whether the appellant Nasir still wanted to give the statement and asked him to give a serious thought before answering the said question, Nasir's answer to Question 11 was "I know. I have sinned and I deserve punishment". Again in Question 12, PW 97 wanted to ascertain whether he was voluntarily making the statement or under any compulsion to which Nasir replied that it was absolutely voluntary. When he was asked as to why he wanted to make the statement Nasir replied that because of the sin he committed by carrying out the attack on the American Centre on 22-1-2002 along with his gang members, his conscience was heavy and he felt guilty that he carried out the attack on his own homeland and that he could not eat or sleep and, therefore, he came forward to give the statement. PW 97 thereafter again gave 10 minutes' time for Nasir to think over, for which Nasir replied that he did not need any more time and only thereafter, the Magistrate, PW 97 proceeded to record the statement.

23. We find that the Magistrate did not want to give any chance to anyone to gain the impression that the confession which the appellant Nasir wanted to make was recorded without giving him any scope to rethink or that unaware of the consequences that he came forward to make the statement. In fact it must be stated that PW 97 was thorough with the ingredients prescribed in Section 164 CrPC relating to the recording of a confession by an accused and that he was not carrying out the exercise in a mechanical

> *way but with all earnestness and in a highly dispassionate manner. Therefore, that part of the requirement, namely, the procedure to be followed while recording a confessional statement has been scrupulously adhered to by PW 97 before allowing the appellant Nasir to make his confession. Again at the end, the Magistrate certified in the manner required under Section 164(4) CrPC and it was mentioned that no police personnel was allowed in his chambers when the confession was recorded."*
>
> *(emphasis supplied)*

197. The caution and concern, noticed by the courts in respect of the confession, are judicially well accepted and are to be kept in mind by the Court while analysing the confession of accused in the facts and circumstances of each case. The Court will have to be satisfied that the procedural safeguards specified under Section 164 Cr.P.C. for recording confession is scrupulously complied. The Magistrate has thus to play a proactive role in order to ensure that the confession is voluntary and is not obtained by any coercion/intimidation/force etc.

198. The observations of the Court, while sounding the note of caution for the Magistrate/Court to comply with the safeguards enumerated under Section 164 Cr.P.C. or those that are judicially evolved are intended to ensure that confession remains voluntary. These observations do not, in any manner, however, impact the credibility of confession, if it is otherwise voluntary and true.

(ii) Confession has to be read as a whole

199. It has also to be borne in mind that while examining the confession of an accused the courts have generally read the entire confession as a whole and not read it selectively. In Aghnoo Nagesia Vs. State of Bihar, AIR 1966 SC 119, the

Supreme Court observed as under in para 12 to 14 and 16:-

> "12. Shortly put, a confession may be defined as an admission of the offence by a person charged with the offence. A statement which! contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. If an admission of an accused is to be used against him, the whole of it should be tendered in evidence and if part of the admission is exculpatory and part inculpatory, the prosecution is not at liberty to use in evidence the inculpatory part only. The accused is entitled to insist that the entire admission including the exculpatory part must be tendered in evidence. But this principle is of no assistance to the accused where no part of his statement is self-exculpatory, and the prosecution intends to use the whole of the statement against the accused.
>
> 13. Now, a confession may consist of several parts and may reveal not only the actual Commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. *If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional Conclusion on the aspect of arrest, disclosure and recovery statement.* Each part discloses some incriminating fact, i.e., some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also, every other admission of an incriminating fact contained in the statement is part of the confession.
>
> 14. If proof of the confession is excluded by any provision of law such as S.24, S. 25 and 26 of the Evidence Act, the entire confessional statement in

> all its parts including the admissions minor incriminating facts must also be excluded, unless proof of it is permitted by some other section such as S. 27 of the Evidence Act. Little substance and content would be left in Ss. 24, 25 and 26 if proof of admissions of criminating facts in a confessional statement is permitted.
>
> 16. If the confession is caused by an inducement threat or promise as contemplated by S. 24 of the Evidence Act, the whole of the confession is excluded by S. 24. Proof of not only the admission of the offence but also the admission of every other incriminating fact such as the motive, the preparation and the subsequent conduct is excluded by S. 24. To hold that the proof of the admission of other incriminating facts is not barred by S. 24 is to rob the section of its practical utility and content. It may be suggested that the bar of S. 24 does not apply to the offer admissions, but though receivable in evidence, they are of no weight, as they were caused by inducement, threat or promise. According to this suggestion, the other admissions are relevant, but are of no value. But we think that on a plain construction of S. 24, proof of all the admissions of incriminating facts contained in a confessional statement is excluded by the section. Similarly, Ss. 25 and 26 bar not only proof of admissions of an offence by an accused to a police officer or made by him while in the custody of a police officer but also admissions contained in the confessional statement of all incriminating facts related to the offence."
>
> (emphasis supplied)

200. Even previously, in Hanumant Govind Nargundkar and another Vs. State of M.P., AIR 1952 SC 343, the court observed as under in paragraph 23:-

> "23. It was further held that the evidence of experts was corroborated by the statements of the accused recorded under Section 342. The accused Patel, when questioned about this letter, made the following statement:
>
> "Exhibit P-31 was typed on the office typewriter Article B. Ext. P-24 being my personal complaint

> letter was typed by my Personal Assistant on one of the typewriters which were brought in the same office for trial, with a view to purchase. As this was my personal complaint no copy of it was kept in the Correspondence Files, Ext. P-34 and Ext. P-35 just as there is no copy in these files of my tender, Ext. P-3A.… In the months of September, October and November 1946, several machines were brought for trial from various parties in our office till the typewriter, Article A was purchased by National Industrial Alcohol Ltd. Company."
>
> If the evidence of the experts is eliminated, there is no material for holding that Ext. P-24 was typed on Article A. The trial Magistrate and the learned Sessions Judge used part of the statement of the accused for arriving at the conclusion that the letter not having been typed on Article B must necessarily have been typed on Article A. Such use of the statement of the accused was wholly unwarranted. <u>It is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. An admission must be used either as a whole or not at all.</u> If the statement of the accused is used as a whole, it completely demolishes the prosecution case and, if it is not used at all, then there remains no material on the record from which any inference could be drawn that the letter was not written on the date it bears."
>
> (emphasis supplied)

<u>(iii) If tainted in part, the taint attaches to each part of the confession</u>

201. The observations made by the Supreme Court in Aghnoo Nagesia (supra) are emphatic that if concession is tainted, the taint attaches to each part of the confession.

202. In Sevantilal Vs. State of Maharashtra, (1979) 2 SCC 58, the Supreme Court has observed in paragraph 9 that if confession appears to be untrue in any material part, it has to be rejected. Para 9 of the report is reproduced hereinafter:-

"9. After hearing learned counsel for the parties at length we find ourselves unable to uphold the impugned judgment insofar as Accused 13 is concerned. The circumstances that he was found peeping into the flat, that he tried to run away on seeing the Customs Officials searching the premises, that he was in possession of duplicate keys of the flat and that he was found wearing a bandi similar to bandi, Ext. J-2 are not incompatible with his innocence. He was a close relation of Accused 12 who has been found to be the person really incharge of the flat and it would thus be natural for him (Accused 13) to share the flat with the permission of Accused 12. In so living with his brother-in-law he may have been given to wear the bandi found on his person not for the purpose of carrying gold but just for use as ordinary raiment. Again, in a city like Bombay it is not unusual for persons sharing a particular accommodation to be provided with separate sets of keys for each in order to facilitate ingress or egress at will. Further, an innocent man finding his premises being watched by persons in authority may well feel funky at the prospect of a false implication on the basis of a mere suspicion (which may or may not be well founded) and may try to make himself scarce. Without more, the circumstances covered by Heads (b), (c), (d) and (e), therefore, cannot be regarded as incriminating circumstances. So the conviction really rests on the confession attributed to the appellant. If it is found to be voluntary and true, it may receive some support from the four heads of evidence just above described. If, on the other hand, the confession appears to be either untrue in any material particular or having been caused by any inducement, threat or promise such as is described in Section 24 of the Evidence Act, it must fall and with it fall the other heads of evidence, leaving no material to support the conviction. As it is, we find that the appellant has been able to prove the existence of circumstances which make it highly probable that his confession is hit by the mandate in Section 24 above mentioned. Our reasons for coming to this conclusion follow."

(emphasis supplied)

(iv) Confession must be voluntary and true

203. It is otherwise settled that before a confession is relied upon the Court must evaluate and conclude that confession is voluntary and true before it is acted. It is equally settled that the court must come to a definite conclusion that confession is both voluntary and true before it is acted upon. It is equally settled that Court has to first determine the voluntariness of accused in making the confession and only if it concludes that confession is voluntary then the court will examine whether it is true or not. In Aloke Nath Dutta Vs. State of West Bengal, (2007) 12 SCC 230, the Supreme Court observed as under in paragraph 87 to 90:-

> "87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (*i*) voluntariness of the confession; (*ii*) truthfulness of the confession; (*iii*) corroboration.
>
> 88. This Court in *Shankaria* v.*State of Rajasthan* [(1978) 3 SCC 435 : 1978 SCC (Cri) 439] stated the law thus: (SCC p. 443, para 23)
>
> "*23*. This confession was retracted by the appellant when he was examined at the trial under Section 311 CrPC on 14-6-1975. It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. Therefore, when in a capital case the prosecution demands a conviction of the accused, primarily on the basis of his confession recorded under Section 164 CrPC, the Court must apply a double test:
>
> (*1*) Whether the confession was perfectly voluntary?
>
> (*2*) If so, whether it is true and trustworthy?

Satisfaction of the first test is a *sine qua non* for its admissibility in evidence. If the confession appears to the Court to have been caused by any inducement, threat or promise such as is mentioned in Section 24, Evidence Act, it must be excluded and rejected *brevi manu*. In such a case, the question of proceeding further to apply the second test, does not arise. If the first test is satisfied, the Court must, before acting upon the confession reach the finding that what is stated therein is true and reliable. For judging the reliability of such a confession, or for that matter of any substantive piece of evidence, there is no rigid canon of universal application. Even so, one broad method which may be useful in most cases for evaluating a confession may be indicated. The Court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test.

89. A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof.

90. In *Muthuswami* v. *State of Madras* [1951 SCC 1020 : AIR 1954 SC 4 : 1954 Cri LJ 236] this Court opined: (AIR p. 5, para 8)

"*8*. The only reason the High Court gave for accepting the confession is because the learned Judges considered there was intrinsic material to indicate its genuineness. But the only feature the learned Judges specify is that it contains a wealth of detail which could not have been invented. But the point overlooked is that none of this detail has been tested. The confession is a long and rambling one which could have been invented by an agile mind or pieced together after tutoring. What would have been difficult is to have set out

> a true set of facts in that manner. But unless the main features of the story are shown to be true, it is, in our opinion, unsafe to regard mere wealth of uncorroborated detail as a safeguard of truth."
>
> (emphasis supplied)

204. Similar views are expressed in Shivappa Vs. State of Karnataka, (1995) 2 SCC 76 in para 5, which are reproduced hereinafter:-

> "5. The only piece of evidence relied upon against the appellant is the confessional statement recorded by PW 17 on 22-7-1986. A confession, if voluntary and truthfully made is an "efficacious proof of guilt". It is an important piece of evidence and therefore it would be necessary to examine whether or not the confession made by the appellant was voluntary, true and trustworthy. The statutory provisions dealing with the recording of confessions and statements by the Metropolitan Magistrate and Judicial Magistrates are contained in Section 164 CrPC and the rules framed by the High Court containing guidelines for recording of confessions. Unless the Court is satisfied that the confession is voluntary in nature, it cannot be acted upon and no further enquiry as to whether it is true and trustworthy need be made."
>
> (emphasis supplied)

(v) Burden to prove that confession is voluntary is on the prosecution

205. Burden of proving that confessional statement is voluntary, truthful and that all safeguards were complied with is on the prosecution. The prosecution has also to show the circumstance in which the accused offered to confess. Observation made by the Supreme Court in Nathu Vs. State of U.P., AIR 1956 SC 56 Para 6 is apposite and is reproduced hereinafter:-

> "6. It is contended for the appellant that this confession cannot be acted upon, firstly because it is not voluntary, and

> secondly because there is no evidence worth the name to corroborate it. On the question whether Exhibit P-15 was voluntary, the cardinal feature to be noted is that the appellant was kept separately in the custody of the C.I.D. Inspector (PW 33) from the 7th August to 20th August, and the confession was recorded on the 21st August. It appears to us that the prolonged custody immediately preceding the making of the confession is sufficient, unless it is properly explained, to stamp Exhibit P-15 as involuntary. PW 33 made no attempt to explain this unusual circumstance. It is true that with reference to this matter the appellant made various suggestions in the cross-examination of PW 33, such as that he was given bhang and liquor, or shown pictures, or promised to be made an approver, and they have been rejected—and rightly—as unfounded. But that does not relieve the prosecution from its duty of positively establishing that the confession was voluntary, and for that purpose, it was necessary to prove the circumstances under which this unusual step was taken. There being no such evidence, we are unable to act upon Exhibit P-15, as a voluntary confession. It was argued that better evidence was not forthcoming, as the investigation by PW 32 was, as already stated, half-hearted and perfunctory, and no adequate steps were taken to secure evidence before PW 33 took up the matter on 18-7-1952. All this is true, and the result is no doubt very unfortunate; but that does not cure the defect from which Exhibit P-15 suffers. It was also argued that both the courts below had found that Exhibit P-15 was voluntary, and that that was a finding with which this Court would not interfere in special appeal. But then, the courts below have, in coming to that conclusion, failed to note that PW 33 has offered no explanation for keeping the appellant in separate custody from the 7th to 20th August, and that is a matter which the prosecution had to explain, if the confession made on 21-8-1952 was to be accepted as voluntary. In this view, the only substantive evidence against the appellant. Exhibit P-15, falls to the ground, and in strictness, the further questions whether that has been corroborated by the evidence of PWs 13 and 15, and whether Exhibits P-5 and P-6 lend assurance to it do not arise."
>
> (emphasis supplied)

206. Similar views have been taken by this Court in one of the earliest judgments on the issue in Nazir Vs. Emperor, AIR 1933 Allahabad 31. This Court has not only sounded the words of caution in entertaining plea of conviction based on confession, rather has suggested a proactive role in collection of such evidence considering its rampant reliance by the prosecution to secure conviction which, very often than not are retracted at

the first opportunity. Paras 13 to 15 of this Court's judgment contain sound principles and advise that are relevant even as on date and are reproduced hereinafter:-

> "13. The above statement was recorded by the learned Sessions Judge himself, and if he had applied his mind to all the circumstances, beginning with the arrest of Ilias and Nazir on the 10th, the request of the police that their confessions be recorded, their being kept separate from other under-trial prisoners under the orders of a Magistrate, their refusal to make a confession when first questioned and their readiness after a few minutes, which they spent in police custody, to, make confessions, and the confession itself in the case of Nazir followed by a retraction when pardon was given to Ilias and not to Nazir, the learned Sessions Judge would not have made the remark which I have quoted above namely that there was nothing suspicious about the confession. To my mind, the inference is irresistible that a promise of pardon had been held out to Nazir and Ilias, and relying on that promise they agreed to make confessions. The police requested, on the faith of their readiness to confess, that their statements be recorded. The effect of the promise lasted on their minds till they were placed before the Magistrate, whose warning opened their eyes and they refused to make any confession. Subsequently they were persuaded to believe that the warning given by the Magistrate was of a stereotyped and formal character and should carry no significance. Nazir made a confession, but subsequently, when he discovered that Ilias was the favoured individual and that no pardon would be given to him, he retracted. Section 24 of the Indian Evidence Act does not require the same cogency of evidence as is necessary to establish a fact. It merely requires that if it "appears" to the court that a confession was induced by threat or promise proceeding from a person in authority in relation to the charge against the accused, it shall be inadmissible in evidence. It has been held in numerous cases that if circumstances create a probability in the mind of the court that the confession was improperly obtained, fit should he excluded from evidence. In the present case, as already stated, the circumstantial evidence is so strong as to establish the fact that Nazir was induced to make a confession by a promise of pardon held out by the police. A very eminent Judge of this Court expressed himself on the subject of retracted confession in the following terms:
>
> "To repeat a phrase I used on a former occasion, instead of working up to the confession they (the police) work down from it, with the result that frequently find ourselves compelled to reverse convictions simply because, beyond the confession, there is no tangible evidence of guilt. Moreover, I have said and I repeat now, it is incredible that the extraordinarily large number of confessions which come before us in the criminal cases disposed of by this Court,

either in appeal or revision, should have been voluntarily and freely made in every instance as represented. I may claim some knowledge of, and acquaintance with, the ways, and conduct of persons accused of crime, and I do not believe that the ordinary inclination of their minds, which in this respect I take to be pretty much the same with humanity all the world over, is to make any admission of guilt. I certainly can add that during fourteen years' active practice in the criminal courts in England I do not remember half a dozen instances in which a real confession, once having been made, was retracted. In this country, on the contrary, the retraction follows almost invariably as a matter of course, and though I am well aware how this is sought to be explained by a suggestion of the influence brought to bear upon the confessor by other prisoners in havalat, the fact remains as an endless source of anxiety and difficulty to those who have to see that justice is properly administered."

14. The remarks hold good today no less than they did when they were made by Straight, A.C.J. I respectfully agree with every word of what he said. In most cases of serious gravity or difficulty we are faced with the problem of retracted confession and the value to be assigned to it against the person making it or his co-accused. In a large number of such cases there is little or no reliable evidence in corroboration. To do lip service to the doctrine which requires corroboration and to accept such evidence in corroboration, for the sake of formality, as a Judge would not conscientiously believe, is not in keeping with judicial integrity.

15. It has been stressed over and over again that when a confession is made and subsequently retracted the committing Magistrate and the Sessions Judge should inquire into all circumstances in which it was made and those in which it was subsequently retracted. One, however, seldom comes across a case in which any serious effort is made either by the Magistrate or the Sessions Judge to explain the phenomenon that a person who took every precaution of concealing his crime and suppressing evidence which could implicate him becomes so full of remorse and penitence when he comes face to face with the police that he makes a "free and voluntary confession", but subsequently refracts it at the inquiry, the remorse and penitence, which are supposed to have acted on his mind before, ceasing to influence it in the slightest degree. While it is true that in some cases voluntary confessions are made and while it is permissible for police officers to resort to legitimate devices to obtain useful information from prisoners, it is inconceivable to me, as it was to Straight, A.C.J., that ordinarily a dacoit or murderer would make a voluntary confession. It is, therefore, necessary that when a confession is firs made and is subsequently retracted with allegations against the police, the Magistrate and the Sessions Judge should probe the matter for their own satisfaction. What is, however, done in practice is to record a confession with due formalities and subsequently to record

> the retraction thereof, leaving it to the accused to get over, if he can, the effect of the confession which stands against him in spite of retraction. It is impossible for the accused, even if he is defended, to adduce any reliable direct evidence of maltreatment or inducement while he was in police custody. His allegations, when put to the investigating officers, are naturally denied. But the matter should not be allowed to rest there. The Judge, with whom the responsibility lies for acting upon the confession, should satisfy himself by putting searching questions to such witnesses as had anything to do with the confession. The first question that ought to strike every Judge is, "Why the accused made the confession?" It is very important to ascertain, from those in whose custody the accused was, the circumstances in which the question of confession first arose, how the accused expressed his willingness to be placed before the Magistrate and his readiness to make a confession. Similar questions arise as regards retraction. It is only if circumstances make it reasonable to believe that the accused voluntarily made the confession and agreed to make it before the Magistrate that an inquisitive mind can be, satisfied. In the present case the statement of the investigating officer, made before the Sessions Judge, does not betray the slightest anxiety on the part of the learned Sessions Judge to elicit any information as regards those circumstances. Such of them as could be ascertained from the record failed to attract his attention. For all these reasons, I am in entire agreement with my learned colleague in holding that Nazir's confession is wholly inadmissible in evidence and should be excluded from consideration."

(vi) Role/Duty of Court in recording confession

207. In Aloke Nath Dutta (supra) the Supreme Court and this Court in Nazir Ahmad (supra) has observed that the court must play an affirmative role in unearthing objective evidence forming the backdrop of retraction. Where none exists the court must give benefit of doubt to the accused and an inverse presumption must be drawn from the absence of such material. Para 108 of the report is relevant and is reproduced hereinafter:-

> "108. The courts while applying the law must give due regard to its past experience. The past experience of the courts as also the decisions rendered by the superior courts should be taken as a wholesome guide. We must remind ourselves that despite the fact that procedural safeguards contained in Section 164 CrPC may be satisfied, the courts

> must look for truthfulness and voluntariness thereof. It must, however, be remembered that it may be retracted subsequently. The court must, thus, take adequate precaution. Affirmative indication of external pressure will render the retracted confession nugatory in effect. The court must play a proactive role in unearthing objective evidence forming the backdrop of retraction and later the examination of such evidence of retraction. However in cases where none exists, the court must give the benefit of doubt to the accused. Where there is no objective material available for verifying the conditions in which the confession was retracted, the spirit of Section 24 of the Evidence Act (irrelevance of confession caused by inducement) may be extended to retracted confession. An inverse presumption must be drawn from absence of materials."
>
> (Emphasis supplied by us)

208. The Courts are also enjoined to see whether there are any circumstance on the record which casts doubt on the voluntary character of confession. Supreme Court in Babubhai Udesinh Parmar Vs. State of Gujarat, (2006) 12 SCC 268 clearly mandates the court to examine the circumstance on record which casts a doubt on the voluntary character of confession.

209. Section 24 of the Evidence Act also acts as a guide for the Court while evaluating the admissibility of confession made by an accused. The law requires that any confession appearing to have been procured by threat or promise is inadmissible. Section 24 of the Evidence Act is reproduced hereinafter:-

> "A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

Analysis of evidence on the aspect of confession to ascertain voluntariness and truthfulness:-

210. The circumstance existing on record of the present case on different aspects of voluntariness and truthfulness of the confession are required to be scrupulously examined in order to come to a correct conclusion on the point of its admissibility.

Prolonged police custody

211. The prosecution admits to have arrested the accused SK on 29.12.2006. His police custody and later custody with CBI was uninterrupted for 60 days, till the accused made his confession on 1.3.2007. The first circumstance highlighted on behalf of the accused to doubt voluntariness of confession is the prolonged and unexplained police custody of accused prior to his confession. Alternatively, it has been argued that this prolonged police custody at least creates a reasonable doubt about the voluntariness of confession.

212. The uninterrupted police custody of accused SK for 60 days i.e. from 29.12.2006 till he made the confession on 1.3.2007 is clearly admitted on record.

213. The accused herein has limited educational exposure having studied only upto Class VII and, therefore, the accused cannot be expected to have knowledge of the working of legal process. It is admitted on record that for this entire period of 60 days during which his police custody was extended by the concerned jurisdictional magistrate, on different occasions, absolutely no legal aid of any kind was extended to the accused. There is nothing on record to show that the family members of the accused were allowed to meet him or his

physical or mental condition was observed. Strangely, there is not a single medical report on record of the accused for this entire period of 60 days when he was kept in police custody. The only material on record is a medical examination report of accused of 1st March, 2007 at 11.20 am. This report is wholly deficient. What it observes is that there are no fresh marks of injury on the accused.

214. The purpose of directing medical examination of accused during police custody is to ensure that possibility of any third degree measures on the accused during police custody is ruled out. The only medical report on record does not subserve this objective. The fact that there were no fresh injuries on the accused merely suggested that there were no marks of injury during the last about 24 hours. In the present case, the accused was in police custody for the last 60 days. During this entire period of 60 days the accused has not been got medically examined by the prosecution at any stage. This is an alarming situation, inasmuch as, the court while examining the voluntariness of confession is expected to hold a deep probe so as to rule out any mischief on part of the police to extract confession. The fact that no medical examination report exists on record during the prolonged police custody of 60 days of accused raises a question mark on the voluntariness of confession.

215. We have carefully examined the facts of the case and we find that it is admitted to the prosecution that during police custody of accused he was physically assaulted. It is the case of the prosecution that lawyers and members of public assaulted the accused on 25.1.2007 while he was produced before the court of magistrate at Ghaziabad. This fact is clearly admitted in the application filed by CBI, Inspector M.S. Phartyal

for recording of the statement of accused appellant. This incident, in fact, has been used as the ground to justify production of accused before the magistrate at Delhi rather than the jurisdictional magistrate where he was produced on all other dates for remand. Though, this aspect is admitted to the prosecution and the incident of 25.1.2007 otherwise occurred while investigation was entrusted to CBI, yet there is no evidence on record to show that the accused was medically examined, even after the incident of assault on 25.1.2007.

216. We are at a loss to understand, as to why the accused, who was in police custody then, was not got medically examined, nor such medical report is produced despite the admission of prosecution of his physical assault. What exactly is the nature of injuries caused to him on 25.1.2007 remains unknown. Why was the accused not examined medically by the prosecution is unknown. In case the accused was examined medically then the non-production of such medical report is a matter of still greater concern. The manner in which the accused has been dealt with by the prosecution during the period of 60 days remains unknown.

217. The fact that accused has limited access to education and otherwise had no criminal antecedents is also a factor to be kept in mind. The fact that he was not provided any legal aid during this period of 60 days of police custody nor there is any medical examination of his physical condition during this 60 days and the accused otherwise was not allowed to meet any family member, etc., are serious issues, which cannot be overlooked.

218. We may note that prolong police custody has otherwise been viewed with suspicion by the courts in India. Police

custody of 14 days, prior to making of confession, unless sufficiently explained has been held to be sufficient to stab the confession as involuntary. Para 6 of the Supreme Court Judgment in Nathu (supra) is already extracted above to substantiate the position in law.

219. In Babubhai (supra), the Supreme Court rejected the confession by holding it to be involuntary where the accused was produced after 16 days of police custody and the magistrate did not examine the body of the accused. Para 5 to 8 of the judgment in Babubhai is reproduced hereinafter:-

> "5. The confession was recorded on 7-9-2000. He was in judicial custody for a period of 16 days. His statement is as under:
>
> > "The incident is two years' old; I do not remember the exact date. On that day I was at my house and at night say around 12.00 I went to the field which is opposite Karamsad Petrol Pump. I don't know whose field this is. On reaching the field I saw that there was one shed with a …, and under that shed one girl was sleeping. I lifted her. I don't know the age of the girl. As soon as she wanted to shout I have closed her mouth, and behind that field one canal is there and I have taken the girl in that canal, there was a field near the canal, and in that field one tree namely baval was there and one floor was constructed thereon. I had taken the girl to that field, I have removed the clothes of the girl in the field, the mouth was shunted (sic) and have raped her, and thereafter I have tied the noose on the neck with her frock as a result of which the girl died. And I have taken the girl to the corner of the field and left the field after keeping the girl in the corner of the field. I have not told anybody about the incident; this is my confession regarding the offence."
>
> 6. It was preceded by routine questions. It was accompanied by a certificate in usual form.
>
> 7. The learned Magistrate examined himself as PW 2. In his deposition he reproduced the statements of the appellant. In his cross-examination, he accepted that the confession started at about 11.15 a.m. and was completed at about 11.30 a.m. He did not remember that on the same day he recorded another confession of the appellant in relation to Sessions Case No. 298 of 2000. He, however, accepted that he had done so when it was brought to his notice. Recording of that confession was completed at 11.45 a.m. Till then no legal aid was provided to him.

> 8. He did not examine the body of the accused. He asked only the routine question as to whether he was ill-treated by the police. He accepted that the accused was produced before him under police protection and was also taken back under the police protection. He stated:
>
> > "… two things are to be noted in the confession statement regarding voluntarily (sic) and reality. I cannot say that the accused has shown the reality or not …."
>
> (emphasis supplied)

220. Police custody of 27 days immediately preceeding the confession by accused has also been frowned upon and the confession held unreliable in Bhagwan Singh Vs. State of M.P., (2003) 3 SCC 21. Para 27 and 30 of the report are reproduced hereinafter:-

> "27. With regard to the judicial confession made by the acquitted accused Pooran Singh to the Judicial Magistrate, there are many striking features casting great doubt on the genuineness of the extra-judicial confession which was retracted in writing by the accused Pooran Singh in the course of his examination under Section 313 CrPC. The accused Pooran Singh was also arrested along with the co-accused under arrest memo (Ext. P-18) on 12-3-1984. His extra-judicial confession was recorded by the Judicial Magistrate (PW 1) on 9-4-1984 when he was produced handcuffed before him in police custody. The fact that Pooran Singh was produced handcuffed in police custody on 9-4-1984 has been admitted by the Judicial Magistrate as PW 1 in statement made by him in the cross-examination. If Pooran was in police custody, in accordance with the requirement of Section 164 CrPC the Magistrate should have taken care to ascertain that there had been no third-degree methods used by the police against him to extract a confession. The Magistrate in deposition as PW 1 does say that he questioned the accused Pooran Singh and the latter confirmed that he was making a statement voluntarily without any pressure. But the record of confession (Ext. P-1) does not show that any specific questions were put to the accused Pooran Singh, whether any physical or mental pressure was put on him by the investigating agency. The first precaution that a Judicial Magistrate is required to take is to prevent forcible extraction of confession by the prosecuting agency (see State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)]). It was also held by this Court in the case of Shivappa v. State of Karnataka [(1995) 2 SCC 76 : 1995 SCC (Cri) 323] that the provisions of Section 164 CrPC must be complied with not only in form, but in essence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in

> such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.
>
> 30. It has been held that there was custody of the accused Pooran Singh with the police immediately preceding the making of the confession and it is sufficient to stamp the confession as involuntary and hence unreliable. A judicial confession not given voluntarily is unreliable, more so when such a confession is retracted. It is not safe to rely on such judicial confession or even treat it as a corroborative piece of evidence in the case. When a judicial confession is found to be not voluntary and more so when it is retracted, in the absence of other reliable evidence, the conviction cannot be based on such retracted judicial confession."
>
> (emphasis supplied)

221. The duration of police custody prior to confession has otherwise been recognized as an important factor to construe the voluntary nature of the confession by the courts in India. In Sarwan Singh v. State of Punjab, 1957 SCC OnLine SC 1; AIR 1957 SC 637, the Court observed as under in para 10:-

> "10. That takes us to the case of Accused 3 Sarwan Singh. We have already pointed out that the order of conviction passed against Sarwan Singh is in the words of the judgment of the High Court based on the fact that "there is the evidence of the approver and it is corroborated in every particular by his own confessional statement". Besides, there is other circumstantial evidence to which reference has already been made in narrating the prosecution story at the beginning of this judgment. It would at once be noticed that, if we come to the conclusion that the approver is an unreliable witness, the basis of the evidence of the approver on which the learned Judges of the High Court proceeded even while dealing with the case against Sarwan Singh has been shaken. If, in our opinion, the approver is unworthy of credit, then it would not be possible to consider the question of the corroboration that his evidence receives from the confessional statement made by Sarwan Singh himself. It is, however, true that Sarwan Singh has made a confession and in law it would be open to the court to convict him on this confession itself though he has retracted his confession at a later stage. Nevertheless usually courts require some corroboration to the confessional statement before convicting an accused person on such a statement. What amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of the circumstances of each case. In the present case, the learned Sessions Judge has considered the question about the voluntary character of the confession made by Sarwan Singh and has found in favour of the prosecution. The judgment of the High Court shows that the learned

Judges agreed with the view of the learned trial Judge mainly because the evidence of the Magistrate who recorded the confession appeared to the learned Judges to show that the confession was voluntary. It is this view which is seriously challenged before us by Mr Mathur on behalf of Sarwan Singh. Prima facie whether or not the confession is voluntary would be a question of fact and we would be reluctant to interfere with a finding on such a question of fact unless we are satisfied that the impugned finding has been reached without applying the true and relevant legal tests in the matter. As in the case of the evidence given by the approver, so too unfortunately in the case of the confession of Sarwan Singh the attention of the learned Judges below does not appear to have been drawn to some salient and grave features which have a material bearing on the question about the voluntary character of the confession. Sarwan Singh was arrested on November 25. His clothes were found bloodstained and he is alleged to have been inclined to help the prosecution by making the statement which led to the discovery of incriminating articles. All this happened on the 25th itself and yet, without any ostensible explanation or justification, Sarwan Singh was kept in police custody until November 30. That is one fact which is to be borne in mind in dealing with the voluntary character of his confession. What happened on November 30 is still more significant. On this day he was sent to the Magistrate to record his confessional statement. The evidence of the Magistrate Mr Grover shows that the accused was produced before him at about 2.30 p.m. He was given about half-an-hour to think about the statement which he was going to make and soon thereafter the confessional statement was recorded. It is true that the Magistrate did put to the accused the questions prescribed by the circulars issued by the High Court of Punjab. Even so, when the learned Magistrate was asked why he did not give more time to the accused before his confessional statement was recorded, his reply was frank and honest. He said that the accused seemed to insist upon making a statement straightaway. The Police Sub-Inspector who had taken the accused to the Magistrate was apparently standing in the verandah outside in the Magistrate's office. The doors of the office were closed but the fact still remains that the Sub-Inspector was standing outside. The evidence of the Magistrate also shows that, soon after the statement was finished, the Sub-Inspector went to the Magistrate's room again. The person of the accused showed some injuries and yet the learned Magistrate did not enquire how the accused came to be injured. It is in the light of these circumstances that the question falls to be considered whether the confession made by the accused can be regarded as voluntary. It is hardly necessary to emphasize that the act of recording confessions under Section 164 of the Code of Criminal Procedure is a very solemn act and, in discharging his duties under the said section, the Magistrate must take care to see that the requirements of sub-section (3) of Section 164 are fully satisfied. It would of course be necessary in every case to put the questions prescribed by

the High Court circulars but the questions intended to be put under sub-section (3) of Section 164 should not be allowed to become a matter of a mere mechanical enquiry. No element of casualness should be allowed to creep in and the Magistrate should be fully satisfied that the confessional statement which the accused wants to make is in fact and in substance voluntary. Incidentally, we may invite the attention of the High Court of Punjab to the fact that the circulars issued by the High Court of Punjab in the matter of the procedure to be followed, and questions to be put to the accused, by Magistrates recording confessions under Section 164 may be revised and suitable amendments and additions made in the said circulars in the light of similar circulars issued by the High Courts of Uttar Pradesh, Bombay and Madras. The whole object of putting questions to an accused person who offers to confess is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise having reference to the charge against the accused person as mentioned in Section 24 of the Indian Evidence Act. There can be no doubt that, when an accused person is produced before the Magistrate by the investigating officer, it is of utmost importance that the mind of the accused person should be completely freed from any possible influence of the police and the effective way of securing such freedom from fear to the accused person is to send him to jail custody and give him adequate time to consider whether he should make a confession at all. It would naturally be difficult to lay down any hard and fast rule as to the time which should be allowed to an accused person in any given case. However, speaking generally, it would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession. Where there may be reason to suspect that the accused has been persuaded or coerced to make a confession, even longer period may have to be given to him before his statement is recorded. In our opinion, in the circumstances of this case it is impossible to accept the view that enough time was given to the accused to think over the matter. Indeed, any Magistrate with enough criminal experience would have immediately decided to give longer time to Sarwan Singh in the present case for the obvious reason that Sarwan Singh appeared to the learned Magistrate to be keen on making a confession straightaway. The learned Magistrate himself has fairly stated that he would have given him longer time but for his insistence to make a confession without delay. This insistence on the part of Sarwan Singh to make a confession immediately should have put the learned Magistrate on his guard because it obviously bore traces of police pressure or inducement. Unfortunately, the effect of the failure of the learned Magistrate to grant enough time to the accused to consider the matter has not been considered by the learned Sessions Judge and has been wholly ignored by the learned Judges of the High Court. Besides, in neither court below has any attention been paid to the fact that Sarwan Singh appeared to have been kept in police custody without any justification between November 26 and November 30. We

> have carefully considered all the relevant facts bearing on this question and we see no escape from the conclusion that the failure of the learned Judges of the High Court to take into account these material facts has introduced a serious legal infirmity in their conclusion that the confession made by Sarwan Singh is voluntary. That is why we think we must reverse this conclusion."
>
> (emphasis supplied)

Delayed Confession (to facilitate tutoring)?

222. According to the prosecution, the accused was arrested on 29.12.2006 and on that day itself he made a detailed confession to the police. The accused also allegedly made a confessional statement at the crime scene leading to the recovery of bones, clothes belonging to other victims. According to prosecution, the accused was sent for narco analysis test etc. on 3.1.2006 and he again made a detailed confessional statement. Accused is said to have made further confessional statement on 11.1.2007, 13.1.2007 and 18.1.2007. Not much progress is shown to have been made in the investigation after 18.1.2007. Surprisingly the accused, however, was not produced before the magistrate for recording of his confession though repeated confessional statements are alleged to have been made by the accused before the police. None of these confessional statements adhere to the safeguards contemplated in law for ascertaining the voluntariness of accused SK. It is almost after two months of uninterrupted police custody that the accused has been produced before the magistrate for recording his confession.

223. The prosecution has not placed on record any credible material to demonstrate the progress of investigation for over a month and a half after 18.1.2007. The applications for remand successively made by the prosecution came up with contradictory versions of the police on the need for further

custody of the accused. The remand application made on 8.2.2007 and 22.2.2007 shows that police custody of accused SK was sought by the CBI on the pretext of recovering the body parts and clothes of victims D and 'XYZ' as also its identification. However, this Court in the judgment rendered in the case of 'XYZ' has clearly noticed that skulls and clothes of victim had been recovered and identified on 29.12.2006 and 3.1.2007 itself. Similar recoveries were also made in respect of victim D before moving of application for remand. It is in this context that we are required to examine the argument of defence that purpose of prolong police custody prior to his confession was to secure; (a) the consent of accused to submit to the prosecution on account of torture; (b) allow time for torture injuries to heal and; (c) allow time to accused to memorise the entire confession tailored to suit the recovery evidence.

224. According to defence the object was to sensationalise the crime with such perverted details that the reader's critical senses are numbed and the sense of revulsion, sprung against the accused.

Torture to accused

225. In Babu Singh Vs. State of Punjab, 1964 (1) Cr.L.J. 566 the Supreme Court dealt with a case of prolong police custody prior to confession where substantial period of police custody was not explained for the investigation. An inference was drawn by the court by relying upon the incident of unexplained and prolong police custody that the period was utilized to torture the accused and to tutor him extensively about the contents of what he was required to show by way of confession by memorizing the script.

226. Throughout his confession, accused SK repeatedly states he has been tutored by the police on vital aspects of the confession, including the names of the victims, the time, method, manner of killing etc. On 18 separate occasions, he states that he cannot remember. For example, in his confession accused SK states as follows:

> "(i) He says that the police made him memorise the names of the victims by showing him photographs.
>
> Question: What have they made you memorise?
>
> Answer: When the UP police arrested me they made me see these photos again and again and told me the names of these people. For each photograph, they told me the name, the time, the manner, etc. But I don't know about the time even now. They had told me all this but I have forgotten.
>
> (ii) He says that whatever names he has given for the victims he was told them by the police while showing him the photographs.
>
> Question: When the police showed you the photographs, would you remember that you had killed that person, etc.?
>
> Answer: I remembered very little and very faintly and that is what I have told them.
>
> (iii) He says he does not remember anyone's name and all the names were told to him by the police."

227. The above-quoted illustrative extracts from the confession supports the inference that the confession was not based on accused SK's personal knowledge but on what he had been tutored to say by the investigative agencies. This also lends credence to the defence version of it being the reason for unusually prolonged police custody prior to the recording of his confession, namely to ensure that he could remember and recite the confession taught to him by the investigative agency.

228. Tutoring by its very nature implies compulsion and falsity and is hit by Section 24 of the Evidence Act. The fact of tutoring is not limited to the names of the victims but also the time, method and manner of the killings etc. Tutoring with

regard to even one of these aspects would attract the bar u/s 24 Evidence Act.

229. It is extremely unnatural and defies logic that accused SK has no clear recollection of the nature and manner in which he disposed off the bodies or whether he had sex with them or whether he ate parts of them, but has a clear and categorical recollection of the time, sequence and manner of entrapping his victims. It is also surprising that he does not remember the names of the victims, or the date of each offence but he is able to chronologically narrate the sequence of killings in his confession. This further strengthens the argument that accused SK was tutored by the investigating agency and the same was done to ensure that the confession is in consonance with the prosecution case.

230. In the confession, accused SK states that UP Police ne ratwaya regarding the names, times and manner of killing of the victims. The term 'ratwaya' (made to memorize) implies compulsion, coercion and interference by the police, negates the voluntariness of a confession. It cannot be ascertained what is voluntary and true, and what is tutored and false. When there is evidence of tutoring, it is impossible to identify which part of the confession is tutored and which part is genuine. The taint attaches to the entire document.

231. We have been taken through the confessional statement in great detail by Sri Chaudhary. In his confessional statement also the accused has alleged that he was tortured. Following extract of the confessional statement is on record of the confession itself and is reproduced hereinafter:-

> "Jismesein 2-3 photo aisi thi matlab usme se mere ko kaafi torture kiya aur tab ja kar ke matlab jo inhone mere ko

> kabool karvai thi. **Acha!** Bohot zyaada torture kiya gaya tha mere ko. **Acha!** To jiski vajah se unhone mere ko ye do-teen photo jo hai matlab isme se kuch wo karwai thi, jo maine yahaan CBI main aakar mana kar diya ki aap chahe kuch bhi kar lo ye maine kiya hi nahi hai."

232. The above statement categorically mentions in the confession itself that the accused has been severely tortured and coerced to confess. The statement testifies to the coercive manner in which the confession has been extracted from accused SK and signifies the involuntary nature of it. There is otherwise no clarity with regard to which of the photograph that he was tortured. The possibility of accused having been tortured of the photograph of victim is, therefore, borne out on record.

233. The Accused also wrote a detailed letter to the Learned Sessions Judge dt. 25.11.08 and 16.3.09 stating, in detail, the brutal methods employed by the police to secure his confession. Although these letters were written generally to the trial court which was presiding over a large number of trials involving accused SK, and not in any specific case, these letters have been included at pg 88 in the appeal paperbook of CC 4196/2010 and at pg 91 in in the appeal paperbook of CC 4196/2010. Furthermore, two additional letters dated 1.4.10 and 10.6.11 were written by accused SK to the trial court in connection with ST No 740/07 and ST No 494/07 which are included in the paperbook of CC 835/11 at pg 295 and in the paperbook of CC 147/13 at pg 347. In the letter dt. 16.3.09 he specifically states that he was repeatedly beaten by the police. He further mentions that during police custody he was beaten up and made to sign on several blank pages (pg 91 in CC 4196/2010). In his statement in letter dated 10.6.11 in CC 147/13, accused SK specifically requests that he be medically examined as he still bears the scars of the torture meted out to

him. Further on 29.3.2010, accused SK wrote a letter (pg 736 in the paperbook) detailing the manner in which the CBI tortured, threatened and coerced him into making the confession. *He states that the CBI informed him that his family was in their custody and if he did not confess as per their say, they would leave the family to the mercy of the frenzied mob who were baying for his blood*.

234. It has been judicially accepted that it is almost impossible for an accused in custody to prove torture. As long as the proved facts give rise to a reasonable probability that the confession is a product of a threat or inducement it must be disregarded. In his statement u/s 313, while describing the brutal torture inflicted on him and had left marks on his body the accused SK also offered to get himself medically examined to prove the torture. However, neither the learned Sessions Court Judge nor the learned Magistrate who recorded the confession took any steps to have the accused SK medically examined.

Confession letter to ACMM, New Delhi

235. It is also pertinent to note that the application of accused for confession is addressed to the learned ACMM, New Delhi and the SJM, CBI, Delhi. Accused SK in his confession categorically admits to having no knowledge of the name of the Court where he has been produced. Had accused SK indeed addressed the application to the ACMM, New Delhi, he would have also known the Court in which he was being produced to record his confession. Additionally, prior to 28.02.2007, accused SK was being produced before the learned SJM Ghaziabad. Hence, it is extremely unnatural that he would on his own address his letter to the ACMM, New Delhi. This further

strengthens his claim that he wrote the letter on the CBI's coercion.

236. Furthermore, the letter by itself is in the nature of a confession, wherein he states he wants to confess regarding the manner in which he killed the victims, then had sex and disposed the bodies. This is contrary to the confession itself, wherein he mentions having sex and then killing. This contrary phrasing further strengthens the case that the letter was written on CBI's coercion.

237. Accused SK had worked as a labourer and servant all his life and had barely studied till the seventh standard. He admits to never having been in a Court or having any knowledge of legal proceedings. However, the letter is written as a legal application in formal Hindi, using official vocabulary that can only be known by someone who is familiar with the legal system and routinely writes formal applications to the court. Words such as "Samaksh, prarthi, nivedan, prastut" are not used in colloquial speech but are part of a legal vocabulary which would have been beyond accused SK's knowledge. The language of the letter strongly suggests that the contents were dictated by a police officer.

No proper medical examination

238. The learned ACMM had directed that before accused SK is handed over to DG (Prisons) Tihar, he be medically examined. Contrary to the learned ACMM's order, no medical examination of the Accused is done prior to handing him over to Tihar prison authorities. The only medical report furnished is the one done by the Jail Hospital on 1.3.2007. Accused SK was produced for recording his confession on 28.2.07 after 60 days

of uninterrupted police custody. It was therefore crucial that a medical examination was conducted on 28.2.07, prior to transferring him to judicial custody to ensure that the request to record a confession was not coerced by the CBI. The CBI's failure to conduct a medical examination, despite the Court's categorical order, is extremely suspicious and gives rise to an adverse inference u/s 114(g) of the Evidence Act.

239. This medical report on 1.3.07 has a noting to the effect that 'No fresh injuries were seen'. This in itself does not rule out the presence of older injuries on accused SK's person and supports his allegation of torture by the police. If older injuries were present on accused SK's body, they should have been noted by the doctor, and their ages and causes ought to have been ascertained. However, due sensitivity on part of the magistrate to this aspect of vital concern is clearly overlooked.

240. In his letter to the Learned Sessions Court, accused SK categorically stated that whenever the CBI took him for medical examination they pressurised the doctor into not mentioning any of the accused's injuries.

241. The medical officer, who is the only person who could have proved the medical report dated 1.3.07, or testified to the nature of accused SK's injuries, has not been examined. Suppression of this crucial testimony leads to an adverse inference u/s 114(g) Evidence Act.

Prosecution stand on torture

242. Learned counsel for the CBI, Sri Jitendra Mishra has argued that the reference of torture in confession was only with regard to 2-3 photographs and the allegation of torture

otherwise is against the U.P. Police and not the CBI. It is also argued that the attending facts and circumstances are suggestive of the complicity of accused and, therefore, the isolated statement in his confession referring to torture must be confined to 2-3 photographs and would not vitiate the confession.

Analysis of evidence on torture

243. The argument of CBI counsel Sri Mishra does not appeal to the Court, inasmuch as, the exact number of photographs for which he was tortured has not been clarified. Once the accused during the course of confession had alleged torture, the magistrate ought to have been alarmed and was expected to have probed about the torture. When was the torture made; how was it made; where it was made; who made it, etc. were obvious questions and were required to be asked from the accused and then probed. The magistrate otherwise should have directed the accused to have been medically examined. Necessary inquiry by the magistrate at the time of recording of confession by the accused has therefore not been made by the magistrate.

244. The argument of CBI that torture of accused by U.P. Police would not create any taint in the confession made by accused during his custody with the CBI is also not acceptable. The accused, herein, was initially in the custody of U.P. Police and was later in the custody of CBI.

245. We find substance in the argument of Sri Chaudhary that mere fact that allegation of torture is against previous investigation agency and, therefore, confession made without specific allegation of torture by subsequent investigating

agency (CBI, herein) would not eliminate the confession from the taint of torture and make it voluntary. The argument of CBI, if accepted, would run counter to Section 24 of the Evidence Act.

246. The language of the confession is unclear and does not lead to a clear conclusion about what was induced by torture and what was not. Accused SK keeps mentioning that his memory is faint. Thus, it cannot be stated with any degree of certainty that the torture was only for few photos and not the rest.

247. If there is evidence of torture, how can one say which part is induced by torture and which part is not? When a confession follows torture, it raises the presumption that it was induced by torture.

248. A confession needs to be clear, unequivocal, unambiguous, convincing, consistent with the internal evidence and capable of only one meaning. It should be such that it can be believed blindfolded. The truthfulness and voluntariness must attach to each and every part of the confession. If there is evidence of coercion, it cannot be determined as to which part of the confession is coerced and which part is not?

Confession in view of Section 28 of the Act of 1872

249. The Prosecution has relied on S. 28 of the evidence act to argue that accused SK's Section 164 Cr.P.C. confession is admissible as it was made after the removal of the impression caused by torture. The prosecution relies on accused SK's stray statement that he refused to admit to have killed the victims in certain photographs before the CBI. The Appellant submits that

S. 28 has no application in the present case.

250. For S. 28 to be applicable the "impression" of threat, promise or inducement needs to be fully removed. The term "impression" is far less fragile than either memory, impact, effect or even consequence. The term "impression" is synonymous or comparable with a vague subconscious feeling. The legislature has deliberately used the term "impression" and held that for a confession to be admissible even the vague subconscious memory of the torture should have been fully removed.

Facets of confession in this case

251. We cannot suppress our concern and surprise at the manner in which legal aid for five minutes was provided to the accused and has been found sufficient by the learned ACMM, New Delhi. Giving of five minutes time for legal aid to the accused was not only highly insufficient but virtually amounted to a farce. Legal Aid counsel will require lot more time to even understand the case of accused much less the time required to ascertain as to what was required to be done to secure his interest. Accused was not given any medical assistance. The investigating agency was also called inside the photography room and made to state the allegations against the appellant before the recording of confession. The CBI I.O. was also directed to wait outside the room throughout the period of recording. During the writing of transcript the appellant was handed over to I.O. at the end of everyday for production before the learned ACMM.

252. The confession transcription clearly notes at the end of proceedings on 1.3.2007 that the accused was given to I.O. for

his production before the Additional Chief Metropolitan Magistrate much after 10.00 pm. The Metropolitan Magistrate, even on 2nd March, 2007, has clearly recorded that a separate order was passed and was given to the I.O. for producing the accused before learned ACMM. These two orders clearly proves that on the night of 1st March, 2007 and again after conclusion of recording of transcript on 2nd March, 2007, the accused was given in the custody of the Investigating Officer of CBI who had initially produced him for recording confession. This direction of the magistrate clearly shows that the I.O. was not only present outside the room throughout the recording of transcript but was given the custody of the accused at the end of the day. The admitted access of I.O. to the custody of accused is a matter of serious concern. This circumstances would clearly lend credence to a reasonable doubt in the minds of the accused and it cannot be said that the accused SK was completely free of influence of the Investigating Agency when his statement was recorded or transcribed.

253. Given the intrinsic nature of torture, it is almost impossible to eradicate the "impression" of brutal police torture that is stamped deep into a person's sub conscious. The gruesome details of the torture given by the appellant in his retraction letters and statement u/s 313, if true, would forever haunt a person. Unfortunately, no effort was made by the Court of Sessions to ascertain its correctness. The manner in which the appellant mechanically parrots the confession including the details that he himself states were tutored and had been coerced to remember 'ratwaya' clearly indicates that he was still reeling under the impression of the torture and tutoring.

254. That even though the appellant lets accidentally slip that he was tortured, it would have been impossible for him to

continue to give the full details of the same knowing that the IO was standing outside the room. Further, at this point even the recording magistrate does not give him any assurance that he should be free of fear or ask him further details regarding who tortured him or the manner of the same. Thus, a stray line that the Appellant did not concede to killing the victims in two photographs before the CBI does not substantiate the prosecution's submission that the effect of torture has been fully removed.

255. In Pyare Lal Bhargava vs State of Rajasthan AIR 1963 SC 1094, the Supreme Court has observed as under in para 4 and 5 of the report:-

> "4. The first question turns upon interpretation of the provisions of Section 24 of the Evidence Act and its application to the facts found in this case. Section 24 of the Evidence Act lays down that a confession caused by inducement, threat or promise is irrelevant in criminal proceedings under certain circumstances. Under that section a confession would be irrelevant if the following conditions were satisfied : (1) it should appear to the court to have been caused by any inducement, threat or promise; (2) the said threat, inducement or promise must have reference to the charge against the accused person; (3) it shall proceed from a person in authority; and (4) the court shall be of the opinion that the said inducement, threat or promise is sufficient to give the accused person grounds which would appear to him reasonable in supposing that he would gain an advantage or avoid any evil of a temporal nature in reference to the proceedings against him. The crucial word in the first ingredient is the expression "appears". The appropriate meaning of the word "appears" is "seems". It imports a lesser degree of probability than proof. Section 3 of the Evidence Act says:
>
> > "A fact is said to be 'proved' when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists".
>
> Therefore, the test of proof is that there is such a high degree of probability that a prudent man would act on the assumption that the thing is true. <u>But under Section 24 of the Evidence Act such a stringent rule is waived but a lesser degree of assurance is laid down as the criterion.</u> The standard of a prudent man is not completely displaced, but

> the stringent rule of proof is relaxed. Even so, the laxity of proof permitted does not warrant a court's opinion based on pure surmise. A prima facie opinion based on evidence and circumstances may be adopted as the standard laid down. To put it in other words, on the evidence and the circumstances in a particular case it may appear to the court that there was a threat, inducement or promise, though the said fact is not strictly proved. This deviation from the strict standards of proof has been designedly accepted by the legislature with a view to exclude forced or induced confessions which sometimes are extorted and put in when there is a lack of direct evidence. It is not possible or advisable to lay down an inflexible standard for guidance of courts, for in the ultimate analysis it is the court which is called upon to exclude a confession by holding in the circumstances of a particular case that the confession was not made voluntarily.
>
> 5. The threat, inducement or promise must proceed from a person in authority and it is a question of fact in each case whether the person concerned is a man of authority or not. What is more important is that the mere existence of the threat, inducement or promise is not enough, but, in the opinion of the court the said threat, inducement or promise shall be sufficient to cause a reasonable belief in the mind of accused that by confessing he would get an advantage or avoid any evil of a temporal nature in reference to the proceeding against him : while the opinion is that of the court, the criterion is the reasonable belief of the accused. The section, therefore, makes it clear that it is the duty of the court to place itself in the position of the accused and to from an opinion as to the state of his mind in the circumstances of a case."

256. In Aloke Nath Dutta (supra), the Court has observed as under in para 108:-

> "108. The courts while applying the law must give due regard to its past experience. The past experience of the courts as also the decisions rendered by the superior courts should be taken as a wholesome guide. We must remind ourselves that despite the fact that procedural safeguards contained in Section 164 Cr.P.C. may be satisfied, the courts must look for truthfulness and voluntariness thereof. It must, however, be remembered that it may be retracted subsequently. The court must, thus, take adequate precaution. Affirmative indication of external pressure will render the retracted confession nugatory in effect. The court must play a proactive role in unearthing objective evidence forming the backdrop of retraction and later the examination of such evidence of retraction. However, in cases where none exists, the court must give the benefit of doubt to the accused. Where there is no objective material available for verifying the conditions in which the confession was retracted, the spirit of Section 24 of the Evidence Act (irrelevance of confession caused by inducement) may be

> extended to retracted confession. An inverse presumption must be drawn from absence of materials."
>
> (emphasis supplied)

257. Use of word "appears" in Section 24 of the Act of 1872 is intentional with the object of securing absolute fairness in admitting confessions into evidence and discarding it if a reasonable apprehension arises, on facts, of it being caused by inducement, threat or promise. "Appears" has been deliberately used by Parliament, for it is impossible for the accused to prove torture/inducement/ threat since he is alone in police custody. Positive proof of torture is not required and a well-grounded suspicion may also suffice.

258. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession even if it is admissible in evidence. In Dagdu v. State of Maharashtra (1977) 3 SCC 68 the Supreme Court held as under in para 51:-

> *"51. Learned Counsel appearing for the State is right that the failure to comply with Section 164(3) of the Criminal Procedure Code, or with the High Court Circulars will not render the confessions inadmissible in evidence. Relevancy and admissibility of evidence have to be determined in accordance with the provisions of the Evidence Act. Section 29 of that Act lays down that if a confession is otherwise relevant it does not become irrelevant merely because, inter alia, the accused was not warned that he was not bound to make it and the evidence of it might be given against him. If, therefore, a confession does not violate any one of the conditions operative under Sections 24 to 28 of the Evidence Act, it will be admissible in evidence. But as in respect of any other admissible evidence, oral or documentary, so in the case of confessional statements which are otherwise admissible, the Court has still to consider whether they can be accepted as true. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or*

> *voluntariness of the confession, the Court may refuse to act upon the confession even if it is admissible in evidence. That shows how important it is for the Magistrate who records the confession to satisfy himself by appropriate questioning of the confessing accused, that the confession is true and voluntary. A strict and faithful compliance with Section 164 of the Code and with the instructions issued by the High Court affords in a large measure the guarantee that the confession is voluntary. The failure to observe the safeguards prescribed therein are in practice calculated to impair the evidentiary value of the confessional statements."*
>
> *(emphasis supplied)*

259. Supreme Court in Mohd Ajmal Amir Kasab v. State of Maharashtra (2012) 9 SCC I has authoritatively pronounced that if a doubt is created regarding the voluntariness of the confession, the confession is to be trashed. In para 457 of the report the Court has observed as under:-

> *"….The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the confession, notwithstanding the safeguards stipulated in Section 164 it has to be trashed; but if a confession is established as voluntary it must be taken into account, not only constitutionally and legally but also morally."*

260. Similarly in Mohd. Jamiludin Nasir v. State of WB (2014) 7 SCC 443 the Court has held that if the court has an iota of doubt, it should reject the confession.

261. Apart from the attending circumstances creating serious doubt upon the voluntariness of confession we find that the confession of accused SK itself mentions that pressure was exerted by the police which clearly goes against the prosecution case. Allegation of torture is made in the confession itself and therefore not much endeavour is required to be made to raise a doubt upon it.

262. Strict proof is otherwise not required and the sufficiency of threat or inducement is to be seen from the perspective of the accused. It is settled that if the accused would have a reasonable belief that by, confessing he would gain an advantage or avoid an evil, it cannot be relied upon.

263. The question whether a particular confession attracts the frown of S.24 has to be decided from the point of view of the confessing accused as to how the inducement threat or promise proceeding from a person in authority would operate on his mind.

264. The CBI moved an application to record the confession of accused SK before the learned ACMM, Patiala House Courts, New Delhi citing prior incidents of violence in the Ghaziabad Court premises during remand proceedings on 25.01.07. However, the CBI deliberately suppressed the fact that accused SK had been produced before the learned CBI Magistrate, Ghaziabad, on two further occasions i.e. on 8.02.2007 and 22.02.2007, without any incident. Therefore, the reason for moving the application at Delhi also remains questionable.

265. It is the CBI's case that accused SK was badly beaten up by the advocates and public when he was produced in the Ghaziabad Court on 25.1.07 and therefore faced an absolute security threat and danger. However, the CBI did not report the assault on accused SK to the Magistrate before whom he was produced on 25.1.07. Further, the CBI did not produce any medical treatment papers corresponding to the said incident nor did they take any steps to provide accused SK with any additional security. Moreover, not only did the CBI not mention the assault on accused SK to the Magistrate on 25.1.07, they did not breathe a word regarding a security threat to

Magistrate subsequent to the day of assault. The first mention of this threat is made only before the ACMM, New Delhi, in the IO's application for recording his confession filed on 28.2.07.

266. The failure to mention the grave security threat and a vicious physical assault on accused SK by advocates of the court to the Magistrate is not substantiated and sounds suspicious.

267. If before confessing, accused SK was facing a threat at Ghaziabad jail, as claimed by the CBI, this threat would have increased manifold after his confession. It is therefore inexplicable why, immediately after completion of the confession accused SK was shifted back to Gaziabad Jail and no threat was apprehended.

Safeguards of Section 164 Cr.P.C.

268. The law imposes safeguards u/s. 164 Cr.P.C. to ensure that the confession is voluntarily given and free from any compulsion or coercion. The safeguards aim to ensure that the confessor has completely understood the consequences of making a confession and still makes one by exercising his free will. According to the defence the mandatory safeguards under s. 164 were allegedly not complied with in this case, and this non-compliance renders the confession inadmissible, unreliable and unworthy of credit.

269. In Shivappa vs. State of Karnataka (1995) 2 SCC page 76, the Court has clearly observed that non-compliance with the provisions contained under Section 164 Cr.P.C. renders confession unworthy of credit. It is held that procedural requirement of Section 164 must be complied with in letter and

spirit. Any failure to comply with the requirement under Section 164 Cr.P.C. impairs the evidentiary value of confession.

270. It is well established that before the Magistrate records an accused's confession he should tell him that he is giving him some time to think over whether or not he wants to confess and for this purpose he is sending the accused to judicial custody where he will be beyond the control of the police. Unless the accused is informed of the purpose of sending him to judicial custody, this salubrious provision will lose its meaning and efficacy. In the present case, accused SK was perfunctorily sent to judicial custody by the learned ACMM who was not the Magistrate who recorded the accused's confession. Moreover, the Learned ACMM did not inform accused SK that he was being sent to judicial custody in order to give him some time to think over whether or not he wants to make the confession and during this period the police will not be allowed to contact him. Consequently, when accused SK was remanded to judicial custody he did not know why he was being sent there. Judicial custody in the absence of any information regarding the purpose behind the same is of no value.

271. In Babu Singh v. State of Punjab 1964 (1) Cri LJ 566 the Supreme Court has emphasized the need to give reasonable time to the accused to deliberate on the need to make a confession. The fact that Magistrate had not recorded in the proceedings about giving of opportunity to think over the issue has also been held to be a circumstance to discard confession.

272. Further, even the Magistrate who recorded accused SK's confession also did not give him an opportunity to think over the matter by remanding him to judicial custody before recording his confession. Nor did he enquire with accused SK

whether he had thought over the matter, or whether he wants some more time to think over the matter. Instead, he proceeded to forthwith record accused SK's confession without satisfying himself about grant of opportunity to the accused SK to deliberate over the issue.

273. It is by now well settled that the Magistrate has to inform the accused before sending him to judicial custody for reflection time that he was not bound to give a confession, that he should think it over, that the confession could be used to convict him in a capital case. He must be made to realise the consequences of making a confession which will send him to the gallows.

274. Accused SK was sent to judicial custody for merely 24 hours. Judicial custody of merely 24 hours is grossly insufficient when the accused has been in police custody for 60 days. The duration of reflection time is dependent on the duration of the preceding police custody and the time necessary to neutralize the influence of the police. The accused SK otherwise was not informed that even this 24 hours time is being given to him to ponder over the issue of making confession.

No effective legal aid

275. Sri Chaudhary for the appellant submits that the concerned ACMM at New Delhi court merely did the formality of legal aid to the accused. On 28.02.2007 when the accused was produced before the concerned ACMM with an application for recording his confession, the court concerned remanded him to judicial custody ostensibly with the purpose of allowing him the opportunity to rethink without specifying the purpose. The learned ACMM, however, did not think it fit to provide any legal

assistance which was crucial for an accused contemplating to make a confession which can take him to the gallows. It was only on the next day that the Judge granted five minutes interview in the interest of justice to the accused inside the court.

276. Given the importance of the course about to be adopted by accused SK in voluntarily confessing before a Magistrate, the potential prejudice it could cause to his case, and the serious punishment it would expose him to, it was absolutely essential that he was thoroughly counselled by the legal aid lawyer who would primarily need to ascertain the allegations against the accused, the stage of the investigation, the reasons for the accused wanting to confess, how he had been treated in custody and whether the accused has been coerced or tortured in any way. The counsel would then need time to explain the implications of such a confession to him. It would be impossible for the legal aid counsel to do any of this in the allotted 5 minutes. Moreover, the presence of the police in the court room and the absence of any privacy would have further inhibited accused SK from saying anything to the legal aid counsel.

277. Every person accused of an offence has a constitutional right under Article 20 to, remain silent and not incriminate himself in the police station, during investigation and finally during trial. If a person is going to make a confessional statement, he must be made aware of the constitutional protection afforded to him before he surrenders his right against self-incrimination. This is all the more necessary in capital cases and where the accused is poor and illiterate. The need for legal aid to be provided to the accused at every stage of legal proceedings from the time of arrest is well established in our law. In Mohd Ajmal Amir Kasab v. State of Maharashtra

(2012) 9 SCC 1 the Supreme Court noted that the accused had the right to have a legal aid lawyer from the very first remand and especially before his confession. The absence of a legal aid to the accused during remand and before confession has been cited by the Supreme Court as a reason to reject the confession.

278. In Babubhai v. State of Gujarat (2006) 12 SCC 268 the Supreme Court has held in para 19 of the report that absence of legal aid to the accused during remand and at the time of making confession is mandatory. Para 19 of the judgment is reproduced hereinafter:-

> *"19. We must also notice that there was no direction to provide free legal aid to the appellant. He had no opportunity to have independent advice. We may, however, hasten to add that it does not mean that such legal assistance must be provided in each and every case but in a case of this nature where the appellant is said to have confessed in a large number of cases at the same time, the State could not have denied legal aid to him for a period of three years."*

279. Supreme Court in the parliamentary attack case, State of NCT vs Navjot Sandhu, (2005) 11 SCC page 600 emphasized the importance of legal aid to the accused and the consequence of its denial where the accused makes a confession while interpreting the provisions of Prevention of Terrorism Act, 2002. The right of accused to consult a lawyer during investigation was highlighted and on its failure the confession itself was discarded. In DK Basu (supra) 1997 1 SCC 416, the Supreme Court categorically held that the arrestee should be permitted to meet his lawyer during interrogation. This direction is similar to the provision for legal aid under Prevention of Terrorism Act, 2002. The guidelines issued in the case of DK Basu was fully applicable in the facts of the present

case.

280. Right to legal aid assumes importance where the accused intends to make a confession before the court. The consequence which may flow for an accused on account of such confession are extremely severe and harsh. A fair procedure, which is otherwise a part of Article 21 of the Constitution of India, would thus necessarily require providing of legal aid to the accused in a case of confession. The legal aid otherwise cannot be an empty formality as is clearly shown to be the case herein. Providing of five minute legal aid apparently serves the requirement of form rather than the substance. The manner in which the accused has been denied legal aid before recording of his confession, therefore, has seriously caused prejudice to the accused appellant and has given a legitimate grievance to the accused appellant of his Constitutional Rights under Article 21 by denying him fair procedure during trial. Denial of legal aid, in the facts of the present case is therefore clearly shown to have violated the right of fair trial to the accused SK.

Non compliance of procedural safeguards under Section 164 Cr.P.C.?

281. Section 164 Cr.P.C. requires the recording magistrate to take certain precautions and perform certain responsibilities in order to ensure that the confession recorded is voluntary. In the present case the non-application of mind extended so far that the recording Magistrate abdicated each of these functions and left it to the satisfaction of the ACMM which is not contemplated in law.

282. As enumerated above the Magistrate did not send the accused SK for a cooling off period after giving him a warning

and telling him the consequences of making a confession. Neither did he ask accused SK about the duration of his police custody, have him medically examined or even inspect the medical reports produced from Tihar jail. He did not stop or take any action on hearing complaints of torture. Further when cross- examined the learned Magistrate (PW-11) stated that as these steps had already been taken by the Learned ACMM, he did not feel the need to repeat them.

283. Further the learned Magistrate even refrained from remanding the accused to judicial custody during the typing of the transcript of the confession. Instead of personally ensuring that the accused was protected from the police and remanding him to judicial custody, the Magistrate handed accused SK over to the IO for production before the Learned ACMM for remand proceedings.

284. Whilst the recording of a confession by a non-jurisdictional magistrate is permitted, the splitting of essential functions that can statutorily be performed only by the recording magistrate is not curable. The jurisdiction of the recording magistrate under Section 164 Cr.P.C. is coupled with the responsibilities to be performed by him, and it is not open to split the two. In that case, the recording Magistrate will not be in a position to record his satisfaction about voluntariness of confession.

285. S. 164 CrPC confers the recording magistrate with certain powers and responsibilities that the recording magistrate alone can perform. As it is the recording magistrate's conclusion of voluntariness that will determine the admissibility of the confession u/s 164 CrPC, these functions cannot be exercised by anyone other than the recording magistrate. The Learned

ACMM could have recorded the confession herself or as in the present case directed the Metropolitan Magistrate (PW-11) to record the same. However, once the Learned ACMM had directed PW-11 to record the confession the scheme of S. 164 CrPC implicitly bars anyone else except the recording Magistrate (PW-11) from performing the functions qua the proceedings u/s 164 CrPC.

286. Even the remand orders passed by learned ACMM contains directions with regard to the manner in which the confession is to be recorded and thereby usurped the jurisdiction of the recording magistrate (PW-11). On facts, it is shown that the directions of learned ACMM have been dutifully followed by PW-11 which clearly amounts to surrendering of his jurisdiction to learned ACMM. This is wholly impermissible in the scheme of Section 164 Cr.P.C.

287. The only person who could have sent accused SK to judicial custody for cooling off was PW11, that too after explaining the consequences of making the confession to him. The Learned Metropolitan Magistrate was required to enquire about the duration of accused SK's police custody and have him medically examined such that he could determine the duration of cooling off necessary to remove the effects of police custody. Further he was required to personally remand accused SK to judicial custody throughout the recording and transcribing of the confession such that he could ensure that the accused SK was protected from any coercive or police influence. Crucially the confession was signed only on the third day and was therefore incomplete till 3.3.07. Since the Magistrate failed to take the steps required at his level, in law, the satisfaction recorded by him under Section 164 Cr.P.C. cannot be held to be valid satisfaction.

288. A careful analysis of the evidence on record regarding confession by accused clearly indicates that the magistrate concerned (PW-11) has not exercised due care and precaution expected of him as per law. The manner of exercise of power by the recording magistrate lends support to the defence argument that the magistrate abdicated his jurisdiction while recording confession and blindly followed the commands of learned ACMM thereby he has deprived himself of the subjective satisfaction of voluntariness necessary to record a confession u/s 164 CrPC, rendering accused SK's confession inadmissible.

No conclusive finding of voluntariness prior to recording of confession.

289. PW-11, moreover, did not comply with the mandatory requirements of being satisfied that the confession is being made voluntarily. A perusal of the confession itself reveals that he did not arrive at a conclusive finding that the Accused is confessing voluntarily but proceeded on the basis of the assumption that it was voluntary. This is reflected in the following lines found in the document:

> "It ***seems*** that he is still willing to get his statement".
>
> "From the above questions which I have put just now to the accused in Hindi it ***seems*** that there is no force, coercion or undue influence on his mind and it ***seems*** that he is ready to get his confession recorded voluntarily."

290. Section 164(2) Cr.P.C. mandates that before recording any such confession the Magistrate must not only explain to the person making it that he is not bound to make confession and that, if he does so, it may be used as evidence against him and that such confession shall not be recorded by the Magistrate unless, upon questioning the person making it, has

reason to believe that it is being made voluntarily. The standard of satisfaction on part of the recording Magistrate, for ascertainment of voluntariness, is intended to be higher when the legislation uses the expression **believe**. It indicates definiteness on his part regarding voluntariness of confession and imposes a higher degree of satisfaction. As against this, the term **seems**, employed by the recording Magistrate merely conveys impression of being voluntary, and not definiteness, as is required in law. Therefore, the recording of the confession is initiated not on the basis of a concrete finding of voluntariness, as was mandatorily required under Section 164 Cr.P.C. Non-observance of mandate of law has thus exposed the confession to challenge on such ground.

Confession not properly proved:

291. The sine qua non of a lawful confession under S. 164 CrPC is that (i) the confession must be properly recorded (ii) the confession must be signed by the accused and the recording magistrate (iii) the confession must contain a memorandum stating the Magistrate's belief in the voluntariness of the confession. If any of the above ingredients are missing the confession is rendered inadmissible.

292. A reading of s. 164 CrPC therefore makes it clear that the section envisages a written contemporaneous record of the accused's confession as only a written document can be contemporaneously recorded, signed and have a memorandum. While the 2009 amendment to section 164 allows for audio-video recording also of confession but the same is allowed in addition to the primary written record and not as a substitute for the written recording. Further the amendment came into effect much after accused SK's confession was recorded.

293. In the present case the prosecution has adduced the audio-video recording as the primary evidence of accused SK's confession u/s 164 CrPC. This falls foul of S. 164 CrPC as the section does not permit for an audio-video recording to be the primary proof of an accused's confession. Further the audio-video recording has not been signed by either the accused SK or the recording magistrate PW11. Furthermore, no memorandum as mandated u/s 164 CrPC has been appended to the audio-video recording or dictated by the magistrate at the end of the audio video recording. Thus, the audio-video recording of accused SK's confession does not comply with the mandate of S. 164 CrPC.

294. The original memory chip of the video camera used to record the confession would constitute primary proof of the recording of confession. This chip has not been produced in court. Whilst a copy of the confession has been adduced through a CD, the same is not accompanied by a certifcate in terms of section 65B of the Act of 1872. Further the memory chip which is the primary document was not sent to the trial court as mandated by s. 164(6) CrPC. Thus, the CD of the confession (Article No. 53) does not constitute lawful proof of accused SK's confession.

295. PW-11, the learned MM, Patiala House, states that accused SK’s confession was audio and video-graphed and identifies the two CDs that were prepared in court which are marked as Article No. 53. However he later admits in his cross-examination that the CDs marked as Article No. 53 do not bear his signatures or the signatures of accused SK and are not the original CDs prepared by him. It is therefore evident that the CD played and proved in court is not the original CD prepared by PW-11 on 1.3.07. Following passage from the cross-

examination of PW-11 are reproduced hereinafter:-

> "अभियुक्त के बयान मैनें आर. सी.-17/2017 में रिकार्ड किया था। आर.सी.-2/2007 में मैनें अभियुक्त का बयान नहीं लिया था। बयानों की दो सी.डी. उसी समय तैयार की गई थी। उन दोनों सी.डी. को मैनें सील किया था और उन पर अपने हस्ताक्षर किये थे। फिर कहा कि चार सी.डी. तैयार की गई थी उनमें से दो सी.डी. विवेचक को दे दी गई थी व दो सी.डी. रिकार्ड में रख ली गई थी जिन पर मैनें व अभियुक्त सुरेन्द्र कोली ने हस्ताक्षर किये थे। वस्तु प्रदर्श-53 पर न मेरे दस्तखत है न अभियुक्त सुरेन्द्र कोली के दस्तखत है। यह सी.डी. मूल सी.डी. की नकल है। यह सी.डी. मेरे सामने तैयार नही हुई थी। मैनें अभियुक्त को बताया था कि मैं मजिस्ट्रेट हूँ। मैनें अपने आप को अभियुक्त को समझाने हुते जज होना बताया था। मैं नहीं बता सकता कि बयानों के पृष्ठ नंबर 13 के 19 वीं पंक्ति में जहां शब्द पता चला टंकित है उसके बाद सी.डी. के अनुसार "पुलिस के जरिये" लिखा होना चाहिए था। यह कहना गलत है कि अभियुक्त ने अपनी मर्जी से बयान न दिया हो बल्कि पुलिस के दबाव में बयान दिया हो। यह कहना भी गलत है कि मेरे संज्ञान में यह बात आ गई थी कि अभियुक्त सुरेन्द्र कोली को पुलिस द्वारा प्रताडित किया गया था फिर भी मैनें उसका ब्यान लिखा हो।
>
> कागज संख्या 292 ख/56 व 292 ख/57 का मूल प्रार्थना पत्र डा० कामिनी लाऊ के समक्ष पेश हुआ था और उनके आदेश के साथ यह प्रार्थना पत्र भी मेरे पास आया था। बयान रिकार्ड करने से पहले मैनें इस प्रार्थना पत्र को पढ लिया था। अभियुक्त की सिक्योरिटी रिस्क के कारण उसे दिल्ली में बयान देने हेतु पेश किया गया था। इस प्रार्थना पत्र में लिखा है कि दिनांक 25.1.2007 को जब अभियुक्तों को गाजियाबाद के कोर्ट में पेश किया गया तो उन्हें वकीलों व पब्लिक के लोगों ने बुरी तरह मारा-पीटा था व गाजियाबाद जेल में अभियुक्त सुरेन्द्र कोली की पिटाई जेल में बंद कैदियों द्वारा की गई थी। मुझे नही मालूम कि अभियुक्त को दिनांक 08.02.2007 व 22.02.2007 को गाजियाबाद की कोर्ट में पेश किया गया था। मुझे विवेचक ने यह नहीं बताया था कि दिनांक 08.02.2007 व 22.02.2007 को गाजियाबाद की कोर्ट में अभियुक्त पर हमला हुआ था। कागज संख्या 292 ख/58 अभियुक्त द्वारा एसी.एम.एम. नही दिल्ली को लिखा गया था। अभियुक्त के बयानों में यह लिखा हुआ है कि जब उससे पूछा गया कि उसे किस कोर्ट में पेश किया गया था तो अभियुक्त ने बताया कि उसे नही मालूम कि उसे किस कोर्ट में पेश किया गया। बयान लेने से पूर्व मैनें अभियुक्त को कानूनी सहायता उपलब्ध नही कराई थी। बयान लेने से पूर्व मैनें अभियुक्त का डॉक्टरी परीक्षण नही कराया था क्योंकि उसका चिकित्सा परीक्षण तिहाड जेल के चिकित्सा अधिकारी द्वारा किया जा चुका था। श्री गुरिन्द्र पाल सिंह, अमन सरीन व नीरज अग्रवाल एडवोकेट के हस्ताक्षर किसी कागज में नही है और न ही उनके कोई वकालतनामा या प्रार्थना पत्र है।"

296. The transcript of the confession moreover is not proved to have been sent to the trial court as is mandated u/s 164(6) CrPC. The magistrate specifically records that he only sent the CDs to the ACMM for further proceedings. The prosecution has failed to establish the chain of custody and the manner in which the transcript reached the Sessions Court where trial got conducted. In these circumstances the transcript of the confession does not satisfy the essential requirements of s. 164

CrPC and does not constitute lawful proof of the confession.

297. It is clear from the statement of the Magistrate that no legal aid was provided to the accused SK during recording of his confession. It was only when he was asked about the confession during trial that he retracted the same. It is precisely because of this that retractions at the stage of recording of statement under section 313 Cr.P.C. are taken into consideration while analysing its voluntariness.

Confession not shown to be true, rather, contradicted by other evidence

298. As mentioned above, it has to be shown that the confession is both true and voluntary, and that the Court must inquire into the truth of the confession only after it reaches an affirmative conclusion about its voluntariness. The truth of the confession is adjudicated by seeing whether it fits into the rest of the evidence adduced by the Prosecution. If it is found that any aspect of the confession is contradicted by any proved fact, the entire confession has to be rejected. Confession must be shown not only to be true but also to be in consonance with the probabilities of the prosecution case on material points. If the confession appears to be untrue in any material particular, it has to be rejected. The test to determine the voluntary nature of a confession is that it must fit into the proved facts and not run counter to them.

299. In the present case, the confession is not explained in view of other prosecution evidence in the following manner:

(i) It is an admitted position that no torsos were found in the bones recovered from the gallery or the drain. The absence of

any torsos and recovery of only skulls, hands and feet does not support the sexual motive proffered by the prosecution.

(ii) As per the confession, the polythene bags containing the body parts were merely thrown into the gallery behind D-5. If this was the case, the bags would have been found piled up one on top of the other. The confession does not state that the plastic bags were buried deep into the ground. However, as per Ex. Ka 16, the seizure panchnama dt. 29.12.06, the skulls and bones were buried in the ground.

(iii) As per the prosecution case, no intact bodies were found, and only different body parts were discovered. It is also the prosecution case that these body parts had been severed before being put in the drain. It is also the prosecution case that the DNA of K and F's parents matched some of the body parts that were discovered. However, as per the confession, the bodies of four victims L, K, Fand Pushpa - were not cut but were simply thrown in their entirety in the drain in front of D-5. The discovery of the severed body parts of K and Ffalsifies the confession on a material point.

(iv) As per the confession and disclosure statements made by accused SK the bodies were thrown from accused SK's toilet on the first floor into the enclosed gallery behind House No. D-5. A look at the site plan reveals that the toilet and the servant room are adjacent to House No. D-4 whereas most of the recoveries have been made towards the other side i.e. House No. D-6. If the prosecution version is to be accepted then all the remains should have been recovered from beneath the window or in the enclosed gallery behind House No. D-4 or adjoining areas of enclosed gallery behind House No. D-5. However, as seen by the recovery map, majority of the skeletal

remains were recovered from the enclosed gallery behind House No. D-6 or adjoining areas towards House No. D-5.

(v) The IO, Chote Singh admits that the window in the servant quarter facing the gallery was at a height of 25 feet. It is beyond the realm of possibility that packets containing dismembered bodies could be thrown from the height of 25ft without leaving any blood splatter on the wall. The complete absence of blood stains on the wall of D5 facing the gallery falsifies the narrative proffered in the confession.

(vi) In the confession the accused states that he would cook the liver and other body parts of the victims in the pressure cooker and eat it. This could have easily been corroborated and there was strong likelyhood of biological stains being found in the utensils used to cook the body parts. It may be noted that a seven-member team from FSL Agra searched D5 thoroughly between 4.1.07 and 6.1.07 and seized all material with even the slightest hint of a suspicious stain. The complete absence of any forensic evidence of the cooking of body parts does not corroborate the allegation of cannibalism.

(vii) It is the case of the prosecution that the skulls recovered from the gallery were buried beneath the mud and a spade was used to unearth the same. In fact S.I Chote Singh, states that many people were digging the ground and recovering the skulls and that they were covered with 2- 3 inches of mud. Yet the confession narrated by accused SK, which is otherwise filled with the minutest detail regarding the offence and the chronological sequence of events in the manner of luring the victim and rendering her unconscious, the attempt to rape, the killing, and the manner of cleaning and disposal of bodies is conspicuously silent about burying of the skulls.

(viii) As per the confession, the offences were committed wholly by accused SK with no involvement of Pandher. However as per the remand application and order dt. 30.12.06 and remand application dt. 11.1.07 both accused SK and Pandher confessed to raping and killing the children going missing from Nithari Noida, including the victim in the present case. Therefore, it is not possible to both convict Pandher u/s 302 r/w 120B and also to believe the confession. Further not only is Pandher charged u/s 302 r/w 120 B IPC he is also convicted u/s 302 r/w 120 B IPC. Once the Court concludes that there is sufficient evidence to convict Pandher, it can no longer rely on accused SK's confession u/s 164 CrPC if it is to be logically consistent.

No independent corroboration of murder, rape or cannibalism

300. There is no evidence that any killing ever took place inside House No. D-5. If accused SK had indeed killed and dismembered 16 bodies inside the house, there was strong likelihood of presence of some blood stains on articles in the house and on his clothes. Further, fragments of human skin, flesh and bones would have certainly been found in the bathroom and in other parts of the house. A team of experts from FSL Agra conducted a thorough examination of House No. D-5 and seized all articles with even the hint of any suspicious stains. The CBI also constituted a team of experts from AIIMS who examined House No. D-5 minutely and collected various samples on 12.1.07 and 13.1.07. However, neither any human remains, nor blood-stained clothes, nor any blood-stained articles such as carpets etc. were found.

301. A perusal of the CFSL report dated 16.3.07 and 8.03.07

shows that a drop of blood was found on the pipe collected from accused SK's bathroom on 5.1.07. However, it could not be determined whether the blood was human or not. A drop of blood was also found on the tile and wash-basin pipe collected from the bathroom on the first floor of the house on 12.1.07.

302. A perusal of the CFSL report shows that no other article collected from the house were stained with blood.

303. If accused SK had indeed been cooking and eating human body parts some biological stains would have been found on the utensils in the kitchen. But no such stains are found. In fact other than the statement in the confession there is no evidence of cannibalism.

304. As per accused SK's confession dated 1.3.07, accused SK had strangulated and killed a many of his victims with a dusting cloth. This cloth is not found anywhere in the house.

305. The prosecution has not adduced any independent evidence on the charge of rape. Even the semen and blood found on victims' clothes recovered from the gallery between D-5, D-6 and the Jal Nigam residential quarters and the drain on the main road facing row of houses does not match the semen found on accused SK's quilt.

306. Accused SK retracted his confession in his statements under section 313 Cr.P.C, and provided specific details of the torture inflicted on him by the police. It is well settled in law that a retracted confession by itself is a weak piece of evidence and needs full and strong corroboration in material particulars by independent evidence both as to the crime and as to the accused's connection with that crime.

307. The prosecution has attempted to create a perfect crime for which there can be no corroboration possible. In any ordinary circumstantial evidence case, evidence of the following circumstances are ordinarily collected by the investigation agency:

(i) Last Seen
(ii) Witness who has seen or heard the Victim near the spot
(iii) Motive
(iv) Witnesses to preparation
(v) Post Offence Conduct
(vi) Recovery of blood-stained weapons
(vii) Forensics Blood on clothes used by the accused.
(viii) Forensics-DNA or semen on the spot of victim's clothes
(ix) Forensics- Blood on the Spot.

308. Curiously, no evidence on the above circumstances are collected or proved by the prosecution in this case.

309. The confession of accused SK is tailor-made to suit the prosecution case. The prosecution story is that the promiscuous acts of Pandher generated pressure on the accused SK who would then act in an automaton state to call young girls so as to satisfy his lust. This prosecution version would not have explained the Nithari killings which included boys as well. To explain this aspect, the accused in his confession stated that pressure on his mind was so extreme that he would overlook the sex of victim and bring even boys to satisfy his lust and thereafter kill them in similar fashion. This part of confession is even foreign to the prosecution case and appears to have been introduced only to explain the circumstances of missing boys from Nithari. We find considerable force in the argument of Sri Chaudhary that

contents of confession were planned only to suit the prosecution case and the manner in which it (confession) has been obtained and produced renders the confession wholly unsafe and unreliable.

Events Mentioned in the Confession are Highly Improbable

310. **No blood stains**: At several points the confession states that bodies were kept in the bathroom for many hours and the clothes were strewn around the drawing room. This allegedly occurred even when people were in the house. It is highly improbable that for many hours the people in the house would not notice the clothes strewn around the drawing room, or the smell coming from the bathroom. Moreover, the other servants would have also been using the bathroom allegedly used by accused SK to keep and carve up the bodies. It is difficult to believe that they too did not notice any of the 16 killings mentioned in the confession. Further, no blood stains were seen in the bathroom or stench noticed during this long period.

311. **No interventions, aborted attempts or failures**: As per the confession, accused SK would enter into an automaton kind of state during which he would lure the victims into the house, kill them, attempt to have sex with their inert bodies, carry them to the upstairs bathroom, carve up their bodies, cook and eat their flesh and then put their body parts in different bags and throw these bags in the drain or the gallery. It is highly improbable that not even once in any of these 16 killings was the Accused interrupted or disturbed by a door bell, the arrival of vendors/ visitors, or the call of his employers/ fellow servants for work that needed to be done.

312. It is also improbable that in the process of luring victims, killing them, raping them and the eating and disposing of the bodies, there were no aborted attempts or failures.

313. **No prior Knowledge of cutting human bodies:** Accused SK states in his confession that he had never indulged in any criminal activity or ever cut human flesh prior to these killings. He also admits to being afraid of the police. Yet in the confession there is no mention of even a single instance of accused SK having failed to carry out the killings or of him not being able to strangulate the victim to make her unconscious (but not kill her) to facilitate rape. The 100% success rate for someone with no prior history is completely improbable. Strangulation to ensure unconsciousness but not death is not something most people would know how to do. Further, for a person with no knowledge of cutting of human flesh and bones, it is highly improbable that he would have been able to cut the bodies with such precision.

314. **Identical Killings**: Each of the 16 killings take place in the identical manner. There is no variation whatsoever in the manner and sequence of events for any of the killings.

315. **Smell of decaying flesh not detected**: According, to the confession a total of 16 bodies were disposed by accused SK over a span of 1½ years. The flesh of all the 17 bodies must have started decomposing and the entire place would be smelling and this stench would have aroused a lot of suspicion. Infact, the prosecution witnesses deposed that the recovered material was smelling at the time of recovery. Yet the IO admits that there was no complaint of any bad smell in the area.

316. **Search of House No. D-5 and interrogation by Police in connection of Crime No 838/06:** Accused SK and Pandher were named as accused in the FIR registered on 7.10.06. Both accused SK and Pandher were under police surveillance since May, 2006 and were called on multiple occasions for interrogation. The IO Dinesh Yadav also admits to calling the Accused for interrogation on 3.12.06. Therefore, it is improbable that despite being under police surveillance accused SK continued to commit murders.

317. **Anticipating objections to Highly Improbable Averments:** In the confession, accused SK provides specific explanations to some of the unbelievable averments in the confession. For instance, on the point of carrying a rather big built adult victim upstairs, he states that he himself was shocked at his ability to do so. This clarification by accused SK, without being asked, reflects that the police while tutoring the confession, were aware of the possible objections which could be taken to the fact and in anticipation tutored accused SK to explain it.

318. **Identity of victims' personal artifacts**: During his confession, accused SK states that he cannot remember various details at 18 different instances. He also says that he does not remember the names of any of his victims and that all names were told to him by the police. Though he allegedly identified the A's personal artifacts at AIIMS accused SK does not even name her in his confession. Thus, it is clear that whilst in police/CBI custody accused SK was made to learn the names of the victims and was confessing not to what he had done or what he himself knew but what had been taught to him.

Scientific evidence relied upon by prosecution

319. Prosecution in support of its case has also relied upon psychological assessment report, polygraph test report, narco analysis, brain electrical oscillation signature profile report and comprehensive forensic report of the same day i.e. 11.9.2007 which are duly exhibited as Paper No. Ex.Ka. 31/1 to Ex.Ka.31/5. These reports have been proved by PW-15 Dr. S.L. Vaya. PW-15 was the Dy. Director in the Directorate of Forensic Sciences, Gandhi Nagar, Gujrat. She has experience of conducting 5000 polygraph and 180 narco and 220/230 brain profile tests. She has also done about 4000 psychological assessment. Her credentials as an expert in the field of forensic sciences are not in dispute. All the four tests are conducted by the forensic department. The procedure for conduct of test has been specified by PW-15 in her examination-in-chief. The narco test is conducted by administering sodium pentothal medicine to induce sleep for the person undergoing test who can freely speak without any inhibition. Psychological assessment report and polygraph report are also scientific processes by which information is compulsorily extracted from the test subject. The process involved is such that the person concerned has no control over himself and narrates the information solicited from him during the tests. The test subject cannot decide as to when he would like to remain silent or when to speak. The concerned person is supposedly made aware that the findings returned in the test can be used against him and his consent is obtained. Such consent is alleged to have been obtained from the accused in the present case. It is also the prosecution case that the consent of accused SK for undergoing the test was obtained voluntarily.

320. The report of the aforesaid tests have been proved by

PW-15. In the opinion of PW-15 the findings returned in the scientific tests, referred to above, clearly implicates the accused and thus constitutes evidence to be relied upon against him. In the cross-examination PW-15 has stated as under:-

"उपरोक्त चारों परीक्षणों की सत्यता वैज्ञानिक रूप में शत प्रतिशत मानती हूँ। नार्को टैस्ट इसलिए नहीं किया जाता है कि व्यक्ति कितने प्रतिशत सत्य बोल रहा है और कितना सत्य नहीं बोल रहा है बल्कि इसलिए किया जाता कि उसके मन में जो बातें भरी हुई हैं वो बाहर आती है। अचेतन अवस्था की सब बातें बाहर नहीं आती है। इस टैस्ट में ये परिभाषित नहीं किया जा सकता कि क्या चेतन मन का क्या अचेतन का। मैं ये नहीं कह सकती कि इस टैस्ट के दौरान जो व्यक्ति बोलता है उसमें कुछ बातें असत्य भी हो सकती हैं ऐसा नहीं है कि यदि किसी व्यक्ति पर पहले किसी बात को कहने का बहुत दबाव बनाया गया हो तो वह व्यक्ति वही बातें कहें, ऐसा नहीं है क्योंकि इस संबंध में हमारे द्वारा पहले परीक्षण कर लिया जा सकता है। ऐसा नहीं है कि यदि किसी व्यक्ति पर बहुत अधिक दबाव बना दिया जाए तो वह नार्को टैस्ट में वहीं बातें कहेगा। किस व्यक्ति को कितनी दवा दी जानी है यह उस व्यक्ति के वजन पर निर्भर करता है जिसकी मात्रा एनेसथेटिक और साईकेट्रिस्ट निर्धारित करते हैं। हमारे द्वारा ऐसा कोई परीक्षण नहीं किया गया जिसमें वांछित मात्रा से कम दवाई दी गई हो तब परीक्षण किया गया हो। यदि कम या ज्यादा मात्रा में दवाई गई हो तो उसके क्या परिणाम होंगे मैं नहीं बता सकती। भार के अतिरिक्त विभिन्न व्यक्तियों में दवाई की मात्रा भिन्न हो सकती है। नार्को टैस्ट में जो व्यक्ति कहता है वही हम सुनते है। इस टैस्ट में यदि वह अपनी दूसरी बातें बताने लगता है तो हम उसे संबंधित बात को बताने को कहते है। बच्चों के नाम बताने के लिए सुरेन्द्र कोली को प्रेरित नहीं किया गया था। जो थोड़ी बहुत इंस्टीगेशन बातें बताने के लिए अभियुक्त सुरेन्द्र कोली को कही गई थी वो हिन्दी में कही गई थी और हिन्दी में ही नोट किया गया था क्योंकि सीडी बनाई गई थी। रिपोर्ट मैंने अंग्रेजी में बनाई थी। साईक्लोजिकल असेसमैंट टैस्ट से पहले कोई दवा नहीं दी जाती और इसमें प्रश्न उत्तर के रूप में कुछ कार्य कराए जाते है। इसकी सत्यता शत प्रतिशत होती है, मेरी राय में। किताबों के आधार पर भी यही मापदंड लिया जाता है जो मैंने लिया था। पोलीग्राफिक टैस्ट के द्वारा व्यक्ति के बयान की सत्यता व असत्यता की जांच मशीन द्वारा की जाती है जिसमें कोई दवा नहीं दी जाती है। इसमें भी पश्नोत्तर होते हैं। साधारणतया इन टैस्ट के निष्कर्ष में गलती की संभावना नहीं रहती। ब्रेन सिगनेचर टैस्ट में व्यक्ति के अनुभव में जो भी परिस्थितियां हैं उनको लेकर एक लिस्ट आफ परोब बनाया जाता है जिसको कंप्यूटर में फीड करके आडियों पर उसको सुनाया जाता है और उसमें जो भी रिसपोंसिस आते है तो उसी के अनुसार कंप्यूटर पर देखा जाता है। इसके लिए एक साफ्टवेयर डेवलप किया गया जो आटोमैटिक रिजल्ट देता है। यह टैस्ट, मस्तिष्क में से कितने अनुभवों को निकाला जा सकता इसलिए किया जाता है और साफ्टवेयर ने जो रिजल्ट निकाले थे उसके आधार पर ही मैंने निष्कर्ष निकाले हैं। साफ्टवेयर की सत्यता *99.99* प्रतिशत है और उसी के आधार पर रिजल्ट दिया गया है। ये बात सही है कि जो हमारे द्वारा टैस्ट किए गए हैं उनमें अचेतन अवस्था की भी कुछ बातें बाहर आ जाती है। ये कहना गलत है कि सुरेन्द्र कोली को बार बार नाम ले लेकर बताया गया तब उसने पीड़ितों के नाम लिए। सारी बातें मैंने अपनी रिपोर्ट में लिखी हैं और उसके साथ सीडी भी है जिससे सभी बातों का पता लग सकता है। मैंने अभियुक्त सुरेन्द्र कोली से ये भी पूछा था कि वह कहां का रहने वाला है आदि। उसके टैस्टों में उसकी फैमिली हिस्ट्री भी आई है। सुरेन्द्र कोली को उस समय पता था कि वह क्या बता रहा है। सीडी मेरे सामने ही तैयार हुई थी। कैसेट में इसका वर्जन तैयार किया गया और अगले दिन सुरेन्द्र कोली को दिखाया गया और फिर सीडी तैयार की गई। सीडी सुरेन्द्र कोली की अनुपस्थिति में तैयार हुई। ये कहना गलत है कि सीडी बनाने के वक्त बातें घटाई बढ़ाई गई हैं। सभी बातें मुल्जिम को बता दी गई थी। ये बाते मैंने रिपोर्ट में नहीं लिखी कि कैसेट से सीडी बनाई गई। सुरेन्द्र कोली को हमारे यहां आईओ दिनेश यादव लेकर आए। सुरेन्द्र कोली *5* से *10* या *11* जनवरी, *2007* तक रोज बुलाया गया था। वह *10.30* बजे से शाम तक हमारे पास रहता था इसके बाद विवेचनाधिकारी उसे ले जाते थे, कहां ले जाते थे लेकिन मुझे नहीं पता कहां ले जाते थे।"

321. From the testimony of PW-15 it transpires that except brain mapping test all other tests are conducted on the accused relying upon his verbal statements/information made during the tests.

322. The accused SK was in police custody when the aforesaid tests were conducted on him. In order to consider the admissibility of tests result we would have to be satisfied that the results do not infringe the protection granted to an accused under section 26 of the Act of 1872. The process involved for holding the test, therefore, requires careful scrutiny.

323. In the narcoanalysis and psychological assessment reports the scientific process employed involves extraction of information from the accused by administering drugs and/or other similar processes. The agencies secure information from the accused based on his verbal statements made during the tests. One of the concerns raised in admissibility of the tests result is the plea of infraction of constitutionally guaranteed right of an accused against his self-incrimination by virtue of Article 20(3) of the Constitution of India.

324. The nature of narcoanalysis test came to be examined by the Supreme Court in Selvi vs. State of Karnataka, (2010) 7 SCC 263. The process undergone for narcoanalysis test has been noticed by the Court in para 42 of the judgment in Selvi (supra) which is reproduced hereinafter:-

> *"42. This test involves the intravenous administration of a drug that causes the subject to enter into a hypnotic trance and become less inhibited. The drug-induced hypnotic stage is useful for investigators since it makes the subject more likely to divulge information. The drug used for this test is sodium pentothal, higher quantities of which are routinely used for inducing general anaesthesia in surgical procedures. This drug is also used in the field of psychiatry since the revelations can*

> *enable the diagnosis of mental disorders. However, we have to decide on the permissibility of resorting to this technique during a criminal investigation, despite its established uses in the medical field. The use of "truth-serums" and hypnosis is not a recent development. Earlier versions of the narcoanalysis technique utilised substances such as scopolamine and sodium amytal."*

325. After exhaustively scanning the law on the issue the Court noted that ordinarily evidence is classified in three broad categories, namely, oral evidence, documentary evidence and material evidence. The statement made during the test by the subject is treated equivalent to an oral statement, made during investigation. The Court further observed that Article 20(3) of the Constitution of India together with section 161(2) Cr.P.C. prohibits compulsory extraction of oral testimony, which is self-inculpatory in nature, at the stage of investigation. A distinction was, however, drawn in respect of physical evidence which stood excluded from the applicability of such rigours. Noticing that the tests includes substantial reliance on verbal statement made by the test subject any compulsory extraction of information was held to violate the right of accused against self-incrimination. Observations contained in para 146 of the judgment in Selvi (supra), in this regard, is reproduced hereinafter:-

> *"146. It is quite evident that the narcoanalysis technique involves a testimonial act. A subject is encouraged to speak in a drug-induced state, and there is no reason why such an act should be treated any differently from verbal answers during an ordinary interrogation. In one of the impugned judgments, the compulsory administration of the narcoanalysis technique was defended on the ground that at the time of conducting the test, it is not known whether the results will eventually prove to be inculpatory or exculpatory. We have already rejected this reasoning. We see no other obstruction to the proposition that the compulsory administration of the narcoanalysis technique amounts to "testimonial compulsion" and thereby triggers the protection of Article 20(3)."*

326. The inculpatory statement made by the accused SK

during narcoanalysis test thus can be equated to a confession made by the accused during custody and would attract the wrath of Section 26 of the Indian Evidence Act, 1872.

327. The mere fact that the accused was in the scientific laboratory and the test was being conducted by the expert would not lessen the impact of Section 26 of the Indian Evidence Act, 1872, inasmuch as the accused was in the custody of police and had been taken by the investigation officer to Gandhi Nagar for the holding of scientific tests. The import of custody is required to be understood in a pragmatic sense and the mere fact that accused was in laboratory would not cease his police custody. We find support for taking such a view from the judgment of the Supreme Court in State of A.P. v. Gangula (1997) 1 SCC 272, wherein the Court observed as under in para 19 of the judgment:-

> *"19. The other reasoning based on Section 26 of the Evidence Act is also fallacious. It is true any confession made to a police officer is inadmissible under Section 25 of the Act and that ban is further stretched through Section 26 to the confession made to any other person also if the confessor was then in police custody. Such 'custody' need not necessarily be post-arrest custody. The word 'custody' used in Section 26 is to be understood in a pragmatic sense. If any accused is within the ken of surveillance of the police during which his movements are restricted then it can be regarded as custodial surveillance for the purpose of the section. If he makes any confession during that period to any person be he not a police officer, such confession would also be hedged within the banned contours outlined in Section 26 of the Evidence Act."*

328. The fact that accused under arrest was left temporarily in the charge of an official of laboratory would thus not discontinue the police custody. Law is otherwise settled that an accused in custody if is temporarily left in charge of an individual (not the police), before whom a confession is made, it would not mean that police custody stood determined.

329. The process involved in polygraph tests and brain mapping was also examined in view of its distinctiveness, regarding the process undergone, with reference to the right of accused against his self-incrimination. Having examined the issue, the Court observed as under in para 180 and 184 of the judgment in Selvi (supra), which are reproduced hereinafter:-

> *"180. We have already stated that the narcoanalysis test includes substantial reliance on verbal statements by the test subject and hence its involuntary administration offends the "right against self-incrimination". The crucial test laid down in Kathi Kalu Oghad [AIR 1961 SC 1808: (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] is that of*
>
> *"imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation" (ibid. at SCR p. 30.).*
>
> *The difficulty arises since the majority opinion in that case appears to confine the understanding of "personal testimony" to the conveyance of personal knowledge through oral statements or statements in writing. The results obtained from polygraph examination or a BEAP test are not in the nature of oral or written statements. Instead, inferences are drawn from the measurement of physiological responses recorded during the performance of these tests. It could also be argued that tests such as polygraph examination and the BEAP test do not involve a "positive volitional act" on part of the test subject and hence their results should not be treated as testimony. However, this does not entail that the results of these two tests should be likened to physical evidence and thereby excluded from the protective scope of Article 20(3).*
>
> *184. Even though the actual process of undergoing a polygraph examination or a BEAP test is not the same as that of making an oral or written statement, the consequences are similar. By making inferences from the results of these tests, the examiner is able to derive knowledge from the subject's mind which otherwise would not have become available to the investigators. These two tests are different from medical examination and the analysis of bodily substances such as blood, semen and hair samples, since the test subject's physiological responses are directly correlated to mental faculties. Through lie detection or gauging a subject's familiarity with the stimuli, personal knowledge is conveyed in respect of a relevant fact. It is also significant that unlike the case of documents, the investigators cannot possibly*

have any prior knowledge of the test subject's thoughts and memories, either in the actual or constructive sense. Therefore, even if a highly strained analogy were to be made between the results obtained from the impugned tests and the production of documents, the weight of precedents leans towards restrictions on the extraction of "personal knowledge" through such means."

330. PW-15 in her examination-in-chief has stated that a communication was received from Chief Judicial Magistrate, Gautam Budh Nagar by the Director, Forensic Science Laboratory, Gandhi Nagar, Gujrat for conduct of narcoanalysis test, lie detection and brain mapping test of accused SK and Monindra Singh. This letter is dated 03.01.2007 and has been exhibited as Ex.Ka.28. The consent letter of accused SK is the next exhibit i.e. Ex.Ka.29, which is in a printed format with only the name of accused SK filled by hand. The signatures of accused SK are at the bottom of page. The other consent letter is Ex.Ka.30 of accused SK, which is similar to Ex.Ka.29. The consent letter (Ex.Ka.29) is extracted hereinafter:-

" सूचित स्वीकृति प्रपत्र

मैं, श्री/श्रीमती सुरेन्द्र कोली S/O शंकर राम (Handwritten) पुत्र/पुत्री/पत्नी, श्री---------- नारको परीक्षण के लिये स्वैच्छिक सहमति देता हूँ/देती हूँ। इस परीक्षण को करने वाले वाले व्यक्ति ने मुझे कार्यप्रणाली एवं परीक्षण के परिणामों की जानकारी दे दी है। इस परीक्षण को कराए जाने से इंकार करने के अधिकार के बारे में भी बता दिया गया है।

ह०अपठनीय
परीक्षकर्ता के हस्ताक्षर
परीक्षण कर्ता के नाम
पद Dy Director
दिनांक 8/1/07

ह० सुरेन्द्र कोली
परीक्षार्थी के हस्ताक्षर
दिनांक 8.1.07
स्थान गाँधी नगर

स्थान G Nagar
Dis. O.T.

331. It is not in dispute that the accused SK was in police custody when the order was passed by the concerned Chief Judicial Magistrate for the accused SK to be sent to Gandhi Nagar, Gujarat for conducting scientific tests on him. Neither the accused was produced before the Chief Judicial Magistrate for recording his consent nor his consent was even obtained before he was sent to Gandhi Nagar. The accused SK while in police custody travelled all the way from Noida to Gandhi Nagar alongwith the Investigating Officer PW-40. It was only when the accused was brought to the scientific laboratory that his consent has been obtained for undertaking the tests. His consent has allegedly been proved by PW-15.

332. The question to be examined while considering the scientific tests report would be as to whether the consent obtained of accused SK was voluntary or not?

333. The accused SK was produced before the laboratory by the Investigating Officer (PW-40). The police custody remained uninterrupted of accused SK and his consent was also obtained during his police custody.

334. Section 26 of the Evidence Act would get attracted in the above context as any consent obtained from accused SK without him being in the immediate presence of a Magistrate cannot be read in evidence against him. No independent witness has otherwise been produced to prove the consent. The consent is also in printed format and the signatures of accused have been obtained at the foot of consent letter.

335. Merely getting the signatures obtained on the printed consent letter would not establish the fact that the consent of accused SK was voluntary and informed. Being in police custody, obtaining of signatures of accused SK on consent letter, in such circumstances, cannot be viewed as an act of voluntary consent on part of the accused.

336. The circumstance of free consent has also been evaluated in Selvi (supra) with reference to the process adopted for holding the scientific tests in question in following words:-

> "242. We can also contemplate a possibility that even when an individual freely consents to undergo the tests in question, the resulting testimony cannot be readily characterised as voluntary in nature. This is attributable to the differences between the manner in which the impugned tests are conducted and an ordinary interrogation. In an ordinary interrogation, the investigator asks questions one by one and the subject has the choice of remaining silent or answering each of these questions. This choice is repeatedly exercised after each question is asked and the subject decides the nature and content of each testimonial response. On account of the continuous exercise of such a choice, the subject's verbal responses can be described as voluntary in nature. However, in the context of the impugned techniques the test subject does not exercise such a choice in a continuous manner. After the initial consent is given, the subject has no conscious control over the subsequent responses given during the test. In case of the narcoanalysis technique, the subject speaks in a drug-induced state and is clearly not aware of his/her own responses at the time. In the context of polygraph examination and the BEAP tests, the subject cannot anticipate the contents of the "relevant questions" that will be asked or the "probes" that will be shown. Furthermore, the results are derived from the measurement of physiological responses and hence the subject cannot exercise an effective choice between remaining silent and imparting personal knowledge. In light of these facts, it was contended that a presumption cannot be made about the voluntariness of the test results even if the subject had given prior consent.
>
> 243. In this respect, we can re-emphasise Principles 6 and 21 of the U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988. The Explanation to Principle 6 provides that:
>
> "The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or

> mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time."
>
> Furthermore, Principle 21(2) lays down that:
>
> "21. (2) No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity of decision or his judgment."
>
> 244. It is undeniable that during a narcoanalysis interview, the test subject does lose "awareness of place and passing of time". It is also quite evident that all the three impugned techniques can be described as methods of interrogation which impair the test subject's "capacity of decision or judgment". Going by the language of these principles, we hold that the compulsory administration of the impugned techniques constitutes "cruel, inhuman or degrading treatment" in the context of Article 21. It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same. The popular perceptions of terms such as "torture" and "cruel, inhuman or degrading treatment" are associated with gory images of blood-letting and broken bones. However, we must recognise that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences. [A similar conclusion has been made in the following paper: Marcy Strauss, "Criminal Defence in the Age of Terrorism—Torture" [48 New York Law School Law Review 201-274 (2003/2004)]"

337. In Selvi (supra) the Supreme Court after analysing the law on holding of narcoanalysis, polygraph test (lie detector test) and brain electrical activation profile (brain mapping) etc, in the context of right of an accused against his self-incrimination, laid down the circumstances in which the results of such scientific tests remain relevant. After elaborately considering the issue in the context of statutory scheme of investigation the Court concluded as under in para 262 to 265:-

> "262. In our considered opinion, the compulsory administration of the impugned techniques violates the "right against self-incrimination". This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in

criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible "conveyance of personal knowledge that is relevant to the facts in issue". The results obtained from each of the impugned tests bear a "testimonial" character and they cannot be categorised as material evidence.

263. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of "substantive due process" which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of "ejusdem generis" and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to "cruel, inhuman or degrading treatment" with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the "right to fair trial". Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the "right against self-incrimination".

264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act, 1872.

> 265. The National Human Rights Commission had published *Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused* in 2000. These Guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the "narcoanalysis technique" and the "Brain Electrical Activation Profile" test. The text of these Guidelines has been reproduced below:
>
> (i) No lie detector tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.
>
> (ii) If the accused volunteers for a lie detector test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.
>
> (iii) The consent should be recorded before a Judicial Magistrate.
>
> (iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.
>
> (v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a "confessional" statement to the Magistrate but will have the status of a statement made to the police.
>
> (vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.
>
> (vii) The actual recording of the lie detector test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.
>
> (viii) A full medical and factual narration of the manner of the information received must be taken on record."

338. In light of the binding principles laid down by the Supreme Court regarding conduct of scientific tests, it is manifestly clear that the scientific evidence relied upon by the prosecution cannot be read in evidence against the accused SK. There is no recovery effected from the accused SK pursuant to the scientific tests conducted upon him. Moreover, the oral testimony of PW-15 would go to show that the accused was taken to Gandhi Nagar by the Investigating Officer Dinesh

Yadav and he was presented before the laboratory at 10.30 in the morning and he would return with the I.O. in the evening. The witness has clearly admitted that she has no knowledge as to where the accused was kept or where he was taken by the Investigating Officer at the end of the day. The scientific opinion is otherwise contained in the CD which has been prepared in the absence of the accused SK. It is admitted on record that there was no legal aid available to the accused nor there is any medical report which may indicate the status of physical and mental well being of the accused during the period he was at Gandhi Nagar.

339. The accused has alleged physical torture and has specifically asserted that he was made to memorise the facts to be uttered before the authorities and the magistrate. We find substance in the argument of Ms. Payoshi Roy, learned counsel for the accused appellant that if the accused is made to memorise facts as is specifically alleged by him in his statement under Section 313 Cr.P.C., as also in several letters sent to the court, it would be but natural that those tutored facts would remain in the subconscious mind and may be reflected in the statement of the accused recorded during the course of scientific tests. There is nothing on record to show as to how and where the accused was kept during his stay at Gujrat and there is nothing to indicate that force etc. was not applied upon him during this period. We are, therefore, doubtful of the credential of the expert's opinion based upon the aforesaid tests which otherwise is an evidence of weak nature. As we have seen that there are specific allegations of torture and force memorising of facts on part of the accused, therefore, it would not be safe to rely upon such scientific evidence to hold the appellant guilty. It is apparently for this

reason that the trial court also did not consider it appropriate to rely upon the report as one of the circumstance to complete the chain of circumstances indicating exclusively the hypothesis of guilt attributed to accused appellant. The scientific evidence, therefore, has rightly not been relied as a circumstance against the accused by the trial court and we find no reasons to take a different view in the matter.

Impact of previous judgment in 'XYZ''s case

340. This takes the Court to the seminal issue whether a different view could be taken of confession of accused SK and the alleged recoveries made under Section 27 of the Evidence Act, from the view already taken by the Supreme Court in the case of 'XYZ' [Surinder Koli vs. State of U.P. (2011) 4 SCC 80]. As a corollary, the question would be whether the judgment of Supreme Court in 'XYZ''s case would operate as res-judicata or the findings of the Supreme Court, therein, would be binding upon this Court under Article 141 of the Constitution of India?

341. Supreme Court in 'XYZ''s case has upheld the judgment delivered by Division Bench of this Court, on 11.09.2009, in the Capital Criminal Appeal No. 1475 of 2009. Para 4 of the judgment of Supreme Court in 'XYZ''s case is reproduced hereinafter:-

> "4. The High Court in the impugned judgment dated 11-9-2009 has discussed the evidence in great detail and we have carefully perused the same. It is not necessary therefore to again repeat all the facts which have been set out in the judgment of the High Court except where necessary. We entirely agree with the findings, conclusion and sentence of the High Court so far as accused Surendra Koli is concerned."

342. The Division Bench of this Court while affirming death sentence on accused SK, vide judgment dated 11.09.2009, was

conscious that several other cases relating to Nithari killings are pending before the court of Sessions and in order to ensure that those cases are decided independently, on the basis of evidence led in those cases, observed as under:-

> "It is also clarified that the findings recorded by us are only confined to the murder of 'XYZ' and the court below shall not be import any observation/comments in the body of this judgment for being applied to the decision while hearing other cases relating to Nithari incident."

343. It is thus urged on behalf of the appellants that the upholding of this Court's judgment dated 11.09.2009, by the Supreme Court, would clearly indicate that the specific observation of this Court restricting the findings in the case of 'XYZ' to that case alone has become final. Consequently, the findings of this Court in the case of 'XYZ', as affirmed by Supreme Court, cannot be extended, or made applicable, on the subsequent trials relating to Nithari killings, including the present case.

344. Law is settled that evidence led in a criminal trial alone would be relied upon for holding the guilt or innocence of an accused unless provided otherwise in law. Evidence led in a different trial therefore would not be read in evidence in a separate and distinct trial. The offences, herein, are otherwise different. The evidence led in the trial of 'XYZ' cannot be made the basis for adjudication of trial conducted in the murder of victim A. The prosecution has also led evidence, separately in the two trials. If the evidence led in the case of 'XYZ' was to determine the outcome of trial held in the case of A, there was hardly any need of holding separate trial in the case of A or producing evidence, independently, in the case of A.

345. Since different trials were held in 'XYZ''s case and A's case, therefore, witnesses though mostly common were

examined all over again resulting in inevitable differences in the evidentiary record of 'XYZ''s case vis-a-vis the case of A. Some of the differences in the trial of two cases are noticed hereinafter:-

(i) Victim 'XYZ' is named in the confession of accused SK under Section 164 Cr.P.C. whereas name of victim A is missing in the said confession.

(ii) DNA profile generated from the blood sample of the father of 'XYZ' matched one of the skulls recovered on 29.12.2006 allegedly at the instance of accused SK. However in the case of victim A situation is somewhat distinct, inasmuch as DNA co-relation report dated 17.03.2007 (Ka-12) shows that the age of skull was 12-18 years which had matched with the DNA sample generated from PW-31 (victim's mother). Questions are raised with regard to identity of the deceased on the ground that 'XYZ' was a child but A was an adult, and in the absence of conclusive evidence of her death the mere fact that she did not return to her parent's home cannot be an incriminating circumstance against the accused SK. The possibility of A having intentionally left her parent's house cannot be ruled out.

(iii) Suggestions put to witnesses regarding torture:

This Court in the case of 'XYZ' CCA 1475/2009 disbelieved the defence case of confession of accused SK having been procured on account of torture and coercion primarily on the ground that no suggestion of torture or coercion was made to the Investigating Officer in the case of 'XYZ'. The observations in 'XYZ', in this regard, are extracted hereinafter:-

> "It is also worthy of notice here that no suggestion was made to P.W. 37 namely M.S. Phartyal that the accused was tortured or coerced to record any confession. In cross

> examination he admitted that after recording of statement under section 164 Cr.P.C. he had not taken Surendra Koli in custody. There is no material on record to suggest that any kind of threat, coercion or inducement was employed to obtain the confessional statement."

This Court in 'XYZ' refused to accept the defence plea of retraction of confession, at the first opportunity, for the following reasons:-

> "P.W. 37 M.S. Phartival was not suggested that there was torture by C.B.I. In his confessional statement he has made allegation only against police which according to him had tortured him and compelled him to identify the photographs of the victims but before C.B.I he had not identified some photographs which are not of his victims. The investigation to C.B.I was transferred on 10th Jan 2007 and he (A-2) was produced before the Magistrate for recording of his confessional statement after a very long time i.e. 28.2.2007 and confessional statement inspires full confidence."

However, in the present case a different situation exists. A suggestion was given to CBI IO M.S. Phartyal that the accused SK was pressurised to confess. It was also suggested that he was present in the room during the recording of the confession. A suggestion was also put to the CBI IO Nirbhay Kumar, that accused SK was threatened and coerced into making a confession u/s 164 Cr.P.C. Suggestions have also been put to PW-11 (learned Metropolitan Magistrate) also that accused SK was compelled to confess and tortured. A suggestion was also put that despite becoming aware of the fact that accused SK was tortured he continued to record the confession.

346. Though confession of accused in the case of A and 'XYZ' is same, yet, the evidence in respect of voluntariness of confession is markedly different in the case of A vis-a-vis 'XYZ'.

347. Additional evidence exists on the point of confession in the case of A which was not available in the case of 'XYZ'. Some of such additional evidence is referred to hereinafter:-

(i) The cross examination of the PW-11 (learned Metropolitan Magistrate) in the case of A brings on record crucial admissions and facts, that were not brought on record in 'XYZ''s case. PW-11 states that he had signed each page of the confession. However, the transcript of the confession exhibited by him bearing exhibit no. Ka 19 does not bear any signatures. In-fact even the memorandum as mandated by S. 164 CrPC is not signed. Further, he admits that though two signed CDs of the confession had been sealed and sent by him to the learned ACMM, the two CDs exhibited in the present case do not bear the signatures of either the accused or the learned Metropolitan Magistrate. He further admits that the exhibited CDs were not made by him while recording the confession. The existence of unsigned copies of the transcript and CDs in the Trial Court's record generates suspicion which has not been explained by the prosecution before this Court.

(ii) The existence of unsigned copies also lends support to the theory that the CBI had pre-prepared a script of the confession and given the same to PW-11. In his statement u/s 313, accused SK also states that from 22.02.07 to 28.02.07 he was made to rehearse and learn the confession.

(iii) It is the case of the prosecution that the after recording the confession four CDs of the same were prepared and all four CDs were signed by both i.e. PW-11 and accused SK. PW-11 admits that two of these CDs were given to the IO, Inspector MS Phartyal. In light of the fact that two original CDs that constitute primary evidence of the confession were handed over to the IO, it cannot be said with certainty that the CDs produced in the Sessions Court at Ghaziabad was sent by learned ACMM, Patiala House and not by IO M.S Phartyal. This is more so as the prosecution has not led any evidence to show

that these CDs were infact sent by the concerned Court at Patiala House to the concerned jurisdictional court/Magistrate. Further the possibility of tampering or editing the audio-videography contained in the CD cannot be ruled out. This is more so when no certificate under Section 65B of Evidence Act was produced during trial.

(iv) In a letter to the Sessions Court as well as in his statement u/s 313 Cr.P.C., accused detailed the brutal manner in which the CBI tortured him in order to compel him to confess. He also states that every time he was taken for a medical examination, the CBI forced the doctors not to show any injuries in the report. During his examination u/s 313 Cr.P.C. he also offers himself to be medically examined as the scars of the torture continue to exist. Surprisingly, this aspect is neither dealt with by the trial court nor any medical examination is got conducted of the accused SK.

(v) The PW-11 admits that when accused SK was produced before him on 1.3.07, his medical examination had not been conducted. He is also unable to state on which date accused SK was medically examined. The order passed by the learned ACMM on 28.2.07 directed that accused SK be medically examined before being sent to Tihar jail on 28.2.07 and before being presented before the learned ACMM on 1.3.07. Both these medical examinations were crucial to establish that accused SK had not been physically hurt either in CBI custody prior to 28.2.07 or in Tihar Jail and therefore rule out the possibility of a confession pursuant to coercion and duress. The absence of any medical report assumes particular importance in light of accused SK's statement that he had been tortured by the CBI and forced to confess.

(vi) The PW-11 admits that on 1.3.07, he had passed an order directing the accused to be produced before the learned ACMM. The order dt. 1.3.07 directs the IO to produce accused SK before the learned ACMM. Importantly, this order was passed during the recording of the transcription of the confession. It is therefore evident that during the recording of the transcription of the confession, accused SK was handed over to CBI custody. Aware, that CBI officials were waiting outside the room and were producing him before the ACMM at the end of every day, accused SK would naturally have been mentally pressurised and threatened by their presence. In these circumstances any statement made by accused SK would be questionable and cannot be said to be voluntary and free from coercion or duress.

(vii) The PW-11 admits that prior to recording his confession accused SK was not given any legal aid. Further, the advocates appointed by the learned ACMM did not file any vakalatnama and were not present during the recording of confession. Accused SK had been in uninterrupted police custody for 60 days prior to the recording of his confession. In this duration, he neither had an advocate nor did he have any visitors or counsel. The absence of legal aid after 60 days of uninterrupted police custody prior to the recording a confession, wherein accused SK was confessing to 16 murders, renders the confession questionable.

(viii) The PW-11 admits that he did not show to accused the undated application, allegedly written by accused SK requesting for an opportunity to confess his crime. The Magistrate's failure to question accused SK and verify whether he had voluntarily written the application requesting for his confession to be recorded has exposed the exercise of

jurisdiction by PW-11 open to challenge on the ground of non-application of mind and acting in mechanical manner in arriving at the subjective satisfaction regarding accused SK's voluntariness to confess and record the confession.

(ix) PW-11 admits that during his confession accused SK states that he did not know before which court he had been produced. This is an important circumstance which lends credence to the defence version that the undated application addressed to the learned ACMM was not voluntary act on part of the accused SK. When accused SK did not know of the court before which he had been produced he could not have addressed the letter to the learned ACMM at New Delhi.

348. In addition to the above additional evidence on the issue of confession, the records in the trial of victim A also demonstrates additional aspects in the evidence regarding arrest of accused SK as also the subsequent recovery allegedly under Section 27 of the Evidence Act.

349. The arrest and S.27 disclosure and recovery are primarily proved by two witnesses PW40 (IO Dinesh Yadav) and PW28 (SI Chote Singh). Crucial statements and admissions made by both witnesses during their cross examination were not elicited in the case of 'XYZ'. Contradictory and contrasting versions regarding the manner of arrest, the content of the disclosure statement, the sequence of recoveries etc go to the root of the matter and provides additional grounds to challenge the prosecution case.

350. Contradictory and contrasting versions in the evidence led in the case of A:-

(i) Manner of Arrest

(a) The IO Dinesh Yadav states that he had seen accused SK for the first time at the time of arrest when a secret informant pointed him out. However, he later admits that he had called accused SK to the police station and interrogated him on 3.12.06. This admission completely falsifies the version of arrest pursuant to a tip off from a secret informant and shrouds the arrest in suspicion.

(b) While it is the case of the prosecution that accused SK was arrested on 29.12.06, the defence has lead evidence to prove that he had been taken to the police station and arrested on 27.12.06. In light of the defence's claim the peculiar circumstances of the arrest assumes significance. It is an admitted fact that there were no public or independent witnesses to the arrest, despite it being a busy road with heavy footfall. Further the IO was unable to state what items were seized from the accused on arrest. On specifically being asked, he is unable to state whether a wallet or any money was seized from accused SK. He admits that there is no panchnama for the recovery of phone. It appears to be somewhat unusual that a person travelling somewhere by a rickshaw would be travelling completely empty handed, without his wallet and without any money even. The stark absence of any corroborative evidence to support the prosecution's claim that accused SK was arrested on 29.12.06 renders the prosecution version questionable.

351. PW40 claims that accused SK was in a rickshaw at the time of arrest and tried to run but was captured by the police. PW28, on the contrary, does not state anything about SK ever trying to run. According to him SK was calmly apprised of the

crime against him and arrested from the rickshaw. The contradictory version of the only two witnesses of arrest is not satisfactorily explained by the prosecution.

(ii) Regarding place where disclosure statement made.

352. PW28, states that the disclosure was made at the spot of arrest i.e. near the Nithari Government Hospital and the accused SK was never taken to the Police Station. He states that after PW40 questioned the accused for 2-3 hours, the disclosure statement was made and thereafter they proceeded directly to the spot of recovery. PW40, on the contrary, states that accused SK was interrogated in the police station and he gave his confessional statement in the police station itself. Another completely contradictory version is given by PW 31, Vandana Sarkar who states that accused SK made a confessional statement in the premises of D-5, which was recorded by PW 40 in the case diary. These contradictory versions of prosecution about the place where disclosure was made by accused SK is irreconcilable and poses a serious doubt to the prosecution case of disclosure and alleged consequential recovery under Section 27 of the Evidence Act.

(iii) Regarding whether it was joint disclosure

353. Both PW40 and PW28 state that on being arrested, the accused SK alone made a confessional statement that led to the consequent recoveries on 29.12.06. However, as per the remand application dt. 30.12.06 submitted by the IO i.e. PW 40 as well as the consequential remand order dt 30.12.06 the disclosure leading to the recovery of skulls on 29.12.06 was consequent to a joint disclosure made by both accused SK and Pandher. Contradiction in the testimony of PW-40 about

recovery being exclusively at the pointing out of accused SK vis-a-vis the remand application of PW-40 alleging the recovery to be joint at the instance of accused SK and Pandher remains unexplained.

(iv) Regarding contents of the disclosure statement

Names of Victims mentioned

354. PW28 and the recovery panchnama state that accused SK named only L @ Dipika named in his disclosure. However, PW40 states that the accused SK mentioned the name of several victims including A. The disclosure statement is allegedly prepared on the direction of PW-40 and, therefore, the dichotomy between oral testimony of PW-40 regarding the contents of disclosure statement vis-a-vis the contents of disclosure statement itself is a serious lacuna in the prosecution case which is not explained.

(v) Disclosure within disclosure

355. PW28 and the Panchnama state that initially accused SK named only L and then at the place of recovery stated that he would help to recover skulls of other victims. PW40 however states that right at the outset accused SK mentioned regarding the remains of L and the other victims including the victim A in the police station itself. This difference in the version of PW-40 and PW-28 exposes the disclosure to a serious challenge.

356. The evidence on record clearly shows that the witness of recovery PW-10 Pappu Lal when arrived at House No. D-5, the digging of enclosed gallery had already commenced. It clearly signifies that it was already known that some biological material was available in the enclosed gallery behind House No.

D-5 and, therefore, the fact already known could not be claimed to be discovered.

(vi) Regarding the murder weapon

357. IO Dinesh Yadav states that accused SK disclosed that he had also hidden the knife used to murder L. However, neither PW-28 nor the recovery panchnama mention a knife as the murder weapon. Importantly, as per confessional statement of accused SK u/s 164 Cr.P.C. he strangulated each of his victims and killed them and no knife was ever used to kill.

(vii) Sequence of recoveries

358. PW-28 and the panchnama state that first skulls from the gallery were recovered followed by recovery of knife on the roof. PW-40 states that first the knife was recovered and then the skulls were recovered from the gallery. As per the case diary, first the knife and then the skulls were recovered.

(viii) Regarding place of sealing the recovered items and making of the panchnama

359. PW-28 states that the skeletal remains and items were sealed in the gallery itself and the panchnama was also recorded therein. He denies any part of the proceedings being conducted in the Jal Nigam compound. PW-40 states that all the recovered items as well as the documentation happened in the Jal Nigam compound. Further, PW-40 claims that each recovered skull was seized under a different seizure memo wherein detailed description of the skull was provided. However, no such seizure memos are on the record. Further, the only panchnama on record does not have any description of the skulls.

(ix) Drain cleaned between 20.12.06-23.12.06

360. In the present case accused SK had lead defence evidence that proves that the drain in front of House No. D-5 was cleaned between 20.12.06 to 23.12.06. It is, therefore, highly impossible that bones and biological material deposited in the drain by accused accused SK prior to 20.12.06 had not been cleaned and remained in the drain only to be recovered on 30.12.06.

(x) Break in the chain of circumstances-Guilt of another not foreclosed

361. In the case of 'XYZ', IO Dinesh Yadav states that he did not know that Naveen Chaudhry was involved in kidney scam. In the present case the IO Dinesh admits that he had learnt that Dr. Naveen Chaudhry's name was involved in the kidney scam. However, he was never question or investigated.

362. The IO Dinesh Yadav states that the gallery is not part of House No. D-5 and was easily accessible from the Jal Nigam Compound and House No. D-6. He further states that things can be thrown into the gallery from both the Jal compound as well as from House No. D-6. The IO also admits that in fact skulls had been recovered from the portion of the gallery behind House No. D-6 as well. He further states that the wall of House No. D-5 facing the gallery is much higher than the wall between Jal nigam compound and the gallery. PW 28, Chote Singh states that the servants quarter window, from where accused SK allegedly threw the body parts was at least 25ft high. These admissions clearly evidence that the open space from were skulls and bones were recovered was not exclusively accessible to accused SK. It was equally accessible to the

residents of House No. D-6 and more easily accessible to the residents of the Jal compound. If knowledge of and proximity to the location of recovery were to be considered incriminating factors several other persons including Dr. Naveen Chaudhry would be equally implicated.

363. The long gap between the death of the victim and the recovery of the bones contradicts the presumption of knowledge of the location of the body parts on part of the accused, or that he had possessed knowledge of the existence of bones. It is not a case where the victims had recently gone missing such that the location of their bodies was exclusively within the knowledge of accused SK.

364. Importantly, while accused SK has no criminal antecedents of any kind, the neighbour residing in the adjoining house no. D-6, behind which most of skulls were found, was neither ever interrogated nor arrested despite the admitted fact that the occupant of such house was arrested in the case of kidney scam. It is well established in law that in a case of circumstantial evidence the chain of circumstances should be complete and must be completely incompatible with the guilt of any other person. In the present case, the question of the guilt of the doctor residing in the adjoining house has not even been investigated. The prosecution case that House No. D-6 was also searched is not material when no interrogation was made from the doctor owning the house.

365. Sri Chaudhary further contends that the Supreme Court judgment in the case of 'XYZ' (Criminal Appeal No. 2227 of 2010 arising out of Reference No. 3 of 2009 decided by this Court on 11.9.2009) can influence the judgment in the present case only if:-

(i) The previous judgment constitutes a bar to the present proceedings by virtue of Article 20(2) of the Constitution of India or Section 300 Cr.P.C. This exigency does not apply here as the crime and trial in the two cases are separate and distinct.

(ii) If the previous judgment in the case of 'XYZ' constitutes an evidence under the Evidence Act.

(iii) If the judgment in 'XYZ' constitutes a precedent; or

(iv) Earlier case of 'XYZ' constitutes issue estoppel.

Whether judgment in 'XYZ' can be considered as evidence in the present case pertaining to victim A?

366. Evidence/judgment in a previous/different trial becomes relevant or could be imported in the subsequent trial only in the manner specified in the Evidence Act. There are three sets of provisions which could be invoked for the purposes, i.e. (I) Section 33 of the Evidence Act, (ii) Section 40-43 of the Evidence Act, (iii) Section 54 of the Evidence Act.

367. We now proceed to examine the facts of this case in the three exigencies in law, referred to above, to ascertain whether the judgment in 'XYZ''s case or the evidence led therein would be binding upon this Court or even relevant in this case?

368. Ordinarily, evidence given by a witness in a previous trial can become relevant in a subsequent trial only where conditions stipulated under Section 33 of the Evidence Act are shown to exist. Section 33 of the Evidence Act is reproduced hereinafter:-

> "Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant

> for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable: Provided— that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding. Explanation.— A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

369. Exigencies warranting applicability of Section 33 of the Evidence Act is not shown to exist in the facts of the present case. The prosecution also did not take recourse to the evidence led in the case of 'XYZ' during subsequent trial, held in the case of A, and rightly opted to produced evidence, independently, in the case of A.

370. Sri Chaudhary, learned counsel for the appellant has placed reliance upon the celebrated judgment of privy counsel in Balgangadhar Tilak vs Shri Shriniwas Pandit and another (1915) 11 The Law Weekly 611 where the scope of Section 33 of the Evidence Act was examined in the context of a previous adjudication made and its relevance in the subsequent trial. The Court observed as under:-

> "It appears that the widow and Bala Maharaj left no stone unturned in the way of litigation. In July proceedings were begun to revoke the probate granted to the trustees, and subsequently criminal proceedings were instituted in respect of perjury.Their Lordships regret to observe that not only are the circumstances with regard to the criminal proceedings referred to in the present litigation by the parties, but that the depositions therein become matter apparently of materiality in the judgment of the learned judges of the High Court.
>
> In the opinion of the Board this was an irregularity of a somewhat serious character. They refer particularly to the depositions in the criminal case, which seem to have been imported in bulk into the present. There is a risk by such

> procedure of justice being perverted. A civil cause must be conducted in the ordinary and regular way, and judged of by the evidence led therein. Under s. 33 of the Indian Evidence Act, 1872, evidence given by a witness in a judicial proceeding in a criminal trial is relevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, but this only, as the section proceeds, "when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way," or under the other circumstances there stated. Not one of these circumstances was proved in the present case, and the depositions could not have been used with propriety even to support the evidence of the plaintiffs, which they appear to have done. But there appears to have been no warrant whatsoever for using them for the purpose of either contradicting or discounting the evidence of the witnesses given in this suit, unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered. It was stated to their Lordships that the prosecution for perjury had in the end completely failed. With that their Lordships have nothing to do. The judgment now given is pronounced irrespective of the result of the criminal suit. Successful or unsuccessful, the introduction and use in this civil action of these criminal proceedings, as above described, were illegitimate."

371. Supreme Court in a recent judgment rendered in A.T. Mydeen and another vs Assistant Commissioner (2021) SCC Online 1017 had the occasion to deal with two separate appeals decided by a composite judgment of High Court wherein evidence of one appeal was read in another. The Court examined relevant provisions of the Code of Criminal Procedure and also Section 33 of the Evidence Act to observe as under in para 25:-

> "25. So far as the law for trial of the cross cases is concerned, it is fairly well settled that each case has to be decided on its own merit and the evidence recorded in one case cannot be used in its cross case. Whatever evidence is available on the record of the case only that has to be considered. The only caution is that both the trials should be conducted simultaneously or in case of the appeal, they should be heard simultaneously. However, we are not concerned with cross-cases but are concerned with an eventuality of two separate trials for the commission of the same offence (two complaints for the same offence) for two sets of accused, on account of one of them absconding."

372. The proposition of law in A.T. Mydeen (supra) has been

summed up by the Supreme Court in para 39 to 41 of the report, which are reproduced hereinafter:-

> "39. The provisions of law and the essence of case-laws, as discussed above, give a clear impression that in the matter of a criminal trial against any accused, the distinctiveness of evidence is paramount in light of accused's right to fair trial, which encompasses two important facets along with others i.e., firstly, the recording of evidence in the presence of accused or his pleader and secondly, the right of accused to cross-examine the witnesses. These facts are, of course, subject to exceptions provided under law. In other words, the culpability of any accused cannot be decided on the basis of any evidence, which was not recorded in his presence or his pleader's presence and for which he did not get an opportunity of cross-examination, unless the case falls under exceptions of law, as noted above.
>
> 40. The essence of the above synthesis is that evidence recorded in a criminal trial against any accused is confined to the culpability of that accused only and it does not have any bearing upon a co-accused, who has been tried on the basis of evidence recorded in a separate trial, though for the commission of the same offence.
>
> 41. It is also an undisputed proposition of law that in a criminal appeal against conviction, the appellate court examines the evidence recorded by the trial court and takes a call upon the issue of guilt and innocence of the accused. Hence, the scope of the appellate court's power does not go beyond the evidence available before it in the form of a trial court record of a particular case, unless section 367 or section 391 of Cr.P.C. comes into play in a given case, which are meant for further inquiry or additional evidence while dealing with any criminal appeal."

373. Not only the above judgment expresses the mandate of Section 33 but also the consistent law on the point that evidence given by a witness in a judicial proceedings is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of same judicial proceedings, the truth or facts it states only where the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. Thus on the analysis of the law relating to

Section 33 of the Act, we have no doubt that the evidence led in 'XYZ''s case or the judgment delivered therein would not be relevant for the purpose of adjudication of the trial relating to A.

374. Under the Indian Evidence Act, a judgment can only be introduced as evidence vide Section 40-43 of the Evidence Act. Section 40-43 of the Evidence Act are re-produced hereinafter:-

> *"40. Previous judgments relevant to bar a second suit or trial. —The existence of any judgment, order or decree which by law prevents any Courts from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.*
>
> *41. Relevancy of certain judgments in probate, etc., jurisdiction- A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. Such judgment, order or decree is conclusive proof— that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation; that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, 1[order or decree] declares it to have accrued to that person; 3[order or decree] declares it to have accrued to that person;" that any legal character which it takes away from any such person ceased at the time from which such judgment, 1[order or decree] declared that it had ceased or should cease; 3[order or decree] declared that it had ceased or should cease;" and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, 1[order or decree] declares that it had been or should be his property. 3[order or decree] declares that it had been or should be his property.*
>
> *42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.—Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.*
>
> *43. Judgments, etc., other than those mentioned in sections*

> *40 to 42, when relevant.—Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act."*

375. The judgment of the Supreme Court is evidence only of the fact of the conviction of the accused person. The findings and reasons recorded in a judgment upon appreciation of the evidence led in the matter have apparently no evidentiary value in a different trial. In Ali Hasan and others v. State, 1975 Cri LJ 345, this Court held as under in para 21-22:-

> *"22. However, even if the certified copy of the judgment is accepted by us as additional evidence we are of the opinion that it does not in any way advance the case of Lakhan Singh accused any further. The judgment can only be utilized for the purpose of showing that Lakhan Singh was acquitted in Session Trial No. 120 of 1969. Neither the reasons that are contained in this judgment not the evidence on record as embodied in the judgment can be taken into consideration for deciding the present appeal. It has been held times out of number by the Supreme Court that-*
>
> "the reasoning in the earlier judgment could not be relied upon as it proceeded on evidence which was recorded separately and which was considered separately. The earlier judgment could be admissible only if it fulfilled the conditions laid down in Sections 40, 43 of the Evidence Act. The earlier judgment was admissible to show the parties and the decision but it was not admissible for the purpose of relying upon the appreciation of evidence."

376. The above observation made by their Lordships of the Supreme Court in the case of Kharkan v. State of UP, reported in AIR 1965 SC 83: (1965(1) Cri LJ 116) were in peculiar facts of the case which are reproduced hereinafter:-

> "10. Neither of these provisions is applicable to the present facts because the two offences were distinct and spaced slightly by time and place. The trials were separate as the two incidents were viewed as distinct transactions. Even if the two incidents could be viewed as connected so as to form parts of one transaction it is obvious that the offences were distinct and required different charges. The assault on Tikam in fulfilment of the common object of the unlawful assembly was over when the unlawful assembly proceeded to the house of Tikam to loot it. The new common object to

> beat Puran was formed at a time when the common object in respect of Tikam had been fully worked out and even if the two incidents could be taken to be connected by unity of time and place (which they were not), the offences were distinct and required separate charges. The learned Sessions judge was right in breaking up the single charge framed by the magistrate and ordering separate trials. In this view the prior acquittal cannot create a bar in respect of the conviction herein reached."

377. It was in light of the above facts that the Court proceeded to observe as under in Kharkan (supra) :-

> "11. .....In our opinion he cannot be allowed to rely upon the reasoning in the earlier judgment proceeding as it did upon evidence which was separately recorded and separately considered. The eyewitnesses in this case are five in number, while in the other case there were only two, but that apart, the earlier judgment can only be relevant if it fulfils the conditions laid down by the Indian Evidence Act in Sections 40-43. The earlier judgment is no doubt admissible to show the parties and the decision but it is not admissible for the purpose of relying upon the appreciation of evidence....."

378. Provisions contained in Section 40 to 43 of the Evidence Act deals with the relevance of judgments of courts of justice. The provision fell for consideration before the Supreme Court in Rajan Rai vs. State of Bihar (2006) 1 SCC Page 191. The observations of the Court made in para 8 to 10 of the judgment are relevant for the present purposes and are reproduced hereinafter:-

> *"8. Coming to the first submission very strenuously canvassed by Shri Mishra, it would be necessary to refer to the provisions of Sections 40 to 44 of the Evidence Act, 1872 (in short "the Evidence Act") which are under the heading "Judgments of courts of justice when relevant", and in the aforesaid sections the circumstances under which previous judgments are relevant in civil and criminal cases have been enumerated. Section 40 states the circumstances in which a previous judgment may be relevant to bar a second suit or trial and has no application to the present case for the obvious reasons that no judgment, order or decree is said to be in existence in this case which could in law be said to prevent the Sessions Court from holding the trial. Section 41 deals with the relevancy of certain judgments in probate, matrimonial, admiralty or insolvency jurisdiction and is equally inapplicable. Section 42 refers to the relevancy and effect of judgments, orders or decrees other than those mentioned in Section 41 insofar as they relate to matters of*

a public nature, and is again inapplicable to the present case. Then comes Section 43 which clearly lays down that judgments, orders or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of the Evidence Act. As it has not been shown that the judgment of acquittal rendered by the High Court in appeals arising out of the earlier sessions trial could be said to be relevant under the other provisions of the Evidence Act, it was clearly "irrelevant" and could not have been taken into consideration by the High Court while passing the impugned judgment. The remaining Section 44 deals with fraud or collusion in obtaining a judgment, or incompetency of a court which delivered it, and can possibly have no application in the present case. It would thus appear that the High Court was quite justified in ignoring the judgment of acquittal rendered by it which was clearly irrelevant.

9. This question had arisen before the Privy Council in Hui Chi-mingv.R.[(1991) 3 All ER 897 : (1992) 1 AC 34 : (1991) 3 WLR 495] wherein the Court was dealing with a case of murder trial. In the said case, the principal offender was acquitted of murder, but convicted of manslaughter at a trial before the High Court of Hong Kong. The said order attained finality. Thereafter, another accused, who was facing trial arising out of the same very occurrence and whose trial was separated, was convicted for the charge of murder by the same High Court, ignoring the judgment of acquittal of the principal accused of the charge of murder, holding that the same was inadmissible. The application for leave to appeal against the conviction of the accused having been dismissed by the Court of Appeal of Hong Kong, the accused appealed by special leave to the Privy Council. In that case, conviction for the charge of murder was upheld by the Judicial Committee holding that evidence of the outcome of an earlier trial arising out of the same transaction was irrelevant and therefore inadmissible since the verdict reached by a different jury, whether on the same or different evidence, in the earlier trial amounted to no more than evidence of the opinion of that jury. Further, it was laid down that a person could properly be convicted of aiding and abetting an offence even though the principal offender had been acquitted and accordingly, the trial Judge had rightly excluded evidence of the principal offender's acquittal of murder.

10. A three-Judge Bench of this Court had occasion to consider the same very question in Karan Singh v. State of M.P. [(1965) 2 SCR 1 : AIR 1965 SC 1037 : (1965) 2 Cri LJ 142] in which there were in all 8 accused persons out of whom the accused Ram Hans absconded, as such trial of seven accused persons, including the accused Karan Singh, who was the appellant before this Court, proceeded and the trial court although acquitted the other six accused persons, convicted the seventh accused i.e. Karan Singh under Section 302 read with Section 149 IPC. Against his conviction, Karan Singh preferred an appeal before the High

Court. During the pendency of his appeal, the accused Ram Hans was apprehended and put on trial and, upon its conclusion, the trial court recorded the order of his acquittal, which attained finality, no appeal having been preferred against the same. Thereafter, when the appeal of the accused Karan Singh was taken up for hearing, it was submitted that in view of the judgment of acquittal rendered in the trial of the accused Ram Hans, the conviction of the accused Karan Singh under Section 302 read with Section 149 IPC could not be sustained, more so when the other six accused persons, who were tried with Karan Singh, were acquitted by the trial court and the judgment of acquittal attained finality. Repelling the contention, the High Court after considering the evidence adduced came to the conclusion that murder was committed by Ram Hans in furtherance of the common intention of both himself and the accused Karan Singh and, accordingly, altered the conviction of Karan Singh from Sections 302/149 to one under Sections 302/34 IPC. Against the said judgment, when an appeal by special leave was preferred before this Court, it was contended that in view of the verdict of acquittal of the accused Ram Hans, it was not permissible in law for the High Court to uphold the conviction of the accused Karan Singh. This Court, repelling the contention, held that the decision in each case had to turn on the evidence led in it. Case of the accused Ram Hans depended upon evidence led there while the case of the accused Karan Singh, who had appealed before this Court, had to be decided only on the basis of evidence led during the course of his trial and the evidence led in the case of Ram Hans and the decision there arrived at would be wholly irrelevant in considering the merits of the case of Karan Singh, who was the appellant before this Court. This Court observed at AIR p. 1038 thus: (SCR pp. 3-4)

"As the High Court pointed out, that observation has no application to the present case as here the acquittal of Ram Hans was not in any proceeding to which the appellant was a party. Clearly, the decision in each case has to turn on the evidence led in it; Ram Hans's case depended on the evidence led there while the appellant's case had to be decided only on the evidence led in it. The evidence led in Ram Hans's case and the decision there arrived at on that evidence would be wholly irrelevant in considering the merits of the appellant's case."

In that case, after laying down the law, the Court further considered as to whether the High Court was justified in converting the conviction of the accused Karan Singh from Sections 302/149 to one under Section 302 read with Section 34 IPC after recording a finding that the murder was committed by Ram Hans in furtherance of the common intention of both himself and the accused Karan Singh. This Court was of the view that in spite of the fact that the accused Ram Hans was acquitted by the trial court and his acquittal attained finality, it was open to the High Court, as an appellate court, while considering the appeal of the

> accused Karan Singh, to consider the evidence recorded in the trial of Karan Singh only for a limited purpose to find out as to whether Karan Singh could have shared the common intention with the accused Ram Hans to commit the murder of the deceased, though the same could not have otherwise affected the acquittal of Ram Hans. In view of the foregoing discussion, we are clearly of the view that the judgment of acquittal rendered in the trial of the other four accused persons is wholly irrelevant in the appeal arising out of the trial of the appellant Rajan Rai as the said judgment was not admissible under the provisions of Sections 40 to 44 of the Evidence Act. Every case has to be decided on the evidence adduced therein. Case of the four acquitted accused persons was decided on the basis of evidence led there while the case of the present appellant has to be decided only on the basis of evidence adduced during the course of his trial."

379. Previous judgment in the case of 'XYZ' does not prevent holding of trial in the case of A and consequently Section 40 of the Evidence Act would not apply. Section 41 relates to cases of probate, matrimony, admiralty or insolvency jurisdiction and has no applicability either. Section 42 holds judgements, orders or decrees relevant if they relate to matters of public nature relevant to the inquiry but are not conclusive proof of what they state. Section 42, also, has thus no applicability in this case. Section 43 provides that judgements, orders or decrees are irrelevant unless it is relevant under some other provision of the Evidence Act. Section 43 also does not make the judgment in 'XYZ' case relevant for the trial in A.

380. The only other way that the Supreme Court judgment in 'XYZ' case could have been used was as evidence of bad character. Section 54 of the Evidence Act bars evidence with regard to bad character of the accused person. It is settled that an accused shall be tried on the basis of evidence with regard to the alleged criminal transaction of which he is accused. Prior criminal record of the accused qualifies as bad character evidence and, therefore, it cannot be introduced by virtue of Section 54 of the Evidence Act. The prosecution has chosen not to adduce the decision in the case of 'XYZ' or the evidence

recorded in that case in the subsequent trial in the case of A. No questions were put to the accused for recording his statement under Section 313 Cr.P.C. in light of the findings returned in 'XYZ' case. The judgment in 'XYZ' case thus cannot be considered as evidence in the case of A by virtue of Section 54 of the Evidence Act.

Can the judgment in 'XYZ' constitute a binding precedent for this Court under Article 141 of the Constitution of India?

381. Judgment of Supreme Court in the case of 'XYZ' merely upholds the findings returned by this Court in the confirmation proceedings under Section 366 Cr.P.C. The adjudication of Supreme Court is on facts. It depends upon the evidence brought before the Court in the case of 'XYZ'. As is already noticed, the evidence on record in the case of A is distinct on various aspects. The judgment of Supreme Court does not lay down any ratio of law which alone would be binding. It is settled that precedent in law is an authority for the principles of law laid down therein. Precedent do not apply to facts, particularly when the evidence in the subsequent case is different. Precedent otherwise has a limited role to play in appreciation of evidence for adjudication of criminal case.

382. Supreme Court in B Shama Rao v. UT Pondicherry AIR 1967 SC 1480 in para 5 held as under:-

> *"It is trite to say that a decision is binding not because of its conclusion but in regard to its ratio and the principle laid down therein."*

383. In Common Cause v. Union of India (2004) 5 SCC 222 at page 223, the Supreme Court observed as under:-

> "6. Reliance is also placed on the observations contained in paragraph 5 of Supreme Court Legal Aid Committee v. Union of India [(1998) 5 SCC 762]. Such observations, or

> simply what was done in a given case, without laying down the law cannot be read as a ratio of the judgment and certainly not as a precedent. Whether a writ of mandamus of the nature which was prayed for before the Court can be issued or not was not a point argued and decided by the Court."
>
> (emphasis supplied)

384. In Union of India v. Dhanwanti Devi (1996) 6 SCC 44 at page 51, the Supreme Court has held as under:-

> *"9. Before adverting to and considering whether solatium and interest would be payable under the Act, at the outset, we will dispose of the objection raised by Shri Vaidyanathan that Hari Krishan Khosla case [1993 Supp (2) SCC 149] is not a binding precedent nor does it operate as ratio decidendi to be followed as a precedent and is per se per incuriam. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates- () findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for*

> *what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi."*
>
> *(emphasis supplied)*

385. A three Judges Bench of the Hon'ble Supreme Court in the case of State Financial Corporation v. Jagadamba Oil Mills [2002 AIR SCW 500] has observed thus:-

> *"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of the Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for the judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."*
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> *(emphasis supplied)*

386. Similarly in the case of Divisional Controller, KSRTC v. Mahadeva Shetty [(2003) 7 SCC 197: AIR 2003 SC 4172], the Apex Court has observed thus:

> *"The decision ordinarily is a decision on the case before the Court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the Court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into facts, it cannot be assumed whether a similar direction must or ought to be made as measure of social justice. Precedents*

> *sub silentio and without argument are of no moment. Mere casual expression carry no weight at all. Nor every passing expression of a Judge, however, eminent, can be treated as an ex cathedra statement having the weight of authority."*

387. Keeping in view these well settled principles along with basic fact that in criminal cases normally the law of precedent is not applicable, as facts of each case always differ with another except in respect of technical pleas like jurisdiction, limitation, etc., any pronouncement whether of Apex Court or High Court in a criminal case is mainly based on appreciation of evidence., which in our view, may not have the effect of binding precedent but have to be considered as guidelines or guiding principles of the Hon'ble Supreme Court. We hasten to add here itself that it is not as if none of the pronouncements of the Hon'ble Supreme Court in respect of criminal cases do not having binding precedent. Even in criminal cases where the Hon'ble Supreme Court declares law regarding question of jurisdiction of Court, law of limitation, procedural aspect, etc., it may have binding precedent in other cases wherein similar situation is placed. But the fact remains that even in these latter cases, the Court is required to see the facts and circumstances of each case and only if they are similar or on parity, it has to implement or follow the binding precedent of the Hon'ble Supreme Court.

388. In the case of Naib Singh v. State of Punjab [(1986) 4 SCC 401: 302 1 AIR 1986 SC 2192] the Apex Court has made it clear that there is nothing like precedent in criminal cases but there are certain guiding principles. In the case of Shankarlal v. State of Maharashtra [(1981) 2 SCC 35: AIR 1981 SC 765.] the Hon'ble Supreme Court has observed that legal principles incantations and their importance lies more in their application to a given set of facts than in their recital in

the judgment.

389. Considering all these decisions of the Hon'ble Supreme Court on the question of precedents or binding nature of its pronouncement, we have to reiterate that though normally under Article 141 of the Constitution of India, the pronouncement of the Hon'ble Supreme Court, which is law of the land, has binding force on all other Courts in the Country, it is only the law declared which would be binding on other Courts. Hence, in our view, so far as the pronouncements of the Apex Court in the criminal cases especially like in respect of sentence, amount of compensation, etc. are concerned, normally they do not have any binding force on other Courts except being considered as guidelines or guiding principles.

390. Supreme Court in Pandurang v. State of Hyderabad AIR 1955 SC 216 para 35 held as under:-

> *"But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another."* *(emphasis supplied)*

391. Municipal Committee v. Hazara Singh (1975) 1 SCC 794 the Court held as under in para 4:-

> *"Indeed, the Kerala case cited before us by counsel viz. State of Kerala v. Vasudevan Nair [Cr.A. No. 89 of 1973, decided by the Kerala High Court on July 18, 1974 All India Prevention of Food Adulteration Cases Reporter, 1975 Part I, p. 8] itself shows that such distortion of the passage in the judgment did not and could not pass muster. When pressed with such misuse of this ruling, the High Court repelled it. The law of food adulteration, as also the right approach to decisions of this Court, have been set out correctly there:*
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> *"Judicial propriety, dignity and decorum demand that being the highest judicial tribunal in the country even obiter dictum of the Supreme Court should be accepted as*

> *binding. Declaration of law by that Court even if it be only by the way has to be respected. But all that does not mean that every statement contained in a judgment of that Court would be attracted by Article 141. Statements on matters other than law have no binding force. Several decisions of the Supreme Court are on facts and that Court itself has pointed out in Gurcharan Singh v. State of Punjab [1972 FAC 549] and Prakash Chandra Pathak v. State of Uttar Pradesh [AIR 1960 SC 195: 1960 Cri LJ 283] that as on facts no two cases could be similar, its own decisions which were essentially on questions of fact could not be relied upon as precedents for decision of other cases."* *(emphasis supplied)*

392. In Charan Singh v. State of Punjab (1975) 3 SCC 39 at page 52, the Court held as under:-

> "32. In the context of what value should be attached to the statements of the witnesses examined in this case, our attention has been invited by the learned Counsel for the appellants to a number of authorities. We have refrained from referring to those authorities because, in our opinion, reference to those authorities is rather misplaced. The fate of the present case like that of every other criminal case depends upon its own facts and the intrinsic worth of the evidence adduced in the case rather than what was said about the evidence of witnesses in other decided cases in the context of facts of those cases. The question of credibility of a witness has primarily to be decided by referring to his evidence and finding out as to how the witness has fared in cross- examination and what impression is created by his evidence taken in the context of the other facts of the case. Criminal cases cannot be put in a strait jacket. Though there may be similarity between the facts of some cases there would always be shades of difference and quite often that difference may prove to be crucial. The same can also be said about the evidence adduced in one case and that produced in another. Decided cases can be of help if there be a question of law like the admissibility of evidence. Likewise, decided cases can be of help if the question be about the applicability of some general rule of evidence e.g. the weight to be attached to the evidence of an accomplice. This apart, reference to decided cases hardly seems apposite when the question before the court is whether the evidence of a particular witness should or should not be accepted."

393. We would like to refer to some of the judgments of the Supreme Court commenting upon the precedential value of a previous decision where additional facts emerge in the subsequent case which makes substantial difference in the outcome.

394. In Gian Chand v. State of Haryana (2013) 14 SCC 420, the Court held as under in para 24:-

> *"24. So far as the judgment in Avtar Singh [(2002) 7 SCC 419 is concerned, it has been considered by this Court in Megh Singh v. State of Punjab [(2003) 8 SCC 666]. The Court held that the circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases or between two accused in the same case. Each case depends on its own facts and a close similarity between one case and another is not enough because a single significant detail may alter the entire aspect. It is more pronounced in criminal cases where the backbone of adjudication is fact based."*
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> *(emphasis supplied)*

395. In Bhavnagar University v. Palitana Sugar Mill (P) Ltd. (2003) 2 SCC 111, the Supreme Court held as under:-

> *"59. A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. [See Ram Rakhi v. Union of India AIR 2002 Del 458 (FB),Delhi Admin. (NCT of Delhi) v. Manohar Lal (2002) 7 SCC 222, Haryana Financial Corpn. v. Jagdamba Oil Mills (2002) 3 SCC 496, and Nalini Mahajan (Dr) v. Director of Income Tax (Investigation)(2002) 257 ITR 123 (Del)."*

396. In Abdul Kayoom v. CIT AIR 1962 SC 680, the Supreme Court observed as under:-

> *"21. What is attributable to capital and what, to revenue has led to a long string of cases here and in the English Courts. The decisions of this court reported in Assam Bengal Cement Co. Ltd. v. CITI (1955) 27 ITR 34] and Pingle Industries case [(1960) 3 SCR N 681] have considered all the leading cases, and have also indicated the tests, which are usually applied in such cases. It is not necessary for us to cover the same ground again. Further, none of the tests is either exhaustive or universal. Each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) [(1960) 3 SCR N 681] by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, its broad resemblance to another case is not at all decisive."*

397. In Parasa Raja Manikyala Rao v. State of AP. (2003) 12 SCC 306, the Court held as under:-

> *"6. At the outset, we think it proper to take note of what weighed with the trial court to direct acquittal of the present appellants. In para 39 of the judgment it was noted as follows:*
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> *"39. Though all the other evidence even as against A-2 and A-3 was as nearly cogent as the one against A-1, the improbability of their participation became one of the two plausible views in the light of the last-mentioned four rulings of the Hon'ble Supreme Court. This gives rise to a doubt insofar as A-2 and A-3 are concerned. Naturally the benefit of such a doubt must go to them."*
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> *7. This is a strange way of dealing with the accusations and consideration of the guilt or otherwise of the accused. How a person reacts in a given case may be the determinative factor so far as that case is concerned. That cannot be applied as a rule of universal application to all cases irrespective of the fact situation in that particular case. There can be no empirical formula as to how one reacts in a given situation and its effect and impact. It would be almost like trying to put a square peg in a round hole. To imprint the fact situation of one decided case upon another or observations made in the peculiar facts of a given case to any or every other case, notwithstanding the dissimilarity in effect and the distinctive features, is legally impermissible...*
>
> *9. Each case, more particularly a criminal case, depends on its own facts and a close similarity between one case and another is not enough to warrant like treatment because a significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."*

398. The concept of Stare Decisis, by its very nature does not apply to the factual aspect of a case. In State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat (2005) 8 SCC 534, the law has been considered by the Supreme Court in following words:-

> *"Stare decisis*
>
> *"110. We have dealt with all the submissions and counter-submissions made on behalf of the parties. What remains to be dealt with is the plea, forcefully urged, on behalf of the*

respondents that this Court should have regard to the principle of stare decisis and should not upturn the view taken in Quareshi-I [1959 SCR 629: AIR 1958 SC 731] which has held the field ever since 1958 and has been followed in subsequent decisions, which we have already dealt with hereinabove.

111. Stare decisis is a Latin phrase which means "to stand by decided cases; to uphold precedents; to maintain former adjudication". This principle is expressed in the maxim "stare decisis et non quieta movere" which means to stand by decisions and not to disturb what is settled. This was aptly put by Lord Coke in his classic English version as "Those things which have been so often adjudged ought to rest in peace". However, according to Justice Frankfurter, the doctrine of stare decisis is not "an imprisonment of reason" (Advanced Law Lexicon, P. Ramanatha Aiyer, 3rd Edn. 2005, Vol. 4, p. 4456). The underlying logic of the doctrine is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible.

112. The trend of judicial opinion, in our view, is that stare decisis is not a dogmatic rule allergic to logic and reason; it is a flexible principle of law operating in the province of precedents providing room to collaborate with the demands of changing times dictated by social needs, State policy and judicial conscience.

113. According to Professor Lloyd concepts are good servants but bad masters. Rules, which are originally designed to fit social needs, develop into concepts, which then proceed to take on a life of their own to the detriment of legal development. The resulting "jurisprudence of concepts" produces a slot- machine approach to law whereby new points posing questions of social policy are decided, not by reference to the underlying social situation, but by reference to the meaning and definition of the legal concepts involved. This formalistic a priori approach confines the law in a straitjacket instead of permitting it to expand to meet the new needs and requirements of changing society (Salmond on Jurisprudence, 12th Edn., at p. 187). In such cases the courts should examine not only the existing laws and legal concepts, but also the broader underlying issues of policy. In fact, presently, judges are seen to be paying increasing attention to the possible effects of their decisions one way or the other. Such an approach is to be welcomed, but it also warrants two comments. First, Judicial inquiry into the general effects of a proposed decision tends itself to be of a fairly speculatiye nature. Secondly, too much regard for policy and too little for legal consistency may result in a confusing and illogical complex of contrary decisions. In such a situation it would be difficult to identify and respond to generalised and determinable social needs. While it is true that "the life of the law has not been logic, it has been

experience" and that we should not wish it otherwise, nevertheless we should remember that "no system of law can be workable if it has not got logic at the root of it" (Salmond, ibid., pp. 187-88).

114. Consequently, cases involving novel points of law, have to be decided by reference to several factors. The judge must look at existing laws, the practical social results of any decision he makes, and the requirements of fairness and justice. Sometimes these will all point to the same conclusion. At other times each will pull in a different direction; and here the judge is required to weigh one factor against another and decide between them. The rationality of the judicial process in such cases consists of explicitly and consciously weighing the pros and cons in order to arrive at a conclusion. (Salmond, ibid., p. 188.)

115. In case of modern economic issues which are posed for resolution in advancing society or developing a country, the court cannot afford to be static by simplistically taking shelter behind principles such as stare decisis, and refuse to examine the issues in the light of the present facts and circumstances and thereby adopt the course of judicial "hands off". Novelty unsettles existing attitudes and arrangements leading to conflict situations which require judicial resolution. If necessary adjustments in social controls are not put in place then it could result in the collapse of social systems. Such novelty and consequent conflict-resolution and "patterning" is necessary for full human development. (See The Province and Function of Law, Julius Stone, at pp. 588, 761 and 762.)

116. Stare decisis is not an inexorable command of the Constitution or jurisprudence. A careful study of our legal system will discern that any deviation from the straight path of stare decisis in our past history has occurred for articulable reasons, and only when the Supreme Court has felt obliged to bring its opinions in line with new ascertained facts, circumstances and experiences. (Precedent in Indian Law, A. Laxminath, 2nd Edn. 2005, p. 8.)

117. Given the progressive orientation of the Supreme Court, its creative role under Article 141 and the creative elements implicit in the very process of determining ratio decidendi, it is not surprising that the judicial process has not been crippled in the discharge of its duty to keep the law abreast of the times, by the traditionalist theory of stare decisis (ibid., p. 32). Times and conditions change with changing society, and, "every age should be mistress of its own law" and the era should not be hampered by outdated law. "It is revolting", wrote Mr Justice Holmes in characteristically forthright language, "to have no better reason for a rule of law than it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long, since, and the

rule simply persists from blind imitation of the past". It is the readiness of the judges to discard that which does not serve the public, which has contributed to the growth and development of law. (ibid., p. 68)

118. The doctrine of stare decisis is generally to be adhered to, because well- settled principles of law founded on a series of authoritative pronouncements ought to be followed. Yet, the demands of the changed facts and circumstances, dictated by forceful factors supported by logic, amply justify the need for a fresh look. 119. Sir John Salmond, while dealing with precedents and illustrating instances of departure by the House of Lords from its own previous decisions, states it to be desirable as "it would permit the House [of Lords] to abrogate previous decisions which were arrived at in different social conditions and which are no longer adequate in present circumstances". (See Salmond, ibid., at p. 165.) This view has been succinctly advocated by Dr. Goodhart who said: "There is an obvious antithesis between rigidity and growth, and if all the emphasis is placed on absolutely binding cases then the law loses the capacity to adapt itself to the changing spirit of the times which has been described as the life of the law." (ibid., p. 161) This very principle has been well stated by William O'Douglas in the context of constitutional jurisprudence. He says: "So far as constitutional law is concerned, stare decisis must give way before the dynamic component of history. Once it does, the cycle starts again." (See Essays on Jurisprudence from the Columbia Law Review, 1964, at p. 20.)"

119. Sir John, Salmond, while dealing with precedents and illustrating instances of departure by the House of Lords from its own previous decisions, states it to be desirable as "it would permit the House [of Lords] to abrogate previous decisions which were arrived at in different social conditions and which are no longer adequate in present circumstances". (See Salmond, ibid., at p. 165.) This view has been succinctly advocated by Dr. Goodhart who said: "There is an obvious antithesis between rigidity and growth, and if all the emphasis is placed on absolutely binding cases then the law loses the capacity to adapt itself to the changing spirit of the times which has been described as the life of the law. (ibid., p. 161) This very principle has been well stated by William O'Douglas in the context of constitutional jurisprudence. He says: "So far as constitutional law is concerned, stare decisis must give way before the dynamic component of history. Once it does, the cycle starts again." (See Essays on Jurisprudence from the Columbia Law Review, 1964, at p. 20.)

399. In Ashish Ranjan v. Anupma Tandon (2010) 14 SCC 274, the Supreme Court held as under:-

> *"18. It is settled legal proposition that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. Such an issue is required to be determined in the background of the relevant facts and circumstances and each case has to be decided on its own facts as the application of doctrine of stare decisis remains irrelevant insofar as the factual aspects of the case are concerned."*

400. In Arasmeta Captive Power Co. (P) Ltd. v. Lafarge India (P) Ltd, (2013) 15 SCC 414, the Court has held as under:-

> *"41. Before parting with this part of our ratiocination we may profitably reproduce the following words of Lord Denning which have become locus classicus:*
>
> *"18…. Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.""*

401. Last but not the least is the question as to whether Supreme Court Judgement in 'XYZ' case would constitute issue estoppel for reception of evidence in respect of confession under Section 164 Cr.P.C. and recovery under Section 27 of the Evidence Act. Issue estoppel prevents reopening of an issue on which there is a final and unchallenged finding by a court of competent jurisdiction and such issue is sought to be re-agitated in a subsequent litigation. In substance the principle is that re-litigation of an issue already settled in a previous adjudication would be impermissible in law. It was in the case of Pritam Singh and another Vs. State of Punjab, AIR 1956 SC 415 that the issue estoppel was first recognized in Indian Law and made applicable in criminal proceedings. The Supreme Court relied upon the observations of Privy Council in Sambasivam v. Public Prosecutor, Federal of Malaya, 1950 A.C. 458, which is reproduced hereinafter:-

> "The effect of a verdict of acquittal pronounced by a

> competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim res judicata pro veritate accipitur is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any steps to challenge it at the second trial."

402. While applying the principal of issue estoppel, the Supreme Court held as under in paragraph 23:-

> "23……...The acquittal of Pritam Singh Lohara of that charge was tantamount to a finding that the prosecution had failed to establish the possession of the revolver Exhibit P-56 by him. The possession of that revolver was a fact in issue which had to be established by the prosecution before he could be convicted of the offence with which he had been charged. That fact was found against the prosecution and having regard to the observations of Lord MacDermott quoted above, could not be proved against Pritam Singh Lohara in any further proceedings between the Crown and him. We are of the opinion that the High Court was right in rejecting the evidence regarding the recovery of Exhibit P-56 against Pritam Singh Lohara and the evidence against him would have to be considered regardless of the alleged recovery of Exhibit P-56 at his instance."

403. A constitution bench of the Supreme Court in Manipur Administration, Manipur Vs. Thokchom Bira Singh, AIR 1965 SC 87, reiterated the applicability of rule of issue estoppel in the criminal jurisprudence with reference to Section 403 of the Cr.P.C. (corresponding to Section 300 Cr.P.C., now). The observation of the bench contained in para 12 and 13 are relevant and are reproduced hereinafter:-

> "12…..It is, therefore, clear that Section 403 of the Criminal Procedure Code does not preclude the applicability of this rule of issue estoppel. The rule being one which is in accord with sound principle and supported by high authority and there being a decision of this Court which has accepted it as a proper one to be adopted, we do not see any reason for discarding it. We might also point out that even before the decision of this Court this rule was applied by some of the High Courts and by way of illustration we might refer to the decision

> of Harries, C.J. in Manickchand Agarwala v. State [AIR 1952 Cal 730] . Before parting, we think it proper to make one observation. The question has sometimes been mooted as to whether the same principle of issue estoppel could be raised against an accused, the argument against its application being that the prosecution cannot succeed unless it proves to the satisfaction of the court trying the accused by evidence led before it that he is guilty of the offence charged. We prefer to express no opinion on this question since it does not arise for examination.
>
> 13. As stated earlier, if Pritam Singh case [AIR 1956 SC 415] was rightly decided, it was conceded that the decision of the Judicial Commissioner was right."

404. The judgments in Pritam Singh (supra) and Manipur Administration (supra) again fell for examination before the Supreme Court in Mohar Rai Vs. State of Bihar, AIR 1968 SC 1281. In para 8 of the judgment the Court again referred to its previous judgment in Manipur Administration's case (supra) and expressed a doubt on the proposition whether the rule could be pressed into action against an accused in following words:-

> "…….That apart, it is doubtful — though for the purpose of this case it is unnecessary to express any final opinion on this point — whether the rule in question could be pressed against an accused, the reason being that while a prosecution cannot succeed unless it proved its case beyond reasonable doubt, the nature of the proof required of an accused in substantiating the plea taken by him is different — it is sufficient if he proves that plea taken by him is reasonable and probable. In that event he is entitled to the benefit of doubt. This aspect was noticed by this Court in Manipur Administration case [(1964) 7 SCR 123] where it was observed:
>
> > "Before parting, we think it proper to make one observation. The question has sometimes been mooted as to whether the same principle of issue-estoppel could be raised against an accused, the argument against its application being that the prosecution cannot succeed unless it proved to the satisfaction of the court trying the accused by evidence led before it that he is guilty of the offence charged. We prefer to express no opinion on this question since it does not arise for examination.""

405. Sri Chaudhary, has placed reliance upon a division bench judgment of Delhi High Court in Gulab Chand Sharma Vs. H.P. Sharma, Commissioner of Income-Tax, Delhi, 1973 SCC OnLine Del 272, in order to contend that the doubt expressed by the Supreme Court with regard to applicability of the principle of issue estoppel against an accused has been taken further and the principle itself has been made inapplicable against the accused for the reasons contained in para 13 of the judgment which is extracted hereinafter:-

> "13. It was then contended that the principle of issue estoppel is applicable only in favour of the accused but not against him. The general rule is that res judicata must apply in favour as well as against each of the parties. (15 Halbury's Laws of England, 201, paragraph 379). Issue estoppel is a branch of the law of res judicata applied to criminal proceedings. This was the conclusion of the majority of the House of Lords in Connelly v. Director of Public Prosecutions [[1964] A.C. 1254, 1321, 1334 (H.L.).] . Logically it may be argued that issue estoppel applies not only in favour of the accused but also against him. (Spencer-Bower and Turner on Res Judicata, paragraph 335). But in all criminal proceedings, the principle of res judicata or issue estoppel may come into conflict with another principle, namely, that the prosecution must prove that the accused is guilty and unless this is done the accused is presumed to be innocent. But principle of issue estoppel cannot override the principle of presumption of innocence of the accused."

406. We have given our thoughtful consideration to the submissions advanced by Sri Chaudhary and we do find substance in his contention. In a criminal trial the onus to prove the guilt of accused is upon the prosecution. There is also a presumption of innocence attached to the accused till his guilt is established beyond reasonable doubt. The guilt of accused beyond reasonable doubt is otherwise required to be established in a fair trial consistent with the procedure laid down in law.

407. We entirely subscribe to the view expressed by the Delhi

High Court in Gulab Chand Sharma (supra) that the principle of issue estoppel may come in conflict with the principle of presumption of innocence of the accused, and in such exigency the well accepted principles of presumption of innocence of accused and the onus on the prosecution to establish guilt of accused beyond reasonable doubt must override the principle of issue estoppel.

408. In the facts of the present case, we have otherwise noticed that the quality of evidence in the case of 'XYZ' is substantially distinct from the evidence led in the present trial and the incorporation of principle of issue estoppel, so as to oust the admissibility of evidence led in the present trial, on the aspect of confession and recovery, would do great harm to the appellant. We are cognizant of yet another important principle accepted in criminal trial that the evidence led in a particular trial alone determines the outcome of trial to the exclusion of evidence led in other trial. We are, therefore, in respectful agreement with the view expressed by Delhi High Court in the case of Gulab Chand Sharma (supra) and hold that the principle of issue estoppel cannot be pressed into service so as to prohibit the reception of evidence in the present trial on the aspect of confession and recovery. Holding of separate trial to establish the guilt of accused, viz-a-viz trial in the previous case of 'XYZ', would lose its significance if the findings returned on the issue of confession and recovery are to be imported with the help of the principle of issue estoppel to the exclusion of evidence on the two aspects in the present trial.

Alternative hypothesis consistent with the innocence of accused, relied upon by the accused SK

409. Accused SK after completion of his statement under section 313 Cr.P.C. moved an application on 14.05.2015 annexing a report of expert committee constituted by the Ministry of Women and Child Development titled as 'Investigation Into Allegation of Large Scale Sexual Abuse, Rape and Murder of Children in Nithari Village of Noida (UP)' dated 17.01.2007, published by the Ministry of Women and Child Development, Government of India (Paper No.366Kha).

410. The Ministry had constituted high level committee consisting of four experts. This high powered committee gave its report. In para 3.2 of this report (Additional Paper Book Volume IV at page 1239) the Committee referred to the scientific information supplied by Dr. Vinod Kumar, Chief Medical Superintendent, Noida, who had supervised the postmortem conducted on the bodies identified after assembling the bones and skulls on 10.01.2007 informed the Committee that "it was intriguing to observe that the middle part of all bodies (torsos) was missing. According to him, such missing torsos give rise to a suspicion that wrongful use of bodies for organ sale, etc. could be possible. According to him, the surgical precision with which the bodies were cut also pointed to this fact. He stated that body organs of small children were also in demand as these were required for transplant for babies/children. A body generally takes more than 3 months to start decomposing and the entire process continues for nearly 3 years. Since many of the reported cases related to children having been killed less than a year back, it is a matter for investigation as to why only bare bones were discovered. He did not favour the theory of cannibalism as it could be a ruse to divert attention from the missing parts of the bodies."

411. The accused moved two specific applications seeking production of postmortem report and examination of autopsy surgeon at Noida as well as prayed for summoning of the above report dated 17.01.2007. Both the applications have been rejected by the court below. We cannot approve of the manner in which these applications were rejected. The court of Sessions relied upon the previous judgment in the case of 'XYZ' and the ostensible delay in conduct of this trial as being the reasons for such rejection. None of these two grounds were either valid or even available. Firstly, judgment in 'XYZ' was already held by this Court in Criminal (Capital) Appeal No. 1475 of 2009 not to influence pending trials in other Nithari cases and secondly, the right of accused to get his defence examined on merits is too well settled to be rejected only on the ground of delay particularly when the accused is to be sent to gallows.

412. Right of the accused to have his explanation given under section 313 Cr.P.C. considered is an important right and rejection of such right on the ground of it being irrelevant or an abuse of process on part of accused cannot be approved of, particularly when the report itself was of the Ministry of Women and Child Development, Govt. of India.

413. The report's conclusion does create a doubt on the prosecution story about the motive for the offence and the failure on part of the investigating agencies to explore the possibility of organ trade as being the motive for the offence is a serious lapse on part of the prosecuting agency, particularly when such large number of women and children had gone missing.

414. The doubt expressed by the Chief Medical

Superintendent, Noida, referred to in the report of the concerned Ministry receives support from the fact that the very adjacent house i.e. House No.D-6, Sector-31, Noida was occupied by a doctor who had been charged for organ trade and was also sent to jail. This fact is clearly admitted by the Investigating Officer PW-40. The prosecution has also admitted that much of the bones were actually seized from behind the house no. D-6, Sector-31, Noida. Most of the recoveries otherwise are from the enclosed gallery behind house no. D-6 and D-5 towards area abutting House No. D-6.

415. The Committee in its report dated 17.01.2007 has noticed that the cases of missing children in the area during the last two years was 29. It noticed that motive of killings was not clear. The victims were both male and female and their ages ranged from 3 year old boy to young women. The premise of it being the handiwork of a serial killer was doubted at that stage.

416. The suggestions of the committee given in para 4.3.2 specifically was that CBI should look into all angles including organ trade in addition to sexual exploitation and other forms of crime against women and children. Need to study organ transplant records of all hospitals in Noida was emphasized. The Committee also emphasized the need to explore the possibility of involvement of a larger gang in Nithari killings.

417. Despite such strong recommendations made by a High Powered Committee constituted by the Ministry of Women and Child Development, Govt. of India, there is nothing on record to show that investigation was carried out on the lines suggested by the Committee. Shockingly, even the statement of doctor residing in house no. D-6, Sector-31, Noida was not

recorded. He was not even interrogated. The CBI Counsel was specifically questioned on this aspect and he merely stated that CBI searched House No. D-6, Sector – 31, on 12.01.2007 and nothing incriminating was found. This explanation is not sufficient as possibility of leaving any trace of crime would be negligible after 13-14 days of the reporting of the incident. It is, however, not disputed by the CBI counsel that no interrogation was made of the owner of House No. D-6, Sector 31, Noida. Investigation was not taken further to rule out the possibility of organ trade as being the cause of disappearance of women and children in Nithari village.

418. We find substance in the contention of Mr. Chaudhary that the investigation in the present case is absolutely slipshod and requisite care and caution required to deal such sensitive case is completely lacking. The prosecuting agency has followed the easy course suggested by the Investigating Officer of UP Police and merely on the strength of recovery, which is not proved, and confession extracted by coercion and made under duress, which is otherwise inadmissible, a domestic servant has been made out to be the villain of Nithari killings completely overlooking the strong possibility of organ trade being the actual reason for the infamous Nithari killings.

419. Detailed analysis of the evidence placed on record of the present case would clearly indicate that prosecution case is based upon circumstantial evidence and that there is no direct evidence of the alleged commission of offence by the accused of kidnapping the victim; attempt to sexually assault her; causing disappearance of evidence of offence and ultimately murdering the deceased. The court below, upon appreciation of evidence on record nevertheless has returned a finding that the prosecution has succeeded in establishing the guilt of accused

beyond reasonable doubt.

420. The circumstances that have been relied upon by the trial court to convict the accused SK have already been noticed by us.

421. Of the above referred circumstances relied upon by the prosecution to implicate the accused, the first circumstance that victim A was residing at Sector 31, Noida, and she never returned from work at D-91 and D-100, on 5.10.2006, is not in issue. Similarly the fact that accused SK was residing in House No. D-5, Sector 31, Noida during the time period of incident is also undisputed. Lodgement of FIR by the father of victim against accused, subsequent to recovery of skeleton remains and the seizure of victim's clothes, as well as arrest of accused pursuant to such FIR is also not disputed. The fact that DNA extracted from a recovered skull and some of the bones seized matched the DNA of victim's parents is also not in dispute. These circumstances, however, are not incriminating in character and do not implicate the accused appellant SK.

422. The circumstances which are mainly relied upon by the prosecution and accepted by the court below to incriminate the accused appellant are as under:-

> "(i) Admissibility of evidence regarding information furnished by accused SK on 29.12.2006, pursuant to which alleged recoveries are made of skull, bones and skeleton etc.
>
> (ii) While in custody, on 29.12.2006, accused confessed to luring and killing women and children before PW-31 and her husband (not produced).
>
> (iii) Accused SK habitually lured women and girls walking pass D-5 either by promising offers of domestic work or offering eatables/treats etc.
>
> (iv) Recovery of a kitchen knife on 11.1.2007 and an axe on 18.1.2007 pursuant to disclosure statement made by accused under Section 27.

(v) Confession of accused under Section 164 Cr.P.C."

423. It being a case of circumstantial evidence, the prosecution was required to prove the circumstance on the basis of which conclusion of guilt is proposed to be established beyond reasonable doubt. The evaluation of evidence on the above circumstances must meet the five conditions laid down in para 153 of the judgment delivered by Supreme Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116. Principles laid down in Para 152 and 153 of the judgment in Sharad Birdhichand Sarda (supra) has consistently been followed and are reproduced hereinafter:-

> "152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in Hanumant case [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :
>
> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."
>
> 153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> (1) the circumstances from which the conclusion of guilt

> is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]
>
> "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (3) the circumstances should be of a conclusive nature and tendency,
>
> (4) they should exclude every possible hypothesis except the one to be proved, and
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

424. Learned counsel for the CBI has heavily relied upon the impugned judgment of trial court and the reasoning contained therein to submit that the finding of guilt recorded against the accused SK merits no interference.

Analysis relating to judgment of sessions court

425. We have carefully perused the judgment of trial court on the circumstances relied upon to prove the guilt of the accused. After referring to the oral and documentary evidence on record, the trial court has framed issues for determination during trial. Noticing this case to be based upon circumstantial evidence, the court has observed that most important circumstance against the accused is his confession made before the

magistrate under Section 164 Cr.P.C. The court has then proceeded to refer to the letter of accused seeking to confess his crime and the consequential recording of his alleged confession. The entire transcription of video-graphed confession has been extracted. The court of sessions has held the confession to be voluntary.

426. We have examined the evidence relating to videography of confession with reference to the settled legal parameters to adjudge its legality. The discussion and finding of the court below on the aspect of confession clearly omits to take note of relevant considerations relating to its voluntariness and truthfulness.

427. The sessions court has not referred to the circumstance of prolonged police custody of accused for 60 days; delayed confession to facilitate tutoring; writing letter of confession to the court about which the accused had no knowledge; lack of adequate medical evidence to show that accused had not been tortured; non-consideration of the statement of accused about him being tortured and made to memorize contents of confession; circumstance of moving application before the court at Delhi for recording confession when the accused was actually at Gautam Budh Nagar; non-consideration of the prayer of accused for his medical examination to prove torture; non-observance of safeguards contemplated under section 164 Cr.P.C.; denial of legal aid to the accused; absence of finding of voluntariness of confession by the recording Magistrate; confession not being proved in the manner specified in law; confession not shown to be true, rather, contradicted by other evidence; no independent corroboration of murder, rape or cannibalism; improbability of events mentioned in the confession etc. Since we have recorded our independent

opinion on the above aspects to doubt the voluntariness and truthfulness of confession, therefore, we do not approve the findings recorded in the impugned judgment regarding admissibility of confession for being relied upon as a circumstance against the accused. Since we have already expressed our views, in detail, we do not deem it proper to reproduce it all over again while declining to approve the reasonings contained in the impugned judgment on this aspect.

428. Similarly, the circumstance with regard to recovery made on the alleged pointing out of the accused on 29.12.2006 and on subsequent dates is held to be proved by the court below overlooking the fact that neither the declaration furnishing such information was recorded in the manner warranted in law nor was it proved. Existence of necessary ingredients to invoke section 27 of the Evidence Act has not been ascertained by the court below. We have given our elaborate reasons in that regard which are completely missing in the impugned judgment. Circumstances existing on record to doubt the recovery are also overlooked. We, therefore, cannot approve of the conclusions and findings recorded by the court below on the aspect of recovery being a circumstance to implicate the accused SK.

429. Similarly, the statement of Pratima (PW-24), Poornima (PW-25) and Anita Haldar (PW-1) has also been misconstrued by the trial court inasmuch as their statements do not constitute any incriminating circumstance against the accused. We have given our elaborate reasons in earlier paragraphs, which can be perused for our conclusions, in this regard.

Analysis of evidence regarding Pandher

430. So far as the accused Pandher is concerned, no charge-sheet was filed against him by the prosecution upon conclusion of investigation in the present case.

431. Informant Jatin Sarkar filed a protest petition in the matter before the concerned Magistrate on the ground that the allegation in the FIR were against Pandher and SK both but the investigating agency on the acceptance of plea of alibi by Pandher has illegally exonerated accused appellant Pandher in the matter. This protest petition was marked to the court of Sessions as the order of committal had already passed by then. The Court of Sessions passed orders on 11.5.2007 for further investigation to be conducted in the matter and to submit its report before the concerned Magistrate. Such report was directed also to be placed before the court of Sessions. The protest petition was, accordingly, disposed of on 11.5.2007.

432. Progress report was submitted by the CBI clearly disclosing the location of accused appellant Pandher on different dates between 5.10.2006 to 14.10.2006. This report was submitted relying upon the location of accused appellant Pandher as per his mobile phone. It was found that during this period the accused Pandher was at Bheemtal at Nainital and stayed in a hotel Great Value; got fuel filled in his vehicle No. DL 4C 1222 at Chamba and other locations. Statements were also obtained of the employees of the hotel and other persons with whom accused Pandher interacted during this period.

433. During the pendency of trial before the Court of Sessions against accused SK being Sessions Trial No. 440 of 2007 an application came to be filed by Smt. Vandana Sarkar (mother

of victim A) stating that on the day her husband Jatin Sarkar came to House No. D-5, Sector-31, various other persons had also arrived at the house. Co-accused SK, Dinesh Yadav I.O. and Moninder Singh Pandher were also present there. When the applicant (Vandana Sarkar) showed the photograph of her daughter to co-accused SK, he confessed his guilt and also implicated his owner Moninder Singh Pandher in the act of rape and murder of the victim. Accused Pandher also offered to show the iron blade with which the victim's body was dismembered. Pandher later brought the iron blade.

434. The application under Section 319 Cr.P.C. of victim's mother further stated that the utterances made by co-accused Surendra Koli and Pandher were recorded by the IO Dinesh Yadav, but these papers have been misplaced. Prayer accordingly was made to summon Pandher under Sections 302 r/w 120B, 364 r/w 120B, 201 and 376 IPC whereas Dinesh Yadav PW-40 be summoned under Section 201 r/w 120B IPC.

435. Objections were filed to the application moved under Section 319 stating that no evidence was collected with regard to complicity of accused Pandher in the matter. It was also stated that the recovery of skull, bones, clothes, knife and iron blade were not backed by testimony of any independent witnesses and in the investigation, including scientific investigation, complicity of co-accused SK alone has been found. The experts have also opined that none of the bodies have been dismembered by the iron blade. It was also stated that accused Pandher was not even present at House No. D-5 and in the confessional statement of co-accused SK there is no role assigned to accused Pandher. The objection further stated that the case diary alleged to have been misplaced is actually part of the record before the Court and since case diary is not

being relied upon, therefore, it has no relevance. Prayer was made to reject the application under Section 319 Cr.P.C.

436. The Court of Sessions vide order dated 28.11.2007 summoned the accused Moninder Singh Pandher under Sections 302 r/w 120B; 201 r/w 120B and 376 IPC. So far as the prayer to summon PW-40 Dinesh Yadav is concerned, the Court found that the case diary had already been handed over to CBI by PW-40 and, therefore, his summoning under Section 319 Cr.P.C. was not required.

437. It was thereafter that the accused Pandher was charged under Section 376; 302 r/w 120B and 201 r/w 120B IPC vide order dated 16.7.2008. It is worth noticing that the Court of Sessions had essentially relied upon the testimony of PW-31 Vandana Sarkar for the purposes of summoning accused Pandher. The testimony made by PW-31 on 7.11.2007 before the Court of Sessions is reproduced hereinafter:-

> "शपथ पूर्वक बयान किया कि-
>
> सैक्टर 31 नोएडा में पिछले 17-18 साल से रह रही हूँ मेरे साथ मेरे घर में मेरा पुत्र सोनू सरकार, बेटी A, और मेरे पति जतिन सरकार रहते थे। मेरी बेटी A का पुत्र अमित सरकार भी रहता था। मेरी पुत्री A 5 अक्टूबर 2006 गायब हो गयी थी जो नहीं मिली उस समय मेरी पुत्री की उम्र 20 वर्ष थी। जब मेरी पुत्री A जब गायब हुई थी उस समय सैक्टर 30 की कोठियों में काम करती थी। जहां मेरी पुत्री काम करने जाती थी वहां रास्ते में बीच में सैक्टर 31 की कोठी डी-5 भी पड़ती थी उसी के सामने से रास्ता था। जिस कोठी में मेरी पुत्री काम करती थी उनकी मालकिन का नाम कनिका हलधर था। 05 अक्टूबर 2006 को मेरी पुत्री सुबह 7.00 बजे घर से गयी थी। उस दिन 1.30 बजे दिन काम खत्म करके कुमकुम सीरियल देखकर घर आ रही थी कुमकुम सीरियल मालकिन के यहा ही देख रही थी लेकिन ये घर नहीं पहुंची। हमने जब मेरी लडकी नहीं आयी तो उसे तलाश किया। गवाह को लिफाफा कागज सं० 10अ में से फोटो 10अ/1 निकालकर दिखाया जिसको देखकर गवाह ने शनाख्त किया कि ये उसी की बेटी की फोटो है। फोटो पर वस्तु प्रदर्श-33 डाला गया। मेरी लडकी उस दिन सफेद सलवार व पीला कुर्ता व रवड की चप्पल पहने थी। हम दोनो मैं और मेरा पति अपनी पुत्री के गायब होने की रिपोर्ट लिखाने थाने गये थे। मैं अपने पति के साथ डी-5 कोठी में उस समय गयी थी जब हड्डिया व कपडे आदि बरामद हुये थे। मैं 29 दिसम्बर 06 को डी-5 कोठी में गयी थी। वहां से जो मेरी लडकी के कपड़े आदि बरामद हुए थे उसकी लिखा पढ़ी हुई थी

जिस पर मैंने व मेरे पति ने अंगूठे लगाये थे गवाह को प्रदर्श क-50 पढकर सुनाया गया तो सुनकर कहा कि यह वही लिखा पढ़ी है जो मेरे सामने डी-5 कोठी में हुयी थी। और जो कपडे मेरी बेटी के वहां से बरामद हुये थे वो हमने पहचान लिये थे। जो मेरी बेटी उस दिन कपड़े पहने हुए थी वो मालकिन कनिका हलधर ने दिये थे।

न्यायालय के समक्ष एक पार्सल खोला गया जिसमें एक सफेद सलवार, पीला प्रिन्टिड कुर्ता और जोडी रवड की चप्पल निकली जिन्हें देखकर गवाह ने कहा कि ये वो ही कपडे, चप्पल है जिसे मैंने डी-5 कोठी में पहचाना था और ये वो ही कपडे व चप्पल है जिसे मेरी लड़की आखिरी बार घर जाते हुए पहने थी सलवार वस्तु प्रदर्श-10 व कुर्ता पर वस्तु प्रदर्श-11 पडा है तथा चप्पलों पर वस्तु प्रदर्श-34 डाला गया।

गवाह ने आजखुद कहा कि उसे इस मामले कुछ अन्य बाते बतानी है जो वह बताना चाहती है। गवाह की मौखिक प्रार्थना स्वीकार की गयी। जिस दिन मैं और मेरे पति जतिन सरकार डी-5 कोठी में गये थे और जब हंगामा हुआ उस समय अनिल हलधर, नन्दलाल, सुनील विश्वास व और बहुत से लोग डी-5 में गये थे। उस समय सुरेन्द्र कोली व दिनेश यादव, मोनिन्दर सिंह पंधेर भी वही थे। मैंने उस समय अपनी पुत्री का फोटो सुरेन्द्र कोली को दिखाया तो इसने कहा कि 01.30 बजे A आ रही थी और सुरेन्द्र ने बताया उसने उसे अच्छा काम दिलाने व अच्छा पगार दिलाने के लिए कोठी के अन्दर बुला लिया ये सब बाते जो सुरेन्द्र बोल रहा था दिनेश यादव लिख रहे थे सुरेन्द्र ने बताया कि मोनिन्दर से कहता था कि कही से भी तू लड़की का जुगाड करके ला क्योंकि मुझे रात में नींद नहीं आती और इसलिए मैं लड़कियों को बुलाकर उन्हे देता था। फिर वो उन लडकियों के साथ बलात्कार वगैरा करके कहता था कि अब तुझे जो करना है वो कर और उसके बाद ठिकाने पर लगा देना। और फिर सिर काट कर पालीथीन में करके पीछे फेंक देता था और धड वगैरा मौका देखकर आगे नाले में फेक देता था। उस समय दिनेश यादव थे और वो सब बाते लिख रहे थे। और मोनिन्दर सिंह बोले कि मैं गन्दा काम लड़कियों के साथ करने के बाद सुरेन्द्र से कहता था कि उसे ठिकाने लगा दे और कहने लगा कि मैंने गलत काम किया मुझे माफ कर दो। मेरे आदमी ने फिर दिनेश यादव से वो कागज लिये और फिर डेढ दो घंटे बाद घर आकर मुझे वो कागज दिखाये। मेरे पति नेफिर मुझसे कहा कि एक दो कागज मैंने पीडित पक्ष को दे दिया है और एक दो कागज उसने मुझे भी दिये और कहा कि ये बहुत जरूरी कागज हैं वो कागज लेकर हम लोग गाजियाबाद आ रहे थे फिर हम लोग गाजियाबाद कोर्ट में आये वहां पर दो आदमी बैठे थे उनमें एक दिनेश यादव सी०ओ० सीटी व दूसरे गिलानी सीबीआई थे दिनेश यादव को मैं इसलिये जानती हूँ कि मैंने उसे डी-5 में देखा था। गिलानी कई बार हम थाने जाते थे जब देखा था। गिलानी कभी कभार हमारे घर आया था इसलिये जानती हूँ। जब हम कचहरी आये थे उस समय गाड़ी में विजय शंकर सीबीआई० भी थे विजय शंकर व गिलानी ने मुझसे कहा कि तुम ये कागज लेकर कोट में मत आया करो नहीं तो तुम्हे जान से मार देंगे। यह 31 दिसम्बर 2006 की बात है जब न्यायालय द्वारा स्पष्ट रूप से पूछा गया कि कचहरी में कागज लेकर तुम और तुम्हारे पति कब आये थे जब विजय शंकर और गिलानी मिले थे तो गवाह ने कहा कि मुझे तारीख याद नहीं है क्योंकि मैं परेशान थी। जिस दिन हम डी-5 कोठी में गये थे और वहां मोनिन्दर व सुरेन्द्र मिले थे तो मोनिन्दर ने कहा कि मैंने जिस आरी से काटा था वो आरी मैं आपको दिखाना चाहता हूँ उस समय फिर मालिक मोनिन्दर उपर गया और आरी लेकर आया हम उपर नहीं गये थे क्योंकि बहुत भीड़ भाड़ थी लेकिन मोनिन्दर उपर से आरी लेकर आया था। हम ऊपर नहीं गये थे क्योंकि बहुत

भीड भाड़ थी लेकिन मोनिन्दर ऊपर से आरी लेकर आया था। जो सारी बाते लिखी गयी वो डायरी गायब कर दी गयी।

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जिरह वास्ते मुलजिम द्वारा श्री एस०एस० शिशोदिया एड० न्याया मित्र।

जो हमारे पास सिकयोरिटी गयी थी उसने कहा था कि आज अदालत जाना है। आज मेरे साथ कोई मीडिया वाले या प्रेस वाले नहीं आये। कहा सी०बी०आई० मेरे घर पर गयी थी आज मैं सिक्योरिटी के साथ आयी हूँ। जब मेरी लडकी गायब हुई जब उसके कपड़े बरामद हुए इस बीच मैंने कोई रिपोर्ट नहीं की। मैं अपने घर से व मेरी लडकी काम करने के स्थान पर जाती थी तो डी-5 के सामने से रास्ता है उसी से जाती थी। लडकी खोने के बाद मैंने पुलिस चौकी में रिपोर्ट की थी लिखित में नहीं की थी क्योंकि हमे लिखना नहीं आता। लड़की खोने के 4-5 दिन बाद चौकी में मौखिक शिकायत की थी। क्योंकि वो रिपोर्ट नहीं लिख रहे थे। मैं सुरेन्द्र कोली को रास्ते में आते जाते समय देखा था। लड़की खोने के दो चार दिन पहले से ही मैंने सुरेन्द्र कोली को देखा था। घटना से पहले मैंने सुरेन्द्र कोली को बाहर से ही देखा था। जिस दिन मेरी लड़की गायब हुई मैंने सुरेन्द्र कोली को नहीं देखा। मैंने या मेरे पति ने अपनी पुत्री A को डी-5 कोठी में जाते नहीं देखा। मेरी पुत्री A ने अपनी मर्जी से शादी की थी लेकिन उसका पति अच्छा नहीं था मारता पीटता था इसलिए मेरी लडकी मेरे ही पास रहती थी। जब हम काम पर से आ रहे थे तो डी-5 पर बहुत हंगामा हो रहा था। मैं और मेरे पति जतिन घर से डी-5 कोठी के लिये चले थे। डी-5 कोठी में जब पहुंचे उस समय दिन के दो ढाई बजे का समय रहा होगा। डी-5 कोठी में हमें कपडे दिखाये गये थे हमारे सामने बरामद नहीं हुए थे। और लिखत पढत भी कोठी के अंदर की गयी थी। जब राज खुला था तब मैंने अपनी लड़की का फोटो दिया था तारीख याद नहीं है डी-5 कोठी में उस मै शाम तक रही थी। जब मेरी लड़की के कपडे डी-5 कोठी में मिले थे उसके बाद ही मैंने रिपोर्ट की थी। जिस दिन कपड़े आदि मिले थे उसी दिन रिपोर्ट लिखा दी थी चौकी में मैं मेरा पति और एक आदमी और गया था। रिपोर्ट मेरे सामने लिखायी थी लेकिन हम दोनों साथ (कागज फटा) रिपोर्ट के बारे में मैं और मेरे पति दोनों ने ही बोला (कागज फटा) किसी पुलिस वाले ने रिपोर्ट लिखी थी। जब मैंने बताया था तो रिपोर्ट लिखी थी उन्होंने स्वयं रिपोर्ट नहीं लिखी थी। यह कहना गलत है कि चूंकि मेरी पुत्री अपने पति को छोड चुकी थी और उसका कही और आना जाना हो यह भी गलत है कि उसे किन्ही अन्य लोगों ने गुम किया हो यह कहना गलत है कि मैं जागरण मंच और प्रेस वालो के कहने पर झूठा बयान दे रही हूँ।

आज गवाह ने प्रार्थना-पत्र के आठ दस्तावेजों की फोटो स्टेट कापी प्रस्तुत की जिन्हें अभिलेख पर रखा गया।

नि०अं०- वन्दना सरकार"

438. Strangely, PW-31 was not immediately recalled as a witness after the accused Pandher was summoned in the matter. It was otherwise imperative for the court of Sessions to have recalled PW-31 as PW-31 had to be necessarily produced

in evidence in the presence of the accused Pandher by virtue of Section 319(4) Cr.P.C.

439. Records reveal that PW-31 was produced before the Court only for the purposes of cross-examination by accused Pandher. The contents of the cross-examination of PW-31 on 25.9.2008 is also reproduced hereinafter:-

> "जिरह वास्ते मोनिन्दर सिंह पंधेर द्वारा देवराज सिंह एड०।
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> मैं अनिल हलधर, झब्बू लाल व कर्मवीर को जानती हूँ आज तीनों मेरे साथ आये है। मैं प्रेमचन्द दीक्षित को नहीं जानती मेरा आदमी जानता था। प्रेमचंद दीक्षित मेरे साथ नहीं आये होंगे मुझे नहीं पता। उनकी किसी की आज तारीख नहीं है चूंकि मेरी तवियत ठीक नहीं है इसलिए उन्हें साथ ले आयी हूँ मैं अनिल के आटो से आयी हूँ। जब मेरे ब्यान हुए थे उससे पहले मैं अदालत में नहीं आयी जब मेरा पति जिन्दा था तब मैं आयी थी। जब मैं पहले अपने पति के साथ आयी तो मेरे पति ने श्री खालिद खान एडवोकेट से कुछ लिखत पढत करायी थी। उस पर मेरा कोई फोटो नहीं लगवाया गया था। और मुझे अंगूठा लगवाया गया था या नहीं ध्यान नहीं है। गवाह ने कागज सं० 8 ख/2 देखकर कहा कि इस पर मेरा फोटो स्टेट फोटो है इस फोटो में पिन्की का बेटा मेरी गोद में है।
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> इस फोटो कापी पर अंगूठे की फोटो है। गवाह ने कहा कि इस पर मेरा अंगूठा लगा या नहीं मुझे याद नहीं। यह मुझे याद है कि मैंने अपने पति के साथ आकर ऐसा दस्तावेज अपने अधिवक्ता से तैयार कराया था। मैं माया सरकार को जानती हूँ यह बात सही है कि माया सरकार मेरे पास आयी थी और मेरी लड़की को काम का अच्छा पैसा दिलाने को कहती थी। मैंने इसमें यह भी लिखाया था कि दि० 05.10.2006 को मेरी लडकी सुबह 7.00 बडे कोठी नं०-91 व 100 पर काम करने गयी थी और लौटकर नहीं आयी। और मैंने यह भी लिखाया था कि दि० 29.12.06 को डी-5 कोठी पर जाकर A के कपडो की पहचान की थी। और मैंने यह भी लिखाया था कि हमें यकीन है कि माया के द्वारा किसी प्रकार बुलाकर मोनिन्दर व सुरेन्द्र ने मेरी लडकी के साथ दुष्कर्म करके हत्या की और शव पीछे गाड़ दिया। ऐसा ही मेरे पति ने भी लिखवाया था। जो मैंने बताया था वो ही वकील साहब ने लिखाया था। और मुझे पढकर सुना भी दिया था। गवाह ने कागज सं० प्रदर्श क-50 को देखकर कहा और पढकर उसे सुनाया गया तो सुनकर कहा कि मैं नहीं कह सकती कि इस प्रकार के दस्तावेज पर मेरा अंगूठा लगा था या नहीं। गवाह ने उक्त दस्तावेज देखकर कहा कि इस पर दो अंगूठे निशानी लगे हैं। मुझे याद नहीं है कि किसी लिखे हुए दस्तावेज पर अंगूठा लगवाया गया या नहीं।
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> मेरी लडकी जब आखिरी बार गयी थी तो उसने सलवार सफेद रंग की और पीला कुर्ता पहना हुआ था। चप्पल प्लास्टिक की रवड़ की थी। मैं रवड व प्लास्टिक में अन्तर नहीं जानती। चप्पल काले रंग की थी। हो सकता है कि चप्पल कोई और पहन रखी हो लेकिन कपड़े मैंने सही पहचाने थे। डी-5 में 29 तारीख को मैंने कपडे पहचाने थे और फिर गाजियाबाद कोर्ट में भी कपड़े दिखाये और मैंने पहचाने थे। मैंने मोनिन्दर सिंह पंधेर द्वारा बरामद कराने व काटने मारने की बात दिनेश यादव को बतायी थी और पीड़ित पक्ष को बतायी

थी उस समय भी कागज लिख कर दिया था। दिनेश यादव ने जो उस समय लिखा था वो हमें दिया था। मेरे आदमी ने इस बारे में लिखकर दिया था लेकिन मुझे नहीं मालूम कि उसने किसको लिखकर दिया। उस समय मैंने वकील साहब को नहीं बताया था मेरे आदमी ने ही वकील किया था उन्होंने ही मोनिन्दर सिंह पंधेर द्वारा आरी बरामद कराने वाली बात व मारने काटने वाली बात बतायी होगी। एफ०आई०आर० लिखाने मैं व मेरे पति साथ गये थे। मैं चौकी में गयी थी यदि उक्त बाते एफ०आई०आर० में नहीं लिखी तो मैं नहीं बता सकती मैं थाने नहीं गयी थी। मैं चौकी गयी थी। चौकी दो तीन दिन बाद गयी थी। चौकी में रिपोर्ट रात के 9.00, 9.30 बजे लिखी गयी थी। सैक्टर 38 के गेस्ट हाउस में हमारे व्यान हुए थे मैंने हर जगह ही आरी की बात बतायी थी। जब दिनेश यादव ने कागज हमें दिया था वो मेरे पति ने दिया था मैंने नहीं दिया था मैं साथ में आयी थी मेरी लड़की का पति शराब वगैरा पीता था इसलिए झगडा हो जाता था और कोई झगडा नहीं था लड़की मेरे पास रहती थी। दामाद अपनी मां के पास रहता था। ये कागज डी-5 में दिनेश यादव ने मेरे पति को दिया था मैं भी वहा साथ थी। मेरा यह बयान भी सही है कि मेरे पति ने वो कागज मुझे घर पर लाकर दिया था क्योंकि डी-5 में मेरे पति को वो कागज दिया गया था जो उसने मुझे घर आकर दिया था और कहा था कि इसे संभाल कर रखना। और इन्हीं कागजों को लेकर मैं गाजियाबाद कोर्ट आ रही थी। जो दिनेश यादव ने कागज मेरे पति को दिया था वो कागज मेरे पति ने वकील साहब को दिया था। गवाह ने 12 ख/5 देखकर कहा कि मैं नहीं बता सकती कि ये वो ही कागज है या नहीं जो मेरे पति ने वकील साहब को दिये। यह कहना गलत है कि 29 तारीख को मेरे व मेरे पति के सामने कोई लिखा पढी ना हुयी हो। आरी की बात 30 तारीख की है और कपड़े हमने 29 तारीख को पहचाने थे। सरदार जी ने आरी तीस तारीख को पहचाने थे। सरदार जी ने आरी तीस तारीख को निकाल कर दी थी मैं दो तीन दिन लगातार डी-5 कोठी में गयी थी। 30 तारीख को पीडित पक्ष सुनील विश्वास, अनिल हलधर आदि लोग थे। जिस दिन आरी बरामद करायी थी उसी दिन मिले थे वाकी दिन नहीं मिले थे। मैं विजय शंकर को जानती हूँ। विजय शंकर सी०बी०आई० में है। गिलानी भी सी०बी०आई० डायरेक्टर है ये लोग मुझे कब मिले याद नहीं है लेकिन आरी बरामद होने के बाद दो तीन दिन बाद मिले थे ये लोग कोर्ट गाजियाबाद में नीचे मिले थे। मेरा सुप्रीम कोर्ट में वकील धाकडे साहब है। यह कहना गलत है कि मैंने धाकडे के कहने से दोनों सी०बी०आई० वालो के नाम लिये हो। जब मुझे धमकी दी थी तब सी०बी०आई० के हाथ में ही केस था। उस समय विजय शंकर व गिलानी के साथ दिनेश यादव भी थे और कोई नहीं था। धमकी वाली बात मेरे पति ने टाइप कराकर थाने में दी थी। यह कहना गलत है कि दिनेश यादव वाली बात मैंने प्रेमचन्द दीक्षित के कहने पर की हो मुझे नहीं मालूम कि दिनेश यादव ने प्रेमचन्द्र दीक्षित को वरखास्त? कराया या नहीं। यह कहना गलत है कि मैंने सारा ब्यान श्री खालिद खान एडवोकेट के कहने से दिया हो। यह कहना गलत है कि यदि ऐसी बात होती तो मैं शपथ-पत्र में अवश्य लिखती यह बात सही है कि 30 तारीख के कागजात मैंने दाखिल किये हैं क्योंकि ये ही मुझे मिले थे। मुझे याद नहीं है कि मैंने पहले यह ब्यान कि "मोनिन्दर उपर से आरी लेकर आया था जो सारी बाते लिखी गयी वो डायरी गायब कर दी गयी यह मुझे याद नहीं है लेकिन मैंने सुना था कि ये डायरी गायब कर दी गयी है। यह कहना गलत है कि यह बात मैंने अपने वकील खालिद खान के कहने पर कही हो।

मुझसे सी०बी०आई० वालो ने पूछताछ की थी। तारीख मुझे याद नहीं है। मैंने सी०बी०आई० को यह बयान दिया था कि "जिस पता लगा कि सैक्टर 31 की डी-5 पर कुछ बच्चो के नरकंकाल व कपडे मिले है तो मैं अपने पति के

साथ वहां गयी और हमने अपनी लड़की के कपडे पहचाने"। मैंने सी०बी०आई० को बताया था कि मोनिन्दर सिंह पंधेर ने आरी बरामद करायी और मारकाट की बताया था उन्होंने लिखा या नहीं मुझे नहीं मालूम। मुझे याद नहीं है कि सुप्रीम कोर्ट में दी गयी जिरह में आरी बरामदगी की बात लिखी है या नहीं। यह कहना गलत है कि जो मैंने आजखुद वाला व्यान दिया है वो अपने वकील साहब के कहने पर दिया हो। यह कहना गलत है कि मैंने यह व्यान दिया हो कि प्रेमशंकर दीक्षित की दिनेश यादव से रंजिश हो और सी०बी०आई० वालो से श्री धाकडे जो मेरे अधिवक्ता है कि रंजिश हो।

नि०अं०-वन्दना सरकार"

440. Inspector Layak Ram of CBI has been produced as PW-36, who had recorded the statement of Jatin Sarkar and Smt. Vandana Sarkar on 23.1.2007 as well as statement of Dinesh Yadav PW-40 on 1.3.2007. In the cross-examination PW-36 has stated as under:-

"जिरह वास्ते मोनिन्दर सिंह द्वारा श्री देवराज सिंह एड.

जब मैने वन्दना सरकार व जतिन सरकार के बयान लिये उनके बाद उत्तम सरकार भी आ गये और जैसा जतिन व वन्दना ने बताया वैसा ब्यान लिखा गया। मुझे वन्दना सरकार ने ऐसा ब्यान कि "मुझे एस०पी० गिलानी व सी०ओ० दिनेश यादव व निदेशक विजय शंकर ने धमकी दी थी" नहीं दिया था। और ना ही मुझे मोनिन्दर द्वारा वन्दना कोई बात बताने के संदर्भ में ब्यान दिया और ना ही उपरोक्त बातों के सम्बन्ध जतिन सरकार ने कोई ब्यान दिया। जतिन व वन्दना सरकार ने मोनिन्दर सिंह द्वारा कोई बरामदगी (आरी) के बारे में ब्यान नहीं दिया।"

441. Dinesh Yadav I.O. has also been produced during trial as PW-40. He has stated that after the investigation was transferred to CBI, all records and evidence in respect of the case, had been handed over to CBI. In the cross-examination PW-40 stated that he has not investigated the case of victim A and was only investigating the Case Crime No. 838 of 2006 in respect of missing victim L. In the cross-examination PW-40 has specifically stated as under:-

"जिरह वास्ते मोनिन्दर सिंह द्वारा श्री देवराज सिंह एड०

यह बात सही है कि अभियुक्त मोनिन्दर सिंह की गिरफ्तार करने के बाद पुलिस के साथ डी०-5 कोठी के बाहर पुलिस के साथ दिया गया था। यह सही है कि 29.12.06 को मोनिन्दर सिंह की निशान देही पर कोई बरामदगी नहीं हुयी थी और यह भी सही है कि दि० 30.12.06, 31.12.06 को भी मोनिन्दर सिंह की निशान देही पर कोई बरामदगी नहीं

हुई थी।"

442. On the application moved by accused Pandher, PW-40 was recalled by the court concerned and he has stated as under on 18.12.2009:-

> "शेष जिरह वास्ते मोनिन्दर सिंह द्वारा देवराज सिंह एड o
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> दिनांक 29.12.06 या उसके बाद कभी भी मेरे द्वारा वादी या अन्य किसी परिजन केस डायरी की फोटोकापी या अन्य कागजात नहीं दिये गये। बरामदगी से सम्बन्धित माल न्यायालय में मौजूद है।"

443. PW-40 was subsequently produced and in his cross-examination by the counsel for Pandher, PW-40 has stated as under on 26.06.2012:-

> ".....जिरह विद्वान अधिवक्ता अभियुक्त मुनेन्द्र सिंह पांधेर-
>
> जातिन सरकार किसी भी बरामदगी के समय मौजूद नहीं थे। दिनांक 29.12.2006, 30.12.2006 व 31.12.2006 या किसी अन्य तिथि को की गई बरामदगी से संबंधित फर्दो की नकले या केस डायरी की नकले मैने जतिन सरकार या किसी अन्य पीडित व्यक्ति को नहीं दिया था। दिनांक 29.12.2006, 30.12.2006 व 31.12.2006 को कोई भी बरामदगी मुनेन्द्र सिंह पंधेर की निशानदेही पर नहीं की गई। दिनांक 11.1.2007 को जल कपांउड से मुनेन्द्र सिंह पंधेर द्वारा चाकू की कोई बरामदगी नहीं कराई गई। जब दिनांक 29.12.2006 को मै मकान नंबर डी-5, सेक्टर 31, नोएडा गया था तो वहां मुझे सब कुछ सामान्य मिला था। गैलरी का स्वामित्व मकान नंबर डी-5, सेक्टर 31, नोएडा के मालिक का नहीं है।"

444. Nirbhay Kumar was posted as Additional Superintendent of Police in the concerned CBI Unit and had conducted investigation of the present case. He has been produced in evidence on 04.03.2010. PW-43 has proved various documents relating to the investigation of the present case. He has stated that in the investigation conducted by him it was found that accused Pandher was not present at the time of incident nor any material to implicate him had been collected during the course of investigation. Statement of PW-43 in that regard reads as under:-

> ".....सधन जांच में पाया गया कि मुल्जिम मोनिंदर सिंह पंथेर घटना के

> समय घटना स्थल पर मौजूद नहीं थे एवं किसी भी तरह का साक्ष्य जो यह दर्शाये कि मुलजिम पंथेर का इस क्राइम में कोई संलिप्तता है ऐसा मेरे समक्ष नहीं आया।"

445. This witness has also proved the receipt of records relating to investigation of the present case including the case diary etc. During his cross-examination PW-43 has stated as under:-

> "दौरान विवेचना A के माता पिता द्वारा यह कभी नहीं बताया गया कि उन्होंने ऐसा सुना है कि मुलजिम मोनिंदर सिंह का A की हत्या व बलात्कार में हाथ है या उसके द्वारा किसी भी व्यक्ति के सामने कोई संस्वीकृति की गयी है। दौराने विवेचना इस बात के पर्याप्त सबूत पाये कि दि० 5.10.06 को दोपहर करीब 1.30 बजे के बाद मोनिंदर सिंह पंधेर अपने आफिस सैक्टर 2 नोएडा में वहां से कम्पनी के अन्य कर्मचारियों के साथ देहरादून के लिये रवाना हो गये। दौराने विवेचना इस बात की पब्लिक सिटी करायी गयी थी अभियुक्तगणों के विरूद्ध कोई भी साक्ष्य हो तो उसे सी.बी.आई. के समक्ष लाया जाये इसके बावजूद श्री मोनिंदर सिंह पंधेर के बिनापर? किसी भी प्रकार कोई भी साक्ष्य जो श्री मोनिंदर सिंह पंधेर की अपराध में संलिप्ता दर्शाता हो ऐसी नहीं प्रकाश में आया।"

446. The accused Pandher in his statement made under Section 313 Cr.P.C. has denied the accusation that he had instructed co-accused SK to dispose of the victims after he exploited them sexually. He has also denied the accusation that any iron blade was got recovered by him. He has stated that on 05.10.2006 he had left along with the driver Pan Singh DW-1 at 10 am and thereafter left for Dehradun along with Vishal Verma and Umesh Saini and had returned only on 14.10.2006.

447. It transpires that while trial was still pending before the Court of Sessions it was pointed out that Section 319(4) Cr.P.C. required the statement of the witnesses to be recorded in presence of the accused, who was later summoned under Section 319 Cr.P.C. The Court also noticed that the statement of PW-31 was since recorded in the absence of accused Pandher, therefore, such statement cannot be read against him. Court below also noticed the argument of CBI Counsel that PW-1 to 30 have not given any evidence against accused

Pandher and, therefore, there is no requirement of recalling these witnesses for recording their statement afresh.

448. The Court of Sessions however held that observance of procedure under Section 319(4) Cr.P.C. is mandatory and the prosecuting agency was required to produce the prosecution witnesses all over again, in presence of accused Pandher, who had been summoned under Section 319 Cr.P.C. In the event CBI fails to produce these witnesses their testimony cannot be read against accused Pandher. Regarding testimony of PW-31 the Court of Sessions held as under:-

> "पी.डब्लू.-31 वंदना सरकार का बयान खास भी अभियुक्त मोनिन्दर सिंह पंधेर की अनुपस्थिति में हुआ है और मोनिन्दर सिंह पंधेर के न्यायालय में उपस्थित होने के बाद उससे केवल जिरह की गयी है। अतः इन परिस्थितियों में पी.डब्लू.-31 का भी बयान खास अभियुक्त मोनिन्दर सिंह पंधेर की उपस्थिति में विधि के अनुसार होना आवश्यक है। तदनुसार पत्रावली दिनांक 06.05.2011 को साक्ष्य हेतु पेश हो। गवाहान के सम्मन जारी हो।"

449. It transpires on record that on 05.08.2011 an application was moved by PW-31 (Paper No.248Kha) with the prayer to exonerate her from appearance before the Court. This application was not opposed by CBI. The Court of Sessions noticed that CBI itself did not intend to produce this witness. Consequently application no.248Kha has been disposed of vide the following orders passed on 05.08.2011:-

> "मुकदमा पेश हुआ। पुकार पर अभियुक्त सुरेन्द्र कोली व मोनिन्दर सिंह पंधेर पुलिस हिरासत मे कारागार से पेश किये गये। श्रीमती वंदना सरकार की ओर से प्रार्थना-पत्र 248 ख दिया गया कि उसे साक्ष्य से उन्मोचित कर दिया जाय। इस प्रार्थना-पत्र का विरोध सी०बी०आई० से विद्वान विशेष लोक अभियोजक द्वारा नहीं किया गया सुना। सी०बी०आई० खुद इस गवाह को साक्ष्य में पेश करना नहीं चाहती। दिनाँक 29.04.2011 को इस न्यायालय द्वारा यह आदेश पारित किया गया कि यदि सी०बी०आई० द्वारा पी.डब्लू-1 लगायत पी.डब्लू.-30 को साक्ष्य में परीक्षित नहीं किया जाता है तो उक्त गवाहान के बयान अभियुक्त मोनिन्दर सिंह पंधेर के विरूद्ध नहीं पढे जायेंगे। अब सी०बी०आई० खुद इस गवाह को साक्ष्य में पेश करना नहीं चाहती है। अतः उसे व पी.डब्लू.-1 लगायत 30 को साक्ष्य में पेश न किये जाने का क्या विधिक प्रभाव होगा। इस सम्बन्ध में निर्णय के समय सम्यक विनिश्चय दिया जायेगा। प्रार्थना-पत्र 248 ख तदनुसार निस्तारित किया जाता है।

सी०बी०आई० के विद्वान विशेष लोक अभियोजक द्वारा प्रार्थना-पत्र 249 ख दिया गया कि गवाह राजवीर, हैड कांस्टेबिल, थाना सै० 20 नोएडा को प्रार्थना-पत्र में उल्लिखित जी.डी. सहित साक्ष्य में तलब किया जाय । इस प्रार्थना-पत्र का विरोध श्री मोनिन्दर सिंह पंधेर के विद्वान अधिवक्ता द्वारा नहीं किया गया लेकिन अभियुक्त सुरेन्द्र कोली के विद्वान अधिवक्ता द्वारा प्रार्थना-पत्र का विरोध किया गया। सुना तथा पत्रावली का अवलोकन किया। मामले में सही निर्णय देने हेतु गवाह राजवीर हैड कांस्टेबिल, थाना सै० 20 नोएडा को प्रार्थना-पत्र में उल्लिखित जी.डी. सहित तलब किया जाना न्यायोचित प्रतीत होता है। तदनुसार राजेन्द्र प्रसाद बनाम नारकोटिक्स सेल (1999) 6 एस.सी.सी. 110 में दी गयी व्यवस्था को देखते हुए प्रार्थना-पत्र 249 ख धारा- 311 जा०फौजदारी के अंतर्गत स्वीकार किया जाता है व सी०बी०आई० को गवाह राजवीर को साक्ष्य में प्रस्तुत करने की अनुमति प्रदान की जाती है। उक्त गवाह व अन्य गवाहान को सम्मन जारी हो। पत्रावली दिनाँक 23.08.2011 को साक्ष्य हेतु पेश हो।

ह० अपठनीय

विशेष न्यायाधीश, भ्रष्टाचार निरोध,

(सी०बी०आइ०), गाजियाबाद"

450. Interestingly, on 25.11.2011 PW-31 appeared for recording her statement but her counsel orally stated that since her statement has already been recorded earlier, her statement made earlier in the examination-in-chief be treated to be her statement in the examination-in-chief. The court of Sessions rejected such plea vide its order dated 25.11.2011 which is reproduced hereinafter:-

"मुकदमा पेश हुआ। पुकार अभियुक्तगण सुरेन्द्र कोली व मोनिन्दर सिंह पंधेर को पुलिस हिरासत कारागार से पेश किया गया।

पी.डब्लू.-31 बंदना सरकार न्यायालय में बयान देने हेतु पेस हुई व उसके विद्वान अधिवक्ता खालिद खान द्वारा मौखिक रूप से यह कहा गया चूँकि श्रीमती बंदना सरकार का बयान पहले हो चुका है। अतः पूर्व में लिखे गये बयान खास को उसको पढ कर सुना दिया जाय और यदि वह उससे सहमत हो तो यह लिखा जाय कि वह पूर्व में दिये गये बयान से सहमत है तथा अब पुनः विस्तृत बयान खास कराने की जरूरत नहीं है जबकि सी०बी०आइ० के विद्वान विशेष लोक अभियोजक का यह कहना है कि वह गवाह को परीक्षित कराना चाहते हैं। जैसे ही गवाह का बयान रिकार्ड किया जाना शुरू किया गया तो गवाह के विद्वान अधिवक्ता श्री खालिद खाना की ओर से प्रार्थना-पत्र 263 ख दिया गया कि बंदना सरकार को साक्ष्य से उन्मोचित किया जाय। इस प्रार्थना-पत्र पर अभियुक्त मोनिन्दर सिंह पंधेर की ओर से कोई आपत्ति नहीं की गयी जबकि सी०बी०आइ० के विद्वान विशेष लोक अभियोजक द्वारा यह पृष्ठांकन किया गया कि अभियोजन पक्ष न्यायालय के आदेशानुसार गवाह को परीक्षित करना चाहता है। विद्वान अधिवक्तागण को प्रार्थना-पत्र 163 ख

पर सुना तथा पत्रावली का अवलोकन किया। जैसा कि पहले या अवधारित किया जा चुका है कि श्रीमती वंदना सरकार का जो ब्यान खास दिनाँक 07.11.2007 को हुआ वह अभियुक्त मोनिन्दर सिंह पंधेर के अनुपस्थिति में हुआ है। अतः अभियुक्त मोनिन्दर सिंह पंधेर के विरूद्ध उसकी उनुपस्थिति में दिया गया बयान नहीं पढा जा सकता है। धारा- 373 जा०फौजदारी में प्रविधान है कि साक्षी का बयान अभियुक्त की उपस्थिति में ही होगा और चूँकि अभियुक्त मोनिन्दर सिंह पंधेर को धारा 319 जा०फौजदारी के अंतर्गत परीक्षण हेतु तलब किया गया है। अतः इन परिस्थितियों में उसकी उपस्थिति में हुआ बयान हो उसके विरूद्ध पढा जायेगा। इसके अतिरिक्त सी०बी०आइ० के विद्वान लोक अभियोजक इस गवाह को मोनिन्दर सिंह पंधेर की उपस्थित में परीक्षित कराना चाहते है। अतः इन परिस्थितियों में गवाह को उन्मोचित किये जाने की इजाजत नहीं दी जा सकती। गवाह न्यायालय में उपस्थित है। तदनुसार सी०बी०आइ० के अभियोजक द्वारा उसका बयान खास कराया जाय। चूँकि अभियुक्त सुरेन्द्र कोली की विरूद्ध उसकी उपस्थिति में पहले बयान विस्तृत रूप से दिया जा चुका है । अतः उसकी पुनरावृत्ति करने की आवश्यकता नहीं है।

ह० अपठनीय
(एस०लाल)

विशेष न्यायाधीश,
भ्रष्टाचार निरोध

(सी०बी०आइ०),
गाजियाबाद।

पुनश्च

उपरोक्त आदेश पारित होने के बाद अभियुक्त मोनिन्दर सिंह पंधेर की ओर से प्रार्थना-पत्र 264 ख दिया गया कि गवाह की मर्जी के विरूद्ध न्यायालय गवाही कराना चाहता है और पी.डब्लू.-31 को साक्ष्य से उन्मोचित किया जाय। विद्वान विशेष लोक अभियोजक द्वारा इस प्रार्थना-पत्र पर पृष्ठांकन किया गया कि अभियोजन पक्ष को गवाह प्रस्तुत करना है।

इस प्रार्थना-पत्र पर अभियुक्त के विद्वान अधिवक्ता व विद्वान विशेष लोक अभियोजक को सुनकर पत्रावली का अवलोकन किया। गवाह की ओर से उसे साक्ष्य से उन्मोचित किये जाने हेतु दिया गया। प्रार्थना-पत्र 263 ख को खारिज किये जाने का आदेश पारित किया जा चुका है। अभियोजन पक्ष इन गवाह को साक्ष्य में पेश करना चाहता है। अतः इन परिस्थितियों में अभियुक्त के अनुरोध पर पी.डब्लू.-31 को साक्ष्य से उन्मोचित नहीं किया जा सकता। प्रार्थना-पत्र तदनुसार खारिज किया जाता है। पी.डब्लू.-31 का बयान लिखा जाय।

ह० अपठनीय
(एस०लाल)

विशेष न्यायाधीश,
भ्रष्टाचार निरोध

(सी०बी०आइ०),
गाजियाबाद।"

451. Statement of PW-31 was then recorded on 25.11.2011 which is reproduced hereinafter:-

> "आदेश दिनांकित 29.4.2011 व 17.10.2011 के अनुपालन में गवाह रिकाल किया गया। आज दिनांक 25.11.2011 को साक्षी श्रीमती वंदना सरकार पत्नी स्वर्गीय जतिन सरकार, उम्र लगभग 40 वर्ष, पेशा मजदूरी, निवासी मकान नंबर 505, सैक्टर 29, नोएडा, थाना सैक्टर 20 जिला गौतमबुद्ध नगर ने शपथपूर्वक बयान किया कि-
>
> मै पिछले 18-20 साल से नोएडा में रह रही हूँ। पंधेर भी इस केस में अभियुक्त था। उसने भी इस अपराध में भाग लिया है। घटना 5-6 साल पहले की है मुझे पूरी बात याद नहीं है। मैने जो पहले बयान दिया है व जो लिखा गया है उसे मान लिया जाये। गवाह को उसका बयान खास दिनांकित 07.11.2007 "गवाह ने अज खुद कहा कि - - - - - - - - - - - - - - - मुझे माफ कर दो।" पढकर सुनाया गया तो उसने कहा कि यह बयान मैने दिया था और यही बयान आज भी मेरा मान लिया जाये।
>
> * * * * * * * जिरह मुनेन्द्र सिंह पंधेर-
>
> गवाह को उससे पूर्व में हुई जिरह दिनांकित 25.9.2008 "मै अनिल हलधर, झब्बू लाल - - - - - - - - - - - - - - - जो मेरे अधिवक्ता है की रंजिश है" पढकर सुनाया गया तो उसने कहा कि यही बयान उसने दिया था मै बार बार अदालत नहीं आ सकती इसलिए मैने पहले भी और आज भी दरख्वास्त दिया कि मुझे गवाही से मुक्त किया जाये। मैने जेएम सीबीआइ के कोर्ट में अपना शपथ पत्र प्रोस्टेस्ट पीटिशन के साथ दिनांक 23.4.2007 को दिया था। यह कहना गलत है कि मैने पंधेर का नाम इसलिए लिया हो कि क्योकि वह मकान का मालिक हो। अज खुद कहा कि ऐसे कैसे संभव है कि पंधेर को घटना मालूम न हो। यह कहना गलत है कि मै इस घटना के बारे में झूठ बोल रही हूँ।
>
> सुनकर तस्दीक किया।"

452. Statement of accused Pandher under Section 313 Cr.P.C. has thereafter been recorded by the Court of Sessions wherein he has reiterated his innocence. He has stated that no knife was ever got recovered on his pointing out.

453. We have carefully examined the facts of the present case and have heard Smt. Manisha Bhandari assisted by Sri Omkar Srivastava, Sri Syed Mohammad Nawaz for the appellant and Sri Jitendra Mishra assisted by Sri Sanjay Kumar Yadav for the respondent.

454. This case is based on circumstantial evidence and the law

in that regard has been settled in Para 152 and 153 of the judgment of the Supreme Court in Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 which has consistently been followed and is already reproduced above.

455. In the facts of the present case the implication of accused appellant has surfaced on the basis of an application moved under Section 319 Cr.P.C., based upon the testimony of PW-31. Court below has relied upon following circumstances to implicate the accused-appellant:-

(i) Accused Pandher was living in the House No.D-5, Sector-31, Noida since 2004 where co-accused SK worked as a private servant and resided there.

(ii) Dozens of Nithari killings occurred in House No.D-5.

(iii) Dismembered body parts of victims killed in Nithari killings are thrown in the enclosed gallery behind House No.D-5 as well as the drain flowing in front of House No.D-5.

(iv) Confessional statement of co-accused SK.

456. So far as the circumstance relating to accused Pandher being the owner of House No.D-5, Sector-31, Noida is concerned there is no factual dispute about it nor there is any issue about co-accused SK living in the said house as private servant. This circumstance however cannot be treated as incriminating against the accused Pandher. So far as the Circumstances No.2, 3 and 4 are concerned the trial Court has relied upon the confession of co-accused SK in order to hold that accused SK used to call girls inside House No.D-5 and either attempted or actually raped them and thereafter strangulated them to death. Co-accused SK further confessed

that he used to dismember the bodies and throw the body parts either in the enclosed gallery behind House No.D-5 or in the drain flowing in front of the house. Court below has relied upon Section 30 of the Evidence Act to state that this confession can be read also against the accused-appellant.

457. So far as the confession of co-accused SK is concerned we have elaborately examined the evidence on record and have found the confession not to be voluntary or true. The reasons recorded for such conclusion is contained in the previous part of this judgment, while dealing with the case of accused SK and the same be treated to be a part of this para as well, in order to avoid repetition. Once the confession of accused SK is discarded for the reasons indicated above, the confession of accused SK cannot be read or relied upon against the accused-appellant.

458. So far as the testimony of PW-31 is concerned it is clearly found that her statement made in the absence of accused on 07.11.2007 cannot be read against accused Pandher. The statement of PW-31 Vandana Sarkar on 25.11.2011 is neither specific nor can be relied upon as being a circumstance to implicate the accused Pandher for the reasons to be indicated hereafter.

459. Pandher admittedly was taken in custody by the police on 29.12.2006. He was therefore in police custody at the time when the self inculpatory statement is said to have been made by him on 29/30.12.2006 before PW-31.

460. The statement attributed to accused Pandher, by PW-31, of asking co-accused SK to invite call girls and after cavorting give them to accused SK, to do whatever he wishes, neither

forms part of the case diary nor has been recorded anywhere else. The prosecution witnesses namely PW-40 as well as the Investigating Officer of CBI have categorically stated that no such statement was ever made by accused Pandher nor such fact was ever disclosed to them by PW-31. The confessional statement of Pandher, even if is taken on its face value, would otherwise be inadmissible by virtue of Section 24-26 of the Act of 1872 as he was then in police custody.

461. No recovery of any knife or iron blade has otherwise been made on the pointing out of accused Pandher as per the prosecution nor any such recovery has been proved in evidence. This is not even the prosecution case nor any witness, including PW-31, has stated so.

462. We may clearly observe that even if we rely upon the previous statement of PW-31 made on 07.11.2007, even then the making of such statement would not complete the chain of events required to be proved to establish the charge levelled against the accused Pandher on the touchstone of a case of circumstantial evidence.

463. The conviction and sentence of accused Pandher is based primarily upon the confession made by co-accused SK, under Section 164 Cr.P.C. Once we come to the conclusion that such confession is neither voluntary nor is true, and also disbelieve the alleged recovery on the pointing out of co-accused SK, there survives absolutely no evidence on record against the accused Pandher to implicate him.

464. The evidence on record at best indicates that accused Pandher lived a promiscuous life and indulged in physical relations with young girls, or would get drunk and enjoy

company of young ladies would not make him guilty of offences under Section 302, 376 or 201 I.P.C. Apart from it, we find no other evidence on record to implicate him.

465. So far as initial prosecution case set up during investigation of recovery of skull, bones and skeletons etc is concerned, it is seen that the prosecution itself gave it up. This line of reasoning was not adopted when the investigation finally concluded with submission of charge-sheet in the matter.

466. Accused Pandher has otherwise been convicted for offences under Immoral Trafficking (Prevention) Act, 1956, under Sections 5 and 7, in another case arising out of the Nithari killings against which no appeal has been instituted/filed. Accused Pandher otherwise is in jail since 24.07.2017 and has by now undergone incarceration of more than six years which is more than the punishment stipulated for offences under the Immoral Trafficking (Prevention) Act, 1956. In such circumstances the further incarceration of the accused Pandher would not be warranted in view of the findings returned by us in the present appeal.

467. We, therefore, find ourselves completely unable to endorse the reasonings and findings returned by the court below with regard to existence of circumstances against the accused to prove his guilt on the parameters of circumstantial evidence. Our conclusions on the existence of circumstances to complete the chain of events, for establishing hypothesis of guilt of accused SK, are as under:-

Conclusion:-

468. The first circumstance relied upon against the accused relates to the information furnished by him on 29.12.2006 to

the police personnels (PW-28 and PW-40) which led to the recovery of skull, bones and skeletons from an open piece of land situated behind House No. D-5, Sector-31, Noida. There is however an issue on the date and time of arrest of accused SK, inasmuch as the prosecution alleges that arrest was made of accused on 29.12.2006 whereas the defence claims that the arrest was made on 27.12.2006. The open space from which discovery of biological material is claimed by the prosecution is an open piece of land/gallery situated behind the row of houses no. D-4, D-5 & D-6 in Sector - 31, Noida and on the other side of the boundary is the colony of Jal Nigam.

ON ARREST

469. Analysis of evidence on the arrest of accused SK makes it amply clear that the prosecution has not been able to successfully prove the circumstance that arrest was made on 29.12.2006. There is no arrest memo on record and the manner of arrest, as per the prosecution witnesses, are distinct and contradict each other. A doubt is clearly raised regarding the prosecution case of arrest of accused SK on 29.12.2006. No independent witness of arrest has otherwise been produced. The defence version of arrest of accused on 27.12.2006 is also not seriously challenged by the prosecution. Consequently, we conclude that the prosecution has failed to prove the circumstance of arrest of accused SK on 29.12.2006.

ON DISCLOSURE

470. As per the prosecution (CBI) the accused confessed his crime and gave information to the Investigating Officer on 29.12.2006 which led to the recovery of biological remains, knife etc. The circumstance of discovery of biological material on 29.12.2006, on the alleged disclosure of accused SK can be treated as recovery under Section 27 of the Evidence Act only

when the exact information/disclosure from the accused is proved in evidence.

471. There is no disclosure statement (Panchnama) of the accused, on record of this case, containing the information furnished by him leading to the alleged recovery on 29.12.2006. No panchnama has been prepared or produced in evidence nor any independent witnesses are produced to prove the information allegedly furnished by the accused.

472. Not only that information allegedly given by the accused on 29.12.2006 is not recorded, but such information given by the accused, while in custody, is not proved in evidence. The contents of information procured from accused SK are also not proved.

473. The prosecution evidence regarding the place and time of making the alleged disclosure statement is full of contradictions. The only two police personnels produced in evidence on this aspect i.e. PW-28 and PW-40 contradict each other. The sole private witness on this aspect i.e. PW-31 makes an entirely different statement on this aspect. Thus, the time and place of furnishing information/declaration is not proved by the prosecution.

474. Even the exact words attributed to the accused appellant as being the statement made by him are not deposed by the investigating officer in his evidence. The two prosecution witnesses furnish different and distinct account of the contents of information furnished by the accused which renders their testimony contradictory and unreliable.

475. Thus, in the absence of any disclosure statement; non-specification of the time, place and contents of disclosure;

absence of independent witnesses and contradictory version of contents of information furnished, we hold that prosecution has failed to prove the information/declaration furnished by the accused and consequently the discovery of bones, skulls or skeletons on 29.12.2006, 31.12.2006 etc. cannot be read in evidence against the accused appellant under Section 27 of the Evidence Act. The prosecution has failed to prove this circumstance against the accused.

ON RECOVERY

476. The recovery of biological remains on 29.12.2006, pursuant to alleged information furnished by accused appellant, is not proved by the sole independent prosecution witness i.e. PW-10 Pappu Lal. This witness admits that a large crowd had already gathered at the spot when he arrived thereby suggesting that some incriminating material had already been found. PW-10 also admits that digging at the place of recovery had already commenced by the time he arrived. The prosecution has thus miserably failed to prove that discovery of biological materials on 29.12.2006, 31.12.2006 was pursuant to any information furnished by the accused appellant.

477. Prosecution evidence on the aspect of recovery is otherwise contradictory, inasmuch as, PW-40 while seeking remand of accused(s) specifically claimed the recovery to have been effected pursuant to information furnished jointly by accused SK and accused Pandher. The testimony of PW-28 and PW-40 on the aspect of recovery is otherwise not reliable. PW-40 has actually not visited the enclosed gallery from which biological materials are alleged to be discovered. PW-28 also is not specific in that regard. We, therefore, hold that prosecution has failed to prove the circumstance of recovery of biological materials or the belongings of victim on the information

furnished by the accused SK.

ON CONFESSION

478. There are multiple confessions made by the accused SK in this case as per the prosecution. The first confession made is before the Investigating Officer (PW-40) on 29.12.2006. Subsequent confession is before CBI on 11.01.2007 and 17.01.2007 after the investigation was transferred to it. These confessional statements since were made to police as such they have rightly been ignored by virtue of section 26 of the Evidence Act. The confession made by the accused SK before the Magistrate on 01.03.2007 is the sheet anchor of the prosecution case wherein the accused admitted his guilt.

479. We have carefully examined the circumstances relating to making of confession by the accused SK and have observed as under:-

(i) Accused appellant SK remained in police custody from 29.12.2006 to 14.01.2007 and thereafter was in the custody of CBI till 28.02.2007.

(ii) There is no explanation furnished by the prosecution for continued police custody for 60 days, continuously, of the accused. The only explanation of CBI that there were different Investigating Officers in separate 16 FIRs lodged is not convincing when the prosecution was relying upon the alleged arrest of accused SK on 29.12.2006 and consequential recovery of skull, bones and skeletons etc. on the basis of information furnished by him. The prolonged police/CBI custody of accused SK is not satisfactorily explained by the prosecution.

(iii) Applications filed by the prosecution seeking remand of accused are on grounds contrary to prosecution case, particularly on the aspect of recovery etc., inasmuch as the remand application states that biological remains were recovered on the joint pointing out of accused SK and co-accused Pandher. Even the justification for remand to secure recovery of clothes of victim 'XYZ' and D is contrary to the evidence on record as per which the recoveries in that regard were already made earlier.

(v) In case the accused SK had already made a confession before the police on 29.12.2006 there is no reason as to why he was not produced before the Magistrate before 01.03.2007 for recording of his confessional statement.

(vi) Prosecution has failed to explain as to how the accused SK came to know that he would be produced before the Court of ACMM Delhi so as to write an application using formal language, offering to record his confession, addressed to the court of ACMM, Delhi when the accused is having limited education i.e. he is only 7th pass.

(vii) Though the accused was in police custody for 60 days but he has not been medically examined in order to rule out the possibility of physical torture etc. The only medical certificate on record is of 01.03.2007 stating that there are no fresh external injuries on the accused. Even this medical evidence is not proved as the doctor issuing the certificate is not produced in evidence. Fresh injuries since extends upto 24 hours and the accused was being produced after police custody of 60 days, therefore, even otherwise this certificate cannot be treated to be a medical certificate proving that accused was not tortured.

(viii) Accused at the first opportunity has retracted from confession and alleged that he was brutally tortured while in police custody. He offered to be medically examined as his genitals were burnt and his nails had been extracted but the accused was not examined medically.

(ix) Despite specific allegation of severe physical torture to the accused for extracting his confession the non-holding of his medical examination has rendered the confession unreliable.

(x) There was no legal aid given to the accused and the legal aid given of 5 minutes by the ACMM, Delhi on 01.03.2007 amounts to its denial and has occasioned failure of justice for the accused who was produced after 60 days of police custody. Moreover, no legal aid was given to accused SK at the time when his confession was being video-graphed.

(xi) In the confession itself the accused has alleged torture by police which renders the confession untrustworthy by virtue of section 24 of the Evidence Act.

(xii) The doctor who had medically examined accused SK on 01.03.2007 has not been produced. The only medical certificate, despite its deficiency in not recording the physical condition of accused is not even proved. Adverse inference would have to be drawn against the prosecution for not producing the doctor.

(xiii) Accused SK even at the time of making of confession and even thereafter during its transcription was handed over by Magistrate recording the confession to the Investigating Officer of CBI on 01.03.2007 and 02.03.2007 which does not remove the police custody and thereby rule out the threat of torture

and, therefore, cannot be relied upon in view of section 28 of the Evidence Act.

(xiv) The recording Magistrate has not recorded his satisfaction about confession being voluntary and has merely used the expression 'seems' which cannot be treated as belief of voluntariness of confession in terms of section 164 Cr.P.C.

(xv) Confession otherwise is not properly recorded by the Magistrate as there is no confession recorded by the Magistrate and signed by the accused and transcription of video-graph without any signatures of the recording Magistrate on it is not in conformity with the requirement under section 164 Cr.P.C.

(xvi) There is no certificate under section 65B of the Evidence Act in respect of CD which is the basis of recording transcription of confession. The memory chip which is the primary document has not been sent to court concerned in terms of section 164(6) Cr.P.C. Even the CDs prepared and exhibited as article no.53 do not bear the signature of recording Magistrate or even the accused. Transcript of confession was also not sent to concerned court by the Magistrate. There is nothing to show as to how the transcript and CDs sent by recording Magistrate to the ACMM, Delhi was sent to the court concerned.

(xvi) Confession of accused is otherwise contradicted by evidence on record and, therefore, cannot be treated to be truthful. Facts in that regard are elaborately mentioned in previous paras of this judgment which are reiterated.

(xvii) There is no independent corroboration of murder, rape or cannibalism in the confession with other evidence on record.

(xviii) Events mentioned in the confession are highly improbable.

(xix) Upon cumulative assessment of the evidence adduced in respect of the confession we have no doubt that prosecution has failed to prove that confession of accused SK is voluntary and true. The circumstance of confession, therefore, cannot be relied upon against the accused SK.

480. As already noticed above, this is a case of circumstantial evidence and the prosecution is under an obligation to prove the existence of circumstances, beyond reasonable doubt, which supports the hypothesis of guilt exclusively attributed to the accused and rules out any hypothesis consistent with the innocence of the accused. The accused appellants SK and Pandher are clearly entitled to benefit of doubt.

481. In the facts of the case, there is no evidence of last seen against the accused and the motive on part of the accused is not established. The accused has no criminal history and was working as a domestic help for the last nearly six years at Noida without any complaint. The two main circumstances relied upon against him of confession and disclosure leading to recovery of biological material including the body parts of victim A is clearly not proved. The possibility of organ trade being the cause of killings in Nithari, particularly when the resident of adjoining house i.e. House No. D-6, Sector-31, Noida, had been arrested earlier in case of kidney scam has not been properly probed/inquired. The plausibility of innocence of accused SK cannot thus be eliminated and it cannot be said with any definiteness that the offence of rape, cannibalism, murder and concealment of evidence is established beyond reasonable doubt against accused SK on the basis of five principles laid down in the case of Sharad Birdichand Sharda

(supra).

Concluding Remarks

482. Before concluding, we express our disappointment at the manner in which Nithari killings, particularly the disappearance of victim A, has been investigated. The prosecution case is based upon the confession of accused SK, made to U.P. Police on 29.12.2006. Procedure required to be followed for recording the accused's disclosure leading to recovery of biological remains i.e. skulls, bones and skeleton etc. has been given a complete go by. The casual and perfunctory manner in which important aspects of arrest, recovery and confession have been dealt with are most disheartening, to say the least.

483. The stand of the prosecution regarding crime in question kept changing from time to time. Initial prosecution case was against accused SK and the owner of House No. D-5 Moninder Singh Pandher and even recoveries made were attributed jointly to them. Successive remand applications filed by the prosecution clearly reflects it. However, with passage of time, the guilt was fastened exclusively upon accused SK. Prosecution evidence has kept changing with the stage of investigation and ultimately all explanations are furnished in form of confession of accused SK, by throwing all possible safeguards to the winds. The manner in which confession is recorded after 60 days of police remand without any medical examination of accused; providing of legal aid; overlooking specific allegation of torture in the confession itself; failure to comply with the requirement of Section 164 Cr.P.C. is shocking to say the least.

484. The failure of investigation to probe the possible involvement of organ trade, despite specific recommendations made by the High Level Committee constituted by the Ministry

of Women and Child Development, Govt. of India, in Nithari killings is nothing short of a betrayal of public trust by responsible agencies. Loss of life of young children and ladies is a matter of serious concern particularly when their lives were brought to an end in a most inhuman manner but that, in itself, would not justify denial of fair trial to the accused nor would it justify their punishment even in the absence of evidence to implicate them.

485. The investigation otherwise is botched up and basic norms of collecting evidence have been brazenly violated. It appears to us that the investigation opted for the easy course of implicating a poor servant of the house by demonizing him, without taking due care of probing more serious aspects of possible involvement of organized activity of organ trading. Inferences of many kind, including collusion etc. are probable on account of such serious lapses occasioned during investigation. However, we do not intend to express any definite opinion on these aspects and leave such issues to be examined at the appropriate level.

486. Though the evidence in this case was voluminous but our task has been made easy by learned counsels appearing for the parties who have rendered all possible assistance to us. We shall be failing in our duty if we do not record our utmost appreciation for the assistance rendered to us by Sri Yug Mohit Chaudhary, learned Senior Counsel assisted by Ms. Payoshi Roy and Siddhartha Sharma, Advocates for the accused SK and Ms. Manisha Bhandari for accused Pandher. Their written arguments and notes, on facts, have greatly facilitated us in formulating and writing our opinion.

487. We conclude, holding that a fair trial has clearly eluded the accused appellants in this case. The need to have a fair

trial has recently been emphasized by the Supreme Court in Munna Pandey vs. State of Bihar 2023 SCC OnLine SC 1103. While referring to the statement of Harry Browne, the Court endorsed the view that "a fair trial is one in which the rules of evidence are honoured, accused has competent counsel, and the Judge enforces the proper court room procedures- a trial in which every assumption can be challenged."

488. The concept of fair trial has been outlined in para 64 to 67 of the judgment in Munna Pandey (supra) which are reproduced hereinafter:-

> "64. All fair trials are necessarily legally valid, but is the reverse necessarily true? What then is the genesis of the concept of a fair trial? The concept of a fair trial has a very impressive ancestry, is rooted in history, enshrined in the Constitution, sanctified by religious philosophy and juristic doctrines and embodied in the statute intended to regulate the course of a criminal trial. Its broad features and ingredients have, in course of time, been concretised into well recognised principles, even though there are grey areas, which call for further legal thought and research.
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> 65. Truth is the cherished principle and is the guiding star of the Indian criminal justice system. For justice to be done truth must prevail. Truth is the soul of justice. The sole idea of criminal justice system is to see that justice is done. Justice will be said to be done when no innocent person is punished and the guilty person is not allowed to go scot free.
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> 66. For the dispensation of criminal justice, India follows the accusatorial or adversarial system of common law. In the accusatorial or adversarial system the accused is presumed to be innocent; prosecution and defence each put their case; judge acts as an impartial umpire and while acting as a neutral umpire sees whether the prosecution has been able to prove its case beyond reasonable doubt or not.
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> 67. Free and fair trial is sine-qua-non of Article 21 of the Constitution of India. If the criminal trial is not free and fair, then the confidence of the public in the judicial fairness of a judge and the justice delivery system would be shaken. Denial to fair trial is as much injustice to the accused as to the victim and the society. No trial can be treated as a fair trial unless there is an impartial judge conducting the trial, an honest, able and fair defence counsel and equally honest, able and fair public prosecutor. A fair trial necessarily includes fair and proper opportunity to the prosecutor to prove the guilt of the accused and opportunity to the accused to prove his innocence."

489. Words of caution are also expressed by the Court, for the

Judges holding trial in criminal cases, in Munna Pandey (supra). Para 70 to 72 of the judgment are apposite and are thus reproduced:-

> "70. This Court has condemned the passive role played by the Judges and emphasized the importance and legal duty of a Judge to take an active role in the proceedings in order to find the truth to administer justice and to prevent the truth from becoming a casualty. A Judge is also duty bound to act with impartiality and before he gives an opinion or sits to decide the issues between the parties, he should be sure that there is no bias against or for either of the parties to the lis. For a judge to properly discharge this duty the concept of independence of judiciary is in existence and it includes ability and duty of a Judge to decide each case according to an objective evaluation and application of the law, without the influence of outside factors.
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> 71. If the Courts are to impart justice in a free, fair and effective manner, then the presiding judge cannot afford to remain a mute spectator totally oblivious to the various happenings taking place around him, more particularly, concerning a particular case being tried by him. The fair trial is possible only when the court takes active interest and elicit all relevant information and material necessary so as to find out the truth for achieving the ultimate goal of dispensing justice with all fairness and impartiality to both the parties.
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> 72. In Ram Chander (supra), while speaking about the presiding judge in a criminal trial, Chinnappa Reddy, J. observed that 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. The learned Judge reproduced a passage from Sessions Judge, Nellore v. Intha Ramana Reddy, 1972 Cri LJ 1485, which reads as follows:—
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> > "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."

490. Upon evaluation of the evidence led in this case, on the

touchstone of fair trial guaranteed to an accused under Article 21 of the Constitution of India, we hold that prosecution has failed to prove the guilt of accused SK and Pandher beyond reasonable doubt, on the settled parameters of a case based on circumstantial evidence.

491. The conviction and sentence of accused SK and Pandher vide judgment and order passed by the court below in Sessions Trial No. 440 of 2007 dated 24.7.2017 is reversed. Capital Criminal Appeal Nos. 5183 of 2017 and 4404 of 2017 are allowed and the reference No. 10 of 2017 is answered accordingly. The accused appellants SK and Pandher shall be released on compliance of Section 437A Cr.P.C. provided they are not required in any other case.

Order Date:- 16.10.2023
Ranjeet Sahu/Raziq Ali

(Syed Aftab Husain Rizvi,J.) (Ashwani Kumar Mishra,J.)