In the Court of Additional Sessions Judge/Special Judge, Anti-Corruption, C.B.I., Ghaziabad

Present: **S. LAL, H.J.S.**

Sessions Trial No. 477 of 2012

The State of U.P. Through the C.B.I.
Vs.
Rajesh Talwar & Another

R.C. No.1(S)/2008/SCR-III/CBI/NEW DELHI

U/ss 302 r/w Section 34, 201 r/w Section 34 & 203 I.P.C.

J U D G M E N T

The cynosure of judicial determination is the fluctuating fortunes of the dentist couple Dr. Rajesh Talwar and Dr. Nupur Talwar, who have been arraigned for committing and secreting as also deracinating the evidence of commission of the murder of their own adolescent daughter-a beaut damsel and sole heiress Ms. Aarushi and hapless domestic aide Hemraj, who had migrated to India from neighbouring Nepal to eke out living and attended routinely to the chores of domestic drudgery at the house of their masters.

The *mise en scene* is Flat No. L-32, Jalvayu Vihar, Sector 25, N.O.I.D.A., a suburb of New Delhi. The *Dramatis Personae* are Dr. Rajesh Talwar, his

wife Dr. Nupur Talwar, the accused of this case, Ms. Aarushi and Hemraj, who were bludgeoned and thereafter, jugulated to death on the intervening night of 15/16 May, 2008, Mr. Umesh Sharma and Mrs. Bharti Mandal.

The parties are *ad idem* that the case is based on circumstantial evidence. Skipping expatiation on prosecution story, a vignette of facts as unveiled is that on 15.05.2008 at about 09:30 P.M. only Dr. Rajesh Talwar, Dr. Nupur Talwar, Ms. Aarushi and Hemraj were last seen in the house by Umesh Sharma, the driver of Dr. Rajesh Talwar and in the morning of 16.05.2008 Ms. Aarushi was found dead in her bedroom, which was adjacent to the bedroom of accused persons and in between these bedrooms there was a wooden partition wall. The dead body of domestic serti t Ee DAs fok t a, t i PD of

situated in the passage and enquired about the whereabouts of Hemraj to which she replied that she had no idea of him and then Dr. Nupur Talwar told her that Hemraj might have gone to fetch milk from Mother-Dairy after locking the middle grill/mesh door from outside and she could wait until he returned. Thereupon, Smt. Bharti Mandal asked Dr. Nupur Talwar to give her keys so that she may come inside the house after unlocking the same and then Dr. Nupur Talwar told her to go to the ground level and she would be throwing keys to her from balcony. Accordingly, Smt. Bharti Mandal came down the stairs and reached the ground level. Meanwhile, Dr. Nupur Talwar opened the latch of middle grill/mesh door and told her from balcony that the door is not locked and only latched from outside and then Smt. Bharti Mandal came back and opened the latch of the door and came inside the house and then thereafter, Dr. Nupur Talwar told Smt. Bharti "*Dekho Hemraj Kya karke gaya hai" (Look here, what has been done by Hemraj).* When maid Smt. Bharti went in Aarushi's room she saw that dead body of Aarushi was lying on the bed and covered with a white bed sheet and her throat was slit. She got frightened. Thereafter, she went down the stairs and informed the inmate of the house situated in first floor. After that, she left the house to do her job in another house. By that time, the parents of Dr. Nupur Talwar and Dr. Dinesh Talwar, the brother of Dr. Rajesh Talwar reached there. One Mr. Punish Rai Tandon, resident of L-28, Sector 25, Jalvayu Vihar also reached there at about 06:15 A.M. and after coming back to his house

telephoned to the concierge of Jalvayu Vihar to inform the Police regarding the occurrence. Accordingly, Mr. Virendra Singh, the security guard reached there and he was informed by Dr. Rajesh Talwar that after committing the murder of Aarushi, the servant Hemraj has fled away. Thereafter, Mr. Virendra Singh came back to Gate No.01 where Constable Pawan met him and he was informed about the incident. Thereupon, Constable Pawan informed Sub-Inspector, In-charge Police Outpost Jalvayu Vihar. S.I. Mr. Bachchoo Singh who reached to the house of the accused at about 07:30 A.M. where S.P.(City), C.O.(City), Officer-in-charge Police Station, Sector 20, N.O.I.D.A., Constable Pawan Kumar and the family members and relatives of the deceased met him. Meanwhile, Dr. Rajesh Talwar delated the matter with the Police Station, Sector 20, N.O.I.D.A. stating therein that he lives in L-32, Jalvayu Vihar, Sector 25, N.O.I.D.A., along with his wife and daughter Aarushi. The servant Hemraj, who hails from Nepal used to live in one room of the said house. His daughter Aarushi, aged about 14 years was sleeping in her bedroom in the preceding night but in the morning she was found dead in her bed, having incised wounds in her throat. The servant has committed the murder of his daughter who is missing since night and therefore, the report be lodged and action taken. On the basis of this report Case Crime No. 695 of 2008 u/S 302 I.P.C. was registered against Hemraj and the substance of the information was recorded in G.D. No. 12 at 07:10 A.M. on 16.05.2008.

The investigation of the case was taken up by S.I. Data Ram Naunaria, the Station House Officer of Police Station, Sector 20, N.O.I.D.A., who during the course of investigation proceeded to the scene of crime, inspected the bedroom of the deceased Aarushi and recorded the statements of Dr. Rajesh Talwar and Dr. Nupur Talwar. Meanwhile, Police Officer S.I. Bachchoo Singh,Officer-In-charge of Police Outpost Jalyavu Vihar of Police Station Sector 20 and posse comitatus drawn from other Police Stations also reached there. On inspection of bed room of Ms. Aarushi it was found that the dead body of the deceased was lying in the bed, her throat was slit by a sharp-edged weapon, her head was on pillow and bed sheet and mattress were soaked with blood, her T-Shirt (Upper garment) was above the waist, trouser was just below her waist and twine of trouser untied but the articles of the room were found properly arranged and placed in order. The blood splatters were there on the wall behind the head- rest of Aarushi's bed. The services of Constable Chunni Lal Gautam were requisitioned who on 16.05.2008 at about 08.00 A.M. took the photographs of room of Aarushi and lobby. He also took finger prints on bottle of whisky, plate, glasses, room of Hemraj, two bottle of liquor, one bottle of sprite and main door.

Inquest on the dead body of Ms. Aarushi was held by S.I. Bachchoo Singh, between 8.00 A.M. to 10.00 A.M. in the presence of Panch witnesses. Thereafter, body was sealed and sent to the morgue for Post-mortem examination though Constable Raj Pal Singh and Pawan Kumar along with necessary

papers. Dr. Sunil Kumar Dohre, Medical Officer, Incharge of Primary Health Centre, Sector 22, N.O.I.D.A. conducted autopsy on the cadaver of Ms. Aarushi between 12.00 o' clock in the noon till 01:30 P.M. The deceased was aged about 14 years, rigor mortis was present in both upper limb and lower limb. She was average built, both eyes were congested. Whitish discharge was found in the vagina. The following ante-mortem injuries were found on the person of the deceased Aarushi:

1) Lacerated wound 4 cm. x 3 cm., 1 cm. above left eye brow on frontal region. This injury was entering into skull cavity.
2) Incised wound 2 cm. x 1 cm. on left eye brow
3) Lacerated wound 8 cm. x 2 cm. on left parietal region
4) Incised wound 14 cm. x 6 cm. on neck, above thyroid cartilage. Trachea partially incised. This wound was 3 cm. away from left ear and 6 cm. away from right ear and 4 cm. below chin. Left carotid artery was slit.

On internal examination, there was fracture in left parietal bone. Haematoma 8 cm. x 5 cm. was present below parietal bone. Similar haematoma was found on right side of skull, trachea was partially cut, both the chambers of heart were empty, lungs were normal. The deceased was having teeth 15 x 15. Oesophagus and Peritoneum were normal. Semi-digested food was found. The deceased had died about 12-18 hours before due to hypovolemia. Viscera of stomach with contents, piece of small intestine, piece of liver with gall

bladder, piece of one kidney was preserved and sent for examination. Vaginal slides were prepared.

During investigation S.I. Data Ram Naunaria seized the blood stained pillow, bed sheet and pieces of mattress from the room of Aarushi in the presence of witnesses Mohd. Aamir and Digambar Singh and memo was prepared. Where after, the room of Hemraj was searched and a bottle containing Sula wine, one empty bottle of Kingfisher beer, a plastic bottle of green colour were recovered and taken into possession. One Ballentine Scotch bottle containing some liquor was recovered from the table of dining hall. All these articles were seized and a memo was prepared and signatures of the witnesses Mohd. Aamir and Digambar Singh were obtained thereon. A site-plan was also prepared by him. The statements of Bharti Mandal, Jeevan, Mohd. Aamir, Digambar Singh, Shivram, Vakil Ahmad, Muzib-Ur-Rahman and Akhilesh Gupta were taken. He tried to go to the roof of the house but the door of the roof was found locked and the lock was having blood stains. He asked Dr. Rajesh Talwar to give the keys of lock of the door of the terrace to him but Dr. Rajesh Talwar told him that he was not having the keys and he should not waste his time in breaking open the lock, else Hemraj will manage to flee away. On 17.05.2008 Dr. Dinesh Talwar was asked to provide the key of the lock of the door of the terrace but he also told that he had no key with him and therefore, the Investigator Data Ram Naunaria broke open the lock of the door of the terrace and went to the terrace along with K.K. Gautam, a retired police officer, Dr. Sushil

Chaudhary and Dr. Dinesh Talwar and found the dead body of Hemraj lying there in a pool of blood. The dead body was covered with a panel of cooler and dragging marks were visible. Dr. Dinesh Talwar was told to identify the dead body but he stated that he could not recognize the dead body. However Ram Prasad, Rudra Lal and other persons who had gathered there identified the dead body as that of Hemraj. On 17.05.2008 Constable Chunni Lal Gautam took the photographs and finger prints of the terrace.

Inquest on the dead body of Hemraj was held by S.I. Bachchoo Singh betwixt 12.30 to 14.30 and, thereafter, the dead body was sealed and sent to mortuary through Constable Raj Pal Singh and Pawan Kumar along with necessary Police papers. Dr. Naresh Raj conducted Post-mortem examination of the dead body of Hemraj on 17.05.2008 at about 9.00 P.M. as per order of the District Magistrate, Gautam Budh Nagar. The deceased was aged about 45 years and average built. Rigor mortis was present in the upper and lower limbs and had passed from head and neck. His eyes were protruding bilaterally. Bleeding from nostril and mouth was seen. Penis was swollen. The following ante-mortem injuries were found on his person:

1) Abrasion 3 cm. x 2 cm. behind the right elbow.
2) Abraded contusion 3 cm. x 4 cm. behind the left elbow
3) Incised wound on the front and sides of neck above the level of thyroid cartilage. The wound is 30 cms. long and is situated 5 cm.

below right ear, 6 cm below left ear and 6 cm below the chin. The wound is involving the trachea.

4) Abraded contusion 3 cm. x 2 cm. on the left frontal region 2 cm above the left eye brow
5) Abraded contusion 2 cm. x 2 cm. on the left frontal region
6) Lacerated wound 3 cm. x 2 cm. x bone deep on the occipital region
7) Lacerated wound 8 cm. x 2 cm. x bone deep on the occipital region, 1 cm. below Injury No. 05.

On internal examination, fracture of occipital bone was seen. Trachea severed above the thyroid cartilage. Chambers of both the heart were empty. Abdomen was distended. The deceased was having 16/16 teeth. 25 ml. liquid contents were seen in the stomach. The deceased died about $1^{1/2}$-2 days before as a result of shock due to hypovolemia, caused by ante-mortem injuries. Viscera of stomach with contents, piece of small intestine, piece of liver with gall bladder, piece of one spleen and kidney was preserved.

During the course of investigation, a red coloured water of cooler was taken in a bottle and its memo was prepared in the presence of independent witnesses Shivram and Digambar Singh. Blood stained and plain floor of the terrace were also taken and memo thereof was prepared and the signature of witnesses Taman Jeet Singh Chaddha and Atul Sachdeva were obtained. Site-plan of the terrace was also prepared by him. On the same date the statements of Taman Jeet Singh

Chaddha, Atul Sachdeva, Shiv Ram, Vakil Ahmad, Digambar Singh, Dr. Rajesh Talwar and Dr. Dinesh Talwar were taken. It was found from the investigation that the evidence of the offence has been concealed and therefore, Section 201 I.P.C. was added. Report of slides was received on that day. Where after, the investigation was transferred to Mr. Anil Samania, S.H.O. of Police Station Sector 39, N.O.I.D.A. On 18.05.2008 Constable Chunni Lal took the photographs of dead body of Hemraj from the mortuary. On 23.05.2008 Dr. Rajesh Talwar was arrested by the local police.

The Government of Uttar Pradesh issued Notification No. 1937-VI-P-3-2008-15(48) P/2008 dated 29.05.2008 giving consent for transfer of investigation from Police to C.B.I. Pursuant to that, the Department of Personnel and Training, Government of India, issued Notification No. 228/47/2008-AVD II dated 31.05.2008 where under the investigation of the case was handed over to the C.B.I. Consequently, C.B.I. registered RC No. 1(S)/2008/SCR-III/CBI/NEW DELHI on 31.05.2008. The investigation was taken up by Mr. Vijay Kumar, the then S.P., C.B.I./SCR-III New Delhi, who was assisted by Additional S.P. Mr. T. Rajabalaji, Dy. S.Ps. Mr. K.S. Thakur, R.S. Kureel and Hari Singh, Inspectors M.S. Phartyal, Naresh Indora, R.K. Jha, Mukesh Sharma etc. He visited the place of occurrence along with retinue on 01.06.2008 and on his direction Inspector Mukesh Sharma prepared Memo of 14 articles which were seized and sealed. Copy of the memo was supplied to Nupur Talwar. On 02.06.2008 on his directions T. Raja Balaji, Naresh

Indora, team of C.F.S.L. experts, independent witnesses Manoj Kumar and Sanjeev Kumar took in possession the blood stained palm print on wall of the terrace and its memo was prepared. On 13.06.2008 Krishna was arrested. On 14.06.2008 Dy. S.P. Mr. Kureel, Anuj Arya, Inspector R.K. Jha, S.K. Singla and B.K. Mohapatra, the scientists and Photographer Mr. Gautam of C.F.S.L. inspected the servant quarter of Krishna in House No. L-14, Sector 25, N.O.I.D.A. and three articles were seized, sealed and taken into possession. On 18.06.2008 Mr. Hari Singh who was part of the investigating team, on direction of the chief investigator Mr. Vijay Kumar seized half Pant and T-shirt of Dr. Rajesh Talwar, gown and bathroom slippers of Dr. Nupur Talwar and 4 set of shoes of Dr. Rajesh Talwar. On 27.06.2008 Raj Kumar was collared. On 11.07.2008 Vijay Mandal was also apprehended. On 09.06.2008 psychological test of Krishna was undertaken in A.I.I.M.S, New Delhi. On 12.06.2008 Brain-mapping, Narco-analysis and Polygraph tests of Krishna were conducted at Forensic Science Laboratory, Bangalore. On 11.07.2008 C.B.I. filed report under section 169 Cr.P.C. in the court of Learned Special Judicial Magistrate (C.B.I.), Ghaziabad and accordingly Dr. Rajesh Talwar was released from custody. Since Mr. Vijay Kumar was bit off, the investigation was transferred on 25.08.2008 to Inspector Mr. M.S. Phartyal, who investigated the case till 13.03.2009 and during the course of investigation, he recorded the statements of witnesses Sanjay Chauhan, Ravindra Tyagi, Dr. Richa Saxena, Sankalp Arora, Rudra Lal, Navneet Kaushik, Afzal Khan, S.I. B.R.

Kakran, Constable Raj Pal, S.I. Data Ram Naunaria, S.I. Bachchoo Singh, Dr. S.C. Singhal, Punish Rai Tandon, Dr. Suneel Kumar Dohre and Kripa Shankar Tripathi. He was assisted in the investigation by Inspector Richh Pal Singh, Inspector Pankaj Bansal, Inspector N.R. Meena and S.I. Yatish Sharma. Thereafter, he was transferred to C.B.I., A.C.B., Dehradun and hence investigation was transferred to Inspector Richh Pal Singh, who conducted independent investigation from March 2009 to first week of September 2009 although he was assisting I.O. from the inception. After that, the investigation was made over to Mr. A.G.L. Kaul, Dy. S.P., C.B.I., SC-III, who in the course of investigation inspected the scene of crime, created e-mail ID-hemraj.jalvayuvihar@gmail.com to remain in touch with the accused and again recorded the statements of relevant witnesses. He also directed Dr. Rajesh Talwar to produce golf sticks. Prior to that Dr. Rajesh Talwar was enquired about one missing golf stick but he had not given satisfactory explanation thereof. The golf sticks were sent to C.F.S.L. for examination. S.P., C.B.I., Dehradun had asked Dr. Rajesh Talwar that when one golf stick was missing then how he had produced the complete set, then on behalf of Dr. Rajesh Talwar one Ajay Chaddha had sent an e-mail from his e-mail ID ajay@mediconz.com to Mr. Kaul intimating therein that one golf stick was found in the attic opposite to the room of Aarushi during cleaning of the flat. On examination of golf sticks, it was found that two golf sticks were cleaner than others. These golf sticks were got identified by Umesh Sharma, the driver of

Dr. Rajesh Talwar, who stated that said two golf sticks were kept by him in the room of Hemraj. The identification proceeding was conducted in the presence of witness Laxman Singh. Dr. Rajesh Talwar had told him that the book titled 'Three mistakes of my life' was in the bed of Aarushi at the time of her murder. Dr. Rajesh Talwar handed over the said book and carton of mobile set of Aarushi to Inspector Arvind Jaitley. The I.M.E.I. No. of this mobile set which was used by Ms. Aarushi was printed on card-board/carton and the same mobile set having this I.M.E.I. No. was recovered later on. In the book no blood or DNA was traced. Mr. Kaul also conducted a dummy test and its memo was prepared. After completing the investigation Mr. Kaul reached to the conclusion that these twin murders were committed by the accused persons and not by Krishna, Rajkumar and Vijay Mandal or any other outsider. However, on interventions of super sleuths of C.B.I. closure report was laid by Mr. Kaul in the court of Learned Special Judicial Magistrate (C.B.I.), Ghaziabad on 29.12.2010/01.01.2011 who on receipt of the said report issued notice to the informant-Dr. Rajesh Talwar, who being aggrieved by and dissatisfied with the closure report filed protest petition seeking impetratory relief to direct C.B.I. for carrying out further investigation but the same was rejected. The closure report was also rejected by the Learned Magistrate on 09.02.2011 and took cognizance of the offence under section 190 (1)(b) of the code of criminal procedure and summoned both the accused persons to stand trial for offences punishable under

sections 302/34 and 201/34 IPC. The said order was challenged in the Hon’ble High Court, Allahabad but without success. Thereafter, the matter was carried to the Hon’ble Supreme Court, where also it met its waterloo and the order passed by the Learned Magistrate was finally affirmed and received the *imprimatur* of the Hon'ble Court Apex.

The case, being exclusively triable by the court of sessions was committed to the court of sessions by the order dated 09.05.2012 passed by the Learned Special Judicial Magistrate (CBI), Ghaziabad. Accordingly, the case was registered in the learned Court of Sessions, Ghaziabad on 10.05.2012 and subsequently made over to this court same day, and, thus the inexorable course of law has taken the accused to this court.

Both the accused were charged for offences punishable under section 302 read with section 34 and section 201 read with section 34 I.P.C. Therewithal, Dr. Rajesh Talwar was also charged for offence punishable under section 203 I.P.C. Both the accused abjured their guilt and claimed to be tried.

The prosecution in support of the accusations/charges examined P.W.-1 Constable Chunni Lal Gautam, P.W.-2 Rajesh Kumar, P.W.-3 Amar Dev Sah, P.W.-4 Sanjay Chauhan, P.W.-5 Dr. Sunil Kumar Dohre, P.W.-6 Dr. B.K. Mohapatra, P.W.-7 K.K. Gautam, P.W.-8 Shohrat, P.W.-9 Virendra Singh, P.W.-10 Mrs. Bharti Mandal, P.W.-11 Kripa Shankar Tripathi, P.W.-12 Punish Rai Tondon, P.W.-13 Dr. Rajeev Kumar Varshney, P.W.-14 Dr. Rohit Kochar, P.W.-15 Umesh Sharma, P.W. 16-

Laxman Singh, P.W. 17- Deepak Kanda, P.W.-18 Bhupendra Singh Avasya, P.W.-19 Deepak, P.W.-20 Vinod Bhagwan Ram Teke, P.W.-21 R.K. Singh, P.W.-22 M.N. Vijayan, P.W.-23 Mrs. Kusum, P.W.-24 Suresh Kumar Singla, P.W.-25 S.P.R. Prasad, P.W.-26 Deepak Kumar Tanwar, P.W.-27 Dr. Rajendra Singh, P.W.-28 Constable Pawan Kumar, P.W.-29 Mahesh Kumar Mishra, P.W.-30 Dr. Dinesh Kumar, P.W.-31 Hari Singh, P.W.-32 Richh Pal Singh, P.W.-33 S.I. Bachchu Singh, P.W.-34 S.I. Data Ram Naunaria, P.W.-35 Inspector M.S. Phartyal, P.W.-36 Dr. Naresh Raj, P.W.-37 Vijay Kumar, P.W.-38 Dr. Mohinder Singh Dahiya and P.W.-39 A.G.L. Kaul.

P.W.-2 has proved his letter as Exhibit–Ka-1. P.W.-3 has proved examination report as Exhibit –Ka-2. P.W.-5 has proved postmortem examination report as Exhibit–Ka-3, entry of postmortem no. 356/8 dated 16.05.2008 in the Post-Mortem Register as Exhibit–Ka-4, entry at serial no. 53 of Viscera Register as Exhibit–Ka-5. P.W.-6 has proved his examination report dated 19.06.2008 as Exhibit–Ka-6, letter dated 19.06.2008 of Smt. Bibha Rani Ray as Exhibit–Ka-7, examination report dated 01.07.2008 as Exhibit–Ka-8, letter dated 02.07.2008 of Smt. Bibha Rani Ray as Exhibit–Ka-9, examination report dated 30.06.2008 as Exhibit–Ka-10,letter dated 30.06.2008 of Smt. Bibha Rani Ray as Exhibit–Ka-11, examination report dated 21.07.2008 as Exhibit–Ka-12,examination report dated 15.10.2009 as Exhibit–Ka-13,examination report dated 15.07.2010 as Exhibit–Ka-14. P.W.-11 has proved the photocopy of entry dated 16.05.2008 made at page no.18 of cremation register as Exhibit–Ka-15,

P.W.-13 has proved his statement recorded under section 164 Cr.P.C. as Exhibit–Ka-16. P.W.-14 has proved his statement recorded under section 164 Cr.P.C. as Exhibit – Ka-17. P.W.- 16 has proved golf clubs identification memo as Exhibit–Ka-18. P.W.-17 has proved print out of e-mail sent to Mr. Neelabh Kishore as Exhibit–Ka-19, print out of e-mail sent by Mr. Neelabh Kihsore as Exhibit–Ka-20, print out of bill and call details record as Exhibit–Ka-21, print out of internet log as Exhibit–Ka-22. P.W.-18 has proved letter dated 21.09.2010 as Exhibit–Ka-23. P.W.-19 has proved certificate under section 65-B of Evidence Act as Exhibit–Ka-24, print out of call details record pertaining to mobile no. 9999101094 as Exhibit–Ka-25, certificate under section 65-B of Evidence Act as Exhibit–Ka-26, print out of call details record pertaining to mobile no. 9899555999 as Exhibit–Ka-27.P.W.-20 has proved his examination report dated 18.06.2008 as Exhibit–Ka-28. P.W.-21 has proved his letter dated 08.08.2008 as Exhibit–Ka-29,photocopy of consumer application form of Dr. Rajesh Talwar relating to mobile no. 9910520630 as Exhibit–Ka-30,photocopy of consumer application form of Dr. Rajesh Talwar relating to mobile no. 9871557235 as Exhibit–Ka-31, photocopy of consumer application form of Rakesh Arora relating to mobile no. 9810509911 as Exhibit–Ka-32, photocopy of consumer application form of Dr. Rajesh Talwar relating to mobile no. 9871625746 as Exhibit–Ka-33,photocopy of consumer application form of Dr. Prafull Durrani relating to mobile no. 9910669540 as Exhibit–Ka-34,photocopy of consumer application form of Dr. Rajesh Talwar

relating to mobile no. 9810037926 as Exhibit–Ka-35, print out of call details record of mobile no. 9910520630 as Exhibit–Ka-36,mobile no. 9871625746 as Exhibit–Ka-37,mobile no. 9810037926 as Exhibit–Ka-38,mobile no. 9871557235 as Exhibit–Ka-39,mobile no. 9810302298 as Exhibit–Ka-40,mobile no. 9810165092 as Exhibit–Ka-41,mobile no. 9810178071 as Exhibit–Ka-42,mobile no. 9810096246 as Exhibit–Ka-43,mobile no. 9910669540 as Exhibit–Ka-44 and mobile no. 9810509911 as Exhibit – Ka-45. P.W.-22 has proved his letter dated 18.11.2010 as Exhibit – Ka-46, print out of call details records of mobile no. 9213515485 as Exhibit–Ka-47 and photocopy of consumer application form of Dr. Rajesh Talwar relating to his mobile no. 9213515485 as Exhibit–Ka-48. P.W.-24 has proved his serological examination report dated 23.06.2008 as Exhibit–Ka-49. P.W.-25 has proved letter dated 06.11.2008 of Director of C.D.F.D.,Hyderabad as Exhibit–Ka-50,report dated 06.11.2008 of C.D.F.D., Hyderabad as Exhibit–Ka-51, clarificatory letter dated 24.03.2011 of Dr. N. Madhusudan Reddy of C.D.F.D., Hyderabad as Exhibit–Ka-52, golf sticks examination report dated 13.07.2010 as Exhibit–Ka-53, diagram of golf sticks as Exhibit–Ka-54,memo of experiments relating to carriage of dead body as Exhibit– Ka-55. P.W.-27 has proved his crime scene reconstruction report dated 16.12.2012 as Exhibit–Ka-56, observation memo relating to crime scene reconstruction as Exhibit – Ka-57 and crime scene inspection report as Exhibit – Ka-58. P.W.-30 has proved letter of Mr. Kandpal of

Maulana Azad Institute of Dental Sciences, New Delhi as Exhibit–Ka-59. P.W.-31 has proved seizure memo dated 18.06.2008 as Exhibit–Ka-60. P.W.-32 has proved memo dated 30.10.2009 pertaining to seizure of 12 golf clubs, receipt memo dated 02.07.2008 and seizure memo dated 13.09.2009 as Exhibits Ka 61-63 respectively. P.W.-33 has proved inquest report of the dead body of the deceased Ms. Aarushi as Exhibit – Ka-64, police Form No. 13 as Exhibit–Ka-65, diagram/sketch of dead body as Exhibit–Ka-66, report of C.M.O. as Exhibit–Ka-67,specimen seal impression as Exhibit–Ka-68, endorsement on back of police Form No. 13 as Exhibit–Ka-69, original chik F.I.R. of Police Station Sector 20, N.O.I.D.A. as Exhibit–Ka-70, inquest report of the deceased Hemraj as Exhibit–Ka-71, report of C.M.O. as Exhibit – Ka-72, diagram/ sketch of dead body as Exhibit–Ka-73, police Form No. 13 as Exhibit–Ka-74, endorsement on back of police Form No. 13 as Exhibit–Ka-75, order of the District Magistrate, Gautambudh Nagar for conducting postmortem examination in the night as Exhibit – Ka-76. P.W.-34 has proved G.D. No. 12 dated 16.05.2008 of 07.10 A.M. as Exhibit–Ka-77, seizure memo dated 16.05.2008 as Exhibit–Ka-78,another seizure memo dated 16.05.2008 as Exhibit–Ka-79, site-plan as Exhibit –Ka-80, carbon copy of letter sent to C.M.O., Gautam Budh Nagar as Exhibit–Ka-81, memo regarding breaking open of lock of the door of terrace and its seizure as Exhibit– Ka-82, memo regarding taking of water of cooler as Exhibit–Ka-83, memo regarding taking of blood stained and plain floor as Exhibit – Ka-84 and sight plan of

terrace as Exhibit–Ka-85. P.W.-35 has proved seizure memo dated 01.06.2008 as Exhibit–Ka-86, memo dated 05.11.2008 regarding receipt of photocopy of ashes-register of crematorium of N.O.I.D.A. as Exhibit – Ka-87. P.W.-36 has proved postmortem examination report of Hemraj as Exhibit–Ka-88. P.W.-37 has proved chik F.I.R. of RC No.1(S)/2008 as Exhibit–Ka-89,inspection memo dated 01.06.2008 of the scene of crime as Exhibit–Ka-90, crime scene (terrace of Flat No. L-32, Jalvayu Vihar) examination memo as Exhibit–Ka-91,inspection of servant quarter of House No. L-14, Sector 25 and inspection cum seizure memo dated 14.06.2008 as Exhibit–Ka-92. P.W.-38 has proved crime scene analysis report as Exhibit–Ka-93 and his letter dated 26.10.2009 as Exhibit–Ka-94. Both the accused have admitted the genuineness of report of Dr. Rajesh Talwar addressed to S.H.O.,Police Station Sector-20, N.O.I.D.A. and hence it was marked as Exhibit–Ka-95. P.W.-39 has proved print out of e-mail sent by Ajay Chaddha to him as Exhibit–Ka-96, Production cum seizure memo dated 26.09.2009 as Exhibit–Ka-97 and closure report as Exhibit–Ka-98. The learned public prosecutor has got proved e-mail of Dr. Andrei Semikhodskii, Director, Medical Genomics, London sent to this court and e-mail of Dr. Andrei Semikhodskii sent on 10.06.2010 to S.P., C.B.I., ACB, Dehradun by D.W.-7 and hence they are respectively marked as Exhibits–Ka-99 and Ka-100.

P.W.-1 has also proved 23 photographs as material Exhibits-1 to 23, 25 negatives as material Exhibits-24 to 48. P.W.-3 has proved carton as material Exhibit-49, tag as material Exhibit-50,

bottle of scotch whisky as material Exhibit-51, polythene with which this bottle was wrapped as material Exhibit-52, envelope inside which this bottle was kept as material Exhibit-53. P.W.-6 Dr. B.K. Mohapatra has proved envelope as material Exhibit-54, bed sheet as material Exhibit-55, empty envelope as material Exhibit-56, pillow with cover as material Exhibit-57, piece of mattress as material Exhibit-58, concrete material inclusive of container as material Exhibit-59, envelope of parcel as material Exhibit-60, one sealed cloth as material Exhibit-61, scratched material of floor along with container as material Exhibit-62, parcel as material Exhibit-63, one cloth of seal as material Exhibit-64, lock as material Exhibit-65, parcel as material Exhibit-66, one cloth of seal as material Exhibit-67, small envelope as material Exhibit-68, empty bottle of beer of Kingfisher Company as material Exhibit-69, polythene with which this bottle was wrapped as material Exhibit-70, envelope as material Exhibit-71, bottle of sprite as material Exhibit-72, polythene as material Exhibit-73, cloth of seal as material Exhibit-74, envelope as material Exhibit-75,Sula wine bottle as material Exhibit-76, polythene as material Exhibit-77,envelope as material Exhibit-78, green coloured top (shirt of Aarushi) as material Exhibit-79, lower (trouser) of Aarushi as material Exhibit-80, under-wear of Aarushi as material Exhibit-81, 5 ear-tops collectively marked as Exhibit-82, empty polythene as material Exhibit-83, the cloth in which ear-tops were wrapped as material Exhibit-84,envelope as material Exhibit-85, another envelope as material

Exhibit-86, T-shirt of deceased Hemraj as material Exhibit-87, envelope in which this shirt was kept as material Exhibit-88, envelope as material Exhibit-89, tag as material Exhibit-90, pantaloon of Hemraj as material Exhibit-91, envelope as material Exhibit-92, another envelope as material Exhibit-93, tag as material Exhibit-94, vest of Hemraj as material Exhibit-95, envelope as material Exhibit-96, another envelope as material Exhibit-97, tag as material Exhibit-98, blood stained under-wear of Hemraj as material Exhibit-99, envelope as material Exhibit-100, another envelope as material Exhibit-101, tag as material Exhibit-102, wrist watch of Hemraj as material Exhibit-103, envelope as material Exhibit-104, polythene as material Exhibit-105, envelope as material Exhibit-106, tag as material Exhibit-107, plastic tube as material Exhibit-108, envelope as material Exhibit-109, another envelope as material Exhibit-110, tag of parcel no. 10 as material Exhibit-111, envelope of parcel no. 10 as material Exhibit-112, small envelope as material Exhibit-113, envelope of parcel no. 11 as material Exhibit-114, tag of parcel no. 11 as material Exhibit-115, small envelope as material Exhibit-116, envelope of parcel no. 12 as material Exhibit-117, tag of parcel no. 12 as material Exhibit-118, small envelope as material Exhibit-119, tag of parcel no. 13 as material Exhibit-120, envelope of parcel no. 13 as material Exhibit-121, small envelope as material Exhibit-122, earth as material Exhibit-123, tag of parcel no. 14 as material Exhibit-124, envelope of parcel no. 14 as material Exhibit-125, small envelope as material Exhibit-126,

tag of parcel no. 15 as material Exhibit-127, envelope as material Exhibit- 128, small envelope as material Exhibit-129, tag of parcel no. 16 as material Exhibit-130, envelope of parcel no. 16 as material Exhibit-131, small envelope as material Exhibit-132, tag of parcel no. 17 as material Exhibit-133, envelope of parcel no. 17 as material Exhibit-134, small envelope as material Exhibit-135, tag of parcel no. 18 as material Exhibit-136, envelope of parcel no. 18 as material Exhibit-137, small envelope as material Exhibit-138, tag of parcel no. 19-A as material Exhibit-139, envelope of parcel no.19-A as material Exhibit-140, small envelope as material Exhibit-141, tag of parcel no. 19-B as material Exhibit-142, envelope of parcel no. 19-B as material Exhibit-143, small envelope as material Exhibit-144, tag of Exhibit 19-C as material Exhibit-145, envelope as material Exhibit-146, small envelope as material Exhibit-147, tag of Exhibit 19-D as material Exhibit-148,envelope as material Exhibit-149, small envelope as material Exhibit-150, tag of Exhibit 19-E as material Exhibit-151, envelope as material Exhibit-152, small envelope as material Exhibit-153, tag of Exhibit 19-F as material Exhibit-154, envelope as material Exhibit-155, small envelope as material Exhibit-156, tag of Exhibit 19-G as material Exhibit-157,envelope as material Exhibit-158, small envelope as material Exhibit- 159, tag of Exhibit 19-H as material Exhibit-160, envelope as material Exhibit-161, small envelope as material Exhibit-162, tag of Exhibit 19-I as material Exhibit-163, envelope as material Exhibit-164, small envelope as material Exhibit-165, tag of Exhibit 19-J as material

Exhibit-166,envelope as material Exhibit-167,small envelope as material Exhibit- 168, tag of parcel no. 20 as material Exhibit-169, bed sheet as material Exhibit-170, envelope of parcel no. 20 as material Exhibit-171, three envelopes as material Exhibit-172, 173, 174, tag of parcel no. 21 as material Exhibit-175,pillow with cover as material Exhibit-176, cloth of seal as material Exhibit-177, one thick brown coloured paper of big size as material Exhibit-178, tag of parcel no. 22 as material Exhibit-180, blanket as material Exhibit-181, cloth of seal as material Exhibit-182, brown coloured thick paper in which blanket was wrapped as material Exhibit-183, wrapper of packet as material Exhibit-184, tag of parcel no. 23 as material Exhibit-185, cello tape as material Exhibit-186, envelope in which bag was wrapped as material Exhibit-187, main envelope as material Exhibit-188, enlarged photo of blood stained palm print as material Exhibit-189, tag of half pant as material Exhibit-190, half pant as material Exhibit-191, paper in which pant was wrapped as material Exhibit-192, tag of T-shirt as material Exhibit-193, T-shirt as material Exhibit-194, paper in which T-shirt was wrapped as material Exhibit-195, tag of nightie as material Exhibit-196, nightie as material Exhibit-197, paper in which nightie was wrapped as material Exhibit-198, yellow coloured envelope as material Exhibit-199, another envelope as material Exhibit-200, main envelope as material Exhibit- 201, tag of the book “The three mistakes of my life” as material Exhibit-202, the above mentioned book as material Exhibit-203, yellow envelope as material

Exhibit-204, main envelope as material Exhibit-205, carton as material Exhibit-206. P.W.-12 has proved golf bag as material Exhibit-207. P.W.-25 has proved chit of Exhibit 176 as material Exhibit-208, parcel as material Exhibit- 209, envelope as material Exhibit-210 and other envelope as material Exhibit-211, white cloth as material Exhibit-212, empty envelope as material Exhibit-213, paper of packet as material Exhibit- 214, pillow cover of purple colour as material Exhibit- 215, two tags as material Exhibit-216, 217, chit of Exhibit no. 214 as material Exhibit-218, golf sticks as material Exhibits-219 to 230 and envelope in which these sticks were sealed as material Exhibit-231.P.W.-32 has proved envelope as material Exhibit-232, white envelope as material Exhibit-233, brown coloured envelope as material Exhibit-234, other envelope in which jars were kept as material Exhibit-235, four jars as material Exhibits-236, 237, 238, 239, four slides as material Exhibits- 240, 241, 242, 243, envelope as material Exhibit-244, carton in which mobile having SIM No. 9639029306 was kept as material Exhibit- 245, mobile set as material Exhibit-246 and tag as material Exhibit-247.

After closure of the prosecution evidence the accused were examined under section 313 Cr.P.C. The accused Dr. Rajesh Talwar has admitted in his statement under section 313 Cr.P.C. that on 15.05.2008 at about 9.30 P.M. his driver Umesh Sharma had dropped him in his residence and at that time he, Dr. Nupur Talwar, Baby Aarushi and servant Hemraj were present. Gate No. 2 of Jalvayu Vihar is closed in the night but Gate No. 1 and 3

remain opened. He and his wife had gone to sleep at about 11.30 P.M. and the air conditioner of their room was on. He has no idea as to whether the supply of electricity was disrupted or not in that fateful night. He has admitted that Smt. Bharti Mandal used to work in his house as a housemaid and when at about 6.00 am on 16.05.2008 Smt. Bharti Mandal had rung the call-bell, he was asleep. His wife Dr. Nupur Talwar had not told Smt. Bharti Mandal that the grill door is latched from outside but Nupur Talwar had thrown the keys from the balcony. The witness Sanjay Chauhan had never visited his residence. When he and his wife had seen the dead body of Aarushi it was covered with a flannel blanket but her upper garment was not above the waist and lower garment not below the waist. They were not in position to talk to anyone as they were lugubrious. He has admitted that the lock of the room of Aarushi was like that of a hotel which if locked from the outside, could be opened from inside without key but could not be opened from outside without key. The door of the room of Hemraj opening towards main door remained closed. He has also admitted that in the dinning table one bottle of Ballentine Scotch Whisky was found but there was no any tumbler and except in the room of Aarushi, no blood stains were found at the remaining part of the house and even in upstairs there were no blood stains. Nobody had asked him to give the key of door of the terrace. School bag and whim-whams were in the bed of Aarushi but he has no knowledge as to whether these were having blood stains or not. He had not gone to the police station to lodge his

report,nay, the report was dictated to him by police personnel in his house. The site-plan is not on scale and in the site-plan bathroom of the room of Hemraj has been wrongly shown and shaft has been wrongly shown to be part of that room. He had not noticed as to whether the bed-sheet of Aarushi's bed had any wrinkles or not. On hearing ululation Mr. Punish Rai Tandon had come to his house but he had not pushed aside him when he tried to console him. Dr. Rajeev Kumar Varshney and Dr. Rohit Kochar had also come to his house. He was wearing T-shirt and half pant and Dr. Nupur was wearing peignoir since night and it is incorrect to say that their clothes were not stained with blood. He has stated that presence of white discharge in the vaginal cavity of Aarushi is matter of record but the statement of Dr. Sunil Kumar Dohre that opening of vaginal cavity was prominent is incorrect in as much as this fact has not been mentioned in the postmortem examination report and in the first three statements given to the investigating officer. The evidence that hymen was old, healed and torn is nothing but an act of calumny and character assassination of his daughter. It is also incorrect to say that injuries no. 1 and 3 of Aarushi were caused by golf stick and injuries no. 2 and 4 were caused by sharp-edged surgical weapon. He has no knowledge as to whether the room of Aarushi was cleaned and mattress was kept in the terrace of House No. L-28 as at that time he was away at the crematorium to perform obsequies of his daughter. He has also admitted that 3-4 months prior to the occurrence he had sent his Santro Car for servicing and he has no

knowledge as to where the golf sticks and other items lying in the car were kept by the driver Umesh Sharma. About 8-10 days before the occurrence painting of cluster had started and the navvies used to take water from water tank placed on the terrace of his house and then Hemraj had started locking the door of the terrace and the key of that lock remained with him. He has also admitted that there is an iron grill wall between the terraces of House No. L-30 and L-32 but he has no knowledge as to whether any bed-sheet was placed on this partition wall. He has also admitted that on 17.05.2008 ashes of Aarushi were collected and locker no. 09 was allotted for keeping the ashes. These ashes were not taken out after half an hour but after 02.00-02.30 hours. It is incorrect to say that S.I. Data Ram Naunaria had enquired of him about the identity of the dead body lying in the terrace rather he had identified the dead body of Hemraj by his hairs in the presence of other police officer. He has also admitted that Hemraj was average built but he has no knowledge as to whether his willy was turgid. He has admitted that on 15.05.2008 at about 11.00 P.M. his wife had gone to Aarushi's room to switch on the internet router and he and his wife went to sleep around 11.30-11.35 P.M. and the same activity was seen from 6.00 A.M. to 1.00 P.M. on 16.05.2008, although computers were shut down. He has also admitted that mobile number 9213515485 was in his name but the same was used by Hemraj and whether any call was made from land line number 120-4316387 to mobile number 9213515485 at 06:00:10 hours on 16.05.2008 is a matter of record.

It is on the record that the pillow with cover was recovered from the room of Hemraj. It is incorrect to say that no DNA was generated in pillow cover and kukri. He has stated that Exhibit Z-20 code Y-204CL-14 was a pillow cover of purple colour in which DNA was generated. He has also stated that case property was tampered with, hence a complaint was sent by him to Department of Bio-Technology that report has been changed. Since the house was in damaged condition and was to be let out and therefore, it was got washed/painted. It is incorrect to say that partition wall was of wood. It was made of bricks over which wooden panelling was done and same was got painted on the suggestion of painter as its polish had faded away. Iron grill of main gate and balcony were unauthorized and therefore, these were got removed and nobody has objected to it. Mr. M.S. Dahiya has given his report on imaginary grounds. Mobile number 9899555999 is in the name of Invertis Institute and not in the name of K.K. Gautam. He has also admitted that area of his house is 1300 sq. feet and it has only one entry gate. He has also admitted that the door of Aarushi's room was having click shut automatic lock which could be opened from inside without key but could not be opened from outside without key. Mr. Ajay Chaddha had never sent an e-mail to Mr. Neelabh Kishore, S.P., C.B.I., Dehradun on his behalf. He has no knowledge as to whether main door was bolted from outside or not at the time of incident. It is incorrect to say that murders were not committed by an outsider or by Krishna, Raj Kumar and Vijay Mandal

and rather by him and the co-accused. Regarding the remaining evidence, he has stated that either it is a matter of record or is false or he is not having any knowledge about the same. He has also filed written statement paper no. 399-kha/1 to 399-kha/11 under section 313 Cr.P.C.

Dr. Nupur Talwar has also admitted in her examination under section 313 Cr.P.C. that on 15.05.2008 at about 09.30 P.M. she, Dr. Rajesh Talwar, baby Aarushi and servant Hemraj were present at L-32, Jalvayu Vihar, Sector 25, Noida. The three gates of Jalvayu Vihar remain opened round the clock but in the night one of the gates is closed. She has also admitted that Smt. Bharti Mandal was working in her house as housemaid and on 16.05.2008 at about 6.00 A.M. Smt. Bharti Mandal had rung call-bell but she did not go to open the door assuming that Hemraj would open the door. Smt. Bharti Mandal has falsely deposed that she had pushed the grill door but it could not be opened in view of the fact that this statement was not given to the investigating officer. It is correct that she had told Smt. Bharti Mandal that Hemraj may have gone to bring milk. It is also correct that wooden door and mesh door are in the same frame. It is also correct that she had told Smt. Bharti Mandal that door will be opened when Hemraj came back and until then she should wait. She has also admitted that Smt. Bharti Mandal had enquired of her as to whether she is having the key of the door and she had replied in the affirmative. She has also admitted that thereupon Smt. Bharti Mandal asked her to give the key so that she may come inside the house after

unlocking the door and then she had told Smt. Bharti Mandal to go to ground level and she would be giving key to her. But it is incorrect to say that when Smt. Bharti Mandal reached at ground level, she might have told her from balcony that she should come up and see that door has not been locked and only latched. She has also admitted that she had thrown duplicate key on the ground level. She has stated that when Smt. Bharti Mandal came inside the house, she and her husband were weeping. She has admitted that school bag and toys were in the bed of Aarushi but she has no knowledge as to whether these were having blood stains or not. She has also admitted that there were blood splatters on the back wall of the bed but not on the outer side of the door. When Aarushi was seen her body was covered with a flannel blanket but the status of the clothes worn by her were not such as deposed to by P.W.-29 Mahesh Kumar Mishra, who had not talked to Dr. Rajesh Talwar. She has also admitted that lock of the door of Aarushi's room was like that of hotel which if locked from outside could be opened from inside but could not be opened from outside without key. She had not told Mahesh Kumar Mishra that outer door of the house was of grill and it was latched from outside and after opening the same Smt. Bharti Mandal came inside the house. She has also admitted that the servant room has two doors and one opened towards the house and other one towards the main gate but the door towards the main gate remained closed and it was not used. She has also admitted that Ballentine Scotch bottle was found in the

dinning table without any tumbler. She has also stated that except in the room of Aarushi blood stains were not found at the remaining part of the house. She has also stated that in the stairs no blood stains were found. Mahesh Kumar Mishra had not asked Dr. Rajesh Talwar to provide key of the door of the terrace. S.I. Bachchu Singh had never tried to talk to her and her husband. Dr. Rajesh Talwar had never gone to the police station to lodge a report and rather complaint was dictated to Dr. Rajesh Talwar by police personnel in the house. She and her husband were fully mournful. She had not noticed as to whether the bed-sheet had any wrinkles/folds on it. Punish Rai Tandon had come to her house on hearing boohoo. Dr. Rajesh Talwar had not shrugged off Punish Rai Tandon. She and her husband were badly weeping. She has also stated that Dr. Rajesh Talwar was wearing T-shirt and half pant and she was wearing maxi since night and it is incorrect to say that their clothes were not stained with blood. It is also incorrect to say that Aarushi had died 12-18 hours before postmortem examination. She has admitted that in the postmortem examination report white discharge has been shown in the vaginal cavity of Aarushi. It is incorrect to say that deceased Aarushi may have died three hours after taking the dinner. Dr. Sunil Kumar Dohre has falsely deposed that vaginal cavity was open and vaginal canal was visible, that opening of cavity was prominent in as much as this fact has not been mentioned in the post-mortem examination report and in the first four statements given to the investigating officer. The evidence that

hymen was old, healed and torn is false. It is also incorrect to say that injuries no. 1 and 3 of Aarushi were caused by golf stick and injuries no. 2 and 4 were caused by sharp-edged surgical weapon as this fact was not stated before the investigating officer in his four-five statements given earlier to the investigating officer. She has no knowledge as to whether the room of Aarushi was cleaned and mattress was kept in the terrace of House No. L-28 as at that time she was at the place of cremation to perform funeral rites of Aarushi. She has also admitted that 3-4 months before the occurrence Dr. Rajesh Talwar had sent his Santro Car for servicing but she has no knowledge as to where the golf sticks and other items lying in the car were kept by the driver Umesh Sharma. About 8-10 days before the incident, at the time of painting of flats, the labourers used to take water from the water tank of her house and then Hemraj had started locking the door of the terrace and the key of that lock remained with him. The ashes of Aarushi were kept in locker of crematorium for about 2-3 hours. The site-plan of the terrace is not on scale. On 15.05.2008 at about 11.30 P.M. she and her husband had gone to sleep after switching off laptop. The start and stop activity of internet may be due to myriad reasons. She had made a telephone call from land line number 0120-4316388 to mobile number 9213515485, which was used by Hemraj. Pillow with cover was recovered from the room of Hemraj. She has falsified the evidence of P.W.-6 that in pillow cover and kukri no D.N.A. was generated. As per report Exhibit-Ka-51, the Exhibit-Z-20 code

Y-0204CL-14 is a pillow cover of purple colour. The clarificatory letter Exhibit-Ka-52 is illegal and the report which was replaced conclusively established the involvement of Krishna. The C.B.I. has tampered with the case property. Since the house was to be given on lease and therefore, it was got painted/washed and there was no instruction for abstaining from painting/washing. It is incorrect to say that partition wall was of wood. It was made of bricks over which wooden panelling was done and the same was got painted on the suggestion of painter as its polish had withered away. Iron grill of main gate and balcony were unauthorized and therefore, these were got removed and C.B.I. had not restrained to make any alteration. Mr. M.S. Dahiya has given his report on imaginary grounds. She has also admitted that area of her house is 1300 sq. feet and it has only one entry gate. She has also admitted that the door of Aarushi's room was having click shut automatic lock of Godrej company which could be opened from inside without key but could not be opened from outside without key. Mr. Ajay Chaddha had never sent an e-mail to Mr. Neelabh Kishore, S.P., C.B.I., Dehradun on their behalf. Mr. Kaul had full evidence against Krishna, Raj Kumar and Vijay Mandal but it was concealed by him to mislead the court. In respect of the other evidence, she has stated that either it is a matter of record or is false or she is not having any knowledge about the same. She has also filed written statement under section 313 Cr.P.C. which is paper no. 400-kha/1 to 400-kha/12.

The accused persons have examined D.W.-1 Rajendra kaul, D.W.-2 Dr. Amulya Chaddha, D.W.-3 Dr. Urmil Sharma, D.W.-4 Dr. R.K. Sharma, D.W.-5 Vikas Sethi, D.W.-6 Vishal Gaurav and D.W.-7 Dr. Andrei Semikhodksii in defence.

Fingerprint reports dated 29.05.2008, 30.07.2008,24.07.2008, 17.06.2008 and 13.06.2008 have been got proved by P.W.-3 and hence these have been respectively marked as Exhibits-kha-1, kha-2, kha-3, kha-4 and kha-5. Fingerprints paper no.- 45-kha/1 to 45-kha/5 have been got proved by P.W.-1 and hence have been respectively marked as Exhibits-kha-6, kha-7, kha-8, kha-9 and kha-10. Letter dated 22.12.2009 (paper no. 189-Aa/1) of Dr. Bibha Rani Ray, Director, C.F.S.L., New Delhi, genoplots paper no. 189-Aa/2, 189-Aa/3 and photocopy of report dated 28.12.2010 paper no. 86-ka/1 to 86-ka/3 have been got proved by P.W.-6 Dr. B.K. Mohapatra and as such have been marked as Exhibits-kha-11, kha-12, kha-13 and kha-14 respectively. Report dated 20.06.2008 paper no. 171-Aa/6, 171-Aa/7 and report dated 18.06.2008 paper no. 163-Aa/6 have been got proved by P.W.-26 and hence marked as Exhibits-kha-15 and kha-16. Report dated 06.09.2008 paper no. 154-Aa/2 to 154-Aa/19 has been got proved by P.W.-27 and, as such, marked as Exhibit-kha-17.Seizure memo dated 11.06.2008 paper no. 125-Aa, seizure memo dated 12.06.2008 paper no. 112-Aa/1 to 112-Aa/2, observation-cum-seizure memo paper no. 114-Aa have been got proved by P.W.-32 and therefore, marked as Exhibits-kha-18, kha-19 and kha-20 respectively.Application dated 11.06.2008 for

granting permission of brain mapping, lie detection and narco analysis examinations of the suspect Krishna at F.S.L., Bangalore has been got proved by P.W.-35 and, hence, has been marked as Exhibit-kha-21.Production cum seizure memo dated 06.07.2008 paper no. 119-Aa/1 has been got proved by P.W.-37 and marked as Exhibit-kha-22. The genuineness of reports paper no. 187-Aa/2 to 187-Aa/4 and 190-Aa/1 has been admitted by the Learned Counsel for the accused persons and, hence, paper no. 187-Aa/2 to 187-Aa/4 has been marked as Exhibit-kha-23 but paper no. 190-Aa/1 was marked inadvertently as Exhibit-kha-25 and therefore, this marking is amended and paper no. 190-Aa/1 marked as Exhibit-kha-25 is marked as Exhibit-kha-24. D.W.-4 has proved his report paper no. 431-kha/2 to 431-kha/17 but at the time of examination of this witness, this paper was marked as Exhibit-Kha-26 and therefore, this report is marked as Exhibit-kha-25.D.W.-6 has proved printout of Cell ID Chart paper no. 468-kha/1 to 468-kha/82 of Bharti Airtel Ltd. which was marked as Exhibit-kha-27 and therefore, this paper is marked as Exhibit-kha-26. D.W.-7 has proved his examination report paper no. 503-kha/1 to 503-kha/13, paper no. 503-kha/14 to 503-kha/19, paper no. 503-kha/20 to 503-kha/26, e-mail correspondence paper nos. 506-kha/1, 506-kha/2, 506-kha/3, 506-kha/4, 506-kha/5, 506-kha/6. At the time of examination of these witnesses the afore stated papers have been respectively marked as Exhibits-kha-28 to kha-36 and therefore, these documents are respectively marked as Exhibits-

kha-27 to kha-35 in seriatim. The learned counsel for the accused has admitted the genuineness of serological examination report dated 17.06.2008 paper no. 165-Aa/7 to 165-Aa/9, biological examination report dated 07.01.2010 paper no. 181-Aa, photocopy of pathological report dated 16.05.2008 paper no. 107-Aa/34, Letter dated 09.09.2008 written by T.D. Dogra of A.I.I.M.S to Mr. Vijay Kumar, S.P., C.B.I. paper no. 154-Aa/1, examination report dated 15.06.2008 of C.F.S.L., Hyderabad paper no. 191-Aa/1 to 191-Aa/4, enclosure No. 1 paper no. 151-Aa/9 to 151-Aa/26, e-mail paper no. 461-kha/1, 461-kha/2 with printout of call details record paper nos. 461-kha/3 to 461-kha/19, photocopy of memorandum of proceedings paper no. 460-kha/1 to 460-kha/4, letter dated 25.07.2013 of Dr. B.K. Mohapatra to Mr. A.G.L. Kaul, paper no. 464-kha/1, genotype plots paper no. 464-kha/2 to 464-kha/8, letter dated 04.06.2008 of S.P., C.B.I.-SCR-III, New Delhi to the Director, C.F.S.L., New Delhi paper no. 66-ka/1 to 66-ka/13 and letter dated 19.06.2008 of Mr. Vijay Kumar to the Director, C.F.S.L., New Delhi paper no. 67-ka/1 to 67-ka/3, but the learned counsel for the accused marked them respectively as Exhibits-kha-37 to kha-47 by mistake and therefore, nos. of Exhibits have been corrected and marked as Exhibits-kha-36 to kha-46.

No other evidence in defence has been given.

I have heard with patience to all the submissions good, bad, relevant, irrelevant and indifferent of Mr. R.K. Saini, the Senior Public Prosecutor and Mr. B.K. Singh, the Public Prosecutor appearing for CBI as well as Mr. Tanvir Ahmad Mir

and Mr. Satya Ketu Singh, the learned counsel for the accused persons and perused the material on record.

The written argument paper no. 562-kha/1 to 562-kha/212 filed on behalf of the accused has been brought on record.

Now is the time to get down to brass tacks. The gravamen of the argument on behalf of prosecution is that from the evidence adduced by the prosecution and the circumstances, it is fully established beyond reasonable doubt that in the intervening night of 15/16.05.2008, both the deceased were seen alive in the company of both the accused persons by Umesh Sharma at about 9.30 P.M. and in the morning of 16.05.2008 Ms. Aarushi was found dead in her bed and the dead body of the servant Hemraj was found on 17.05.2008 in the terrace of the house and there is nothing to suggest that in the fateful night any intruder(s) came inside the house and committed the murders of both the deceased. It was further added in the submissions of the learned prosecutors that no explanation has been offered by the accused persons as to how and under what circumstances both the deceased died and the circumstances unerringly point out towards the guilt of the accused persons that they are the authors of this diabolical crime. In furtherance of the arguments, it was also submitted that from the evidence and material as available on record, it is also proved that both the accused knowing that the double murder has been committed, caused the evidence of the commission of the murders to disappear with the intention to

screen themselves from legal punishment and Dr. Rajesh Talwar also knowingly gave false information to the police station Sector- 20, N.O.I.D.A. that the murder of Ms. Aarushi has been committed by Hemraj, who is absconding since night and as such the accused persons are liable to be convicted accordingly. The learned prosecutors in support their arguments have placed reliance on **State of Rajasthan Vs. Kashi Ram AIR 2007 SC 144, Trimukh Maroti Kirkan Vs. State of Maharashtra 2007 Cr.L.J. 20 (SC), Chattar Singh & another Vs. State of Haryana 2009 Cr.L.J. 319 (SC), Arabindra Mukherjee Vs. State of West Bengal 2012 Cr.L.J. 1207, Dr. Sunil Clifford Daneil Vs. State of Punjab 2012 Cr.L.J. 4657, Munish Mubar Vs. State of Haryana 2013 Cr.L.J. 56, Vivek Kalra Vs. State of Rajasthan 2013 Cr.L.J. 1524, Parkash Vs. State of Rajasthan 2013 Cr.L.J. 2040** and **Rohtash Kumar Vs. State of Haryana 2013 Cr.L.J. 3183.**

The t*erminus a quo* of Mr. Tanvir Ahmad Mir the learned counsel for the accused is that this case is hedged on circumstantial evidence and the theory of grave and sudden provocation as propounded by P.W.-38 Dr. M. S. Dahiya in his report Exhibit-ka-93 does not inspire confidence and is liable to founder. Elaborating his submissions, it was vigorously argued by Mr. Mir that Dr. Dahiya has inculcated this theory in his report Exhibit-ka-93 on the basis of information supplied to him by the investigating agency that the blood of Hemraj was found on the pillow of Aarushi in her bedroom; that it appears that the accused Dr. Rajesh Talwar had seen both

the deceased in the bedroom of Aarushi in compromising position which incensed the accused to commit the murders; that Dr. Dahiya has himself mentioned in his report Exhibit-ka-93 that perusal of photographs, CDs, postmortem examination reports etc. cannot be a substitute for a real site visit and hence the observation of his own report has its limitation; that Dr. Dahiya has no where mentioned in his report that he visited and inspected the scene of crime on 09.10.2009 and in his cross-examination he has admitted that no public person was associated during the alleged inspection of the place of occurrence and no inspection memo was prepared; that Dr. Dahiya has stated that he visited the place of occurrence alongwith inspector Arvind Jaitely but inspector Jaitely has not been produced by the prosecution to corroborate the statement of Dr. Dahiya; that Mr. A.G.L. Kaul has himself mentioned in his closure report Exhibit-ka-98 that no blood of Hemraj was found on the bed-sheet and pillow of Aarushi and that there is no evidence to suggest that Hemraj was killed in room of Aarushi. It has also been submitted that no blood, biological fluid, sputum, sperm, body hair, pubic hair, skin/flesh or any biological material belonging to Hemraj was found in Aarushi's room anywhere. It was also argued that Dr. Dohre has simply mentioned in his postmortem examination report of Ms. Aarushi that white discharge was observed in the vagina of Ms. Aarushi but he has not mentioned in the postmortem examination report that opening of vaginal cavity was prominent and the vaginal canal was visible; that the vaginal orifice of Aarushi

was wide and open and that vaginal canal could be seen; that the hymen of the deceased was old, torn and healed and these facts were not stated to the earlier investigating officers on 18.05.2008, 18.07.2008 and 03.10.2008; P.W.-5 Dr. Sunil Kumar Dohre has admitted on internal page no. 5 of his cross-examination that in the postmortem examination report it has not been mentioned that white discharge was found in the vaginal cavity of Aarushi and in column no. 5, 6 and 14 no abnormality detected has been written and this witness has also admitted in his cross-examination that no spermatozoa was detected in the slides and the subjective finding of Dr. Dohre is inadmissible in evidence and as such no reliance can be placed on the evidence of Dr. Dohre. Likewise, it has been contended by the learned counsel for the accused that the evidence of P.W.-36 Dr. Naresh Raj to the effect that swelling of the pecker of Hemraj was because either he had been murdered in the midst of sexual intercourse or just before he was about to have the sexual intercourse which he has stated on the basis of marital experience is nothing but a medical blasphemy and this part of evidence smacks of his lack of knowledge of forensic science and he has never stated such fact to the investigators Anil Kumar Samania, C.B.I. Inspector S.H. Sachan and Mr. A.G.L. Kaul under section 161 Cr.P.C. and thus in the court he has given the above statement for the first time after making improvements and hence no reliance can be placed upon such testimony of Dr. Naresh Raj. It was further contended that Dr. Naresh Raj has himself

admitted in his evidence that he cannot produce any authority whatsoever in support of above statement and rather he has admitted that he agreed with the opinion of Modi on Medical Jurisprudence, Forensic Science and Toxicology that “from 18 to 36 hours or 48 hours after death, eyes are forced out of their sockets, a frothy reddish fluid or mucus is forced out of the mouth and nostrils, abdomen become greatly distended, the penis and scrotum become enormously swollen” and thus the evidence of Dr. Naresh Raj does not lend any credence that penis of Hemraj was inflated due to being engaged in sexual intercourse and accordingly theory of grave and sudden provocation based on nooks as projected by the prosecution has to be rejected *in toto.*

The next contention put forward by the learned counsel is that both Dr. Sunil Kumar Dohre and Dr. Naresh Raj were the members of the expert committee constituted by the investigating agency and after examining number of documentary evidence such as inquest reports, postmortem examination reports of both the deceased, report Exhibit-kha-17 was given by the committee in which it was mentioned that no finding indicative of sexual assault is mentioned in the postmortem examination report and injuries as mentioned in the postmortem examination reports of both the deceased could have been possible also by a heavy weapon like kukri having both sharp-edge and blunt portion/edge and thus the evidence of witness Dr. Sunil Kumar Dohre that injuries no. 1 and 3 of Ms. Aarushi may have been caused by golf stick and injuries no. 2 and 4 may be possible due to use of surgically

sharp-edged weapon and evidence of witness Dr. Naresh Raj that injuries no. 6 and 7 of Hemraj are possible to have been caused by blunt object such as golf stick and injury no. 3 may be caused by scalpel cannot be accepted.

Another leg of argument is that Mr. A.G.L. Kaul has clearly mentioned in his closure report that no blood of Hemraj was found on the bed-sheet and pillow of Aarushi, there is no evidence to prove that Hemraj was murdered in the room of Aarushi, scientific tests on Dr. Rajesh Talwar and Dr. Nupur Talwar have not conclusively indicated their involvement in the crime, the exact sequence of events in the intervening night of 15/16.05.2008 to 6.00 A.M. in the morning is not clear, the offence has taken place in an enclosed flat, hence, no eye-witnesses are available and the circumstantial evidence collected during the course of investigation have critical and substantial gaps and there is absence of clear-cut motive and non recovery of any weapon of offence and their link either to the servants or to the parents. It was also argued that all the Exhibits collected from the room of Aarushi were examined by P.W.-6 Dr. B.K. Mohapatra but he has no where stated that blood of Hemraj and DNA of Hemraj were found on any of Exhibits examined by him. Similarly P.W.-25 Mr. S.P.R. Prasad has no where stated that blood or DNA of Hemraj were found in the Exhibits examined by him and even biological fluid like semen could not be detected in the undergarments of Hemraj and as such it becomes pellucid that from the evidence it is not established that both the deceased were engaged in

sexual intercourse which may have enraged the accused Dr. Rajesh Talwar to eliminate the deceased persons and D.W.-3 Dr. Urmil Sharma had categorically stated in her evidence that in a girl of about 13-14 years of age, due to hormonal changes between two menstrual cycles, there is normal physical and biological discharge which is of white colour and appears at the cervix; if there is more discharge, then the same can flow out of the vaginal canal and through the vaginal opening; normal physiological and biological discharge will not stick to vaginal wall unless and until one does not get infected; without microscopic examination it cannot be found out and said whether the discharge is biological discharge or from an outside source; during the course of vaginal examination, the vaginal canal cannot be seen unless both labia are separated with the help of an instrument; the labia are separated with the hand and for the purposes of seeing the vaginal canal, a speculum has to be inserted, only then the vaginal canal will be seen; if the dead body of 13-14 years old girl is examined for the purposes of her vaginal examination, then the vaginal orifice shall not be found open and the vaginal canal cannot be seen; in case of a girl who has a torn hymen (old torn) and is used to sexual intercourse, if after her death and during the course of rigor mortis, her vagina is cleaned, then in that situation, the mouth of the vagina shall not remain open; in a case where rigor mortis has started and after an hour the vagina is opened and cleaned with cotton, even then the mouth of the vagina will remain closed and even if rigor mortis has

developed all over the body and if someone attempts to forcibly open the vagina, then definitely, there will be injury marks in the vagina and it may remain open.

Mr. Mir has also invited my attention towards the evidence of D.W.-4 Dr. R.K. Sharma who too has deposed that in a case where the rigor mortis has just started or has developed and if someone tries to interfere with the vaginal cavity or genital organs, then in that area, perimortem injuries will be caused, which will depend upon how much force was used; in this area, one is bound to see bruises, lacerations, tears and during the course of postmortem, these would be clearly visible; the injures which are caused after the death, they are called perimortem injuries; if during the course of postmortem, the postmortem doctor while conducting vaginal examination finds that the vaginal orifice is opened and vaginal cavity is visible, then in this situation 'no abnormality detected' cannot be written in the postmortem examination report; no subjective finding can be given; in the postmortem examination report of Hemraj Dr. Naresh Raj has written that eyes were protruding out, blood oozing out of mouth and nostrils, stomach was distended and there was swelling in the penis which are all signs of putrification and therefore, swelling in the penis and scrotum was an account of putrification of the dead body and not because of sexual intercourse and thus it is manifest that theory of grave and sudden provocation can hardly be believed and the spun and structure of the prosecution story is devoid of

reality and the accused deserve compurgation by giving them benefit of doubt. To buttress his arguments, Mr. Mir has placed reliance on **Shambhu Nath Mehra Vs. State of Ajmer AIR 1956 SC 404, V.D. Jhingan Vs. State of U.P. AIR 1966 SC 1762 (3JJ), Kali Ram Vs. State of Himachal Pradesh (1973) 2 SCC 808 (3JJ), Yogendra Morarji Vs. State of Gujarat (1980) 2 SCC 218 (3JJ), Shankarlal Gyarasilal Vs. State of Maharashtra (1981) 2 SCC 35 (3JJ), Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116 (3JJ), Padala Veera Reddy Vs. State of A.P. 1989 Supp (2) SCC 706 (3JJ), State of H.P. Vs. Jai Lal 7 Ors. (1999) 7 SCC 280, Shamnsaheb M. Multtani Vs. State of Karnataka (2001) 2 SCC 577 (3JJ), Kajal Sen Vs. State of Assam (2002) 2 SCC 551, Mousam Singha Roy Vs. State of WB (2003) 12 SCC 377, Anil Sharma Vs. State of Jharkhand (2004) 5 SCC 679, Gaffar Badshaha Pathan Vs. State of Maharashtra (2004) 10 SCC 589, P.Mani Vs. State of T.N. (2006) 3 SCC 161, Vikram Jeet Singh vs. State of Punjab (2006) 12 SCC 306, Ramesh Chandra Agarwal Vs. Regency Hospital Ltd. (2009) 9 SCC 709, Subramaniam Vs. State of T.N. (2009) 14 SCC 415, Niranjan Panja Vs. State of West Bengal (2010) 6 SCC 525, Babu Vs. State of Kerala (2010) 9 SCC 189, Sunil Kumar Sambhudayal Vs. State of Maharashtra (2010) 13 SCC 657, Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri (2011) 2 SCC 532, Govind Raju @ Govind Vs. State (2012) 4 SCC 722, Manik Gawali Vs. State of**

Maharashtra Crl. Appeal No. 292 of 2006 decided by Hon'ble High Court of Bombay**, Rishipal Vs. State of Uttarakhand 2013 Cr.L.J. 1534** and **Joydeb Patra Vs. State of West Bengal 2013 Cr.L.J. 2729.**

Countervailing the submissions of learned counsel for the accused it was vehemently argued on behalf of prosecution that from the evidence on record it brooks no dispute that whitish discharge was found in the vagina of Ms. Aarushi at the time of postmortem examination of her dead body which conclusively demonstrates that both the accused were indulged in sexual intercourse and the bed-sheet below the pelvic region of the deceased Ms. Aarushi was found wet and no biological fluid was detected during the examination of bed-sheet; the string of trouser of Ms. Aarushi was found untied; T-shirt of Ms. Aarushi was just above the waist and trouser was just below the waist as is evident from the perusal of photographs material Exhibits-1, 2 and 4 which clearly suggest that both the deceased were seen on the job and hence they were eliminated and the accused were knowing this fact and hence apprehensive that in the postmortem examination report of Ms. Aarushi the evidence of coitus may surface and therefore, Dr. Sushil Chaudhary of Eye Care Hospital, Sector-26, N.O.I.D.A. made a telephone call to previously acquainted P.W.-7 K.K. Gautam, a retired police officer to see that no observation regarding evidence of sexual intercourse should come in the postmortem examination report and this fact is abundantly proved from the call-detail records of Dr.

Dinesh Talwar, brother of the accused Dr. Rajesh Talwar, Dr. Sushil Chaudhary and Mr. K.K. Gautam. It was also argued that P.W.-5 Dr. Sunil Kumar Dohre has deposed that when he was going towards the postmortem examination room then Dr. Dinesh Talwar gave him a cell-phone and told him to talk with Dr. T.D. Dogra of Forensic Medicines, A.I.I.M.S and then he talked with Dr. Dogra. It was also harangued that indubitably both the murders were committed in the night of 15/16.05.2008 within the four-wall of flat no. L-32 and as such in the given circumstances the prosecution is not bound to explain each and every hypothesis put forward by the accused persons and since from the prosecution evidence it is established that the murders were committed inside the flat no. L-32 and both the accused were present there in the night and therefore, when prima facie the prosecution has proved the presence of the accused persons inside the flat in the fateful night and hence in view of the provisions as contained in section 106 of the Evidence Act, it was obligatory on the part of the accused persons to rule out the theory of grave and sudden provocation as also to establish that somebody else other than the accused persons has committed the murders which they could not establish and therefore, in these circumstances the arguments of the learned counsel for the accused deserve to be rejected.

I have cogitated over the rival submissions made on either side. Admittedly, the case in hand is not based on percipient evidence and rather hinges on circumstantial evidence. To begin at the

beginning, it appears apposite to deal with the concept of proof beyond reasonable doubt. Mr. Ram Gopal in **"India of Vedic Kalpsutras"** has stated at page no. 201 that even under the ancient system of administration of Criminal justice, the benefit of doubt was always given to the accused. So Apastamba laid down that "नः च्ः सन्देहे दण्डम् कुरियात्" (the king should not punish any person in case of doubt).

It will be apposite to refer to Para 5.25 of the report of the committee on Reforms of Criminal Justice System Volume 1, 2003 which considered the historical background of the principle of 'Proof beyond reasonable doubt'.

Para 5.25- "The principle of proof beyond reasonable doubt was evolved in the context of the system of jury trial in the United Kingdom. The verdict on the guilt of the accused was the responsibility of the jury. The jury consisted of ordinary citizens in the locality. As they are not trained judges, they may jump to the conclusion without due care and concern for the rights of the accused. Therefore, standard of proof beyond reasonable doubt appears to have been evolved for the guidance of the jury. That principle which was originally meant for the guidance of the jury is being followed by all the courts of the countries which follow common law".

It appears seemly to trace the concept of proof beyond reasonable doubt as evolved by superior law courts of England and India. In **Miller Vs. Minister**

or Pensions (1947) All England Law Reports 372 (Vol.2) Lord Denning J. observed, "I……. proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to lead only to a remote possibility in his favour which can be dismissed with the sentence "of course, it is possible, but not in the least probable" the case is proved beyond doubt…….".

The concept of benefit of doubt has been explained in many decisions which have consistently been followed in a catena of cases, and are referred to *infra* for ready reference:-

A stream of rulings of the Hon'ble Supreme Court commencing with the **M.G. Agarwal Vs. State of Maharashtra (1963) 2 SCR 405, 491: AIR 1963 SC 200: (1963) 1 Cri LJ 235** and climaxed by **Sujit Biswas Vs. State of Assam 2013 (82) ACC 467 (SC)** has settled the law on this aspect and there is no legal maelstrom about it.

In **M.G. Agarwal Vs. State of Maharashtra (1963) 2 SCR 405, 491: AIR 1963 SC 200: (1963)** 1 Cri LJ 235, it was observed by the Constitution Bench of the Hon'ble Supreme Court as below:-

"It is a well established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and

is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. There is no doubt or dispute about this position. But in applying this principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts the court has to judge the evidence in the ordinary way and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt. The court considers the evidence and decides whether that evidence proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem, the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt."

The following observations made in **Himachal Pradesh Administration Vs. Om Prakash AIR 1972 SC 975** are also very pertinent.

"……The benefit of doubt to which the accused is entitled is reasonable doubt- the doubt which rational thinking man will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind which fights shy- though unwittingly it may be- or is afraid of the logical

consequences, if that benefit was not given or as one great judge said “it is not the doubt of the vacillating mind that has not the moral courage to decide by shelters itself in a vain and idle scepticism.” It does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the offence. If that were so, the law would fail to protect society as in no case can such a possibility be excluded. It will give room for fanciful conjectures or untenable doubts and will result in deflecting the course of justice if not thwarting it all together. It for this reason that the phrase has been criticized…….. The mere fact that there is a remote possibility in favour of accused is itself sufficient to establish the case beyond reasonable doubts. This then is the approach.”

In **Jennison Vs. Baker 1972 (1) ALL ER 997=(1972) 2 QB 52**, it was pithily stated: “Law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.” Increasingly people are believing as observed by Salmond quoted by Diogenes Laertius in “Lines of the philosophers” laws are like spiders' webs, if some light or powerless thing falls into them, it is caught, but bigger one can break through and get away. Jonathan Swift in his “Essay on the Faculties of the Mind” said in similar lines: “laws are like of cob webs, which may catch small flies, but let wasps and hornets break through.”

In **Shivaji Sahabrao Bobade and another Vs. State of Maharashtra (1973) 2 SC 793**, it was observed by a three Judge Bench of the Hon’ble

Supreme Court- “Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned author (Glanville Williams in ‘Proof of Guilt’) has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated ‘persons’ and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial

protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that “a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent..... In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents”.

In **State of Punjab Vs. Jagir Singh Baljit Singh AIR 1973 SC 2407**, it was again observed that “A criminal trial is not like a fairy tale wherein one is free to give flight to one’s imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of an interplay of different human emotions. In arriving at the conclusion of a crime, the court has to judge the evidence by yardstick of probabilities, its intrinsic worth and the animus of the witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the court should not at the same time reject evidence which is *ex facie* trustworthy on grounds which are fanciful or in the nature of conjectures.”

In **Dharam Das Wadhwani Vs. State of U.P. (1974) 4 SCC 267**, it has been observed that the rule of benefit of reasonable doubt does not imply a

frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of legitimate inferences flowing from evidence, circumstantial or direct. At the same time, it may be affirmed, as pointed out in **Kali Ram Vs. State of H.P. (1973) 2 SCC 808** that if reasonable doubt arises regarding the guilt of accused, the benefit of that cannot be withheld from him. If crime is to be punished gossamer web niceties must yield to realistic appraisals. The test that the accused must be guilty and not may be guilty should not be confused with exclusion of every contrary possibility.

This court is conscious, to quote great American Judge Justice Holmes, of the "felt necessities of time". In **Narottam Singh Vs. State of Punjab and others 1980 SCC (Crl.) 113**, it has been held that the "sacred cows" of shadowy doubts and marginal mistakes, processual or other, can not deter the court from punishing crime where it has been sensibly and substantially brought home.

In **State of Haryana Vs. Bhagirath (1999) 5 SCC 96,** it was observed:

"…… But the principle of benefit of doubt belongs exclusively to criminal Jurisprudence. The pristine doctrine of benefit of doubt can be invoked when there is a reasonable doubt regarding the guilt of accused. It is the reasonable doubt which a conscientious judicial mind entertains on a conspectus of the entire evidence that the accused might not have committed the offence, which affords the benefit to accused at the end of the criminal trial. Benefit of doubt is not a legal dosage

to be administered at every segment of the evidence, but any advantage to be afforded to the accused at the final end after consideration of the entire evidence, if the judge conscientiously and reasonably entertains doubt regarding the guilt of the accused.

It is nearly impossible in any criminal trial to prove all the elements with a scientific precision. A criminal court could be convinced of the guilt only beyond the range of a reasonable doubt. Of course, the expression “reasonable doubt” is incapable of definition. Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the judge.

Francis Wharton, a celebrated writer on criminal law in the United States has quoted from judicial pronouncements in his book Wharton’s Criminal Evidence (at p. 31, Vol. 1 of the 12th Edn.) as follows:-

“It is difficult to define the phrase ‘reasonable doubt’. However, in all criminal cases a careful explanation of the term ought to be given. A definition often quoted or followed is that given by Chief Justice Shaw in the Webster case. He says: ‘It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that consideration that they cannot say they feel an

abiding conviction to a moral certainty of the truth of the charge.' "

In the treatise **The Law of Criminal Evidence** authored by **H.C. Underhill** it is stated (at p. 34, Vol. 1 of the 5th Edn.) thus:

"The doubt to be reasonable must be such a one as an honest, sensible and fair-minded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in the minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt."

In **Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi (1983) 1 SCC-1, Takhaji Hiraji Vs. Thakur Kuber Singh Chaman Singh & others (2001) 6 SCC 145 (3 JJ),** it was observed that benefit of doubt must always be reasonable and not fanciful. In **Krishna & others Vs. State (2003) 7 SCC 56, Batcu Vainkateshwarlu and others Vs. Public Prosecutor, High Court of A.P. 2009 (1) CCSC 1 (3JJ), Murugam Vs. State 2009 (1) UP Cr.R. 74 (SC), State through CBI Vs. Mahendra Singh Dahiya AIR 2011 SC 1017, Iqbal Moosa Patel Vs. State of Gujarat 2011**

Cr.L.J. 1142 (SC), Chhotanney & others Vs. State of U.P. & others AIR 2009 SC 2013, Valson and others Vs. State of Kerala (2009) 2 SCC (Crl.) 208 and Bhaskar Ramappa Madar & others Vs. State of Karnataka 2009 Cr.L.J. 2422 (SC), it has been held that to constitute a reasonable doubt, it must be free from a over emotional response and zest for abstract speculation. Doubts must be actual and substantial doubts as to the guilt of the accused persons. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. In **Devendra Pal Singh Vs. State of N.C.T. of Delhi (2002) 5 SCC 234 and Sucha Singh & others Vs. State of Punjab (2003) 7 SCC 643** it has been held that proof beyond reasonable doubt is a guideline, not a fetish. In **Ramesh Harijan Vs. State of U.P. (2012) 5 SCC 777, Nagesh Vs. State of Karnataka 2012 (77) ACC 900 and Sujit Biswas Vs. State of Assam 2013 (82) ACC 467**, it was again observed that proof beyond reasonable doubt is not imaginary, trivial or merely possible doubt. It is a fair doubt based upon reason or common sense.

Ergo, this court cannot be oblivious that in a criminal trial suspicion no matter how strong cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between ‘may be’ and ‘must be’ is quite large and divides vague conjectures from sure conclusions. Mere conjectures or suspicion do not take the place of legal proof. The large distance between ‘may be true’ and ‘must be true’, must be covered by way of

clear, cogent and unimpeachable evidence produced by the prosecution before an accused is condemned as a convict and the basic golden rule must be applied. It is also to be remembered that in the case of **Narendra Kumar Vs. State (N.C.T. of Delhi) (2012) 7 SCC 171**, it has been held that the prosecution has to prove its own case beyond the reasonable doubts and cannot take support from the weakness of the case of defence and hence there must be proper and legal evidence to record the conviction of the accused. Recently, in **Mohd. Faizan Ahmad Vs. State of Bihar (2013) 2 SCC 131**, the Hon'ble Apex Court has again cautioned by making observation that suspicion however grave cannot take the place of proof. Grave violence to basic tenets of criminal jurisprudence would occur if in absence of any credible evidence, criminal courts are swayed by gravity of offence and proceed to hand out punishment on that basis. The observations made by the Hon'ble Supreme Court in **Oma Vs. State of T.N. (2013) 3 SCC 440** that a judge trying a criminal case has a sacred duty to appreciate the evidence in a seemly manner and is not to be governed by any kind of individual philosophy, abstract concepts, conjectures and surmises and should never be influenced by some observations or speeches made in certain quarter of the society but not in binding judicial precedents have also to be kept in mind.

It also appears apposite to keep in mind the following observations, although in different context, of the Hon'ble Supreme Court in **National Textile**

Workers' Union v P.R. Ram Krishna (1983)1 SCC 228-

"We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either chop the tree or if it is a living tree it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough it will cast away the law which stands in the pathway of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind."

The law on circumstantial evidence is not tenebrous. In an Essay on the Principles of Circumstantial Evidence by William Wills by T. & J.W. Johnson & Company 1872, the concept of circumstantial evidence has been explained as under:-

"In matters of direct testimony, if credence be given to the relators, the act of hearing and the act of belief, though really not so, seem to be contemporaneous. But the case is very different when we have to determine upon circumstantial evidence, the judgment in respect of which is essential inferential. There is no apparent necessary connection between the facts and the inference; the facts may be true and the inference erroneous, and it is only by comparison with the results of

observation in similar or analogous circumstances, that we acquire confidence in the accuracy of conclusions.

The term ‘presumptive’ is frequently used as synonymous with circumstantial evidence; but it is not so used with strict accuracy. The word ‘presumption’, *ex vi termini*, imports an inference from facts, and the adjunct ‘presumptive’, as applied to evidentiary facts, implies the certainty of some relation between the facts and the inference. Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent, and not real; even when the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ, therefore, as genus and species.

The force and effect of circumstantial evidence depend upon on its incompatibility with and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of arguments resembling the method of demonstration by the *reductio ad absurdum*.”

In **Hanumant Govind Nargundkar Vs. State of M.P. AIR 1952 SC 343, Bhagat Ram Vs. State of Punjab AIR 1954 SC 621, Eradu Vs. State of Hyderabad AIR 1956 SC 316, Hukum Singh Vs. State of Rajasthan AIR 1977 SC 1063, Gambhir Vs. State of Maharashtra (1982) 2 SCC 351, Eara Bhadrappa Vs. State of Karnataka AIR 1983 SC 446, Sharad Birdhi Chand Sarda Vs.**

State of Maharashtra (1984) 4 SCC 116, State of U.P. Vs. Sukhbasi AIR 1985 SC 1224, Balwinder Singh Vs. State of Punjab AIR 1987 SC 350, Ashok Kumar Chatterjee Vs. State of M.P. AIR 1989 SC 1890, Padala Veera Reddy Vs. State of A.P. 1989 Supplementary (2) SCC 706, Tanvibex Pankaj Kumar Divetia Vs. State of Gujarat (1997) 7 SCC 156, Anthony D'souza and others Vs. State of Karnataka 2003 (46) ACC 318 (SC- 3JJ), State of Rajasthan Vs. Kheraj Ram (2003) 8 SCC 224, State of U.P. Vs. Satish AIR 2005 SC 1000, Birendra Poddar Vs. State of Bihar (2011) 6 SCC 350, C. Changa Reddy Vs. State of A.P. 1997 JIC 258 (SC), State of U.P. Vs. Ram Balak (2008) 15 SCC 551, Inspector of Police, T.N. Vs. John David 2011 (2) JIC 529 (SC), Ram Reddy Rajesh Khanna Reddy Vs. State of A.P. (2006) 10 SCC 172, Anil Kumar Singh Vs. State of Bihar (2003) 9 SCC 67, Reddy Sampath Kumar Vs. State of A.P. (2005) 7 SCC 603, Sattatiya Vs. State of Maharashtra (2008) 3 SCC 210, Bharat Vs. State of M.P. (2003) 3 SCC 106, State of Goa Vs. Pandurang Mohite (2008) 16 SCC 714, Vijay Kumar Arora Vs. State (N.C.T.) Of Delhi (2010) 2 SCC 353, Sidharth Vashistha @ Manu Sharma Vs. State (N.C.T. of Delhi) 2010 (69) ACC 833 (SC): (2010) 6 SCC 1, G. Parswanath Vs. State of Karnataka (2010) 5 SCC 593, Bhagwan Dass Vs. State (N.C.T.) of Delhi AIR 2011 SC 1863, Rukia Begum Vs. State of Karnataka (2011) 4 SCC 779, Kulvinder Singh Vs. State of Haryana (2011) 5 SCC 258,

Mohammad Mannan @ Abdul Mannan Vs. State of Bihar (2011) 5 SCC 317, Mustakeem @ Sirajuddin Vs. State of Rajasthan 2011 Cr.L.J. 4920 (SC) Brajendra Singh Vs. State of M.P. (2012) 4 SCC 289, Dhananjoy Chatterjee Vs. State of West Bengal (1994) 2 SCC 220, Shivu Vs. State of Karnataka (2007) 4 SCC 713, Shivaji Vs. State of Maharashtra (2008) 15 SCC 269, Abu Bucker Siddique Vs. State AIR 2011 SC 91, Jagroop Singh Vs. State of Punjab AIR 2012 SC 2600 , Tulsi Ram Sahadu Suryavanshi Vs. State of Maharashtra (2012) 10 SCC 373, Madhu Vs. State of Kerala 2012 (1) JIC 609 (SC), Pudhu Raja Vs. State 2012 (79) ACC 642 (SC) and **Raj Kumar Singh @ Raja Vs. State of Rajasthan (2013) 5 SCC 722**, it has consistently been held that in the case based on circumstantial evidence the circumstances must unerringly lead to one conclusion consistent only with the hypothesis of the guilt of the accused and in case of circumstantial evidence every incriminating circumstance must be clearly established by reliable and clinching evidence. Circumstances so proved must form a chain of events from which the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible.

Constitution Bench of the Hon'ble Supreme Court in **Govinda Reddy Vs. State of Mysore AIR 1960 SC 29**, after following the principle laid in **Hanumant Govind Nargunkar Vs. State of M.P. AIR 1952 SC 343** has held that there must be a chain of evidence so complete as not to leave any

reasonable doubt for a conclusion consistent with that innocence of the accused and it must be shown that within all human probability the act must have been committed by the accused.

In **Dharam Das Wadhwani Vs. State of U.P. (1974) 4 SCC 267**, it has luculently been held that "every evidentiary circumstance is a probative link, strong, or weak, and must be made out with certainty. Link after link, forged firmly by credible testimony may form a strong chain of sure guilt binding the accused. Each link taking separately may just suggest but when hooked on to the next and on again may manacle the accused inescapably. Only then can a concatenation of incriminating facts suffice to convict a man".

Chief Justice Fletcher Moulton once observed that **"proof does not mean rigid mathematical formulae since "that is impossible".** However proof must mean such evidence as would induce a reasonable man to come to a definite conclusion. Circumstance evidence on the other hand, has been compared by Lord Coleridge **"like a gossamer thread, light and as unsubstantial as the air itself and may vanish with the merest of touches."**

While appreciating circumstantial evidence, we must remember the law as laid down in **Ashraf Ali Vs. Emperor (43 Indian Cases 241 at para 14)** that when in a criminal case there is conflict between presumption of innocence and any other presumption, the former must prevail. In **Gagan Kanojia Vs. State of Punjab 2007 (1) Allahabad**

Criminal Rulings 231 (SC), it has been held that the prosecution must prove that within all human probabilities the act must have been done by the accused. The prosecution case, thus, must be judged in its entirety having regard to the totality of the circumstances. The approach of the court should be an integrated one and not truncated or isolated. The court should use the yard-stick of probability and appreciate the intrinsic value of the evidence brought on records and analyze and assess the same objectively.

In **Dr. Sunil Clifford Daniel Vs. State of Punjab 2012 Cr.L.J. 4657 (SC), Prakash Vs. State of Rajasthan (2013) 4 SCC 668, Vadlakonda Lenin v State of U.P. 2013(81) ACC 31 (SC) and Majenderan Langeswaran Vs. State (N.C.T. of Delhi) & others (2013) 7 SCC 192**, it has been reiterated that in a case of circumstantial evidence the prosecution must establish each instance of incriminating circumstance, by way of reliable and clinching evidence and the circumstances so proved must form a complete chain of evidence, on the basis of which, no conclusion other than one of guilt of the accused can be reached.

In **Sathya Narayan Vs. State 2013 (80) ACC 138 (SC),** it has recently been held that even in absence of eye-witness court can award conviction if various circumstances relied upon by the prosecution are fully established beyond doubt. Chain of events has to be completed on the basis of proved circumstances.

Thus, where a case rests on circumstantial evidence, five golden principles of standard of proof required are decocted:-

1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances must be or should and not may be established;
2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explained 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;
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.

These five golden principles constitute the **'Panch Sheel'** of the proof of a case based on circumstantial evidence.

Thus, the evidence on record and circumstances obtaining herein have to be appreciated and kept in mind in the light of the law as enunciated in the afore-stated cases. Admittedly, both the accused persons were seen together with both the deceased on the intervening night of 15/16.05.2008 at about 9.30 P.M. by Mr. Umesh

Sharma, the driver of the accused Dr. Rajesh Talwar, who has deposed that when on 15.05.2008 at about 9.30 P.M. he had dropped Dr. Rajesh Talwar at L-32, Jalvayu Vihar, N.O.I.D.A., then at that time he had given the keys of the car to the servant Hemraj at the gate of the house and at that time Dr. Rajesh Talwar, Dr. Nupur Talwar and baby Aarushi were present in the house. This part of evidence has been admitted by both the accused persons in their examinations under section 313 Cr.P.C. In **State of Maharashtra Vs. Sukhdeo Singh AIR 1992 SC 2100,** it has been held that in view of section 313 (4) Cr.P.C. there is no impediment in taking the confessional statement or admission of the accused into consideration given in his statement under section 313 Cr.P.C. for recording his conviction and it can even form the sole basis for conviction. In **Dharni Dhar Vs. State of U.P. (2010) 7 SCC 759,** it has been held that admission or the confession of the accused under section 313 Cr.P.C. recorded in course of trial can be acted upon and the court can rely on these confessions to convict. In **Kheruddin Vs. State of West Bengal (2013) 5 SCC 753**, it has been held that statement under section 313 Cr.P.C. can be taken into consideration, not only because of what section 313 (4) Cr.P.C. provides but also because of law laid down in several pronouncements such as in **Sanatan Naskar Vs. State of West Bengal (2010) 8 SCC 249, Ashok Kumar Vs. State of Haryana (2010) 12 SCC 350, Brajendra Singh Vs. State of M.P. (2012) 4 SCC 289** and **Ram Naresh Vs. State of Chhatisgarh AIR 2012 SC 1357.** Thus, this fact

stands conclusively proved that both the deceased were seen alive with the accused persons at about 9.30 P.M. on 15.05.2008 at L-32, Jalvayu Vihar, N.O.I.D.A. P.W.-5 Dr. Sunil Kumar Dohre has stated on oath that the death of Ms. Aarushi took place 12 to 18 hours before postmortem examination of her dead body. P.W.-36 Dr. Naresh Raj has also deposed that the deceased Hemraj had died before $1^{1/2}$ to 2 days before postmortem examination of his dead body and as such this fact also stands proved that both the deceased were murdered in the midnight of 15/16.05.2008. The accused persons have not taken plea of *alibi.* Their presence in the flat cannot be doubted by any stretch of imagination. Ms. Aarushi was seen lying dead in her bed on 16.05.2008 at about 6.00 A.M. by the maid servant Mrs. Bharti Mandal. The dead body of Hemraj was found on 17.05.2008 in the terrace of flat after breaking open the lock of door of the terrace. It is to be noted that both the accused were found present in their flat in the morning of 16.05.2008 when the maid Mrs. Bharti Mandal had reached there. The bed-room of Ms. Aarushi was adjacent to the bed-room of the accused persons and both the bed-rooms were divided by wooden partition wall. The servant Hemraj was also living in a room of this flat. The accused persons have nowhere taken a plea that someone had come to meet them or their servant Hemraj after 9.30 P.M. on 15.05.2008. Even no suggestion has been thrown before any witness that some outsider(s) had come to meet any of the inmates of the flat in that night. P.W.-2 Mr. Rajesh Kumar, Executive Engineer, Urban Electricity

Distribution Division-VI, Ghaziabad has deposed that in flat no. L-32, Sector-25, N.O.I.D.A. the electricity was supplied from feeder no. 01 and there was no disruption in the supply of electricity w.e.f. 6.00 P.M. on 15.05.2008 to 7.00 A.M. on 16.05.2008 and even no shut-down was taken. He has further stated that he has written a letter Exhibit-ka-1 to S.P. (C.B.I.) on the basis of the log-book maintained at Electricity Sub-Station 33/11 K.V., Sector-21-A, N.O.I.D.A. informing therein about the status of the supply of electricity. It has no where been suggested before this witness that there was disruption of supply of electricity in that night. P.W.-9 Virendra Singh has stated before this court that he is employed as security guard of Jalvayu Vihar, Sector-25, N.O.I.D.A., which is sentinelled by security personnel and there are seven gates in Jalvayu Vihar and out of them two gates remain opened during the day hours and in the night hours out of these two gates one gate is closed at 10.30 P.M. but another gate remains opened but the small gates of all the seven gates are closed after 10.30 P.M. and in each gate one guard is deployed in the night but two guards are deployed in the gate which remains opened in the night. He has further stated that in the night of 15/16.05.2008 he was deployed at gate no. 1 and in the said night he had not seen any person loitering in suspicious circumstances nor any other guard had told him that any person was seen loitering. The accused persons have not taken the plea that before they retired to bed allegedly at about 11.30 P.M. in the night the main door was not bolted or locked from inside and it remained opened just to facilitate

some intruder(s) to come inside the flat. Both the accused have admitted that the door of Ms. Aarushi's bed-room was having click shut automatic lock like that of a hotel which if locked from the outside, could be opened from inside without key but could not be opened from outside without key. It is but natural that the door of Ms. Aarushi's bed-room must have been locked by the parents and key remained with them and not with the servant and therefore, no outsider(s) could have opened the door from outside without the key of the lock. It is not possible that the servant Hemraj might be keeping the key of the door of Ms. Aarushi's bed-room as no parents would permit the servant to keep the key with him particularly in the night hours when young girl is inside her bed-room. There is no evidence of egress and ingress; there is no evidence of any larcenous act; there is no evidence of any forcible entry inside the flat; there is no evidence at all to suggest that friends of Hemraj came inside the flat after 9.30 P.M. and shared drinks of liquor with Hemraj in the postmortem examination report of Hemraj no finding has been given that liquor contents were found in his stomach and no suggestion has been given before any witness that Hemraj had taken alcohol with his friends in that night. It is well-nigh impossible that Hemraj will dare to booze with his friends in his servant room particularly when the accused persons were very much present in the nearby room. It is established from the evidence of Mrs. Bharti Mandal that mesh door was latched from inside and she was misled to go to the ground level and in the meanwhile when

she went down the stairs at the ground level the latch was opened by Dr. Nupur Talwar. It is not possible that an outsider(s) after committing the twin murders will clean the private parts of Ms. Aarushi, dress-up the bed-sheet, cover the dead body with the flannel blanket, place toys in proper order, dare to drink scotch and Sula wine, will take away the body of Hemraj to terrace, place a panel of cooler over his body, place a bed-sheet over the iron grill dividing the roofs to save from gaze well knowing that both the accused are in their bed-room and they can awake at any time. This is not the case of defence that their bed-room was bolted from outside by any person(s) and they were 'cabined, cribbed and confined' in their bed-room. Both the accused have stated in their statements under section 313 Cr.P.C. that about 8-10 days prior to the occurrence painting of cluster had started and the labourers used to take water from the water tank placed in their roof and therefore, Hemraj had locked the door of terrace and the key of the door remained with him. If it was so, then it was not possible for an outsider(s) to rummage out the key and thereafter, lock the door of the terrace from inside when the dead body of Hemraj was lying in the terrace. When the investigators asked Dr. Rajesh Talwar to provide the key of the door of the terrace, he gave incoherent answers and a device was resorted to by Dr. Rajesh Talwar to throw enquirers off the scent. From the evidence it is also established that both the accused changed their vestures. It is against the order of human nature that on seeing their dearest daughter lying in a pool

of blood the accused being the natural father and mother will not hug her. In the process of hugging, their clothes will be deeply stained with the blood but not found so. Both the accused have also admitted in their statements under section 313 Cr.P.C. that the area of the flat is 1300 sq. feet and it has only one gate. If some outsider(s) might have committed the offence then after making his exit from the flat, either he will bolt the outer or middle mesh door from outside or will keep them open but this was not done and rather the outer mesh door was latched from inside by the accused persons and that's why when the maid came and placed her hand on the mesh door, it did not open and she was purposely told to go to the ground level and thereafter, latch was opened. In this view of the matter it can safely be concluded that no outsider came inside the house in the fateful night and therefore, when the prosecution has been successful in proving that both the deceased were last seen alive in the company of both the accused at flat no. L-32 at about 9.30 P.M. on 15.05.2008 and both the deceased were murdered in the intervening night of 15/16.05.2008 then from this fact, as held in **Tukaram Ganpat Pandare Vs. State of Maharashtra AIR 1974 SC 514** this court may have regard to the common course of natural events, human conduct, public or private business, in their relation to the facts of the particular case as envisaged in section 114 of Evidence Act and can reasonably be presumed that it is the accused and accused only who have murdered the deceased and none else for want of giving evidence in rebuttal

under section 106 of the Evidence Act which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In **Crystal Developers Vs. Asha Lata Ghosh (2005) 5 SCC 375** it has been held that it is well settled that inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not with dead uniformity. This was the bounden duty of both the accused personally knowing the whole circumstances of the case to give evidence on their behalf and to submit to cross-examination, which they have failed to do so. In **Gurcharan Singh Vs. State of Punjab AIR 1956 SC 460** it has been held that the burden of proving a plea especially set up by an accused which may absolve him from criminal liability, certainly lies upon him. In **Razik Ram Vs. J.S. Chouhan AIR 1975 SC 667** it was observed “the principle under lying section 106 which is an exception to the general rule governing burden of proof applies only to such matters of defence which were supposed to be specially within the knowledge of the party concerned. It cannot apply when the fact is such as to be capable of being known also by persons other than the party.” The case laws- **Shambhu Nath Mehra Vs. State of Ajmer AIR 1956 SC 404, Kali Ram Vs. State of Himachal Pradesh (1973) 2 SCC 808 (3JJ), Yogendra Morarji Vs. State of Gujarat (1980) 2 SCC 218 (3JJ), Shankarlal Gyarasilal Vs. State of Maharashtra (1981) 2 SCC 35 (3JJ), Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116 (3JJ), Padala Veera Reddy Vs.**

State of A.P. 1989 Supp (2) SCC 706 (3JJ), Shamnsaheb M. Multtani Vs. State of Karnataka (2001) 2 SCC 577 (3JJ), Kajal Sen Vs. State of Assam (2002) 2 SCC 551, Mousam Singha Roy Vs. State of WB (2003) 12 SCC 377, Gaffar Badshaha Pathan Vs. State of Maharashtra (2004) 10 SCC 589, P.Mani Vs. State of T.N. (2006) 3 SCC 161, Vikram Jeet Singh vs. State of Punjab (2006) 12 SCC 306, Subramaniam Vs. State of T.N. (2009) 14 SCC 415, Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri (2011) 2 SCC 532, Govind Raju @ Govind Vs. State (2012) 4 SCC 722, Babu Vs. State of Kerala (2010) 9 SCC 189, Rishipal Vs. State of Uttarakhand 2013 Cr.L.J. 1534 and Joydeb Patra Vs. State of West Bengal 2013 Cr.L.J. 2729 as relied upon by the learned counsel for the accused are of no help to the accused persons as distinguishable on facts and circumstances of the instant case. In **Shambhu Nath Mehra Vs. State of Ajmer AIR 1956 SC 404** it has been held that section 106 lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate it is proportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty and inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his

knowledge. It was further held that this section cannot be used to undermine the well-established rule of law that, save in a very exceptional class of a case, the burden is on the prosecution and never shifts. In **Kali Ram Vs. State of Himachal Pradesh (1973) 2 SCC 808 (3JJ)** it has also been held that the burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumption arises regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. In **Yogendra Morarji Vs. State of Gujarat (1980) 2 SCC 218 (3JJ)** the Hon'ble Court was dealing with the right of private defence and the burden of the accused under section 105 of Evidence Act. In **Shankarlal Gyarasilal Vs. State of Maharashtra (1981) 2 SCC 35 (3JJ)** it was held that falsity of plea taken by the accused cannot prove his guilt, though it may be an additional circumstance against him. In **Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116 (3JJ) and Padala Veera Reddy Vs. State of A.P. 1989 Supp (2) SCC 706 (3JJ)** the circumstantial evidence was

found not sufficient conclusively to establish the guilt of the accused and therefore, the accused were acquitted on the ground that suspicion cannot take the place of legal proof. In **Shamnsaheb M. Multtani Vs. State of Karnataka (2001) 2 SCC 577 (3JJ)** the prosecution failed to prove the charge under section 302 I.P.C. and no charge under section 304-B I.P.C. was framed and hence it was held that conviction under section 304-B without affording opportunity to the accused to enter on his defence and disprove the presumption under section 113-B Evidence Act would result in failure of justice. In **Kajal Sen Vs. State of Assam (2002) 2 SCC 551** the prosecution story with regard to the involvement of the accused was found doubtful and hence appeal was allowed. In **Mousam Singha Roy Vs. State of WB (2003) 12 SCC 377** the appeal was allowed *inter alia* on the ground that P.W.-2 & 3 were chance witnesses and their presence at sweetmeat stall could not be proved. In **Gaffar Badshaha Pathan Vs. State of Maharashtra (2004) 10 SCC 589** it was held that the burden on accused is much lighter and he has only to prove reasonable probability. In **P.Mani Vs. State of T.N. (2006) 3 SCC 161** the facts of the case were different. It was not a case where both husband and wife were last seen together inside a room and as per prosecution case the children who have been watching T.V. were asked to go out by the deceased and then she bolted the room from inside and then on seeing smoke coming from the room they rushed towards the same and broke open the door. In that context it was held that section 106 of Evidence Act cannot be

said to have any application. In **Vikram Jeet Singh vs. State of Punjab (2006) 12 SCC 306** it has been held that when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. It was further held that suspicion, however, grave may be, cannot be a substitute for proof. In **Subramaniam Vs. State of T.N. (2009) 14 SCC 415** the accused was acquitted because the prosecution had suppressed certain facts and the accused was acquitted by the trial court against which appeal was filed and then he was convicted under section 302 I.P.C. but acquittal under section 498A I.P.C. and section 4 Dowry Prohibition Act was affirmed by the Hon'ble High Court and in that context the Hon'ble Supreme Court allowed the appeal and accused was acquitted. In **Babu Vs. State of Kerala (2010) 9 SCC 189** the accused was acquitted by the trial court but convicted by the Hon'ble High Court and then the Hon'ble Supreme Court held that the trial court's judgment was well reasoned as the chain of circumstances were found not complete. In **Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri (2011) 2 SCC 532** the facts were entirely different. That was the case under Representation of People Act and hence law laid down in different branch of law is not applicable. The facts of **Govind Raju @ Govind Vs. State (2012) 4 SCC 722** are also entirely different. In that case, the appellant had approached the police and then it was held that it is quite unbelievable that he would indulge in committing such a heinous crime and the

statement of P.W.-1 implicating the accused did not inspire confidence and suffered from improbabilities and was not found free from suspicion and his statement was also not corroborative by other witnesses. In **Rishipal Vs. State of Uttarakhand 2013 Cr.L.J. 1534** it was found that the prosecution could not prove beyond reasonable doubt that the deceased died due to poisoning although it was also laid down that burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution and it is only when this burden is discharged then the accused could prove any fact within his special knowledge under section 106 of Evidence Act. In **Joydeb Patra Vs. State of West Bengal 2013 Cr.L.J. 2729** it was held that when the prosecution has not been able to prove its case beyond reasonable doubt that the deceased died due to poisoning, the courts below could not have held the appellant guilty only because they have not been able to explain under what circumstances the deceased died. In **Mani Subrat Jain Vs. Raja Ram Vohra (1980) 1 SCC 1** it was held that precedents are law's device to hold the present prisoner of the past and must bind only if squarely covered. In **Abhay Singh Chautala Vs. CBI (2011) 7 SCC 141**, it has been held that long standing precedent should not be disturbed. '***Stare decisis et non quieta movere***' – it would be better to stand by that decision and not to disturb it.

It will be seemly to refer to some important decisions in respect of the law relating to evidence to be adduced under section 106 of the Evidence Act. In **Radhey Lal and others Vs. Emperor AIR**

1938 All. 252, it was held by the Hon'ble Justice Allsop that an accused person is required to explain the circumstances which appear against him in the evidence and if he cannot or will not do so, he must take the consequences. If he chooses to take up the position that he relies upon the technicality that the whole burden of proof was upon the prosecution and refuses to say anything about the matter, he can hardly be surprised if he is convicted upon the evidence produced by the prosecution, if that proves circumstances from which his guilt can be inferred.

In **Krishan Kumar Vs. Union of India (1960) 1 SCR 452,** it was held that it is not the law of this country that the prosecution has to eliminate all possible defences or circumstances which may exonerate him. If these facts are within the knowledge of accused then he has to prove them. Of course, the prosecution has to establish a *prima facie* case in the first instance. It is not enough to establish facts which give rise to a suspicion and then by reason of section 106 of the Evidence Act to throw the onus on him to prove his innocence. In **Collector of Customs v D. Bhoormall (1972)2 SCC 544** it was held "Prosecution/or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth and as Professor Brett felicitously puts it- "all exactness is a fake". El Dorado of absolute proof being unattainable the law accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment

of such a degree of probability that a prudent man may, on its basis, believe in the existence of a fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case. The other, cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and the weight of the evidence is to be considered- to use the words of Lord Mansfield- in **Batch Vs. Archer (1774) 1**, cowp-63 at page 65 **"according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted."** Since it is exceedingly difficult, if not absolutely impossible, for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of his primary burden.....". The same view has been reiterated in **Mohmmad Amir Kasab @ Abu Mujahid Vs. State of Maharashtra (2012) 9 SCC-1.**

Holmes J. in **Greer Vs. U.S. 245 USR 559** remarked "a presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth."

In **State of West Bengal Vs. Mir Mohammad Umar (2000) 8 SCC 382**, it was observed- "The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilized doctrine although it admits no process of intelligent

reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and society would be casualty."

The observations made in **T. Shankar Prasad Vs. State of A.P. 2004 Cr.L.J. 884** are very relevant, which are excerpted herein below-

"Proof of fact depends upon the degree of probability of its having existed. The standard required for searching the supposition is that if a prudent man acting in any important matter concerning him. Fletcher Moulton L.J. in **Hawkins Vs. Powells Tillery Steel Coal Co. Ltd. 1911(1) KB 988** observed as follows-

"Proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to a particular conclusion."

The said observation has stood the test of time and can now be followed as the standard of proof. In reaching the conclusion the court can use the process of inferences to be drawn from facts produced or proved. Such inferences are akin to presumption in law. Law gives absolute discretion to the court to presume the existence of any fact which it thinks likely to have happened. In that process the court may have regard to the common course of natural events, human conduct, public or private

business vis-a-vis the facts of the particular case. The discretion is clearly envisaged in section 114 of the Evidence Act.

Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court is only applying a process of intelligent reasoning which the mind of a prudent mind would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. Presumption in law of evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the court can draw an inference and that would remain until such inference is either disproved or dispelled.

For the purpose of reaching one conclusion the court can rely on a factual presumption. Unless the presumption is disproved or dispelled or rebutted the court can treat the presumption as tantamounting to proof. However, as a caution of prudence we have to observe that it may be unsafe to use that presumption to draw yet another discretionary presumption unless there is a statutory compulsion. This Court has indicated so in **Suresh Budharmal Kalani v State of Maharashtra (1998(7) SCC 337)** “A presumption can be drawn only from facts and not from other presumptions by a process of probable and logical reasoning”. In **Achara Parambath Pradeepan and others Vs. State of Kerala 2007 (1) Crimes 54 (SC),** it was held that if a person is last seen with the deceased, he must offer an explanation as to how and when he

parted company. Section 106 lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence the court can consider his failure to adduce any explanation as an additional link which completes the chain. The principle has been succinctly stated in **Re Naina Mohammad AIR 1960 Madras 218.**

In **Murli Dhar Vs. State of Rajasthan AIR 2005 SC 2345, Prithi Pal Singh and others Vs. State of Punjab (2012) 1 SCC 10,** after relying on the law as propounded in **State of West Bengal Vs. Mir Mohammad Umar (2000) 8 SCC 382, Shambhu Nath Mehra Vs. State of Ajmer AIR 1956 SC 404, Sucha Singh Vs. State of Punjab (2001) 4 SCC 375 and Sahadevan Vs. State (2003) 1 SCC 534**, it has been held that section 106 Evidence Act does not relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. Section 106 applies to cases where prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In **Sandeep Vs. State of U.P. (2012) 6 SCC 107**, it has been held

that burden of proof regarding facts specially within accused's knowledge lies on him. In **Babu Vs. Babu 2003 SCC (Crl.) 1569 and in Amar Singh Man Singh Suryavanshi Vs. State of Maharashtra (2007) 15 SCC 455** it was held that where husband and wife were living together and at the time of death they were alone in the room, it was for the husband to explain as to how the deceased met her death. In **Tulsi Ram Sahadu Suryavanshi Vs. State of Maharashtra (2012) 10 SCC 373**, it has been held that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as to the most probable position. The above position is strengthened in view of section 114 of the Evidence Act which empowers the court to presume the existence of any fact which it thinks is likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct etc. in addition to the facts of the case. In these circumstances, the principles embodied in section 106 of the Evidence Act can also be utilized. Section 106 however, is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubts, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, has offered an explanation

which might drive the court to draw a different inference.

In **Babu @ Bala Subramaniam & others Vs. State of T.N. (2013) 8 SCC 60,** it was observed as under:-

"Besides it is not contended by A-1 Babu that he was not present in the house when the incident occurred. To this fact situation, section 106 of the Evidence Act is attracted. As to how the deceased received injuries to her head and how she died must be within the exclusive personal knowledge of A-1 Babu. It was for him to explain how the death occurred. He has not given any plausible explanation for the death of the deceased in such suspicious circumstances in the house in which he resided with her and when he was admittedly present in the house at the material time. This circumstance must be kept in mind while dealing with this case. We are not unmindful of the fact that this would not relieve the prosecution of its burden of proving its case. But, it would apply to the case where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless, the accused by virtue of special knowledge regarding such facts, has offered an explanation which might drive the court to draw a different inference. In this case, the law as enunciated in Tulsi Ram's case as referred to *supra* has been relied upon. In **Trimukh Maroti Kirkan Vs. State of Maharashtra 2007 SC Criminal Rulings 384**, it was held by their Lordships of the Hon'ble Supreme Court that if an offence takes place inside the

privacy of the house and in such circumstances where the assailants have all the opportunities to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of accused if strict principle of circumstantial evidences is insisted upon by the courts. It was further held that when death had occurred in the custody of the accused, he is under an obligation to give a plausible explanation for the cause of death of the deceased in his statement under section 313 Cr.P.C. and mere denial of the prosecution case coupled with absence of any explanation will be inconsistent with the innocence of the accused but consistent with the hypothesis that the accused is a prime accused in the commission of murder. The same view was taken in **Mohibur Rehman Vs. State of Assam (2002) 6 SCC 715, Amit @ Ammu Vs. State of Maharashtra (2003) 8 SCC 93, State of Rajasthan Vs Kashi Ram AIR 2007 SC 144 and Santosh Kumar Singh Vs. State through C.B.I. (2010) 9 SCC 747 (Priyadarshini Mattoo's Case). In Rajendra Prahlad Rao Wasnik Vs. State of Maharashtra 2012 (77) ACC 153 (SC),** it has been held that once the prosecution proved that accused and victim were seen together, it was for the accused to explain the circumstances. In its latest judgment in **Ravirala Laxmaiah Vs. State of Andhra Pradesh (2013) 9 SCC 283**, it has recently been ruled that where the accused has been seen with the deceased victim (last seen theory), it becomes the duty of the accused to

explain the circumstances under which the death of the victim has occurred. (*Vide* **Nika Ram Vs. State of H.P. (1972) 2 SCC 80, Ganesh Lal Vs. State of Maharashtra (1992) 3 SCC 106 and Ponnusamy Vs. State of T.N. (2008) 5 SCC 587).** Thus the quintessence of case laws in a thumb-nail-sketch is that the law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty of the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would, undoubtedly, be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

P.W.-10 Bharti Mandal has recounted that on 16.05.2008 at about 06:00 A.M. she reached as usual at Flat No. L-32, Jalvayu Vihar and rang the

call-bell of the house but no response came from inside. After pressing the call-bell second time, she went up-stairs to take mopping bucket. Thereafter, she put her hand on the outer grill/mesh door but it did not open. Subsequently, she again pressed the call-bell and then Dr. Nupur Talwar after opening the wooden door came near the grill door/mesh door situated in the passage and enquired about the whereabouts of Hemraj to which she replied that she had no idea of him and then Dr. Nupur Talwar told her that Hemraj might have gone to fetch milk from Mother-Dairy after locking the middle grill/mesh door from outside and she could wait until he returned. Thereupon, she asked Dr. Nupur Talwar to give her keys so that she may come inside the house after unlocking the same and then Dr. Nupur Talwar told her to go to the ground level and she would be throwing keys to her from balcony. Accordingly, when she came down the stairs and reached the ground level, Dr. Nupur Talwar threw keys from balcony and told her that the door is not locked and only latched from outside and then she came back and opened the latch of the mesh door of the passage and came inside the house. Thereafter, Dr. Nupur Talwar told her "*Dekho Hemraj Kya karke gaya hai" (Look here, what has been done by Hemraj).* When maid Smt. Bharti went in Aarushi's room she saw that dead body of Aarushi was lying on the bed and covered with a white bed sheet and her throat was slit. Mr. Mir has criticized the evidence of Mrs. Bharti Mandal on the fulcrum that she was thoroughly tutored before stepping into the witness box and she has admitted this fact in her

cross-examination and therefore, no reliance can be placed upon her testimony. Her testimony has also been animadverted on the premise that she has admitted in her cross-examination that for the first time in the court she has deposed that thereafter she came at the gate and placed her hand on the outer mesh door and then it opened and she has not given such statement to the investigating officer and thus she has made improvements while giving statement in the court which is nothing but an afterthought as a result of tutoring. Mr. Mir has counted upon **Anil Prakash Shukla Vs. Arvind Shukla (2007) 9 SCC 513** in support of his arguments but I find myself unable to countenance with the submission of the learned counsel. In the said case the order of acquittal was recorded by the Hon'ble High Court of Allahabad against which appeals were filed by the complainant and the State Government. The Hon'ble Supreme Court was pleased to hold that P.W.-1 Anil Prakash was not a natural witness, he had animosity against the accused Arvind Shukla, his presence at the scene of occurrence was by a sheer chance and the deceased Atul Prakash had stated before the investigating officer 20 days after the incident that he had been tutored to give an incorrect statement before the Magistrate and the Magistrate was neither cited as witness in the charge-sheet nor produced in the court and hence dying declaration was rightly disbelieved by the Hon'ble High Court. It is well settled law that in an appeal against the order of acquittal, the appellate court normally does not disturb the findings of acquittal unless the

judgment of acquittal is perverse as the acquittal strengthens the presumption of innocence of the accused (*Vide* **Narendra Singh Vs. State of M.P. (2004) 10 SCC 699).** In **State of Goa Vs. Sanjay Thakran and other (2007) 2 SCC (Crl.) 162** it has been held that appellate court can review the evidence and interfere with the order of acquittal only if the approach of the lower court is vitiated by some manifest illegality or the decision is perverse and the court has committed manifest error of law and ignored the material evidence on record. In that case, the law as laid down in **Chandrappa and others Vs. State of Karnataka 2007 (58) ACC 402 (SC)** was relied on. The same view has been reiterated in **Babu Vs. State of Kerala (2010) 9 SCC 189.**

In the case in hand Mrs. Bharti Mandal has nowhere stated that before giving statement to the investigating officer, she was tutored by anyone. “The facts and circumstances often vary from case to case, the crime situation and the myriad psychic factors, social conditions and people's life-styles may fluctuate, and so, rules of prudence relevant in one fact-situation may be inept in another. We cannot accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases” (*vide* **Rafiq Vs. State of U.P. AIR 1981 SC 559).** In **Haryana Financial Corporation Vs. M/s Jagdamba Oil Mills AIR 2002 SC 834, Islamic Academy of Education & another Vs. State of**

Karnataka & others (2003) 6 SCC 697, P.S. Sathappan Vs. Andhra Bank Ltd. (2004) 11 SCC 672, M/s Zee Telefilms Ltd. & another Vs. Union of India & others 2005 (2) SCJ-121, Ramesh Chand Daga Vs. Rameshwari Bai 2005 (3) SCJ-1, it has been held that observations of the courts could not be read as provisions of statute. The observations of the court are to be read in the context in which they appear. Judges interpret statutes and do not interpret judgments. In **B. Shyama Rao Vs. U.T. of Pondicherry AIR 1967 SC 1480 (Constitution Bench), R.L. Jain (Dead) by LRs Vs. Delhi Development Authority (2004) 3 ACE 235 and State of Rajasthan Vs. Ganesh Lal AIR 2008 SC 690,** it was held that reliance on a decision without looking into the factual background of the case before it, is clearly impermissible. A decision would be a precedent on its own facts. Each case presents its own features. A decision is an authority for what it actually decides. What is of the essence in a decision is ratio and not every observation found therein nor what logically follows from various observations made in the judgment.

In **M/s Amar Nath Om Prakash Vs. State of Punjab AIR 1985 SC 218 and Union of India & others Vs. Arul Mozhi Iniarasu AIR 2011 SC 2731,** it was observed that observations of court are not to be read as Euclid's Theorem or provisions of statute. Observations must be read in context they are made. Blind reliance on decision by court is improper.

In **Narmada Bachao Aandolan Vs. State of M.P. AIR 2011 SC 1989 (3JJ) and Rajeshwar Vs. State of Maharashtra 2009 Cr.L.J. 3816 (Bombay-FB),** it has been held that disposal of cases by blindly placing reliance upon a decision is not proper. A little difference in facts or additional facts may make a lot of difference to the precedential value of a decision. Thus, the above case law cited by learned counsel is of no help to the accused persons as being based on different contextual facts and circumstances and therefore, that citation is an act of supererogation.

One must not forget that P.W.-10 Bharti Mandal is totally illiterate and bucolic lady from a lower-strata of the society and hails from Malda District of West Bengal who came to N.O.I.D.A. to perform menial job to sustain herself and family and therefore, if she has stated that she has given her statement on the basis of tutoring, her evidence cannot be discarded or rejected. The accused Dr. Nupur Talwar has admitted in her answers to question nos. 18, 19, 22 and 23 under section 313 Cr.P.C. that the evidence given by Mrs. Bharti Mandal is correct. However, she has taken plea that the evidence of Mrs. Bharti Mandal to the effect that she had put her hand on the outer mesh door is incorrect as she has not stated this fact to the investigating officer. In **Mohan Lal and another Vs. Ajit Singh and another AIR 1978 SC 1183** it has been held that under section 313 Cr.P.C. it is permissible to accept that part of the statement which accords with the evidence on record and to act upon it. It was further held that while considering

the statement of the accused under section 313 Cr.P.C. it is permissible to reject the exculpatory part of the statement if it is disproved by the evidence on record and to act upon it. In **Waman Vs. State of Maharashtra 2011 Cr.L.J. 4827 (SC),** it was held that the testimony of a witness cannot be disbelieved merely because of some omission in statement under section 161 Cr.P.C. and the evidence before the court. In **Alam Gir Vs. State (N.C.T.) of Delhi AIR 2003 SC 282,** it was observed that evidence of, otherwise credit-worthy witness cannot be discarded merely because it was not available in statement under section 161 Cr.P.C. In **Achara Parambath Pradeepan and others Vs. State of Kerala 2007 (1) Crimes 54 (SC),** it was held that it would be too much to expect of any person to say everything in his statement before the police. To see a person by face is one thing but to know him by name is different. Some improvements in the testimony of the witness could not lead to rejection thereof in its entirety. In **Govind and others Vs. State of M.P. AIR 1994 SC 826,** it was held that if the witness had not given details of occurrence in her statement under sections 161, 164 Cr.PC then it will not be a ground to reject her evidence. In **Jagdish Narayan Vs. State of U.P. 1996 JIC 388 (SC) and Lal Jit Singh Vs. State of U.P. 2001 S.C.Cr.R 297 (3JJ)** it has been held that omissions in the statements given to police if not material will not amount to contradiction to impeach the version. In **State of U.P. Vs. Ram Swarup 1997 JIC 1132 (DB),** it has been held that minor contradictions are not to be given much importance.

In **Shyam Sunder Vs. State of Chhattisgarh (2002) 8 SCC 39** it was observed that where an incident is narrated by the same person to the different persons on different occasions some difference in the mode of narrating the incident is bound to arise. But such differences do not militate against the trustworthiness of the narration unless the variations can be held to be so abnormal or unnatural as would not occur if the witness has really witnessed what he was narrating. In **Leela Ram Vs. State of Haryana 2000 (40) ACC 34 (SC),** it was held that "when an eye-witness is examined at length, it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant detail. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But court should bear in mind that it is only when the discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence……." "It is common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence, it is not sufficient to impair the credit of the witness. No doubt section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement, but a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness." In **Sukh Dev Yadav & others Vs.**

State of Bihar 2001 SCC (Crl.) 1416, it was observed that there would hardly be a witness whose evidence does not contain some amount of exaggerations or embellishments. Sometimes there is a deliberate attempt to offer the exaggerated evidence and sometimes the witnesses in their over anxiety to do better from the witness box detail out an exaggerated account. Minor variations in prosecution evidence are of no value if the evidence in its entirety appears to be trustworthy.

In **Sunil Kumar Vs. State Government of N.C.T. of Delhi 2004 (48) ACC 27 (SC)** it was observed that slight insignificant omissions could neither be termed as improvement in statement or contradictions. Testimony recorded in court after lapse of considerable period cannot be expected to be exact and precise mathematical reproduction of facts. In **Umar Daraz & others Vs. Nihal Singh & others 1965 AWR 489,** it was observed that the art of “x-bamboozling” a witness has attained the high degree of perfection. For these reasons no importance should be given to the so called admission.

In **Jai Shree Yadav Vs. State of U.P. 2004 ALJ 3232 (SC),** it has been held when witness is subjected to lengthy arduous cross-examination over a lengthy period of time, there is always a possibility of the witness committing mistakes, which can be termed as omissions, improvements and contradictions and therefore, those infirmities will have to be appreciated in the background of ground realities which makes the witness confused because of the filibustering tactics of the cross-

examining counsel. In **Mata Deen Vs. State of U.P. 1979 Allahabad Criminal Rulings 2 SOC (SC),** it has been held that statements given to I.O. are supposed to be brief and the detailed statements are given in the court.

In **Zwinglee Ariel Vs. State of M.P. AIR 1954 SC 15, Nisar Ali Vs. State of U.P. AIR 1957 SC 366, Ugar Ahir Vs. State of Bihar AIR 1965 SC 277, Sohrab Vs. State of M.P. AIR 1972 SC 2020, Bhagwan Tana Patil Vs. State of Maharashtra (1974) 3 SCC 536, Balaka Singh Vs. State of Punjab (1975) 4 SCC 511, S.G.P. Committee Vs. M.P. Das Chela (1998) 5 SCC 157, Krishna Mochi Vs. State of Bihar (2002) 6 SCC 81, Nathu Singh Yadav Vs. State of M.P. (2002) 10 SCC 366, Sucha Singh and others Vs. State of Punjab (2003) 7 SCC 643, Israr Vs. State of U.P. 2004 AIR SCW 6916, Jakki Vs. State (2007) 9 SCC 589, Kulvinder Singh Vs. State of Punjab (2007) 10 SCC 455, Ganesh Vs. State of Karnataka (2008) 17 SCC 152, Dinesh Singh Vs. State of U.P. 2008 SCCrR 1201, Dalbir Singh Vs. State of Haryana AIR 2008 SC 2389, Jaya Seelan Vs. State of T.N. (2009) 12 SCC 275, Prem Singh Vs. State of Haryana (2009) 14 SCC 494, Mani Vs. State (2009) 12 SCC 288, Animi Reddy Venkata Ramana and others Vs. P.P. High Court of A.P. 2008 (61) ACC 703 (SC) and Balraje Vs. State of Maharashtra (2010) 6 SCC 673**, it has been held that the maxim *"Falsus in uno, falsus in omnibus"* is not applicable in India.

In **State of Andhra Pradesh Vs. Kanda Gopaludu 2005 (53) ACC 772 (SC)** it was observed that every discrepancy in statement of witness cannot be treated as fatal. In **B.K. Channappa Vs. State of Karnataka 2007 (2) Crimes 171(SC),** it has been held that in a searching lengthy cross-examination, some improvements, contradictions and omissions are bound to occur which if not serious and vital would not permit to discard the substratum of the prosecution case. In **Indra Pal Singh Vs. State of U.P. 2009 Cr.L.J. 942 (SC),** it has been held that giving undue importance and acquitting the accused on insignificant contradictions is not proper. In **State of U.P. Vs. Krishna Master 2010 Cr.L.J. 3889 (SC),** it has been held that discrepancies normally exists. They are due to errors of observations, mental disposition, shock and horror at the time of incident. Unless they go to the root of matter, such discrepancies do not make evidence unreliable.

Following the law as expressed in **State Vs. Sarvanana (2008) 17 SCC 587** and **Sunil Kumar Sambhu Dayal Gupta Vs. State of Maharashtra (2010) 13 SCC 657**, it has been held in **Ravi Kapur Vs. State of Rajasthan AIR 2012 SC 2986** that if variation in statements of witnesses is not material to affect the prosecution case then it has to be ignored.

In **Sahabuddin Vs. State of Assam 2013 (80) ACC 1002 (SC),** it has been ruled that every variation or immaterial contradiction cannot provide advantage to the accused. It is a settled principle of

law that while appreciating the evidence, the court must examine the evidence in its entirety upon reading the statement of a witness as a whole and if the court finds the statement to be truthful and worthy of credence, then every variation or discrepancy particularly which is immaterial and does not affect the root of the case of the prosecution would be of no consequences. In that case also, the law as laid down in **State Vs. Sarvanan (2008) 17 SCC 587** has been followed.

In **Sampath Kumar Vs. Inspector of Police, Krishnagiri (2012) 4 SCC 124,** it was observed that minor contradictions are bound to appear in statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person. Discrepancies in testimony of witness caused by memory lapses are acceptable. In that case, the law as laid down in **Narayan Chetram Chaudhary Vs. State of Maharashtra (2000) 8 SCC 457** and **State of H.P. Vs. Lekhraj (2000) 1 SCC 247** was relied on. In Lekhraj's case, it was observed “The criminal trial cannot be equated with a mock scene from a stunt film ……. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The traditional dogmatic hyper-technical approach has to be replaced by rational, realistic and genuine approach for administering justice in a criminal trial. The Criminal Jurisprudence cannot be considered to be a Utopian thought but have to be considered as part and parcel of the human civilization and realities of life. The courts cannot ignore the erosion in values of life which are a

common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and the mankind."

In **Ramesh Harijan Vs. State of U.P. (2012) 5 SCC 777 and Kuria Vs. State of Rajasthan (2012) 10 SCC 433**, it has also been held that it is duty of the court to unravel the truth under all circumstances. Undue importance should not be given to minor discrepancies which do not shake the basic version of the case. In **Jagroop Singh Vs. State of Punjab AIR 2012 SC 2600,** it has been held that omissions and contradictions in evidence of witness affect credibility of witness only if omission and contradiction affect core of the prosecution case.

In **Lal Bahadur Vs. State (N.C.T. of Delhi) (2013) 4 SCC 557,** it has been held that marginal variations in the statements of a witness cannot be dubbed as improvement as the same may be elaboration of the statement made by the witness earlier. In view of the above legal propositions, the evidence of P.W.-10 who is completely disinterested witness having no animosity or rancour against the accused, cannot be brushed aside as unworthy of belief.

Unequivocally, white discharge was found in the vaginal cavity of Ms. Aarushi at the time of postmortem examination of her dead body by Dr. Sunil Kumar Dohre and this fact has not been gainsaid by the accused persons in their statements under section 313 Cr.P.C. Presence of white

discharge in the vaginal cavity of Ms. Aarushi denotes that she was engaged in sexual intercourse, albeit, no spermatozoa was found in the vaginal swab. This fact gets strengthened from another fact that the private parts of Ms. Aarushi were cleaned with water and therefore, the bed-sheet below the pelvic region was found wet and no biological fluid or semen could be detected while examining the bed-sheet material Exhibit-55 by P.W.-6 Dr. B.K. Mohapatra, the Senior Scientific Officer Grade-I of C.F.S.L., New Delhi. Dr. Mohapatra has clearly deposed that in the said material Exhibit no urine could be detected. He has proved his biological examination and DNA profiling report dated 15.07.2010 as Exhibit-ka-14 in which it has been also mentioned that the designated circular area of bed-sheet Exhibit-1(material Exhibit-55) did not yield DNA for analysis. If both the deceased could not have been found engaged in sexual intercourse there was no reason to make endeavour that factum of sexual intercourse be not mentioned in the postmortem examination report of Ms. Aarushi. P.W.-7 K.K. Gautam has deposed that he is acquainted with Dr. Sushil Chaudhary of Eye Care Hospital, Sector-26, N.O.I.D.A. who on 16.05.2008 made a telephone call to him and informed that the daughter of Dr. Rajesh Talwar who happens to be the brother of his friend Dr. Dinesh Talwar has been murdered and the dead body has been sent for postmortem examination and therefore, he should help him. He has also stated that Dr. Sushil Chaudhary has also desired that the fact of rape should not be mentioned in the postmortem

examination report but he expressed his inability on this point. P.W.- 17 Deepak Kanda, Nodal Officer, Airtel, New Delhi has deposed that User ID DSL 01205316388 is in the name of Mrs. Nupur Talwar, R/o L-32, Sector-25, N.O.I.D.A. and its land line telephone number is 01204316388. P.W.-19 Deepak, Nodal Officer, Vodafone Mobile Services Ltd., New Delhi has deposed that mobile no. 9899555999 is in the name of K.K. Gautam of Invertis Institute of Studies and mobile no. 9999101094 is in the name of Dr. Sushil Chaudhary. P.W.-21 R.K. Singh, Nodal Officer, Bharti Airtel Ltd., New Delhi has proved that mobile nos. 9910520630, 9871557235, 9871625746, 9810037926 are in the name of Dr. Rajesh Talwar. He has also proved that mobile no. 9810302298 is in the name of Dr. Dinesh Talwar. P.W.-22 M.N. Vijayan, Nodal Officer, Tata Tele Services Ltd., New Delhi has proved that mobile no. 9213515485 is registered in the name of Dr. Rajesh Talwar. P.W.-19 has deposed that as per Exhibit-ka-25 on 16.05.2008 a call was made at 11:15:06 hours from mobile no. 9810302298 to mobile no. 9999101094. Duration of this call was 105 seconds. He has also stated that on 16.05.2008 a call was made from 9999101094 to mobile no. 9899555999 at 11:57:36 hours and its duration was 144 seconds. On the same date a call was made from 9999101094 to mobile no. 9810302298 at 12:07:56 hours and it lasted for 18 seconds. On the same date a call was made from 9999101094 to mobile no. 9899555999 at 12:08:44 hours for 128 seconds. On the same date a call was made from 9810302298 to mobile no. 9999101094 at 15:02:08

hours and its duration was 34 seconds. On the same date a call was made from 9810302298 to mobile no. 9999101094 at 15:06:00 hours and its duration was 14 seconds. On the same date a call was made from mobile no. 9899555999 to mobile no. 9999101094 at 18:57:11 hours and its duration was 66 seconds and at 18:57:15 hours and its duration was also 66 seconds. On the same date a call was made from mobile no. 9999101094 to mobile no. 9810302298 at 19:26:17 hours and its duration was 40 seconds. Thus, it becomes evident that Dr. Sushil Chaudhary, Dr. Dinesh Talwar and K.K. Gautam were in touch with each other on telephones over this issue. Call-detail records have been duly proved. Certificate under section 65-B of the Evidence Act has also been proved by P.W.-19. Recently, in **Prashant Bharti Vs. State (N.C.T. Of Delhi) (2013) 9 SCC 293** it has been held that evidence of mobile phone call-details is conclusive in nature for all intents and purposes. In that decision the law as laid down in **Gajraj Vs. State (N.C.T. Of Delhi) (2012) 1 SCC (Cri.) 73 = (2011) 10 SCC 675** was relied on in which it has been held that existence of even serious discrepancy in oral evidence has to yield to conclusive scientific evidence (Call Detail Records). In **2005 (3) Crimes 87 (SC),** it has been held that print-outs taken from computer/server are admissible and they are to be treated as authentic. It is pertinent to mention here that before 16.05.2008 they have hardly made telephone calls to each other and thus it is fully established that they were in contact with each other regarding non-disclosure of factum of sexual intercourse in the

postmortem examination report of Ms. Aarushi. Dr. Sunil Kumar Dohre has also stated that when he was on way to postmortem examination room then Dr. Dinesh Talwar gave him a cell-phone and told him to talk with Dr. T.D. Dogra of A.I.I.M.S. Although, Dr. Dohre had only stated that Dr. T.D. Dogra had told him that blood samples of the deceased Aarushi be taken but it appears that Dr. Dogra had asked him not to mention in the postmortem examination report about the evidence of sexual intercourse and this fact has been deliberately suppressed by Dr. Dohre.

If Dr. Dohre has not mentioned in the postmortem examination report that opening of vaginal cavity was prominent and the vaginal canal was visible; that the vaginal orifice of Aarushi was wide and open and that vaginal canal could be seen; that the hymen of the deceased was old, torn and healed and these facts were not stated to the earlier investigating officers on 18.05.2008, 18.07.2008 and 03.10.2008 then it cannot be said that his statement cannot be relied upon. Since questions regarding the condition of vagina were not specifically asked by the earlier investigating officers and therefore, there was no occasion to tell about these facts to them. In **Jaswant Singh Vs. State of Haryana (2000) 4 SCC 484** it has been held that an omission in order to be significant must depend upon whether the specific question, the answer to which was omitted, was put to the witness. If the condition of vagina, vaginal orifice was not mentioned in postmortem examination report and it was also not mentioned that hymen

was old, torn and healed then it shows negligence or deliberate act on the part of Dr. Dohre who appears to have suppressed these material facts in the postmortem examination report only because he was approached by Dr. T.D. Dogra and Dr. Dinesh Talwar of his professional fraternity who remained in touch with him before postmortem examination.

A man may tell a lie but the circumstances can never. Both the accused have admitted in their written statements under section 313 Cr.P.C. that on some occasions Dr. Nupur Talwar removed the key from Ms. Aarushi's lock and kept the same with her. It is an admitted fact that the door of Ms. Aarushi's bed-room was having click shut automatic lock and as such it could have been opened either by the parents with the key from outside or by Ms. Aarushi from inside. P.W.-29 Mahesh Kumar Mishra has deposed that when he had talked to Dr. Rajesh Talwar then he had told him that in the preceding night at about 11.30 P.M. room of Ms. Aarushi's door was locked from outside and after taking the key he had gone to sleep. It is not the case of the accused that on that fateful night the key of bed-room was with Hemraj or that they had opened the door with the key and therefore, it becomes clear that the room was opened by Ms. Aarushi herself. It was not possible either for Hemraj or an outsider to unlock the door without the key. Mere absence of spermatozoa in the vaginal swab cannot rule out possibility of sexual intercourse as has been held in **Prithi Chand Vs. State of Himachal Pradesh 1989 SCC (Cri.) 206**. It is established that private parts of deceased Ms. Aarushi were cleaned and

because of that bed-sheet below the pelvic region was found wet and hence presence of spermatozoa can hardly be seen or found.

In **Dudh Nath Pandey Vs. State of U.P. AIR 1981 SC 911, State of U.P. Vs. Babu Ram (2000) 4 SCC 515, Munshi Prasad Vs. State of Bihar 2001 (43) ACC 1001 (SC), State of Haryana Vs. Ram Singh AIR 2002 SC 620,** it has been held that the credibility of defence witnesses stands on the same footing on which prosecution witnesses stand and there is no distinction between the two. The defence witnesses are entitled to equal treatment with the witnesses of prosecution. However, the evidence of D.W.-3 Dr. Urmil Sharma and D.W.-4 R.K. Sharma does not inspire confidence on this aspect. D.W.-3 has stated in her cross-examination that if male has undergone operation of vasectomy ordinarily no spermatozoa shall be found in his discharge. She has also stated that if there is no spermatozoa in a male-discharge then spermatozoa will not be seen. It is not to be forgotten that both the accused are doctors by profession and therefore, they were in position to destroy the evidence of performance of sexual intercourse. D.W.-3 Dr. Urmil Sharma is completely an interested and partisan witness who has appeared in the court to depose in favour of the accused persons and therefore, her evidence cannot be relied upon. She has admitted in her cross-examination that she had met the accused persons 8-10 years back. She also knows Dr. Dinesh Talwar because they both work in Apollo Hospital. She has also admitted in her cross-examination that she has

not examined the white discharge of this case and without microscopic examination it will be difficult to say as to whether the white discharge in the vagina is from outsource or not and if the doctor conducting postmortem examination has mentioned about the presence of white discharge in the postmortem examination report then question of examination by microscope will not arise and thus the evidence of D.W.-3 cannot be believed. D.W.-4 Dr. R.K. Sharma has also admitted that white discharge has been shown in the postmortem examination report of Ms. Aarushi. His statement to the effect that if during the process of setting in of rigor mortis vagina is cleaned with cotton or soft cloth then injuries on external and internal part of vagina may come cannot be believed at all.

P.W.-36 Dr. Naresh Raj has mentioned in his postmortem examination report that the penis of Hemraj was found swollen but if he has stated before the court that the swelling was because either he had been murdered in the midst of sexual intercourse or just before he was about to have sexual intercourse is nothing but quite preposterous and really a medical blasphemy as the reasons ascribed by him are ludicrous. D.W.-4 Dr. R.K. Sharma has rightly pointed out in his statement that in the postmortem examination report of Hemraj, Dr. Naresh Raj has written that eyes were protruding out, blood oozing out of mouth and nostrils, stomach was distended and there was swelling in the penis which are all signs of putrification and therefore, swelling in the penis and scrotum was an account of putrification of the dead body and not because of

sexual intercourse. Be that as it may, the fact remains that the penis of Hemraj was found swollen at the time of postmortem examination of his dead body. Death of both the deceased has taken place inside the flat of the accused persons and therefore, mode and manner of committing the murder of the deceased are within the especial knowledge of the accused which they could not explain. The prosecution cannot be supposed to give evidence of that fact which is impossible for it to be given because no eye witness except the accused persons was present at the time of the murder of the deceased persons. To repeat at the cost of repetition, in all human affairs absolute certainty is a myth and as **Professor Brett** felicitously puts it- “all exactness is a fake”.

If Mr. A.G.L. Kaul has mentioned in his closure report that no blood of Hemraj was found on the bed-sheet and pillow of Aarushi, there is no evidence to prove that Hemraj was murdered in the room of Aarushi, scientific tests on Dr. Rajesh Talwar and Dr. Nupur Talwar have not conclusively indicated their involvement in the crime, the exact sequence of events in the intervening night of 15/16.05.2008 to 6.00 A.M. in the morning is not clear, the offence has taken place in an enclosed flat, hence, no eye-witnesses are available and the circumstantial evidence collected during the course of investigation have critical and substantial gaps and there is absence of clear-cut motive and non recovery of any weapon of offence and their link either to the servants or to the parents, then on that ground no dent is created on the case of

prosecution. The court is not bound by the said observations/findings of the investigating officer Mr. Kaul. The learned Special Judicial Magistrate (C.B.I.), Ghaziabad after disagreeing with the reasons for submitting closure report, summoned the accused persons to stand trial. That order has finally been affirmed by the Hon'ble Supreme Court and therefore, from the said findings of the investigating officer no benefit can be derived by the accused persons.

P.W.-6 Dr. B.K. Mohapatra has mentioned in his report Exhibit-ka-6 that Exhibit-21 was one pillow with printed multi coloured pillow-cover having few faint brown stains. In Exhibit-kha-45 at page 33 it has been written that one blood stained pillow with pillow-cover was recovered from the room of Ms. Aarushi. Dr. Mohapatra has mentioned in his report Exhibit-ka-6 at para no. 8.12 IV that partial DNA profiles generated from the source of Exhibits-4(blood scrappings), 6-b (glass bottle), 9 (blood scrappings) and 21 (pillow) are consistent with the DNA profiles generated from the source of Exhibit-11 (blood stained threads) and Exhibit-24 (piece of wall having impression of palm print) at the amplified loci. In Exhibit-kha-17 on which reliance has been placed by the accused, it has been mentioned at page no. 11 (paper no. 154-Aa/12) in answer to question no. 2 that partial DNA profiles generated from Exhibits-4 (blood scrappings), 6-b (glass bottle), 9 (blood scrappings) and 21 (pillow) are consistent with the DNA profiles generated from the source of Exhibit-11 (blood stained threads) and Exhibit-24 (piece of wall having impression of palm

print) at the amplified loci and thus it becomes abundantly clear that Hemraj's DNA has been found on the pillow with cover which was recovered from the room of Ms. Aarushi as per letter dated 04.06.2008 Exhibit-kha-45 of S.P. (C.B.I.).

Dr. M.S. Dahiya, although, has not mentioned in his report Exhibit-ka-93 that he inspected the scene of crime but P.W.-39 Mr. A.G.L. Kaul has deposed that in the case diary dated 09.10.2009 he has mentioned that scene of crime was inspected along with Dr. M.S. Dahiya. If inspector Arvind Jaitley who accompanied Dr Dahiya has not been produced then no adverse inference can be drawn. There is no requirement of law to associate public witness at the time of inspection of the crime scene. I.O. Mr. Kaul also accompanied Dr. Dahiya at the time of inspection of scene of crime and therefore, plurality of evidence was not required. Subornation of witnesses has been frowned upon by the Hon'ble Supreme Court. Dr. Dahiya is a reputed expert of forensic science. He is credited to have given reports in very important cases which he has detailed in his evidence. He is also the author of a book “Crime Scene Management”. He has stated on oath that on 09.10.2009 he had visited the scene of crime along with the investigating team and then he had prepared his report after having discussion with the investigating officer. There is nothing to suggest that such a witness holding high post and an eminent expert will succumb to the pressure of C.B.I. to give his report Exhibit-ka-93 against the accused persons with whom no animosity or prejudice has been shown. In view of the findings

returned in the preceding paragraphs the report Exhibit-ka-93 of P.W.-38 Dr. M.S. Dahiya cannot be castigated as bereft of logic and rather the report is compatible with the circumstances delineated herein above. Thus, the motive of the crime also stands proved. Mind is, indeed, a peculiar place and the working of human mind is often inscrutable. Motive is the moving power which impels action or a definite result or to put it differently motive is that which incites or stimulates a person to do an act (*vide* Chandra **Prakash Shahi Vs. State of U.P. (2000) 5 SCC 152).** In **State of Karnataka Vs. David Razario and others (2002) 7 SCC 728,** it has been held that where a credible evidence exists on record to establish guilt of the accused, it is not necessary to find out the motive of the crime. In **State of M.P. Vs. Digvijay Singh AIR 1981 SC 1740, Vinod Kumar Vs. State of M.P. 2002 (44) ACC 994 (SC), Thamman Kumar Vs. U.T. of Chandigarh (2003) 6 SCC 380, State of H.P. Vs. Jeet Singh (1999) 4 SCC 370 and Suresh Chand Bahri Vs. State of Bihar AIR 1994 SC 2420,** it has been held that absence of motive would not in any manner destabilize the prosecution case. In **Mani Kumar Thapa Vs. State of Sikkim (2002) 7 SCC 157, Sahadevan @ Sagadevan Vs. State 2003 SCC (Crl.) 382**, it has been held that if the circumstances are proved beyond doubt, then the absence of motive would not hamper a conviction. In **Ujagar Singh Vs. State of Punjab (2007) 13 SCC 90,** it was held “it is true that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence of

motive would dislodge the entire prosecution story is perhaps giving this one factor an importance which is not due and (to use the cliché) the motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy." In **Mohmmad Adil Vs. State 2009 CrLJ NOC 424** it was held that motive if proved makes the case stronger but its absence does not render evidence unworthy of acceptance. Proof of motive in a case based on circumstantial evidence is of no consequence when evidence is strong and circumstances speak loudly, boldly and clearly. There would be a single circumstance so strong, weighty and conclusive that unless satisfactorily explained, guilt of the accused could be drawn from it. In **Jagdish Vs. State of M.P. 2010 (1) U.P. Criminal Rulings 391 (SC),** it has been held that in a case of circumstantial evidence motive does not have extreme significance. In absence of motive, the conviction based on circumstantial evidence can in principle be made. In **Pradeep Vs. State (N.C.T. of Delhi) 2011 Cr.L.J. 4115 (DB-Delhi)** it was held that absence of motive in a case based on circumstantial evidence is of no consequence, if circumstances relied upon by the prosecution are beyond reasonable doubt. In **Ajit Singh Harnam Singh Gujral Vs. State of Maharashtra 2012 (1) ACR 94 (SC),** it has been held that motive is important in case of circumstantial evidence but it does not mean that if prosecution is unable to satisfactorily prove motive, its case must fail. Court cannot enter into the mind of human being. The same view has been taken in **Amitava Banarjee @**

Bappa Banarjee Vs. State of West Bengal 2012 (1) ACR 306 (SC). In **Munish Mubar Vs. State of Haryana (2012) 10 SCC 464,** it was held that evidence regarding existence of motive which operates in mind of an assassin is very often not within the reach of others. Motive may not even be known to victim. Motive may be known to assassin and none else may know what gave birth to such evil thought in his mind. Recently, in **Sanaullah Khan Vs. State of Bihar (2013) 3 SCC 52,** it has been held that where other circumstances lead to the only hypothesis that accused has committed the offence, court cannot acquit the accused of offence merely because motive for committing offence has not been established.

It is a matter of common knowledge that many a murders have been committed without any known or prominent motive. Mere fact that prosecution has failed to translate that mental disposition of the accused into evidence does not mean that no such mental condition existed in the mind of the assailant. Recently, in **Vivek Kalra Vs. State of Rajasthan 2013 (82) ACC 65,** it has been observed that where chain of other circumstances is established beyond reasonable doubt that it is the accused and accused alone who committed the offence it cannot be held in absence of motive that accused has not committed the offence.

Paper no. 182-Aa/2 to 182-Aa/13 was duly prepared by Dr. Dahiya under his own signatures and it has been proved in accordance with the provisions of Evidence Act and therefore, rightly it was marked as Exhibit-ka-93. Accordingly objections

regarding marking of Exhibit are not sustained and overruled.

It has next been contended by Mr. Mir that five different murder weapons viz hammer, sharp-edged weapon, kukri, golf club no. 5 and surgical scalpel surfaced during the investigation; from 16.05.2008 to October 2009 the golf club was never in the spectrum of the investigating agencies; on the basis of the incorrect information supplied by Mr. A.G.L. Kaul, Dr. Dahiya for the first time introduced golf club as one of the murder weapons; Dr. Dahiya mentioned in his report Exhibit-ka-93 that triangular shaped head injury suggest that weapon of assault must have been a golf club but in his evidence he has admitted that I.O. had never showed him any golf club; there is also some possibility of hockey stick to have been used; the golf clubs were taken in possession by C.B.I. on 30.10.2009 but their test identification parade is not accordance with law and hence inadmissible; in the examination report it was found that blood or other biological fluids could not be detected on Exhibits-1 to 12 (12 golf sticks); negligible amount of soil was found sticking in the cavity of the numbers engraved on bottom portion of the head of the golf sticks (golf clubs) marked Exhibit 3 & 5 in comparison to the soil sticking in the cavity of the numbers engraved on bottom portion of the heads of golf sticks (golf clubs & iron putter) marked Exhibits 1, 2, 4, 6, 7, 8, 9, 10, 11 & 12; P.W.-15 Mr. Umesh Sharma has been declared hostile and has stated that in the C.B.I. Office on seeing golf clubs bearing nos. 4 & 5 he has not stated that these very golf clubs had been taken out

by him from the car and kept in the servant quarter of L-32; that when golf club bearing nos. 4 & 5 were shown to him he has stated that he cannot say whether these were the golf sticks bearing nos. 4 & 5; the test identification memo was not explained to him in Hindi and since Mr. Kaul has beaten him up and therefore, he had signed the memo out of fear; that P.W.-16 Mr. Laxman Singh has deposed that Mr. Umesh Sharma took out two golf sticks from bag and stated to Mr. Kaul that these very two golf sticks were kept by him in the servant quarter; that Dr. Dohre for the first time on 28.05.2010 gave statement to the I.O. that blunt injuries were caused by a golf club and he has not stated in his postmortem examination report that injury nos. 1 & 3 can be caused by golf club and only kukri was shown to him by C.B.I.; Dr. Naresh Raj never opined that blunt injuries could be caused by golf club and for the first time in the court he stated that injuries nos. 6 & 7 of Hemraj can be caused by a hard object like a golf stick; that he had not given statement to Mr. H.S. Sachan that injuries nos. 3, 6 and 7 can be caused by a surgical scalpel or a golf club respectively; that both Dr. Dohre and Dr. Naresh Raj had opined as members of the expert committee that blunt injuries could be caused by kukri; Dr. Mohapatra has mentioned in his report Exhibit-kha-37 the golf clubs examined by him resulted in no identification of blood, no DNA, no biological material on any of the golf clubs; that according to report Exhibit-ka-53 of Mr. D.K. Tanwar Exhibit-3 is the wooden golf club, Exhibit-5 is the golf club with the engraving no. 4, Exhibit-6 is the golf club with

the engraving no. 5 and thus golf club bearing engraving no. 5 (Exhibit-6) was having dirt while it has been the case of C.B.I. that golf club bearing engraving no. 5 (Exhibit-6) was used as a murder weapon; that the statement of Mr. Kaul that in the intervening night of 15/16.05.2008 Dr. Rajesh Talwar heard some noise and then he went to the room of Hemraj and picked up one golf stick and thereafter he again heard noise coming from his daughter's room, whereupon he pushed the door which was ajar and found both the deceased in compromising position and then he bludgeoned both of them to death with the golf club but is self-contradictory as in his closure report Mr. Kaul has himself jotted down that the exact sequence of events (in the intervening night of 15/16.05.2008 00.08 mid night to 6:00 A.M. in the morning) is not clear; no evidence has emerged to show the clear role of Dr. Rajesh Talwar and Dr. Nupur talwar, individually in the commission of crime; a board of experts constituted during earlier investigation team has given an opinion that the possibility of the necks being cut by kukri cannot be ruled out, although doctors who have conducted postmortem examination have said that cut was done by surgically trained person with a small surgical instrument; D.W.-4 Dr. R.K. Sharma has deposed that if an injury is caused by the golf stick then a depressed fracture will be caused and the bone will have a depression; this concept is based on Locard's Principle of Exchange; in Ms. Aarushi's or Hemraj's postmortem examination report, it is nowhere mentioned that any of the injuries caused depressed

fractures; in Hemraj's postmortem report the injury no. 7 has been mentioned as having dimension of 8 X 2 cm. which cannot be caused by a golf stick because the bone on the back of the head is round shaped and the surface of the golf stick is flat, therefore, if the golf stick is used in any manner to cause injury then area of the impact shall never be 8 X 2 cm.; in Ms. Aarushi's postmortem examination report the injury nos. 1 & 3 have been mentioned only as fracture but depressed fracture has not been mentioned; therefore, injury no. 1 & 3 on the head of Ms. Aarushi was not caused by the golf club; in postmortem examination report of Ms. Aarushi injury nos. 1 & 3 has been described by Dr. Dohre as a line fracture and therefore, the said injury nos. 1 & 3 could not have been caused by the golf club and thus theory of golf club was introduced for the first time in October 2009, although, set of golf clubs was available but no notice under section 91 Cr.P.C. was ever given to produce the same nor Dr. Rajesh Talwar was questioned about the golf club. It was further submitted that T.I.P. of golf clubs was never conducted in the presence of Judicial Magistrate; that golf clubs were wrapped with a cloth on the middle portion and heads and handles of clubs were exposed and not sealed at all and therefore, possibility of tampering or cleaning at the end of C.B.I. cannot be ruled out and even Malkhana Register has not been produced nor incharge Malkhana was produced to show the proper custody of golf clubs and the entire chain of custody is fraught with suspicion as it has not been proved as to when golf clubs were sent back to C.F.S.L. or to

Mr. D.K. Tanwar and thus the story as depicted by the prosecution is absolutely apocryphal.

It has also been argued by Mr. Mir that the theory propounded by Dr. Dahiya that necks of both the deceased were slit by surgical scalpel is also not worth reliable in view of the fact that expert committee in its report Exhibit-kha-17 dated 06.09.2008 opined that both the head and neck injuries are possible to have been caused by kukri; Dr. Dohre has no where stated on 18.05.2008, 18.07.2008 and 03.10.2008 that injury nos. 2 and 4 may be caused by surgically sharp-edged weapon and for the first time he has stated before the investigation officer on 30.09.2009 and 28.05.2010 that injury nos. 2 and 4 were caused by sharp-edged surgical instrument; the evidence of Dr. Naresh Raj that injury no. 3 of Hemraj may be caused by scalpel cannot be accepted as he has also not stated to Mr. H.S. Sachan that the injuries no. 3, 6 and 7 can respectively be caused by surgical scalpel and golf stick and P.W.-30 Dr. Dinesh has stated in his cross-examination that he does not know what was the syllabus of B.D.S. in the year 1983; that statement of Dr. Chandra Bhushan Singh was neither recorded nor he was produced in the court and D.W.-2 Dr. Amulya Chaddha has stated in his evidence that dentist do not receive any emergency patients who would require treatment with scalpels and mostly dentists keep scalpels in their clinic and not at home and a prosthodontist hardly uses a scalpel and most commonly no. 15 blade is used in the scalpel; the job of orthodontist cannot be performed by a prosthodontist unless he has got the specialization;

the cutting edge of blade no. 15 is 7.8 mm., normally in injuries caused by scalpels one is bound to see slashes and injuries on the necks of the deceased do not have the pattern of slashes and rather they are deep which can be caused by heavy sharp-edged and curved shaped weapon; if scalpel is used in cutting the trachea then the scalpel can break because it has cartilage, cutting of which is not easy; carotid artery of Ms. Aarushi was found cut and it was found very deep and as such cutting with scalpel is very difficult; surgically trained person cannot cut the neck in one stroke with a small instrument and both Dr. Dohre and Dr. Raj have no where stated in the court that cuts on the necks of the deceased were surgical cuts and as such use of surgical scalpel in causing the neck injuries of both the deceased is not proved. In support of his arguments the learned counsel has placed reliance on **State of H.P. Vs. Jai Lal and others (1999) 7 SCC 280, Ramesh Chandra Aggarwal Vs. Regency Hospital Limited and others 2010 (1) ALJ 740 (SC), Madan Gopal Kakkad Vs. Naval Dubey and another (1992) 3 SCC 204, Mohd. Zahid Vs. State of T.N. (1999) 6 SCC 120, Manik Gawali Vs. State of Maharashtra Crl. Appeal No. 292 of 2006 decided by Hon'ble High Court of Bombay on 21.12.2012, Ramkishan Mithan Lal Sharma Vs. State of Bombay AIR 1955 SC 104, Budhsen Vs. State of U.P. 1970 (2) SCC 128, Kanan Vs. State of Kerala (1979) 3 SCC 319, Panna Yar Vs. State of T.N. (2009) 9 SCC 152, Prabir Mondal Vs. State of West Bengal (2010) 1 SCC 386.** These

arguments are more captious than substantial and therefore, have to be accepted to be rejected only. In the postmortem examination report of Ms. Aarushi Exhibit-ka-3 it has been clearly mentioned that injury nos. 1 and 3 are lacerated wounds while injury nos. 2 and 4 are incised wounds. Likewise, in the postmortem examination report of Hemraj Exhibit-ka-88 injury no. 1 has been shown as abrasion, injury nos. 2, 4, 5 as abraded contusions, injury no. 3 has been shown as incised wound and injury nos. 6 and 7 have been shown as lacerated wounds. Thus, injury nos. 1 and 3 of Ms. Aarushi are possible to have been caused by some blunt object and injury nos. 2 and 4 are possible to be caused by any sharp-edged weapon. Likewise, injury nos. 1, 2, 4 and 5 of Hemraj are possible to be caused by dragging, injury nos. 6 and 7 are possible to be caused by a blunt object like golf stick and injury no. 3 is possible to have been inflicted by a sharp-edged weapon. It is regretted that both Dr. Dohre and Dr. Raj have not mentioned in the postmortem examination reports as to which injury was caused by which weapon. This was required to be specifically mentioned in the postmortem examination reports but alas they have not done so for the reasons best known to them. Dr. Dohre has stated at page no. 3 of his cross-examination that since on 18.07.2008 the investigating officer had not asked about the weapons for causing injuries of Ms. Aarushi and therefore, he had not told him. He has further deposed that injury no. 1 and 3 may be caused by blunt object and injuries no. 2 and 4 may be caused by sharp-edged weapon and on

28.05.2010 he had given statement to I.O. that injury no. 1 and 3 may be caused by golf stick and injury no. 2 and 4 may be caused by small surgically sharp weapon. Since the earlier investigating officers had not especially asked him about the weapons which were possibly used and therefore, he could not tell about them to previous investigating officers. P.W.-36 Dr. Naresh Raj has also deposed that injury nos. 1, 2, 4 and 5 are possible to have been caused by dragging on hard surface, injury no. 3 may be caused by sharp-edged weapon like scalpel and injury nos. 6 and 7 may be caused by blunt object like golf stick. If Dr. Raj has not stated on 25.07.2008 to the investigating officer Mr. Sachan that injury nos. 3, 6 and 7 have been caused by surgical scalpel and golf stick respectively then on that ground his testimony cannot be disbelieved. In **State of H.P. Vs. Manohar Thakur 1998 (37) ACC 429 (SC),** it has been held that even if some details are missing in statement to I.O. then it cannot be ground to reject the testimony of the witness. If golf stick and surgical scalpel were not sent to Dr. Dohre and Dr. Raj then on account of this failure or omission it cannot be said that above injuries of both the deceased were not caused by golf stick and scalpel. In **State of U.P. Vs. Ashok Kumar Srivastava AIR 1992 SC 840** it was held that prosecution is not required to meet any and every hypothesis put forward by the accused. It is important to mention that murders of both the deceases were committed by the accused persons and at that time no third person was present there and therefore, it is within their especial knowledge

as to with which weapons the injuries were inflicted upon the deceased persons. The court is not bound by the opinions of the doctors, because after all medical evidence is basically opinionative and is of advisory character. The opinion of a doctor cannot be treated as gospel truth and last word. D.W.-4 Dr. R.K. Sharma has admitted in his cross-examination that if the neck of any person is slit with intent to kill him it will not be necessary to cut the neck layer by layer. He has also admitted that if the size of injury on the head is similar to the dimensions of the golf stick then this injury has been caused by golf stick or not depends on depressed fractures but he had not seen the injuries of both the deceased. He has further stated that the injury as shown in photo material Exhibit-3 above the eye-brow is in OVOID form and the other injury below eye-brow is triangular and oozing of blood is not seen. A specific suggestion has been given before this witness that small cut is not possible by kukri and only chopped wound will be inflicted by kukri. The evidence of Dr. Sharma is not reliable because he has displayed in his website that “lawyers can have our services for their clients for better interpretation of scientific evidence against or for their clients.....” Thus it becomes clear that he gives report in favour of the person from whom he charges fees irrespective of the merit of the case. However, looking to the nature and dimension of injury nos. 1 and 3 of Ms. Aarushi and injury nos. 6 and 7 of Hemraj it is possible that these injuries may have been caused by some blunt object like golf stick and injury nos. 2 & 4 of Ms. Aarushi and injury no. 3 of Hemraj are

possible to be caused by any sharp-edged weapon like scalpel and injury nos. 1, 2, 4 and 5 of Hemraj are possible to be caused by dragging. Dragging marks depend on the manner in which the deceased was carried. There can be no cut and dried formula that dragging marks will come on a particular part of the body.

P.W.-26 Deepak Kumar Tanwar, Senior Scientific Officer, Grade-1, C.F.S.L., New Delhi has deposed that on 10.11.2009 one parcel was sent by biology division to his division and its seal was intact. This parcel was opened on 15.04.2010 and 12 golf sticks were found which were marked as Exhibit-1 to 12. He has further stated that he has examined the golf sticks in terms of letter dated 30.10.2009 and 22.06.2010 of S.P., C.B.I., Dehradun, Camp Office, New Delhi and prepared report dated 13.07.2010 Exhibit-ka-53 and diagrams collectively marked as Exhibit-ka-54. He has further deposed that length of stick Exhibit- 5 is 96 cm., length of head on frontal side is 8 cm., 5.2 cm., 7.5 cm. and 2.5 cm. and on back side it is 7.5 cm. and 3.00 cm. There is a margin on back side whose breadth is 0.50 cm. Tracing measurement of head of Exhibit-5 on frontal side is 5.2 cm. and 8.00 cm. and on back side 7.5 cm. and 3.4 cm. He has also stated that there is a margin on back side whose breadth is 0.50 cm. Likewise, length of stick Exhibit-3 is 104 cm. length of head on frontal side is 8 cm., 2.5 cm., 5.5 cm. and 2.5 cm. Tracing measurement of head of Exhibit-3 was 8 cm. and 3.4 cm. In the report Exhibit-ka-53 it has been mentioned that Exhibit-5 is a golf stick which bears the engraved

writings/markings “4GP OVERSIZE GOLF PAK XL 02” and the stick bears the printed writings “GP ACTION PLUS PRECISION GRAPHITE BY GOLF PAK MID FLEX”. It has also been written in the said report that golf sticks (golf club and iron putter) marked Exhibits- 1 to 12 reveal that negligible amount of soil was found sticking in the cavity of the numbers engraved on bottom portion of the head of the golf sticks (golf clubs) marked Exhibit 3 & 5 in comparison to the soil sticking in the cavity of the nos. engraved on bottom portion of the heads of golf sticks (golf clubs and iron putter) marked Exhibits- 1, 2, 4, 6, 7, 8, 9, 10, 11 and 12. In the postmortem examination report of Ms. Aarushi Exhibit-ka-3 ante-mortem injury no. 3 has been shown as lacerated wound on left parietal region 8 cm. X 2 cm. In the postmortem examination report of Hemraj Exhibit-ka-88 ante-mortem injury no. 7 has been shown as lacerated wound 8 cm. X 2 cm. into bone deep on the occipital region 1 cm. below injury no. 6. Thus the measurement of frontal head of stick Exhibit-5 tallies with the measurements of ante-mortem injury no. 3 of Ms. Aarushi and injury no. 7 of Hemraj. In view of this clinching scientific evidence, it is conclusively proved that lacerated wounds of both the deceased were caused by golf stick. The incised wounds of both the deceased are of same pattern and cannot be caused by kukri and rather possible to have been caused by a small sharp-edged instrument like scalpel. In view of above findings it can safely be concluded that injuries as mentioned above were caused by golf club and scalpel. D.W.-2 Dr. Amulya Chaddha has also admitted that for oral

surgery 15 no. blade is required by dentist and during the course of study use of this blade is taught. He has also admitted that if apart from gum this blade is used on other part of the body then that part will be cut. P.W.-30 Dr. Dinesh Kumar has stated in his evidence that for dissection scissors, forceps, needles and scalpel are used by B.D.S. students. It is to be noted that both the accused are dentists by profession and therefore, keeping scalpel at home and use thereof cannot be ruled out. It is also significant to note that Dr. Rajesh Talwar has admitted in his written statement under section 313 Cr.P.C. that he was the member of Golf Club, N.O.I.D.A. Moreover, the golf sticks were produced by him, which were in his possession. He has also admitted that before his car was sent for servicing two golf sticks were taken out from the car by his driver Mr. Umesh Sharma and were kept in the room of Hemraj. One such stick could be seen in the photograph no.-21 of D-98. The other stick was found from loft while cleaning the flat. P.W.-39 Mr. A.G.L. Kaul has deposed that Mr. Ajay Chaddha has sent an e-mail to him intimating therein that one golf stick was recovered by him and Dr. Nupur Talwar from the attic opposite to the room of Ms. Aarushi during cleaning of the flat. P.W.-31 Mr. Hari Singh has stated that on 18.06.2008 he has seized five articles through seizure memo Exhibit-ka-60 in which Dr. Nupur Talwar and her relative Mr. Ajay Chaddha had appended their signatures. Both the accused have stated in their examination under section 313 Cr.P.C. that Mr. Ajay Chaddha has not sent any e-mail on their behalf which cannot be

believed in the face of the statement given by P.W.-39. P.W.-31 Mr. Hari Singh has stated that Mr. Ajay Chaddha is a relative of Talwars. Mr. Ajay Chaddha has not been produced to rebut the evidence of P.W.-31 and P.W.-39.

Mr. Mir with his suasive reasoning has laid criticism that test identification of golf club has not been made in the presence of a Magistrate and therefore, test identification proceedings conducted by Mr. A.G.L. Kaul carry no significance in the eye of law. It was also submitted that golf clubs were wrapped with a cloth on the middle portion and heads and handles of clubs were exposed and not sealed at all and therefore, possibility of tempering or cleaning at the end of C.B.I. cannot be ruled out. These arguments are more factitious than genuine and hardly carry any conviction and therefore, cannot be accepted keeping in view the facts and circumstances of the case. P.W.-32 Richhpal Singh has stated that on the direction of Mr. Kaul he had taken 12 golf clubs and their case on 30.10.2009 from Dr. Rajesh Talwar and seizure memo Exhibit-ka-61 was prepared by his companion inspector Arvind Jaitely. In Exhibit-ka-61 it has specifically been mentioned that all the golf clubs and case have been sealed separately with a cloth and sealing wax. P.W.-32 has stated at page no. 3 of his cross-examination that all the golf sticks were wrapped with a cloth in the middle portion and it was sealed and therefore, this argument is found to be completely fallacious that golf clubs were not sealed. If the test identification was not conducted in the presence of a Magistrate then it will not affect

the prosecution case. In **Mahabir Vs. State of Delhi AIR 2008 SC 2343** after following the law as laid down in **Matru Vs. State of U.P. (1971) 2 SCC 75** and **Santokh Singh Vs. Izhar Hussain (1973) 2 SCC 406,** it was held that test identification parade does not constitute substantive evidence. Test identification can only be used as corroborative of statement in court. It was further held that the test identification parade belongs to stage of investigation. T.I. Parades are essentially governed by section 162 Cr.P.C. Failure to hold same would not make inadmissible evidence of identification in court. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. The same view was earlier taken in **Kanta Prasad Vs. Delhi Administration AIR 1958 SC 350, Vaikuntana Chandrappa and others Vs. State of A.P. AIR 1960 SC 1340, Budh Sen Vs. State of U.P. AIR 1970 SC 1321 and Rameshwar Singh Vs. State of J & K AIR 1972 SC 102.** In **1998 SCJ 354** it was held that T.I. parade is only corroborative evidence and substantive evidence is statement of witness made in the court. The purpose of T.I. parade is to test the observation, grasp, memory, capacity to recapitulate what he has seen earlier. In **Jadunath Singh Vs. State of U.P. AIR 1971 SC 363** it was held that absence of test identification is not always fatal. It appears proper to mention here that golf clubs were not the stolen property for which test identification must have been essential. They were also not recovered by the police and even no F.I.R. regarding their theft, heist and dacoity was lodged.

In **State of Assam Vs. Upendra Nath Rajkhona 1975 Cr.L.J. 354** it was held that identification of washer-man's mark on the clothes found on the dead body by the washer-man was not necessary.

In **Mulla and others Vs. State of U.P. AIR 2010 SC 942,** it has been held that failure to hold parade does not render evidence of identification in court inadmissible. However, evidence relating to identification made for first time in court should not form basis of conviction and can only be used as corroborative evidence. In **Sheo Shankar Singh Vs. State of Jharkhand 2011 Cr.L.J. 2139** it has been held that failure to hold test identification parade does not weaken identification in the court. In **Shyam Ghosh Vs. State of West Bengal 2012 AIR SCW 4162** it was held that Cr.P.C. does not oblige the investigating agency to necessarily hold the test identification parade which has been followed in **Ravi Kapur Vs. State of Rajasthan AIR 2012 SC 2986.** In **Kunjuman @ Unni Vs. State of Kerala 2013 (2) Allahabad Criminal Rulings 1324 (SC),** it has been held that failure to hold T.I.P. is not fatal to the prosecution. Absence of T.I.P. makes no difference to the prosecution case. The same view was iterated earlier in **Vijay @ Chinee Vs. State of M.P. (2010) 8 SCC 191.**

P.W.-15 Umesh Sharma was the driver of Dr. Rajesh Talwar and still he is the satellite of Dr. Rajesh Talwar and because of allegiance he has turned hostile and resiled from his previous statement given to the investigating officer. Nevertheless, he has admitted that 3 to 4 months

prior to this occurrence he had kept two golf sticks, mopping cloth and bucket in the servant quarter of flat no. L-32 after taking them out from Santro car which was sent for servicing. When this witness was declared hostile and the learned prosecutor was permitted to cross-examine him and during the course of cross-examination he was shown golf club nos. 4 and 5 then he admitted that these sticks were kept by him in the room of Hemraj. In identification memo Exhibit-ka-18 it has been written that the contents of the memo have been explained in Hindi to Mr. Umesh Sharma in presence of the independent witness but he has falsely deposed that it was not explained to him in Hindi. He has given false statement that on that day he was having pains in ear and therefore, could not properly listen. His statement that on that day he had visited a doctor of E.N.T. for treatment of his ear is also found to be false because the prescription of the doctor which he had shown in the court was of 20.10.2009 while the identification proceedings were conducted on 02.08.2010. He has further stated that he does not remember as to whether he had visited E.N.T. Specialist on 02.08.2010. He has admitted that at the time of preparation of identification memo he had not told Mr. Kaul that he is suffering from ear pain and is hard of hearing. He has feigned ignorance that the identification proceedings were conducted in the presence of witness Laxman Singh. It is well-settled law that the evidence of a hostile witness does not get effaced and his statement to the extent of supporting the prosecution case can be relied upon. In **Soma Bhai Vs. State of Gujarat**

AIR 1975 SC 1453, State of U.P. Vs. Ramesh Prasad Misra (1996) 10 SCC 360, Sathya Narayan Vs. State 2013 (80) ACC 138 (SC), Ramesh Harijan Vs. State of U.P. (2012) 5 SCC 777, Gura Singh Vs. State of Rajasthan AIR 2001 SC 330, B.S. Shinde Vs. State of Maharashtra (2002) 7 SCC 543, Gagan Kanojia Vs. State of Punjab (2006) 13 SCC 516, Sarvesh Narain Shukla Vs. Daroga Singh (2007) 13 SCC 360, Bhagwan Singh Vs. State of Haryana (1976) 1 SCC 389, Rabindra Kumar Dey Vs. State of Orissa (1976) 4 SCC 233, Syad Akbar Vs. State of Karnataka (1980) 1 SCC 30, Khujji @ Surendra Tiwari Vs. State of M.P. (1991) 3 SCC 627 (3JJ), T. Shankar Prasad Vs. State of A.P. 2004 Crl. J. 884: (2004) 3 SCC 753, Muniappan Vs. State of T.N. (2010) 9 SCC 567, Rajendra & others Vs. State of U.P. 2009 (2) JIC 356 (SC-3JJ), Param Jeet Singh @ Pamma Vs. State of Uttrakhand (2010)10 SCC 439, Himanshu @ Chintu Vs. State (N.C.T. of Delhi) (2011) 2 SCC 36, Ram Krushna Vs. State of Maharashtra 2007 (58) ACC 604 (SC), Bhajju @ Karan Singh Vs. State of M.P. (2012) 4 SCC 327, Gudu Ram Vs. State of H.P. 2013 (1) SCCR 46, M. Sarvana @ K.D. Sarvana Vs. State of Karnataka 2012 Cr.L.J. 3877, Govind Raju @ Govind Vs. State (2012) 4 SCC 722, Yomesh Bhai Pran Shanker Bhatt Vs. State of Gujarat (2011) 6 SCC 313, Koli Lakhmabhai Chanabhai Vs. State of Gujarat Judgment Today 1999 (9) SC 133, Prithi Vs. State of Haryana 2011 (72) ACC 338, Sidharth Vashistha @ Manu Sharma

Vs. State (N.C.T. of Delhi) 2010 (69) ACC 833 (SC), Radha Mohan Singh @ Lal Saheb & others Vs. State of U.P. (2006) 2 SCC 450 (3JJ), State of Rajasthan Vs. Bhawani & others AIR 2003 SC 4230 (3JJ), Subba Singh Vs. State (2009) 6 SCC 462, Ramappa Halappa Pujar & others Vs. State of Karnataka (2009) 1 SCC (Crl.) 250, Swami Prasad Vs. State of M.P. (2009) 2 SCC (Crl.) 354, Jodh Raj Singh Vs. State of Rajasthan 2007 (58) ACC 614, Gurpreet Singh Vs. State of Haryana 2002 (45) ACC 934 (SC), Sat Paul Vs. Delhi Administration AIR 1976 SC 294, Bhagwan Dass Vs. State (N.C.T.) of Delhi AIR 2011 SC 1863, Haradhan Das Vs. State of West Bengal 2013 (1) ACR 1162 (SC) and **Lahu Kamlakar Patil & others Vs. State of Maharashtra (2013) 6 SCC 417,** it has been held that courts are entitled to rely upon such portion of evidence of prosecution witness who has been permitted to be cross-examined by the prosecution, as supports the prosecution case. P.W.-16 Laxman Singh who is quite disinterested witness has also stated that Umesh Sharma had taken out golf sticks no. 4 and 5 although he has stated that these sticks were taken out from bag. The fact remains that golf sticks no. 4 and 5 were taken out by Umesh Sharma. It is also important to mention here that the accused Dr. Rajesh Talwar has not taken plea that golf sticks do not belong to him.

It is the contention of the learned counsel for the accused that Malkhana (godown) Register has not been produced nor incharge Malkhana was

produced to show the proper custody of golf clubs and the entire chain of custody is fraught with suspicion as it has not been proved as to when golf clubs were sent back to C.F.S.L. or to Mr. D.K. Tanwar. Dilating his argument it was submitted that report dated 07.01.2010 Exhibit-kha-37 reveals that golf clubs were received in the biology division of C.F.S.L. Lab on 30.10.2009 and they were examined by Dr. B.K. Mohapatra and returned to the investigating officer on 07.01.2010 but Exhibit-ka-53 dated 13.07.2010 of D.K. Tanwar (physics division) it has been shown that the golf-clubs were received from biology division on 10.11.2009 but they were opened on 15.04.2010 and returned to forwarding authority on 13.07.2010 and therefore, if the biology division returned the Exhibits on 07.01.2010 to the forwarding authority then how the same Exhibits without any forwarding letter proving chain of custody were sent again to the physics division and no evidence has been adduced to show as to when the forwarding authority after 07.01.2010 re-sent the articles to the physics division of C.F.S.L. and in the circumstances it was imperative to produce Malkhana Register and also to examine officer-in-charge, Malkhana, C.B.I. which has not been done and therefore chain of custody of golf-clubs is not proved. I am unable to subscribe to the contention of the learned counsel. The golf-clubs were seized through production-cum-seizure memo Exhibit-ka-61 on 30.10.2009 and on the same date these golf-clubs were sent to C.F.S.L. by the forwarding authority as is evident from perusal of Exhibit-kha-37. In this report it has also been mentioned at

para 8.3 that regarding query no. 2 the report in original from physics division of this laboratory shall be submitted after completion of the examinations in the physics division of this laboratory. This shows that in the meantime Dr. Mohaparta forwarded the Exhibits to the physics division and that is the reason that P.W.-26 D.K. Tanwar has mentioned at page no. 2 of his report Exhibit-ka-53 that one sealed parcel was received from biology division on 10.11.2009 and it was sealed by the seals of biology division and the seals on parcel were found intact. P.W.-26 has also testified this fact by stating on oath about this fact. He has also stated that this parcel was opened on 15.04.2010 and report of examination was given on 13.07.2010. In the report dated 07.01.2010 Exhibit-kha-37 it has been mentioned at the bottom that the remnants of the Exhibits with original packing have been sealed in two parcels and handed over to the forwarding authority. P.W.-6 Dr. B.K. Mohapatra has not been cross-examined as to whether only his report was forwarded by the director or whether along with this report the Exhibits were also sent. P.W.-26 D.K. Tanwar has stated that one sealed parcel was received from biology division on 10.11.2009 and it was sealed by the seals of biology division and the seals on parcel were found intact and as such in the circumstances there was no need to produce the Malkhana Register or to examine officer-in-charge Malkhana, C.B.I. and tampering of golf-clubs is not proved. Therefore, the

argument of learned counsel is found impuissant. The accused cannot take any benefit

from the case laws cited by their learned counsel which are based on different contextual facts, settings and circumstances.

The next submission of Mr. Mir is that the prosecution has made a futile attempt to bolster its case by alleging that the internet router installed at the place of crime showed start and stop activity throughout the whole night suggesting that the accused persons were awake but from the evidence on record this fact is also not proved and evidence given in this respect by P.W.-17 Deepak Kanda, P.W.-18 Bhupender Singh Awasya and the documents Exhibit-ka-19, ka-20, ka-21 and ka-22 relied upon by the prosecution are not reliable because P.W.-17 Deepak Kanda has stated in his cross-examination that he does not know whether there was a modem or a wi-fi; he was never taken to the place where the modem was installed; he does not know that his company had installed the modem along with which a wireless router was also installed; he does not know that if the laptop or desktop computer are switched off then also there will be data transfer between the router/modem and I.S.P. which are switched on; he cannot say whether the log provided to him was a detailed one or not; he has himself admitted that the view of technical team was obtained according to which there were four main reasons for start and stop activity of internet- (i) physical closing of dialer (ii) physical closing of modem/router (iii) power recycling of modem and (iv) network failures and no member of technical team was examined and therefore his evidence is nothing but *on dit*. Moreover, this witness has also

admitted that even from 02:04:35 hours till 10:16:19 hours on 16.05.2008 the usage pattern was similar and start/stop activity was also seen from 02:04:35 hours (in the night) to 13:11:44 hours on 16.05.2008 and thus, physical operation by the accused persons is not established; he has further argued that P.W.-18 has also stated in his cross-examination that he never went to L-32, Jalvayu Vihar to make physical inspection; the router, modem, router log or modem log, laptop log or the desktop log were never sent to him; he cannot say whether the logs supplied to him were complete or not; if the router or modem is switched on then log to that extent shall also be available and upon examination of router log it can be said when the router was switched on and switched off and he had written to the investigating officer that computer internet activity log, modem and router log and detailed log of I.S.P. be provided to him but not made available which were essential for complete analysis of these logs and if the investigator had sent the aforesaid details then better analysis could have been done.

These arguments are specious and hence cannot be accepted. The statements of the accused under section 313 Cr.P.C. that they went to sleep at about 11.30 P.M. on 15.05.2008 are found to be false. P.W.-17 Deepak Kanda has clearly deposed that user ID DSL01205316388 is registered in the name of Nupur Talwar R/o L-32, Sector-25 N.O.I.D.A. and its land-line telephone no. is 01204316388 and he had supplied the logs of above mentioned broad band from 01.05.2008 to 16.05.2008 through e-mail to Mr. Neelabh Kishore S.P., C.B.I., Dehradun. He has

further stated that as per electronic record internet activity started on the said DSL ID on 15.05.2008 at 23:00:50 hours and it lasted up to 02:04:30 hours on 16.05.2008 and thereafter again it started on 16.05.2008 at 02:04:35 hours and it continued up to 03:02:16 hours and again it started at 03:28:36 hours and lasted 03:34:07 hours and then it again started at 03:41:01 hours and remained active up to 03:43:32 hours and then started at 06:01:51 hours and stopped at 06:04:55 hours. He has further stated that according to itemized bill internet of 11835 kilo-bytes was used on 15.05.2008 at 23:00:50 hours and then on 16.05.2008 internet 46 kilo-bytes was used at 02:04:35 hours and then again on 16.05.2008 at 06:01:51 hours 3 kilo-bytes internet was used. He has further stated that he has sought opinion from technical team about the start and stop activity of internet and the technical team has opined that stop and start activity may be due to (i) physical closing of dialer (ii) physical closing of modem/router (iii) power recycling of modem and (iv) network failures. Nothing has been suggested before this witness that start and stop activity was due to network failures in that night. This witness has also stated that the aforesaid data was obtained by IT and Technical Team from server which is being preserved for three years. If this witness has stated that he does not know whether there was a modem or a wi-fi; he was never taken to the place where the modem was installed; he does not know that his company had installed the modem along with which a wireless router was also installed; he does not know that if the laptop or desktop computer are

switched off then also there will be data transfer between the router/modem and I.S.P. which are switched on and he cannot say whether the log provided to him was a detailed one or not then on that ground it cannot be said that in the night of 15/16.05.2008 the internet was not used at the times as disclosed by this witness in his examination-in-chief because start and stop activity is not possible without the physical intervention and the data used is not possible without surfing on internet and hence in the circumstances if any member of technical team has not been examined, it will have no impact.

P.W.-18 Bhupender Singh Awasya, Scientist-C of C.E.R.T.-In Department of Information Technology, Govt. of India has also deposed that logs of DSL Modem No. 01205316388 were sent for analysis by S.P., C.B.I., Dehradun and then he and Mr. Anil Sagar, Director, CERT-In have analyzed the logs and then report/letter Exhibit-ka-23 was prepared and signed by Mr. Anil Sagar. In Exhibit-ka-23 it has been mentioned that time gaps between two sessions depicts inactivity or no internet connection establishment between the CPE (Customer Premises Equipment) device and the ISP (Internet Service Provider); Longer time gaps indicates that a) user has consciously disconnected the connection, b) there is network disruption such as unavailability of telecom carrier and unavailability of services at ISP end. This is the period when no internet connection is established by the CPE device; retrieval of names/identities of sites visited by the user and/or downloaded packet details during

a particular session can be established by the respective logs and packet capture maintained by the ISP. Both the technologies come under real-time monitoring category. Logs and/or packet details are only available when it is being captured during the session in real-time. It is neither available nor can be regenerated as the session expires or after the session is terminated. If P.W.-18 has stated in his cross-examination that he never went to L-32, Jalvayu Vihar to make physical inspection; the router, modem, router log or modem log, laptop log or the desktop log were never sent to him; he cannot say whether the logs supplied to him were complete or not; if the router or modem is switched on then log to that extent shall also be available and upon examination of router log it can be said when the router was switched on and switched off and he had written to the investigating officer that computer internet activity log, modem and router log and detailed log of ISP be provided to him but not made available which were necessary for complete analysis/investigation of these logs then on that ground it cannot be held that the internet was not used in the night of 16.05.2008 and no start and stop activity of router is possible without human intervention. Both the accused have admitted in their statements under section 313 Cr.P.C. that at about 11.00 P.M. in the night Dr. Nupur Talwar went in the Aarushi's room to switch on the internet router and then Dr. Rajesh Talwar started working on internet on his laptop and they went to sleep around 11.30 P.M. It is very important to mention here that none of the accused has stated in their

detailed written statements under section 313 Cr.P.C. as to when the router were switched off. Even in oral examination under section 313 Cr.P.C. they have not stated that when the router was switched off. In that very night the router or laptop were in their possession and they have especial knowledge about the mode, manner and functioning of the router and therefore, it was for them to explain under section 106 of Evidence Act to satisfy the court regarding the start and stop activity of internet router. In **Rattan Singh Vs. State of H.P. (1997) 4 SCC 161** it was held that the examination of accused under section 313 Cr.P.C. is not a mere formality. Answers given by the accused to the questions put to him during such examination have a practical utility for criminal courts. Apart from affording an opportunity to the delinquent to explain incriminating circumstances against him, they would help the court in appreciating the entire evidence adduced in the court during trial. In this view of the matter, it is established that in the night of 15/16.05.2008 internet was used throughout the whole night intermittently and the accused were awaken. It should be borne in mind that both the accused are acquainted with the internet functioning and therefore, they may have continued with the start and stop activity of internet router till 13:11:44 hours on 16.05.2008 with intent to confuse and camouflage the investigating agency as also to create evidence in their favour.

The next submission of learned counsel for the accused is that the presence of P.W.-4 Sanjay Chauhan at the place of occurrence in the morning

of 16.05.2008 has not been proved and therefore, his statement that he had seen blood stains on the stairs as well as on the railing is not credible and hence his evidence carries no weight. It was also submitted that the investigating officer Mr. M.S. Phartyal has admitted in his cross-examination that he had gained knowledge from some witness that Sanjay Chauhan was also present at the crime scene and therefore, his statement was recorded but on this aspect he does not want to peruse the case diary. It was further added that evidence of P.W.-13 Dr. Rajiv Kumar Varshney, P.W.-14 Dr. Rohit Kochar, P.W.-7 K.K. Gautam, P.W.-10 Bharti Mandal and P.W.-29 Mahesh Kumar Mishra are contradictory as some of the witnesses have stated that they had seen the blood stains on the stairs and railing while others have denied this fact and therefore, in view of the maddening contradictions, the entire warp and woof of the prosecution story is rendered brittle.

I do not agree with the submissions of the learned counsel. P.W.-4 Sanjay Chauhan is an officer of Provincial Civil Service and no animus with this witness has been established by the accused. He is also completely disinterested witness and therefore, his evidence cannot be viewed with a lens tinged with suspicion. He was posted as Additional Executive Magistrate as well as a staff officer in the office of District Magistrate, Gautambudh Nagar on the relevant date. He has categorically stated on oath that when on 16.05.2008, when he was returning to his residence after morning walks and came near the curve of sector-25 N.O.I.D.A. then

saw the presence of police and government vehicles there and thought that there is some problem of law and order and therefore, he went inside sector-25 where he gained knowledge that a murder has been committed in flat no. L-32, Jalvayu Vihar and therefore, he reached there at about 7.30-7.40 A.M. and went inside the room of Ms. Aarushi where she was found dead and her dead body was covered with a white sheet, her trouser was just below the waist. He has further stated that some police personnel were seen on the stairs and therefore, he also climbed 2-3 steps and had seen blood stains on the stairs as well as the railing and then he came back thinking that crime scene may be disturbed. He has also stated that he had perceived that in the upstairs there were blood stains but not in the down stairs. He has stood the test of grueling cross-examination and nothing could be elicited to doubt his presence at the crime scene in the morning of 16.05.2008 and discredit his testimony. He has also stated that he remained there at the place of occurrence for about an hour. His evidence cannot be castigated that stadium in sector 25 N.O.I.D.A. is about 28 km. away from his residence and it is not possible to come for morning walks after covering such a long distance. He has assigned reasons for taking morning walks in the N.O.I.D.A. Stadium by stating that during those days Greater N.O.I.D.A. was not developed and keeping in view the nature of his job, it was not safe for him to have morning walks there.

P.W.-13 Dr. Rajiv Kumar Varshney has also testified that on receiving a message about the

murder of Ms. Aarushi he went there at about 9.00 A.M. but by mistake he climbed up to the terrace door where in the door and lock he found blood stains and then he located the flat of Dr. Rajesh Talwar and came inside where Dr. Rohit Kochar and his wife met him to whom he told about the presence of blood stains on door and lock of the terrace. Thereupon, he came with Dr. Rohit Kochar near the terrace door and showed him blood stains. He has further stated that on minute observation blood stains were seen in the stairs. Meanwhile, a policeman also came there and he was also shown the blood stains on the stairs. Thereafter, both of them came inside the flat and Dr. Rajesh Talwar came out of the flat and went towards the stairs but immediately came back. It is to be noted that he has been the colleague of Dr. Rajesh Talwar in ITS Dental College N.O.I.D.A. and both of them were in the same faculty. Thus, there is no reason to doubt on the testimony of this witness, particularly when he was the colleague of Dr. Rajesh Talwar.

P.W.-14 Dr. Rohit Kochar was also the colleague of Dr. Rajesh Talwar in ITS Dental College, N.O.I.D.A. and since 2007 he was acquainted with Dr. Rajesh Talwar, he has deposed that on 16.05.2008 at about 8.00-8.15 A.M. he received a telephone call from one friend who informed him about the murder of Ms. Aarushi and then he along with his wife Dr. Preeti Kochar went to the house of Dr. Rajesh Talwar where a large number of persons were present there. After about 45-60 minutes Dr. Rajiv Kumar Varshney came there and told him that by mistake he had gone up to the terrace door and

had witnessed blood stains on handle of terrace door and floor and then he went up with him and found foot prints of red colour which appear to have been cleaned and blood stains on the handle of terrace door. He has also stated that by that time some persons also came there and one of them was a policeman, who was also shown the blood stains. Despite incisive cross-examination nothing favourable could be extracted from this witness and therefore, there is no reason to disbelieve his testimony. If certain facts on trivial and non significant matters have not been stated to the investigating officer(s) by P.W.-13 & 14 in their statements under section 161 Cr.P.C. then by dint of that their testimony cannot be discarded. It is also important to mention that both P.W.-13 and P.W.-14 have given their statements under section 164 Cr.P.C. before the learned Metropolitan Magistrate, New Delhi on 15.12.2010 *vide* Exhibit-ka-16 and ka-17. In **Shyam Sunder Vs. State of Chhattisgarh (2002) 8 SCC 39** it has been held that when an incident is narrated by the same person to different persons on different occasions some difference in the mode of narrating the incident is bound to arise but such differences do not militate against the trustworthiness of the narration unless the variations can be held to be so abnormal or unnatural as would not occur if the witness had really witnessed what he was narrating. *Ex-cathedra,* if Dr. Rohit Kochar has stated before this court that he had seen blood stains only on handle of terrace door and floor and has stated before the Metropolitan Magistrate that blood stains

on the door, handle and floor were seen then only on that ground his testimony cannot be held to be unreliable. Possibility of cleaning the blood stains on stairs and railing by the accused after commission of the crime in the night cannot be ruled out as they had enough time and opportunity to do so.

P.W.-7 K.K. Gautam has also stated that on 17.05.2008 when he went to the flat of Dr. Rajesh Talwar alongwith Dr. Sushil Chaudhary then Dr. Dinesh Talwar met them there and thereafter took them the to the rooms of Ms. Aarushi and Hemraj and the stairs leading to terrace and showed blood stains on stairs, railing, lock, latch and door of terrace and then on the request of Dr. Dinesh Talwar he telephoned S.P. City Mr. Mahesh Mishra and told him about the blood stains and for opening the terrace lock. On this part of statement, this witness has not been cross-examined at all and therefore, his testimony on this aspect goes unchallenged. In **Bal Krishna Vs. State 1977 Crl. J. 410, State of U.P. Vs. Nahar Singh 1998 Cr.L.J. 2006 (SC) and State of U.P. Vs. Anil Singh 1989 SCC (Crl.) 48,** it has been held that where a witness had not been specifically cross-examined on a particular question, the court cannot presume something adverse to the witness in relation to that question unless his attention is specifically drawn to it. In **Laxmi Bai (deceased) through LRs and others Vs. Bhagwant Buva (deceased) through LRs and others (2013) 4 SCC 97,** it has been held that if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box to give a full and proper explanation. In

that case the law as given in **Khem Chand Vs. State of H.P. AIR 1994 SC 226, State of U.P. Vs. Nahar Singh (1998) 3 SCC 561, Rajender Pershad Vs. Darshana Devi (2001) 7 SCC 69 and Sunil Kumar Vs. State of Rajasthan (2005) 9 SCC 283** was relied on.

It is the contention of Mr. Mir that if there could have been blood stains on stair and railing then certainly the same must have been seen by P.W.-10 Bharti Mandal when she had gone up the stairs after pressing the call-bell on the second occasion but she has also nowhere stated that blood stains were seen by her and as such the evidence of Sanjay Chauhan, Dr. Rajiv Kumar Varshney, Dr. Rohit Kochar and K.K. Gautam that they had seen the blood stains proves to be false. This argument has no legs to stand. This witness has also not been cross-examined on the point as to whether she had seen any blood stains when going up the stairs. The investigating officers have also not specifically questioned this witness of having seen any blood stains on stairs or not. Had she been questioned on this point and she might have replied that she had not seen any blood stains on the stairs then the matter would have been otherwise. As such in the circumstances the evidence of P.W.-4, 7, 13 & 14 is not discredited.

In furtherance of his arguments it was also pointed out by the learned counsel that P.W.-34 Dataram Naunoria, S.H.O. of Police Station, Sector-20 has also stated that when he went through the stairs to the roof-door, he found blood marks on the lock of the terrace door but no blood stains on stairs, railing and roof near the door and

red coloured foot prints and thus his evidence contradicts the claim of P.W.-4, 13 and 14. Likewise, P.W.-29 Mahesh Kumar Mishra the then S.P., City has also stated before this court that lock of the terrace door was having blood marks but the stairs did not bear any blood marks. Thus, his testimony demolishes the claim of P.W.-4, 13 and 14. It was also submitted by the learned counsel that P.W.-1 Constable Chunni Lal Gautam too has stated that on 16.05.2008 he went up the stairs to the roof door, examined the door, the latch and the lock but did not observe any blood stains on stairs or railing nor any blood stained foot prints as claimed by P.W.-4, 13 & 14. It was also submitted that P.W.-12 Punish Rai Tandon has also stated that he had gone up the stairs two times on 16.05.2008 but he also did not observe any blood stains on stairs and railing and D.W.-5 Vikas Sethi has also stated that when he went to the stairs up towards the roof he had not seen blood stains at any place and S.I. Sunita Rana gave her statement to the assisting investigating officer Pankaj Bansal that on 16.05.2008 there was no blood stains on the stairs at all and thus in view of the inherent contradictions as pointed out above no reliance can be placed on the evidence of these witnesses.

I find it difficult to accede to the arguments of the learned counsel for the accused. As already stated above P.W.-4 Sanjay Chauhan, P.W.-13 Dr. Rajiv Kumar Varshney and P.W.-14 Dr. Rohit Kochar have categorically stated that they had seen the blood stains on the stairs, lock, handle and door of the terrace. P.W.-4 has also stated that he had seen

blood stains on railing. P.W.-13 & 14 who are medical professionals have stated that on meticulous examination it was found that blood stains were visible and therefore, in view of this evidence it is proved that blood stains were there on stairs and railing, lock, handle and door of terrace. P.W.-1 Constable Chunni Lal remained busy in taking finger-prints from various places. He has nowhere specifically stated that he had not seen the blood stains. He has simply stated at page no. 8 of his cross-examination that he does not remember that when he climbed the stairs and had gone to the roof there were two doors or not across the stairs. P.W.-12 Punit Rai Tandon was has stated that when he went inside flat no. L-32 and came to know about the occurrence then he came back from there and informed the security personnel about the incident and when at about 4.00 P.M. Umesh Sharma the driver of Dr. Rajesh Talwar asked him to provide the key of his terrace door then he had gone up the stairs to open the lock of his terrace door and again at about 4.30 P.M. he again went up the stairs to open the lock of the terrace door. He has not been cross-examined specifically as to when he had gone up the stairs two times on 16.05.2008 whether he had seen any blood stains on stairs, railing, lock, handle and terrace door of Dr. Rajesh Talwar. P.W.-29 Mahesh Kumar Mishra and P.W.- 34 S.I. Dataram Naunoria have also stated that they had seen blood stains on the lock of the terrace door of Dr. Rajesh Talwar. If P.W.-29 has stated that there were no blood stains on the terrace then it cannot be said that there were no blood stains on the stairs.

P.W.-34 has stated at page no. 9 of his cross-examination that he does not remember whether S.P. City had told Constable Chunni Lal to take the photographs of blood stains on the upstairs. Since blood stains appeared to have been cleaned and therefore, this witness may not have noticed minutely the faint bloodstains on the stairs and as such no importance can be attached to the omission on this aspect on part of P.W.-29. P.W.-34 has also not been specifically asked whether he had seen blood stains on the upstairs or not and he has nowhere stated that he had not seen bloodstains on the stairs.

The next submission of the learned counsel for the accused is that theory of the prosecution that Hemraj was taken in a bed-sheet to the terrace through the stairs and his body was dragged on the roof is not proved and the dummy test carried is not admissible under section 45 of the Evidence Act and the evidence given by P.W.-26 Deepak Kumar Tanwar, P.W.-27 Dr. Rajendra Singh, P.W.-38 Dr. M.S. Dahiya and P.W.-39 A.G.L. Kaul in this respect is of no significance. I agree with the contention of the learned counsel to the extent that dummy test is not admissible under section 45 of the Evidence Act because P.W.-27 Dr. Rajendra Singh has admitted at page no. 4 of his cross-examination that he cannot tell whether the dummy test is conclusive or not. However, the fact remains that crime scene was re-enacted and dummy test was conducted. It is also possible that after bludgeoning Hemraj with golf stick he was carried in a bed sheet by both the accused to the terrace when he was in a state of

concussion and thereafter on the terrace his throat was slit and body was dragged. The dragging marks could be easily seen in the photographs material Exhibit-14, 17 and 18. P.W.-36 Dr. Naresh Raj has deposed that ante-mortem injury nos. 1 2, 4 and 5 of Hemraj may occur due to dragging on a hard surface. It is well settled law that there is no set pattern of injuries caused by dragging. It depends how the body was lugged about. Under Section 106 Evidence Act it was incumbent upon the accused to establish as to how the body of Hemraj was taken to the roof by whom and who had locked the terrace door from inside but they have miserably failed to establish the same. It is not expected of the prosecution to lead evidence on the point which is exclusively within the knowledge and domain of the accused. Thus, the argument of the learned counsel is devoid of any merit.

It has next been argued with perspicacity by the learned counsel for the accused that from the evidence of P.W.-15 Umesh Sharma it is proved that one door of Hemraj's room opening towards the passage remained closed as in front of this door refrigerator was kept to block the opening of the door and P.W.-39 A.G.L. Kaul has admitted that the wooden door was having an automatic click shut lock and therefore, the statement of Bharti Mandal that flat was locked from inside cannot be believed. It was also argued that Mrs. Shashi Devi has given her statement to I.O. Hari Singh that whenever she went to deliver ironed clothes outermost iron mesh door was found jammed. I do not agree with this submission because P.W.-10 Bharti Mandal has

asseverated that when she had placed her hand on outer mesh door it did not open and Dr. Nupur Talwar had told her that perhaps Hemraj might have gone to fetch milk after locking the middle grill/mesh door from outside and when she came again from ground level and placed her hand on the mesh door it got opened. There is no valid reason to disbelieve the statement of Bharti Mandal and it is proved that when Bharti Mandal had reached at flat no. L-32 it was latched from inside and purposely she was told to go to the ground level so that in the meantime Dr. Nupur Talwar may open the latch of the door from inside which ultimately she did so. P.W.-15 is a traitor who after taking oath has deliberately back tracked. He has invented a new story that outer mesh door opened with sound due to being jammed. Mrs. Shashi Devi has neither been produced by the prosecution nor by the defence and therefore, her statement under section 161 Cr.P.C. cannot be looked into as held in Mohd. Ankoos Vs. P.P. High Court of A.P. 2009 AIR SCW 7132. Be that as it may, it is amply proved that when Bharti Mandal had placed her hand on the outer mesh door, it did not open and when she came back from ground level it got opened when she placed her hand on it which clearly suggests that outer mesh-door was latched from inside at the time of arrival of Mrs. Bharti Mandal. The terrace door was also locked from inside and therefore entry of third person is completely ruled out.

It has next been argued by the learned counsel for the accused that the evidence proffered by the prosecution that Dr. Rajesh Talwar after committing

the murder consumed neat whiskey without pouring it into a tumbler can hardly be believed and the evidence given in this respect by finger-prints lifter constable Chunni Lal Gautam, P.W.-3 Amar Dev Sah, P.W.-6 B.K. Mohapatra, P.W.-24 Suresh Kumar Singla and P.W.-25 S.P.R. Prasad is not credible. In furtherance of his arguments it was submitted *con brio* that P.W.-1 has stated that he had taken finger-prints from the whisky bottle and the plate and he had applied black powder and when the finger-prints developed tape was applied on that; about 15-20 gms. of powder was used and he does not remember whether he had given the statement to the investigating officer that whisky bottle from which he had taken the finger-prints had a red colour mark and the bottle was almost of red colour; he does not remember that on 29.03.2010 he had given statement to the inspector Arvind Jaitley that he had used the powder to take chance-prints from the bottle and had seen any blood on the same; that in the report Exhibit-kha-1 of P.W.-3 Amar Dev Sah it has been mentioned that the lifted chance-prints marked as Q-1 and Q-10 are different from specimen 10 digit finger-print slips marked as S-1 to S-7 while in Exhibit-kha-3 it has been stated that chance-prints detected from the wine bottle marked as Q-3, Q-5 and Q-6 are different from specimen 10 digit finger-prints marked as S-1 to S-7 (S-1 & S-2 are of Dr. Rajesh Talwar & Dr. Nupur Talwar respectively); P.W.-6 Dr. B.K. Mohapatra has mentioned in his report Exhibit-ka-6 that blood was detected on Exhibit-6 d (Ballantine scotch bottle) and mixed partial DNA profile was generated from it

which is consistent with both the sets of DNA profile generated from the source of Exhibits of parcel-1 and parcel-24 at the amplified loci and he has also deposed that from Exhibit-6 d partial profile of male and partial profile of female DNA was generated but in cross-examination he has stated that study of 16 markers is undertaken and he has taken only those peaks which he had considered as correct; genotype plots have not been placed on record in the court; in the genotype table he has only shown the correct peaks which were selected by him; if multiple peaks are seen in the genotype then no opinion can be given; for one man, in one loci, maximum two peaks will appear; if in one loci more than two peaks appear, then the same is called as multiple peaks; when a mixed profile is obtained no opinion is given about the same; if upon observing 9 loci same tandem repeats are seen then in that case it cannot be concluded that both are from the same source and if the source is not known and upon comparison/observation of 9 loci, same tandem repeats are seen, then the identity cannot be established, however, at similar observation of 15 loci identity is established and thus it is not proved that Ballantine scotch bottle had DNA of Aarushi & Hemraj. It was further submitted that P.W.-25 S.P.R. Prasad in his report Exhibit-ka-51 dated 06.11.2008 has mentioned that alias Exhibit-F (Ballantine scotch bottle) did not yield any DNA for analysis, alias Exhibit-X (DNA Sample said to be extracted from Exhibit-6 d) yielded male DNA profile; the DNA profiles from the sources of Exhibit-W (DNA sample said to be extracted from the bloodstained palm

print found on the wall of the roof/terrace, marked as 24), Exhibit-X (DNA sample said to be extracted from the Exhibit-6 d bottle) and Exhibit-Z20 (one pillow cover, purple coloured cloth) are a male origin and identical; the DNA profile of the sources of Exhibit-U (broken hair comb, article said to be of Hemraj), Exhibit-R (two razors, articles said to be of Hemraj) and Exhibit-Z30 (one bed cover multi coloured with suspected spots of blood) are matching with the DNA profiles of the sources of Exhibit-W (DNA sample said to be extracted from the bloodstained palm print found on the wall of the roof/terrace, marked as 24) and Exhibit-X (DNA sample said to be extracted from the Exhibit-6 d bottle), as shown in the enclosed table 7 but in his evidence he has stated that the samples from Exhibit-F (Ballantine scotch bottle) were taken from its mouth; P.W.-24 Suresh Kumar Singla has mentioned in his report dated 17.06.2008 Exhibit-kha-36 that blood on Exhibit-6d is of human origin but Exhibit-6d gave no reaction for blood groups A, B, AB & O and as such in view of this evidence it is not established that Dr. Rajesh Talwar consumed the neat liquor and the blood of both the deceased and DNA got embossed on the said bottle and P.W.-3 Amar Dev Shah has stated that out of five chance-prints Q-3 to Q-7 found on the bottle three prints i.e. Q-3, Q-5 and Q-6 were fit for comparison and when they were compared with the finger prints of the accused no match resulted; while Dr. Mohapatra has stated that DNA profile found from the bottle was a mixed partial profile of male and female origin which were consistent with the profile generated from the

blood stained palm prints and Exhibits like bed-sheet, mattress and pillow-cover collected from Ms. Aarushi's room but P.W.-25 S.P.R. Prasad on analysis of extracts generated by Dr. Mohapatra from the said bottle found DNA profile of only male which matched with the profile of the blood stained palm-print and other profiles belonging to deceased Hemraj. If Dr. Rajesh Talwar had consumed neat liquor from its mouth then in that eventuality the saliva and DNA of Dr. Rajesh Talwar must have come in contact with the mouth of the bottle but no DNA could be found on it and therefore, this circumstance as relied upon by the prosecution is liable to be disbelieved. The aforesaid arguments do not appeal to the reason and therefore, liable to be rejected. In Thogorani @ K. Damyanti Vs. State of Orissa and others 2004 Cr.L.J. 4003 and **Raghubir Desai Vs. State 2007 Cr.L.J. 829,** it was held that DNA test is clinching piece of evidence. DNA testing can make a virtually positive identification when two samples are matched. It exonerates innocent and helps to convict the guilty. In **Smt. Kamti Devi Vs. Poshi Ram AIR 2001 SC 2226,** it has been held that the result of genuine DNA test is said to be scientifically accurate. In **Sanjay @ Kaka Vs. NCT of Delhi 2001 CrLJ 1230 (SC),** it was held that failure of prosecution to prove the origin of blood on clothes would not extend any benefit to the accused. In **Sunil Clifford Daniel Vs. State of Punjab 2013 (80) ACC 1999 (SC),** it was held that if classification of blood has not been determined because of lapse of time, no advantage can be conferred on the accused to enable him to claim any

benefit and the report of disintegration of blood cannot be termed as missing link. Relying on **Prabhu Babaji Navie Vs. State of Bombay AIR 1956 SC 51, Raghav Prapanna Tripathi Vs. State of U.P. AIR 1963 SC 74** and the **State of Rajasthan Vs. Tej Raj AIR 1999 SC 1776,** it was held in **Gura Singh Vs. State of Rajasthan AIR 2001 SC 330** that a failure by the serologist to detect the origin of the blood due to disintegration of the serum does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes, it is possible either because the stain is too insufficient or due to haematological changes and plasmatic cogulation, that a serologist may fail to detect the origin of the blood. In **Keshav Lal Vs. State of M.P. (2002) 3 SCC 254** it has been held that non-ascertainability of the blood group cannot be made a basis to discard the evidence of the witnesses who otherwise inspired the confidence of the court. In **Hira Lal Pandey Vs. State of U.P. (2012) 5 SCC 216,** it was observed that fact that Serological report was not produced although blood stained earth was collected and that investigation commenced only on next day of incident, are defects in investigation which are not of a such nature as to cast doubt on the prosecution story. In **Rama Nathan Vs. State of T.N. AIR 1978 SC 1204,** it was observed that the mere fact that the identity of the accused could not be established on the basis of number of finger prints obtained during the course of investigation cannot be said to be enough to justify his acquittal when there was overwhelming evidence against him to establish his

guilt. In **State of Karnataka Vs. M.N. Ram Das (2002) 7 SCC 639,** it was held that failure to send murder weapon for finger prints may not be fatal keeping in view the fact that it was soaked in the blood or that there was other evidence connecting the accused. It is doubtful whether blood soaked chopper, if analysed by a finger-print expert could have any clues as to finger-prints. Be that as it may, even if it is considered as a lapse in the investigation, that will not cast a cloud of doubt on the prosecution case. In **Musheer Khan @ Badshah Khan & others Vs. State of M.P. AIR 2010 SC 762,** it has been held that evidence of finger print expert is not substantive evidence. Such evidence can only be used to corroborate some items of substantive evidence which are otherwise on record. In **State of Maharashtra Vs. Anil 2006 Cr.L.J. (NOC) 288 (Bom)** and **Baso Prasad Vs. State of Bihar (2006) 13 SCC 65** it has been held that unless it is established in the cross-examination that the opinion given by the expert is incorrect, the said evidence cannot be discarded on showing minor discrepancies such as non-production of the original work-book. D.W.-7 Dr. Andrei Semikhodskii has stated at page no. 3 of his examination-in-chief that Genotype plots in paper no. 464-kha/2 to 464-kha/8 are version of final conclusion documents. This paper could not permit him to determine the height of many peaks, the morphology of many peaks and because of this he cannot tell whether some peaks could be PCR artifact or real peaks and this has a profound implication to determine the possible number of contributors to the biological

sample. He has further stated that since the complete raw datas have not been supplied to him and therefore, he is not in position either to concur with or disagree with the report given by Dr. B.K. Mohapatra. However, even without raw data he disagrees with the report of Dr. Mohapatra on two points- (I) Dr. Mohapatra has not calculated the RMP (Random Match Probability), which does not allow the court to form an opinion as to the strength of DNA evidence and (ii) Dr. Mohapatra has deposed that he does not interpret a mixed profile and therefore, his capability is questioned and his statement may lead to miscarriage of justice. In cross-examination he has admitted that the copy of the report Exhibit-ka-6 was sent to him and in Exhibit-ka-6 tables of genotype plots have been given. He has stated that samples of genotype plots which have been attached with his report are having 11 markers and the samples of genotype plots which have been produced by Dr. Mohapatra are having 16 markers and he knows that in India the experts use AMP FL STR 16 Loci base and Gene Mapper ID Software. It is correct to say that the height of the individual peak of the generated genotype plot can be seen by the examiner from the system itself and can be documented by the expert if it is within acceptable limit. It is also correct to say that the individual allels can be analysed in the system with respect to its height, size, and all other parameters. It is also correct to say that the height of the peaks, morphology of peaks can be viewed in a better manner from the system itself by doing zoom. However, the height of the peaks can be best

judged or estimated by the tabular chart which gives the exact value. It is correct that Dr. Mohapatra has recorded the allels which he has identified in the tabular chart given in Exhibit-ka-6. He does not know as to whether there are any guidelines or rules that the printouts of blank genotype plots without any allels peak are to be kept. He agrees that genotype plots contain information with reference to some allels, all dyes, very rough estimate/ general estimate of peak heights, very rough estimate/general estimate of peak heights ratio, some data points and some file names. It is correct to say that many samples can be made to run together in the DNA kit after one and another but the interval must be of at least 30 seconds between the samples. It is also correct to say that Dr. Mohapatra has made inter-se comparison of the DNA in the samples received by him. It is also correct to say that Dr. Mohapatra has not given identity of the source of DNA. It is true that the LCN DNA results have been the subject of adverse observations by the courts due to possibility of contamination.

Thus the defence witness has admitted the evidence and report of Dr. B.K. Mohapatra with minor tit-bits here and there. Dr. Mohapatra has stated at page no. 19 of his cross-examination that NABL guidelines are followed and record of every process is maintained and electrophoregram is in his record. He has also stated at page no. 8 of his cross-examination that DNA is extracted from the sample and thereafter purification is done and then amplification and genotyping is done and then

results are obtained. He has also mentioned the method of test in his work sheet with which he has come to depose in the court. He has also stated at page no. 23 of his cross-examination that genotype plots are generated from automatic machine-Automatic Genetic Analyzer. He has also stated at page no. 26 of his cross-examination that lab procedure has been mentioned in his report Exhibit-ka-10 and other reports and even if there is a contaminate in DNA result will be the same and only change will be in the graph. He has also stated that he has extracted electrophoregram of positive control. Thus, there appears no reason to discard the report and evidence of Dr. B.K. Mohapatra. P.W.-24 Suresh Kumar Singla has examined a portion of cloth piece described as pillow-cover (Exhibit-26) and a portion of blood stained threads described as kukri with sheath (Exhibit-27) and Exhibit-26 was found to be of human-in-origin but Exhibit-26 gave no reaction for blood groups A, B, AB & O and human blood could not be detected on Exhibit-27. He has proved his examination report as Exhibit-ka-49. In the cross-examination he has stated that in the Exhibit-ka-27 human blood was not found and blood of common animals like cow, sheep, goat, cock, dog and Buffalo was also not found. This evidence proves that kukri was not used for homicide. He has also stated that his lab follows NABL guidelines. P.W.-25 S.P.R. Prasad, Senior Technical Examiner, C.D.F.D., Hyderabad has proved examination report as Exhibit-ka-51. He has also proved clarificatory letter dated 24.03.2011 as Exhibit-ka-52 in which it has been mentioned that

there are typographical errors in the description of the Exhibits-Z14 and Z20 and therefore the description of “Exhibit-Z14 shall be read as “one pillow-cover (purple coloured cloth) Y-204, C-110” instead of pillow with pillow-cover (Blue and White Coloured)” and the description of “Exhibit-Z20” shall be read as “pillow with pillow-cover (Blue and White Coloured) Y-204, C-114” instead of “one pillow-cover (purple coloured cloth)”. He has given cogent reasons for this *faux pas.* He has stated on oath that before given inputs electrophoregrams of Exhibit-Y204 CL-14 from which DNA profile was received and Exhibit-Y204 CL10 from which DNA profile was not received were checked. It is to be noted that no DNA was found in the pillow-cover of Krishna by C.F.S.L., New Delhi and C.D.F.D., Hyderabad and both have found DNA of Hemraj in the pillow-cover of Hemraj. This issue was raised before the Hon'ble High Court, Allahabad by the accused Dr. Nupur Talwar in Criminal Revision No. 1127 of 2011 Dr. Nupur Talwar Vs. C.B.I. & another and after hearing both the sides it was adjudicated on 18.03.2011 by the Hon'ble High Court that the objections raised by the accused are baseless and it was clear that DNA of Hemraj was not found on Krishna's pillow-cover. The matter was again agitated before the Hon'ble High Court in Petition No. 35303 of 2012 and it was held by the Hon'ble High Court that the clarificatory letter of C.D.F.D., Hyderabad has mentioned as to how the error has crept in. It is also pertinent to mention here that original Exhibits are having proper tags of C.F.S.L. and C.D.F.D. and full description of the Exhibits have been mentioned in

the tags and signed by the concerned experts. All the tags have been exhibited with envelopes and material Exhibits i.e. pillow-cover and pillow with cover. In view of this clinching scientific evidence the arguments advanced on behalf of the accused have got no force.

It was next contended by the learned counsel for the accused that in a case based on circumstantial evidence if chain of events points out to only hypothesis that the accused are guilty and then conviction can be recorded otherwise not but in the instant case alternative hypothesis is proved from the evidence on record in as much as when Dr. Rajesh Talwar was arrested nothing was discovered on his pointing out although he was taken in police custody remand for several days; no incriminating evidence including murder weapon was found from him; a number of Exhibits were collected and got examined but yielded no evidence to connect the accused with the crime; polygraph test and psychological assessment tests conducted upon Dr. Rajesh Talwar, no incriminating material was obtained; weapons of offence as introduced by N.O.I.D.A. police were never found; during investigating Krishna a friend of Hemraj was arrested and order was passed by Special Judicial Magistrate (C.B.I.), Ghaziabad on 11.06.2008 granting permission to C.B.I. to conduct Lie Detector Test, Brain Mapping Test and Narco Analyses Test at F.S.L. Banglore and the aforesaid tests indicated that Krishna had revealed crucial information leading to the double murders and his complicity is found; as per application dated 14.06.2008 of C.B.I.

not only Krishna but other persons were also involved; that when Krishna was arrested and taken on remand then he gave a voluntary disclosure statement confessing the double murders by kukri; Krishna also disclosed that murders were committed by him and accomplices Rajkumar and Vijay Mandal; in the application dated 17.06.2008 of C.B.I. it was again stated that Krishna had admitted to have committed the double murders and then his custody remand was granted till 23.06.2008 by Special Judicial Magistrate (C.B.I.), Ghaziabad and it was observed by the learned Magistrate that on perusal of case diary and disclosure memo it is revealed that accused Krishna has confessed his guilt that on 14.05.2008 Hemraj has told him to get a kukri and accordingly he had gone with kukri to Hemraj and in the night of 15.05.2008 at around of 12.00 O'Clock he had gone to meet Hemraj at L-32 and can get recovered the mobile phone of Ms. Aarushi; on 14.06.2008 a kukri alongwith sheath and purple colour pillow-cover were recovered from his room; on 18.06.2008 the clothes of Dr. Rajesh Talwar and Dr. Nupur Talwar which they were wearing in the night intervening 15/16.05.2008 were seized but on scientific examination and DNA analysis they yielded blood and DNA of Ms. Aarushi alone; Rajkumar was arrested on 27.06.2008 and during custody remand he also made a disclosure statement admitting his involvement alongwith Krishna and others which stands proved from the application dated 28.06.2008 filed by Vijay Kumar the then investigating officer; Vijay Mandal was arrested on 11.07.2008 and he also disclosed his complicity

alongwith Krishna and Rajkumar; that on 11.07.2008 an application was given by C.B.I. before the learned Special Judicial Magistrate (C.B.I.), Ghaziabad under section 169 Cr.P.C. mentioning therein that evidence against Dr. Rajesh Talwar is insufficient and consequently he was released from jail; Dr. Sunil Dohre and Dr. Naresh Raj opined that antemortem injuries on the heads of both deceased are possible to have been caused by kukri; P.W.-37 Vijay Kumar has stated in his evidence that in Brain Mapping Test, Narco Analysis Test and Polygraph Test of Krishna his complicity in double murders has been found; Krishna, Rajkumar and Vijay Mandal were involved in the crime; Vijay Kumar has also stated that K.K. Gautam has stated before him that he had found that on the bed of Hemraj at least three persons must have been seated as there were depressions in the bed and in the two glasses substance like alcohol was seen and it seemed that toilet of Hemraj had not been flushed and more than one person had urinated in the toilet; that P.W.-35 M.S. Phartyal has also admitted in his cross-examination that the above three persons had confessed to have committed murders, however they were not cooperating and giving misleading information; that sound test was carried on 10.06.2008 and it was found that accused sleeping in their bed-room with air-conditioner switched on cannot hear opening and closing/bolting of entry-exit door; that on 15.05.2008 at about 16:58:14 hours a call was made from telephone number 01206479896 to mobile number 9213515485 and on the same date another call was made from the

said land-line number to the said mobile number at 17:37:33 hours by Krishna to Hemraj from N.O.I.D.A. Clinic of Dr. Rajesh Talwar and at that time Dr. Rajesh Talwar was in his Hauz Khas Clinic and Dr. Nupur Talwar was in Fortis Hospital, Sector-62, N.O.I.D.A. which is proved from the C.D.R. of mobile number 9810178071 in the name of Dr. Nupur Talwar and as such as it is proved that all the erstwhile accused persons were in contact with each other. Like a drowning man catching at the straw, wild suggestions have been thrown that there was a possibility of the murder of both the deceased having been committed by these three erstwhile accused and thus alternative hypothesis of commission of double murders by Krishna, Rajkumar and Vijay Mandal stands proved and *ex-consequenti,* the accused deserve to be acquitted.

I do not find any substance in the aforesaid submissions. The purpose of investigation is to find out the real culprits and in that process even suspected persons are arrested by the investigating agencies for interrogation but when their culpability and complicity in the commission of the offence is not established, then they are let off and therefore, if Krishna, Rajkumar and Vijay Mandal were arrested by C.B.I. during the course of investigation but no *prima-facie* evidence surfaced against them then they were rightly not proceeded against. Recovery of kukri was not made on the basis of pointing out by the accused Krishna. Even this kukri was not recovered from his room on the basis of his disclosure statement and rather from the perusal of Exhibit-ka-92, it will reveal that C.B.I. team along

with forensic experts from C.F.S.L., New Delhi inspected the room of Krishna Thadarai in the presence of his brother-in-law Bhim Bahadur Thapa and then kukri along with sheath was recovered. P.W.-37 Vijay Kumar, a quondam S.S.P. of C.B.I. has stated at page no. 2 of his cross-examination that although Krishna confessed before him but he had changed his version and therefore, he could not reach at the conclusion that he has perpetrated the crime. This witness has wrongly deposed that on the basis of disclosure statement made by Krishna kukri was recovered from his room because in Exhibit-ka-92 it has no where been written that on the basis of disclosure statement recovery of kukri was made on 14.06.2008. If, while moving applications for granting police custody remand of these three erstwhile accused it was mentioned that these persons are involved in the crime then it cannot be held that, in fact, these persons were the perpetrators of the crime because, in practice, the investigating agency when moves application for police custody remand of an accused then all-out efforts are made to convince the concerned judicial magistrate regarding the complicity of the accused so that custody remand may be granted and therefore, if the learned Special Judicial Magistrate (C.B.I.), Ghaziabad has made certain observations for grant of police custody remand on the basis of averments made in the applications, then by that observation this court is not bound to infer that the suspects were actually involved in the crime. It is also pertinent to mention here that investigation at that stage was at preliminary stage and all the

cumulative evidence and circumstances had not surfaced by then and hence, for these reasons no importance can be attached to the applications for grant of remand and the orders passed by the Special Judicial Magistrate (C.B.I.), Ghaziabad thereon. In **Smt. Selvi and others Vs. State of Karnataka AIR 2010 SC 1974 (3JJ)** it has been held that the results of Brain Mapping, Narco Analysis and Polygraph Tests cannot be admitted in evidence and the results obtained from such tests cannot be categorized as material evidence and 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 tests and therefore, in view of the law settled by the Hon'ble Supreme Court, if the erstwhile accused persons had given any inculpatory statements during the course of these tests then they are of no legal significance. If on 15.05.2008 at about 16:58:14 hours and 17:37:33 hours telephone calls were made by Krishna to Hemraj from N.O.I.D.A. Clinic of Dr. Rajesh Talwar and at that time Dr. Rajesh Talwar was in his Hauz Khas Clinic and Dr. Nupur Talwar was in Fortis Hospital, Sector-62, N.O.I.D.A. then it cannot be said that they were planning to commit any crime. One should not lose sight of the fact that Hemraj was also murdered in the intervening night of 15/16.05.2008 and therefore, conspiracy between Hemraj and Krishna cannot be deduced by any stretch of imagination. There is no evidence that Rajkumar and Vijay Mandal were in contact either

with Hemraj or Krishna. The evidence of K.K. Gautam that on examination of the room of Hemraj it was observed that three persons might have been sitting in the bed as there were depressions on the bed and in the two glasses substance like alcohol was seen and it seemed that toilet of Hemraj had not been flushed and more than one person had urinated in the toilet hardly inspires confidence as this statement is based on surmises, conjectures and speculations. It is not possible at all that in the midnight around 12.00 O'Clock Krishna, Rajkumar and Vijay Mandal will come to the room of Hemraj and have liquor drinks. If it was so, four glasses might have been found there but K.K. Gautam has stated before the I.O. that in only two glasses substance like alcohol was seen which has not been confirmed by any other evidence. The prosecution story and its evidence will not receive a jerk and jolt because the erstwhile accused were not charge-sheeted or put on trial as the jerk and jolt is not such as to upset and tilt the prosecution version against the accused and create any reasonable doubt in regard to their complicity in the ghastly crime. Since the occurrence is nocturnal inside the flat and the crime came into light in public domain in the morning of 16.05.2008 and therefore, it is possible in all human probability that both the accused may have created evidence of such a nature which may confuse the investigators. The accused Dr. Rajesh Talwar has admitted at page no. 2 of his written statement under section 313 Cr.P.C. that he and his wife have been brought up in a very liberal atmosphere with modern outlook and at page 3 he

has stated that he takes alcohol at parties. However, at page no. 4 of his written statement he has stated that whisky bottle should have been ordinarily in the cabinet. This answer itself suggests that Dr. Rajesh Talwar is fond of liquor and he used to take liquor in his flat as he himself has admitted that whisky bottle must have been in the cabinet and not in the dining table and therefore, there is every possibility that whisky was taken by the accused Dr. Rajesh Talwar. It is also possible that whisky bottle might have been lifted after wearing gloves. It is also possible that Sula wine may have also been taken by the accused when he was extremely and intensely in tension after committing the crime or it was partly made empty to show that Hemraj and his friends had consumed the liquor. It is not the case of the accused that Hemraj used to take wine or liquor.

If weapons of offence i.e. hammer, knife and scalpel have not been recovered then due to that, the case of prosecution is not affected. In **Umar Mohmmad Vs. State of Rajasthan 2008 (60) ACC 295 (SC)** it has been held that non recovery of incriminating material/weapons of offence from the accused cannot be a ground to exonerate them when the eye witnesses examined by the prosecution are found to be trustworthy. In this case, the law as laid down in **Krishnamochi and others Vs. State of Bihar (2002) 6 SCC 81** was followed. In **Baba Deen @ Babai Vs. State of U.P. 2012 (78) ACC 660 (DB ALL)** it has been held that non recovery of weapon of offence is not a ground for acquittal of the accused when there is a clinching and reliable evidence. In that case the law as

expounded in **State of Rajasthan Vs. Arjun Singh 2012 (77) ACC 708 (SC)** has been followed. It is to be noted that head and neck injuries of both the deceased persons do not appear to have been caused by hammer and knife respectively and therefore, question of their recovery does not arise. Golf sticks were produced by Dr. Rajesh Talwar himself. The size of Scalpel is just like a pen and can easily be concealed or destroyed at any time after the commission of the double murders in the night and both the accused had sufficient time and opportunity to destroy or conceal the scalpel and other incriminating evidence which was against them. In view of the discussion made above, the arguments advanced on behalf of the accused pale into insignificance.

The next contention of the learned counsel for the accused is that from the evidence it is not proved that the crime scene was dressed up by the accused persons and insinuation that toys having no blood stains were kept on the bed after the commission of the murder; that the bed-sheet was not having creases; that dead body of Hemraj was covered with a cooler panel; that the accused persons changed their clothes which they were wearing in the night of the occurrence and fresh clothes were worn before the onset of the dawn are nothing but a pack of lies and have been concocted as a cock and bull story but these allegations are not proved by the evidence in view of fact that on perusal of photographs paper no. 560-ka-/31, 560-ka/37and 560-ka/39 which were taken from the digital camera (which was given to Ms. Aarushi as

birth day gift) in the evening of 15.05.2008 it will reveal that toys, pillow have also been shown in those photographs which were taken in the evening and and Dr. Nupur Talwar was also wearing the same gown which she was found wearing in the morning and therefore, the allegations are proved to be utterly false and the prosecution story collapses like pack of cards. I am not going to be lured by attractive ingenious and dexterous defence taken by the learned counsel in as much as from the perusal of above photographs as well as photographs material Exhibits-ka-1, ka-2, ka-3, ka-4, ka-5 it will reveal that in the photographs which are alleged to have been taken in the evening of 15.05.2008 the bed-sheet is of different colour having strips of multiple shades while in material Exhibits-1 to 5, multi-coloured printed bed-sheet is clearly seen which is all together different from the bed-sheet seen in photographs paper no. 560-ka/31, 560-ka/37 and 560-ka/39. In addition to that in photograph paper no. 560-ka/31, 560-ka/37 and 560-ka/39 one toy has been shown just near the head rest while in material Exhibits-1 and 2 that toy has been shown near the legs of Ms. Aarushi; likewise in the bed-sheet as shown photographs paper no. 560-ka/31, 560-ka/37 and 560-ka/39 creases are clearly visible while in the photographs material Exhibits-1 to 5 no such creases are visible at all. Moreover, the bed-sheet as shown in photographs paper no. 560-ka/31, 560-ka/37 and 560-ka/39 appears to be comparatively new than multi coloured printed bed-sheet as shown in material Exhibits- 1 to 5 which appears to be faded

as a result of use since long back. In photographs paper no. 560-ka/31, 560-ka/37 and 560-ka/39 no pillow of the set of bed-sheet has been shown while in photograph material Exhibit-1 one additional and small pillow of the set of the multi-coloured printed bed-sheet has been shown. In the material Exhibits-1 to 5 school bag has been shown near the dead body of Ms. Aarushi while this bag is not visible in the photographs paper no. 560-ka/31, 560-ka/37 and 560-ka/39. No blood stains are also visible in this bag. Upon the comparison of photographs taken by the digital camera in the evening of 15.05.2008 with the photographs material Exhibit- 1 to 5 it clearly shows that the bed-sheet was changed and this in all probability must have been done by the accused. It is also possible that before going to sleep Dr. Nupur Talwar might have changed her gown which she was wearing at the time of taking pix from digital camera. As stated herein before, being mother of the child it is not possible that on seeing her child dead she would not have hugged her. During hugging certainly, the gown of Dr. Nupur Talwar must have also been blood stained but no blood was found, which clearly shows that she had changed her gown or other night-garment, which she was wearing in the night. So is the case with Dr. Rajesh Talwar. P.W.-14 Dr. Rohit Kochar has stated that when on 16.05.2008 he had gone in flat no. L-32 then he had seen that Dr. Rajesh Talwar was in red coloured T-Shirt and half pant and Dr. Nupur Talwar was in white suit or gown but the clothes of both were not stained with blood. P.W.-6 Dr. B.K. Mohapatra has stated that in the half pant, T-shirt

and gown blood stains were faint which may be either that there were light blood satins or blood was cleaned. When the blood splatters can go upto the wall behind the head-rest of the bed then it is not possible that there will be no blood splatters on the toys, school bag and the book “The three mistakes of my life” which were kept on the bed itself. Even if the bed is used for a moment the the creases appear in bed-sheet. It a matter of common knowledge that if one is attacked while lying on the bed he/she will not remain static and resist the attack and in that process creases are bound to occur in the bed-sheet. An outsider killer after committing the crime will not waste his time in dressing-up the bed-sheet, arranging toys and pillow in proper order in the bed-sheet, covering the dead body of Ms. Aarushi with a flannel blanket and cleaning private parts of Ms. Aarushi as his top priority will be to escape away immediately after commission of the murder and thus dressing-up of the bed-sheet and placing toys and pillow is possible to be done by the accused persons only. Similarly, no outsider assassin will bother to take away the body of Hemraj to the terrace and later on drag it to the corner of the terrace and place cooler panel over the dead body and also a bed-sheet on the mesh grill which was between the roofs in such a way that nobody could be able to see the dead body of Hemraj and thereafter will come inside the flat and lock the terrace door from inside and then will leave the flat. In all human probability these activities are possible to be done by the accused and nobody else. It is also not possible that when the victims were

attacked they would not have screeched or yelped. Had both the deceased been murdered by an outsider then hearing of the screeches of victims may have certainly awakened the accused persons even if they could be in deep slumber in the adjoining room and the air-conditioner of their room was on as sound travels with more intensity in the night. If the cooler panel has not been taken into possession by S.I. Data Ram Naunaria and he has not directed constable Chunni Lal Gautam to take photographs and finger-prints of panel then it is merely a negligence on the part of Mr. Naunaria but it is well settled law that on account of negligence or defective investigation of I.O. the prosecution case cannot be thrown away or dubbed as untrue and the accused cannot take advantage of the same as has been held in **H.N. Rishbud Vs. State of Delhi AIR 1955 SC 196 (3JJ), Karnel Singh Vs. State of M.P. (1995) 5 SCC 518, Ram Bihari Yadav Vs. State of Bihar (1998) 4 SCC 517, Paras Yadav Vs. State of Bihar AIR 1999 SC 644, Amar Singh Vs. Balwinder Singh AIR 2003 SC 1164, Dhanaj Singh @ Shera and others Vs. State of Punjab (2004) 3 SCC 654, Surendra Paswan Vs. State of Jharkhand AIR 2004 SC 742, Ram Bali Vs. State of U.P. (2004) 10 SCC 598, Zahira Habibullah H. Shekh Vs. State of Gujarat (2006) 3 SCC 374, Rakesh Kumar Vs. State of Haryana (2009) 3 SCC (Cr.) 1243, Sheo Shankar Singh Vs. State of Jharkhand 2011 Cr.L.J. 2139 (SC), Kashi Nath Mandal Vs. State of West Bengal AIR 2012 SC 3134, Ganga Singh Vs. State of M.P. (2013) 7 SCC 278,**

Hema Vs. State 2013 (1) ACR 670 (SC), Sahabuddin Vs. State of Assam 2013 (80) ACC 1002 (SC). Thus, the arguments of the learned counsel do not hold any water.

The next contention of the learned counsel for the accused is that the allegations that private parts of Ms. Aarushi were cleaned after her murder are preposterous and this theory has been ingeniously invented by P.W.-5 Dr. Sunil Kumar Dohre while giving statement in the court that vaginal orifice of Ms. Aarushi was prominent, vaginal canal was visible which means that somebody had interfered physically with her private parts either just before the setting in of rigor mortis or during the phase of rigor mortis but this piece of evidence cannot be accepted because Dr. Dohre has no where mentioned these facts in the postmortem report and rather it was written in the postmortem examination report that on examination of private parts- 'no abnormality detected' and he has also not given statement regarding the vaginal status to Police Inspector Anil Samania nor to Mr. Vijay Kumar the then S.P., C.B.I., nor to Inspector M.S. Phartyal, nor to any member of the A.I.I.M.S committee and made improvements only on 30.09.2009 when his 6th statement was recorded by A.G.L. Kaul and if private parts may have been cleaned then certainly S.I. Bachhu Singh, who held inquest on the dead body of Ms. Aarushi must have mentioned this fact that bed-sheet was found wet and even S.I. Dataram Nauneria, S.P. City Mahesh Kumar Mishra and Constable Pawan Kumar have not stated in their testimony that the bed-sheet of Ms. Aarushi was

having any evidence of washing and it was wet and thus the evidence of Dr. Dohre stands belied. This argument has also no substance. In the photograph material Exhibit-1 some stain is visible on right-side just beside the pelvic portion of Ms. Aarushi in the bed-sheet. The bed-sheet was seized and sealed by S.I. Dataram Naunaria. It was examined by P.W.-6 Dr. B.K. Mohapatra in the light of the questionnaire annexed with the letter dated 09.04.2010 of S.P., C.B.I., Dehradun. In the examination report-Ka-14 it has been mentioned that in Exhibit-1 i.e. printed multi-coloured bed-sheet having reddish brown stains at many places urine, semen could not be detected and designated circular area of Exhibit-1 did not yield DNA for analysis. In the face of this clinching and reliable scientific evidence it is proved to the hilt that the private parts of Ms. Aarushi were cleaned with water and that's why in the designated circular area of the bed-sheet neither urine nor semen was found. If constable Pawan Kumar, S.I. Bachhu Singh, S.I. Dataram Nauneria and S.P. (City) Mahesh Kumar Mishra have not stated that the bed-sheet was found wet and in the inquest report S.I. Bachhu Singh has not mentioned that the bed-sheet of Ms. Aarushi was found wet than no importance can be attributed to this omission. Since Inspector Anil Samania, S.P., C.B.I., Mr. Vijay Kumar, Inspector M.S. Phartyal have not specifically questioned Dr. Dohre above the vaginal status of the deceased Ms. Aarushi and therefore, he could not tell them about the same and when Mr. Kaul recorded his statement on 30.09.2009 and he was asked specifically to tell about the vaginal status and then he gave

statement regarding the vaginal status of Ms. Aarushi. It was not expected of Dr. Dohre to tell the other members of the expert committee about the vaginal status of Ms. Aarushi. In view of the discussion the arguments of the learned counsel cannot be accepted.

The next contention of the learned counsel for the accused is that, in fact, F.I.R. was dictated to Dr. Rajesh Talwar at his flat by police personnel and he had never gone to the police station Sector-20 to lodge the F.I.R. and it has falsely been deposed by P.W.-34 Dataram Nauneria that F.I.R. was lodged by Dr. Rajesh Talwar at police station itself but when he was cross-examined on this aspect it was stated by him that his statements were recorded by C.B.I. officers 2-3 times and he had gone through the same and admitted them to be correct but in his statements it has not been written that Dr. Rajesh Talwar had lodged the complaint at the police station itself and he cannot furnish any reason for the same. It was further submitted that this witness has admitted that he has not recorded the statement of G.D. writer constable Rajpal Singh and he had not seen Dr. Rajesh Talwar in the police station on 16.05.2008 and he had given statement on 24.10.2008 to the C.B.I. Inspector M.S. Phartyal that on 16.05.2008 at around 7.00 A.M. he had received a telephone call probably from police control-room or from the residence of S.S.P. and immediately thereafter received a call from M.K. Mishra, S.P. (City) who informed him that in Flat No. L-32, Sector-25, a lady had been murdered and he was directed to reach there immediately and he has

further stated that he had told the C.B.I. officers that upon receiving information from the police station he had immediately rushed to Flat No. L-32 but he does not know why the C.B.I. officers had not recorded this statement and he had not asked them to record his statement to the effect that he had gone to Flat No. L-32 after receiving information from the police station; it has not come in his knowledge that on 16.05.2008 at 06.55 A.M. Dr. Dinesh Talwar had made a telephone call to police control-room regarding the murder of Ms. Aarushi; P.W.-35 M.S. Phartyal has admitted in his cross-examination that S.I. Dataram Nauneria had not given a statement to him that on 16.05.2008 at around 07.10 A.M. Dr. Rajesh Talwar had lodged the complaint at the police station itself; P.W.-29 Mahesh Kumar Mishra had also admitted in his cross-examination that he had received an information from city control-room at about 07.00 A.M. that at L-32, Jalvayu Vihar one girl had been murdered and this information was given to the police control-room by the uncle of the girl; he had reached at L-32 at about 07.30 A.M. and till the time he remained there at the crime scene F.I.R. was not lodged and he had asked the accused persons to get the F.I.R. lodged and had instructed S.I. Dataram Nauneria that whatever the accused write he must lodge the F.I.R. on that basis and when he had reached at L-32 Dr. Rajesh Talwar was writing the complaint and thus it is amply proved that Dr. Rajesh Talwar had not gone to the police station to lodge the F.I.R. and rather F.I.R. was dictated to him at the flat itself and accordingly in the G.D. Exhibit-

ka-77 arrival of Dr. Rajesh Talwar in the police station has wrongly been mentioned by constable Rajpal Singh and as such the allegation of lodging false F.I.R. and misdirecting N.O.I.D.A. police is not proved. This argument is too tenuous. P.W.-34 S.I. Dataram Nauneria has stated at page no. 6 of his cross-examination that in the morning of 16.05.2008 he was at his residence which is in the premises of the police station and he was informed by Constable Rajpal Singh regarding the occurrence and then after 15-20 minutes he had reached at the crime scene. Although he has admitted that on that date he had not seen Dr. Rajesh Talwar in the police station but it should be borne in mind that report was lodged at 07.10 A.M. and at that time he was not in the office of the police station and rather he was at his residence and therefore in the fact-situation it is constable Rajpal Singh who would have been the best witness to tell whether Dr. Rajesh Talwar had come to the police station to lodge the F.I.R. The genuineness of complaint Exhibit-ka-95 has been admitted by both the accused and therefore it's formal proof is not required and can be read into evidence as held in **Sadiq Vs. State 1981 Cr.L.J. 379 (Allahabad FB), Shaikh Farid Hussain Sab Vs. State of Maharashtra 1984 Cr.L.J. 487 (Bombay FB) and Boraiah @ Shekhar Vs. State 2003 Cr.L.J. 1031 (Karnataka FB).** P.W.-34 has proved the photocopy of G.D. No. 12 dated 16.05.2008 as Exhibit-ka-77 in which it has been shown that at 07.10 A.M. Dr. Rajesh Talwar came to the police station and handed over a complaint on the basis of which case

crime number 695 of 2008 under section 302 I.P.C. was registered against Hemraj. The scribe of G.D. Constable Rajpal Singh has not been examined by the prosecution. No prayer was ever made by the accused to summon constable Rajpal in defence to examine him to prove about the correctness of the entry made in the said G.D. In **Jafar Ali Vs. State of U.P. 2004 (48) ACC 854,** it has been held by the Division Bench of the Hon'ble High Court of Allahabad that entry in G.D. is made by police official in discharge of official duties and therefore, there is no reason to disbelieve the entry so made. The court may presume under section 114-(e) of Evidence Act that judicial and official acts have been regularly performed. The legal maxim *omnia praesumuntur rite it dowee probetur in contrarium solenniter esse acta* i.e., all the acts are presumed to have been done rightly and regularly, applies.

It is trite in law that when there is a fight between ocular and documentary evidence, it is the documentary evidence which will prevail and therefore, the evidence of P.W.-29 Mahesh Kumar Mishra that when at about 7.30 A.M. he reached at Flat No. L-32, Dr. Rajesh Talwar was writing the complaint and he had instructed S.I. Dataram Nauneria to lodge the F.I.R. on that basis and till the time he remained there F.I.R. had not been lodged is proved to be false and this statement appears to have been given under some misconception or loss of memory due to passage of time. Oscar Wilde has aptly remarked that memory is the weakest companion of a human being. If S.I. Dataram Nauneria had not stated before the C.B.I. Officers

that on 16.05.2008 at about 07.10 A.M. Dr. Rajesh Talwar had come to the police station to lodge the F.I.R. then due to that it cannot be said that Dr. Rajesh Talwar had not gone to the police station to lodge the F.I.R. It has no where been suggested before P.W.-34 that false entry in G.D. may have been recorded by Constable Rajpal Singh. Assuming *arguendo* that Dr. Rajesh Talwar had not gone to the police station to lodge the F.I.R. even then it is proved that he gave false information to the police that murder of Aarushi has been committed by Hemraj knowing that murders of Ms. Aarushi as well as Hemraj were committed by him and his wife Dr. Nupur Talwar. Thus the arguments on this count also fail.

The next contention of the learned counsel for the accused is that P.W.-29 Mahesh Kumar Mishra has deposed that when on 17.05.2008 he had seen the dead body of Hemraj then at that time both the accused were not present in the flat and only Dr. Dinesh Talwar, Dr. Durrani and some other persons were present; Dr. Dinesh Talwar and Dr. Durrani identified the dead body of Hemraj and after some time Dr. Rajesh Talwar also arrived there but he appeared grudging to identify the dead body and when people who had assembled there identified the dead body of Hemraj then Dr. Rajesh Talwar also identified the dead body but this fact was not stated before I.O. Mr. Vijay Kumar. Likewise P.W.-33 S.I. Bachhu Singh has deposed that dead body of Hemraj was not identified by Dr. Dinesh Talwar and Dr. Rajesh Talwar who had reached there later; P.W.-34 S.I. Dataram Nauneria has deposed that on

06.06.2008 he had stated to I.O. Mr. R.S. Kuril that on 17.05.2008 when Dr. Rajesh Talwar had reached he had expressed his inability to recognize the dead body of Hemraj but he cannot say how Mr. Kuril has mentioned in his statement that on that day he had not met Dr. Rajesh Talwar at all and I.O. Mr. Kaul has admitted that S.I. Dataram Nauneria had stated before Mr. Kuril that on 17.05.2008 that he had not met Dr. Rajesh Talwar at all and thus it is proved from the above evidence that Dr. Rajesh Talwar had not refused to identify the dead body of Hemraj.

I don't find any force in this argument. It is proved from evidence on record that terrace door was locked from inside by the accused persons after taking away the body of Hemraj in the terrace and as such they were knowing well that dead body of Hemraj is lying in the terrace. P.W.-29 Mahesh Kumar Mishra has stated at page no.2 of his examination-in-chief that Dr. Rajesh Talwar was asked by him to provide the key of terrace door but he had stated that it is not traceable. He has also stated that when he went to the terrace he had found Dr. Dinesh Talwar, Dr. Durrani and some other persons there and they had told him that the dead body was of Hemraj and after some time Dr. Rajesh Talwar also reached there and when he enquired from him about the dead body then he seemed reluctant to identify the dead body and when other persons present there stated that the dead body was of Hemraj then Dr. Rajesh Talwar also identified the dead body. P.W.-33 S.I. Bachhu Singh has also stated that Dr. Dinesh Talwar had declined to identify the dead body and after some time Dr.

Rajesh Talwar has also came there and he too did not identify the dead body but thereafter Dr. Rajesh Talwar stated that the dead body may be of Hemraj. P.W.-34 S.I. Dataram Nauneria has also stated that when he enquired from Dr. Dinesh Talwar about the dead body then he feigned his ignorance and meanwhile Dr. Rajesh Talwar also came there and he was asked to identify the dead body but he also declined to identify it. He has also stated that Ram Prasad, Rudra Lal had also come there and they identified the dead body to be of Hemraj, the servant of Dr. Rajesh Talwar. He has also stated that a memo Exhibit-ka-82 regarding breaking open of the lock was prepared but Dr. Dinesh Talwar had refused to sign in this memo. From the perusal of Exhibit-ka-82 it will transpire that a note was appended to that effect below the memo that Dr. Dinesh Talwar refused to put his signatures. If all the above witnesses had not stated before the investigating officer that Dr. Rajesh Talwar had declined to identify the dead body of Hemraj then the omission about minute details will not create any dent in the case of the prosecution. In a plethora of cases which have been alluded to *supra* in the preceding paragraphs and in **State of Punjab Vs. Wassan Singh AIR 1981 SC 697** and **State of Andhra Pradesh Vs. Kanda Gopaludu 2005 (53) ACC 772 (SC)** it has been held that human memory is apt to blur with the passage of time and hence minor omissions regarding collateral and subsidiary facts which do not affect the substratum of the case will not affect the credibility of the witnesses. As already stated it depends

whether the investigating officer had specifically asked a particular question from the witness and if not asked then it is not necessary that the witness will tell the investigating officer on his own. The statements given to the investigating officer are supposed to brief and detailed statements are always given in the court. P.W.-7 K.K. Gautam has also deposed that the when the police had enquired from Dr. Dinesh Talwar about the identity of the dead body then he had also feigned his ignorance. Thus, the arguments of the learned counsel are bereft of reasons.

The next submission of the learned counsel for the accused is that from the evidence adduced by the prosecution it is not proved that the accused persons caused destruction of evidence of the commission of the twin murders in as much as the floor of Aarushi was cleaned on 16.05.2008 with the permission of the police personnel present there; the outer-most grill door was unauthorized and therefore got removed after many months of the occurrence and there was no prohibitory orders restraining the accused from removing the grill door and the apartment was got painted a year and half after the occurrence. It was further submitted that P.W.-15 Umesh Sharma has deposed that he had cleaned the floor of Aarushi's room after seeking permission from the police officers and at that time both the accused were away at crematorium to perform the last rites of Aarushi; D.W.-5 Vikas Sethi has also deposed that he had sought permission from the police officers and one lady police official for cleaning which they had accorded; P.W.-12

Punish Rai Tandon has stated that the outer-most grill door was not a part of the house originally and Dr. Rajesh Talwar had got it separately installed later and on 16.05.2008 cleaning was done in the presence of police officials; P.W.-29 Mahesh Kumar Mishra has stated that on the pillow there was a lot of blood which had seeped down onto the floor and besides that area blood was not found anywhere in the room of Aarushi including her loo; P.W.-39 A.G.L. Kaul has admitted that statement of S.I. Sunita Rana was recorded by assisting investigating officer Mukesh Sharma and she has stated to him that 2-3 ladies along with one male person were cleaning the drawing room and thus destruction of evidence of the commission of the murders is not proved at all. These arguments are also liable to be trashed. No permission was sought by the accused from the C.B.I. before removing the outer-most grill door and painting of partition wall knowing it well that investigation is going on and thus vital piece of evidence was destroyed. P.W.-15 and D.W.-5 both are highly interested and partisan witnesses being paid employees of the accused persons and therefore their evidence given on the aspect of cleaning of the floor with the permission of the police cannot be believed. D.W.-5 has been convicted under sections 63 and 68 of Copy Right Act by A.C.M.M., Rohini Courts, New Delhi. S.I. Sunita Rana has not been produced by the prosecution and therefore she should have been got examined as defence witness but that was not done despite opportunity given to the accused to file list of witnesses containing the names of the witnesses

which are proposed to be examined in defence but her name was not included in the list of witnesses and therefore, the statement given by Sunita Rana under section 161 Cr.P.C. to assisting investigating officer Mukesh Sharma, being not substantive piece of evidence cannot be looked into as the statement under section 161 Cr.P.C. can be used for the purpose of contradictions only. From the oral and documentary evidence it is proved that blood splatters were found on the wall behind the head-rest of the bed as well as on the frontal side of the door of Aarushi's room. The blood splatters are clearly visible in the photograph material Exhibit-4 and photograph nos. 29, 31, 32, 33, 34, 35 and 36 of D-98. P.W.-1 constable Chunni Lal Gautam has stated on oath that he had seen blood splatters on the wall behind the back of the Ms. Aarushi's bed. P.W.-29 Mahesh Kumar Mishra has also stated in his examination-in-chief that there were some toys kept on the bed but without blood stains and blood splatters were in the wall behind the head-rest of Ms. Aarushi's bed as well as on the frontal side of the door of Ms. Aarushi's room. S.I. Bachhu Singh and S.I. Dataram Nauneria have also stated that there were blood splatters behind the wall of Ms. Aarushi's bed. Those ladies who had instructed Umesh Sharma and Vikas Sethi to clean the floor have neither been named by Unesh Sharma and Vikas Sethi nor have they been produced in the court. Likewise, P.W.-15 and D.W.-5 have not disclosed the names of the police officers who had permitted to clean the floor. Obviously, these two witnesses could not clean the floor without the tacit

approval of the accused persons. P.W.-23 Kusum has deposed on 12.11.2012 that about four years ago when in the summer season she was going to her residence situated in Sadarpur Village then she had found a mobile set in a park and after 6-7 days of this recovery,her brother Rambhool came to her residence and then her son had given this mobile set to Rambhool and after aboubt one and half year Delhi Police came in Dashahara Village and arrested her brother Rambhool. She and her husband were also arrested by the police and mobile set was seized and after interrogation they were released. P.W.-32 Richhpal Singh had stated that on 13.09.2009 he has taken one cell-phone with SIM and G.D. No. 7 dated 13.09.2009 from Mr. Chandram Head Constable, Crime Branch, Delhi Police, Sun Light Colony, New Delhi and seizure memo Exhibit-ka-63 was prepared by his companion S.I. Yatish Chandra. He has further stated that number of SIM was 9639029306 and I.M.E.I. no. of this mobile set was 354568012881114. P.W.-39 has stated that Dr. Rajesh Talwar had told him that the book 'Three mistakes of my life' was in the bed of Ms. Aarushi at the time of her murder and card-board box of Ms. Aarushi's mobile was with him and this book and card-board box were handed over to inspector Arvind Jaitley who has prepared production-cum-seizure memo Exhibit-ka-97. In Exhibit-ka-97 it has been written that in the card-board box I.M.E.I. No. 354568012881114 of Nokia N-72 mobile was found printed and it was stated by Dr. Rajesh Talwar that this was the packaging of mobile phone of here daughter and the same

mobile-set was found by Kusum. P.W.-39 has deposed that the cell-phone whose I.M.E.I. no. was printed in the card-board box was used by Ms. Aarushi and accordingly it is proved that mobile-set of Ms. Aarushi was thrown in the park to conceal and destroy the evidence. He has also stated at page no. 9 of his cross-examination that mobile-set of Hemraj was found active in Punjab circle as was informed to him by TATA Telecom. D.W.-4 has admitted in his cross-examination that in the shop of his father mobile-sets are being sold and mobile-set of Ms. Aarushi was pre-paid and used to get it recharged at the instance of Dr. Rajesh Talwar. He has also admitted that his father's sister lives in Punjab. A specific suggestion has been thrown before this witness that data of mobiles of Ms. Aarushi and Hemraj were deleted by him and mobile-set of Hemraj must have been got sent to punjab. In Kodali Puran Chandra Rao Vs. P.P. Andhra Pradesh AIR 1975 SC 1925 (3JJ), it was held that the following ingredients are to be proved by prosecution:-That an offence has been committed;

1) That the accused knew or had reason to believe the commission of such offence;
2) That with such knowledge or belief he
    a) Caused any evidence of the commission of that offence to disappear, or
    b) Gave any information respecting that offence which he then knew or believed to be false;
3) That he did so as aforesaid, with the intention of screening the offender from legal punishment.

The same view has been taken in **Palvinder Kaur Vs. State of Punjab AIR 1952 SC 354, Wattan Singh Vs. State of Punjab 2004 (48) ACC 677** and **Budhan Singh Vs. State of Bihar 2006 (55) ACC 550.**

From the evidence it is proved that the accused persons disposed off/destroyed the scalpel, blood stained clothes worn by them during the commission of the offence, dressed-up the scene of crime, cleaned private parts of Ms. Aarushi, covered the dead body of Ms. Aarushi with a flannel blanket and that of Hemraj with a cooler panel, placed a bed-sheet on grill dividing two roofs, locked the door of terrace, concealed or destroyed the key of the terrace door which has not been found till yet, wiped the blood stains on stairs, secretly hid the murder weapon- one golf stick in the loft, cleaned the two golf sticks, concealed and threw away the mobile sets of both the deceased, knowing well that murders of both the deceased have been committed. All these things were done by the accused with the intention to screen themselves from legal punishment. As such charge under section 201 I.P.C. is fully proved against the accused persons.

The next contention of the learned counsel for the accused is that the allegation that key to the lock of terrace door was not made available on 16.05.2008 and it was concealed by the accused is not borne out from the evidence on record because the key along with bunch of keys always used to be in the possession of Hemraj and therefore question of producing the key by the accused persons to the

police does not arise and as such their conduct cannot be dubbed as evasive. This argument also has no legs to stand. P.W.-13 Dr. Rajiv Kumar Varshney has stated at page no. 3 of his cross-examination that in his presence the key of terrace door was asked for but it was not traceable. P.W.-14 Dr. Rohit Kochar has also deposed that a policeman had asked Dr. Rajesh Talwar to make available the key of terrace door but Dr. Talwar went inside the flat and did not come out for considerable time. P.W.-29 has also stated at page no. 2 of his examination-in-chief that terrace door was found locked and he had asked Dr. Rajesh Talwar to provide the key and then Dr. Talwar had told him that the key is not traceable and then he had directed A.S.P./C.O. Mr. Akhilesh and S.H.O. that the lock will not be broken and in case the key is not available then it will be better to take out the lock along with the latch. P.W.-33 S.I. Bachhu Singh has also stated that on 17.05.2008 S.H.O. Mr. Nauneria had asked Dr. Dinesh Talwar to open the lock of the terrace door but he had stated that the key is not traceable and thereafter lock was got broken by Dr. Dinesh Talwar. P.W.-34 S.I. Dataram Nauneria has also stated that he tried to go to the roof through the stairs but the terrace door was found locked and he asked Dr. Rajesh Talwar to make available the key of the lock but Dr. Rajesh Talwar responded that the key is not available and he should not waste his time in breaking open the lock otherwise Hemraj will flee away and thus in view of this evidence the argument of the learned counsel is found to be damp squib.

The penultimate submission of the learned counsel for the accused is that Dr. Dohre has mentioned in his report that the time of the death of Ms. Aarushi is 1 to $1^{1/2}$ days from the time of conducting the postmortem examination but in the court he has stated that time of death was 12-18 hours from the time of conducting postmortem examination and one day is of only 12 hours from which it is proved that Dr. Dohre lacks expertise and his evidence cannot be accepted. It was further submitted that D.W.-4 Dr. R.K. Sharma has clearly stated that the death of Ms. Aarushi could have been caused about 8-10 hours from the time of conducting the postmortem examination because in summer months the rigor mortis starts very quickly and after a period of four hours from consumption of food, semi-digested food can be seen and in next two hours it completely gets digested and since in the stomach of Ms. Aarushi semi-digest food was found and as such her death had taken place 4-6 hours after having consume the dinner and therefore the entire evidence of Dr. Dohre is found to be unbelievable and fraught with suspicion. I agree with this contention to the extent that Dr. Dohre has incorrectly mentioned in his report that the time of death of Ms. Aarushi was 1 to $1^{1/2}$ days from the time of conducting postmortem examination and one day is of only 12 hours. This court fails to understand as to why this gentleman has stated that on day is of only 12 hours. However, the remaining part of his evidence cannot be brushed aside on that ground. In **Shakila Abdul Gaffar Khan (Smt.) Vs. Vasant Raghunath**

Dhoble and others (2003) 7 SCC 749, it has been held that falsity of a particular material would not be vitiate the entire testimony of the witness concerned. In such a case it is the duty of the court to separate grain from chaff and only when that is not feasible, the court can discard the evidence in *toto.* P.W.-5 Dr. Dohre has explained the reasons as to how he had written in the postmortem examination report that death of Ms. Aarushi was 1 to $1^{1/2}$ days from the time of conducting postmortem examination. When he was questioned by the court itself as to how this time was written by him then he stated that the deceased had died about 12 O'Clock in the night and he had conducted postmortem examination at about 12 o'clock in the noon and when he was going to complete the postmortem examination report then media persons came there and therefore the time of Ms. Aarushi's death as 1 to $1^{1/2}$ days was written down in haste. It is worthwhile to mention here that both the accused have not taken the plea that death of Ms. Aarushi did not take place in the mid-night and therefore if any blunder has been committed by Dr. Dohre while recording the time of death of Ms. Aarushi in the postmortem examination report then no benefit can be derived by the accused. It is also important to mention here that exact time of death cannot be stated with mathematical accuracy by any doctor conducting postmortem examination and there can be variation of 3 to 4 hours on either side of death. In **Jagmohan and others Vs. State of U.P. 2005 (53) ACC 307 (DB),** it was held that stomach contents of the deceased not makes the prosecution case doubtful.

State of U.P. Vs. Sarva Jeet & others 2005 (2) Allahabad Criminal Rulings 1480 (DB), it has been held that stomach contents cannot be determinative of time of death. In that case the law as exposited in **Ram Bali Vs. State of U.P. 2004 (49) ACC 453 (SC), Anil Sharma Vs. State of Jharkhand AIR 2004 SC 2294, P.P. Venkaih Vs. State of A.P. AIR 1985 SC 1715 and Nihal Singh & others Vs. State of Punjab AIR 1965 SC 26** has been followed. In Ram Bali's case, it was held that the medical evidence is not yet so perfect as to be able to tell the precise time of death of the deceased in a computerised mathematical manner on the basis of stomach contents. The time taken normally for digesting food, would also depend upon the quality and quantity of food as well, besides others. The time also varies according to digestive capacity. The process of digestion is not uniform and varies from individual to individual and the health of a person at a particular time and so many other varying factors.

The t*erminus ad quem* of the learned counsel for the accused is that on cumulative appreciation of the evidence as brought on record the prosecution has miserably failed to prove the charges against the accused persons and rather from the evidence it is proved that the murders were committed by some other person(s) who had visited Hemraj in the intervening night of 15/16.05.2008 which is clearly indicated by the blood found on Sula wine bottle, Kingfisher beer bottle and Sprite plastic bottle seized from the room of Hemraj and the chain of circumstances has not been concatenated and

hence accused deserve to be acquitted of the trumped up charges.

I find myself completely in disagreement with the said contention of the learned counsel for the accused. Of course, there is no direct evidence in this case but as discussed above it is clear that the prosecution has placed a clinching wealth of circumstances from which the guilt of both the accused has been made out to the extent human instruments can apprehend. Recondite possibility of alternative hypothesis as put forward by the accused cannot be accepted. In **Khem Karan Vs. State of U.P. AIR 1974 SC 1567 (3JJ)** it has been held that neither mere possibilities nor remote possibilities nor mere doubts which are not reasonable can, without danger to the administration of justice, be the foundation of the acquittal of an accused person, if there is otherwise fairly credible testimony. From the evidence as tendered by the prosecution in form of oral and documentary evidence this court reaches to the irresistible and impeccable conclusion that only the accused persons are responsible for committing this ghastly crime as the following circumstances unerringly point towards the hypothesis of guilt of the accused-

1)- That irrefragably in the fateful night of 15/16.05.2008 both the accused were last seen with both the deceased in Flat No. L-32, Jalvayu Vihar at about 9.30 P.M. by Umesh Sharma, the driver of Dr. Rajesh Talwar;

2)- That in the morning of 16.05.2008 at about 6.00 A.M. Ms. Aarushi was found murdered in her bed-room which was adjacent to the bed-room of the accused and there was only partition wall between two bed-rooms;

3)- That the dead body of the servant Hemraj was found lying in the pool of blood on the terrace of flat no. L-32, Jalvayu Vihar on 17.05.2008 and the door of terrace was found locked from inside;

4)- That there is a close proximity between the point of time when both the accused and the deceased persons were last seen together alive and the deceased were murdered in the intervening night of 15/16.05.2008 and as such the time is so small that possibility of any other person(s) other than the accused being the authors of the crime becomes impossible;

5)- That the door of Ms. Aarushi's bed-room was fitted with automatic click-shut lock. P.W.-29 Mahesh Kumar Mishra the then S.P. (City), N.O.I.D.A. has deposed that when he talked to Dr. Rajesh Talwar on 16.05.2008 in the morning, he had told him that in the preceding night at about 11.30 P.M. he had gone to sleep with the key after locking the door of Ms. Aarushi's bed-room from outside. Both the accused have admitted that door of Ms. Aarushi's bed-room was having automatic-click-shut lock like that of a hotel, which could not be opened from outside without key but could be opened from inside without key. No explanation has been offered by the accused as to how the

lock of Ms. Aarushi's room was opened and by whom;

6)- That the internet remained active in the night of the gory incident suggesting that at least one of the accused remained awake;

7)- That there is nothing to show that an outsider(s) came inside the house in the said night after 9.30 P.M.;

8)- That there was no disruption in the supply of electricity in that night;

9)- That no person was seen loitering near the flats in suspicious circumstances in that night;

10)- That there is no evidence of forcible entry of any outsider(s) in the flat in the night of occurrence;

11)- That there is no evidence of any larcenous act in the flat;

12)- That in the morning of 16th may 2008 when the maid came to flat for the purpose of cleaning and moping a false pretext was made by Dr. Nupur Talwar that door might have been locked from outside by the servant Hemraj although it was not locked or latched from outside;

13)- That the house maid Bharti Mandal has no where stated that when she came inside the flat both the accused were found weeping;

14)- That from the testimony of Bharti Mandal it is manifestly clear that when she reached the flat and talked to Dr. Nupur Talwar then at that

time she had not complained about the murder of her daughter and rather she told the maid deliberately that Hemraj might have gone to fetch milk from Mother dairy after locking the wooden door from outside. This lack of spontaneity is relevant under section 8 of the Evidence Act;

15)- That the clothes of both the accused were not found soaked with the blood. It is highly unnatural that parents of deceased Ms. Aarushi will not cling to and hug her on seeing her murdered;

16)- That no outsider(s) will dare to take Hemraj to the terrace in severely injured condition and thereafter search out a lock to be placed in the door of the terrace;

17)- That it is not possible that an outsider(s) after committing the murders will muster courage to take Scotch whisky knowing that the parents of the deceased Ms. Aarushi are in the nearby room and his top priority will be to run away from the crime scene immediately;

18)- That no outsider(s) will bother to take the body of Hemraj to the terrace. Moreover, a single person cannot take the body to the terrace;

19)- That the door of the terrace was never locked prior to the occurrence but it was found locked in the morning of 16.05.2008 and the accused did not give the key of the lock to the police despite being asked to give the same;

20)- That the accused have taken plea in the statements under section 313 Cr.P.C. that about 8-10 days before the occurrence painting of cluster had started and the navvies used to take water from water tank placed on the terrace of the flat and then Hemraj had started locking the door of the terrace and the key of that lock remained with him. If it was so then it was not easily possible for an outsider to find out the key of the lock of terrace door;

21)- That if an outsider(s) may have committed the crime in question after locking the door of terrace and had gone out of the flat then the outer most mesh door or middle mesh door must have been found latched from outside;

22)- That the motive of commission of the crime has been established;

23)- That it is not possible that after commission of the crime an outsider(s) will dress-up the crime scene;

24)- That golf-club no. 5 was thrown in the loft after commission of the crime and the same was produced after many months by the accused Dr. Rajesh Talwar;

25)- That pattern of head and neck injuries of both the accused persons are almost similar in nature and can be caused by golf-club and scalpel respectively;

26)- That the accused Dr. Rajesh Talwar was a member of the Golf-Club, N.O.I.D.A. and golf-clubs were produced by him before the C.B.I.

and scalpel is used by the dentists and both the accused are dentists by profession;

The manner in which the murders were committed is not the handiwork of single accused and rather the murders were committed and evidence destroyed by both the accused in furtherance of their common intention which is apparent from the facts and circumstances as discussed above. In **Barendra Kumar Ghosh Vs. King Emperor AIR 1925 PC 1,** it was observed that in crime as well as in life, he also serves who merely stands and waits. In **Rishi Dev Pandey Vs. State of U.P. AIR 1955 SC 331 (3JJ),** it was held that it is not necessary to adduce direct evidence of the common intention. Indeed, in many cases it may be impossible to do so. The common intention may be inferred from surrounding circumstances and conduct of the parties. In **Laxman Vs. State of Maharashtra AIR 1974 SC 1803 (3JJ),** it has been held that intention to kill can be inferred from the number and nature of the injuries caused to the deceased. In **Harshad Singh Pahelwan Singh Thakore Vs. State of Gujarat (1976) 4 SCC 640,** it was observed that conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplish their purpose cumulatively. Section 34 I.P.C. fixing constructive liability conclusively silences such a refined plea of extrication. Lord Sumner's Classic Legal Short Hand for constructive criminal liability, expressed in the Miltonic Verse **"they also serve who only stand and wait"** a *fortiori* embraces cases of common intent instantly formed, triggering a plurality of

persons into an adventure in criminality, some hitting, some missing, some splitting hostile heads, some spitting drops of blood. Guilt goes with community of intent coupled with participatory presence or operation. No finer juristic niceties can be pressed into service to nullify or jettison the plain punitive purpose of the penal code. In **Krishna & others Vs. State (2003) 7 SCC 56,** it has been held that acts of all accused need not be the same or identically similar. They must be actuated by one and the same common intention. The reason why all are deemed guilty in such cases is that the presence of accomplice gives encouragement, support and protection to the person actually committing the act. The provision embodies the common sense principle that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. In **Surendra Chauhan Vs. State of M.P. (2000) 4 SCC 110,** it has been held that to apply section 34, apart from the fact that there should be two or more accused, two factors must be established–(i)common intention and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused section 34 will be attracted as essentially it involves a vicarious liability but if the participation of the accused in the crime is proved and a common intention is absent, section 34 cannot be invoked. Under section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting an offence. Such presence of those who in one way or the other

facilitate the execution of common design is itself tantamount to actual participation in the criminal act. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in commission of offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. In **Janak Singh Vs. State of U.P. 2004 Cr.L.J. 2533 (SC),** it has been held that section 34 I.P.C. is applicable even if no injury is caused by a particular accused. In **Lallan Rai Vs. State of Bihar (2003) 1 SCC 268** relying upon the dictum laid down in **Barendra Kumar Ghosh Vs. King Emperor AIR 1925 PC 1 and Mohan Singh Vs. State of Punjab AIR 1963 SC 174,** it was held that essence of section 34 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result. It has been stated that such consensus can be developed on the spot but in any case, such a consensus must be present in the commission of the crime itself. In that case the law as laid down in **Ashok Kumar Vs. State of Punjab AIR 1977 SC 109** and **Mahboob Shah Vs. Emperor AIR 1945 PC 118** was followed. In **Harbans Kaur & others Vs. State of Haryana 2005 (2) SCJ-542: (2005) 9 SCC 195,** it has been held that if two or more persons intentionally do an act jointly position of law is just the same as if each of them has done it individually by himself. In **Shree Kantiah Ramayya Munipalli Vs. State of Bombay AIR 1955 SC 287, Tukaram Ganpat Pandare Vs. State of Maharashtra AIR 1974 SC 514, Surendra**

Chandran Vs. State of M.P. 2000 SCC (Crl.) 772, Suresh and others Vs. State of U.P. 2001 SCC (Crl.) 601, Raju Pandurang Mahale Vs. State of Maharashtra (2004) 2 ACE 341, Bishna Vs. State of West Bengal (2005) 12 SCC 657, Surinder Singh @ Chhinda Vs. State of Punjab 2006 (3) ACR 2745 (SC), it was held that for application of section 34 common intention no overt act of the accused is necessary. In **Balwant Singh Vs. State of Punjab (2009) 2 SCC (Crl.) 204**, it was observed that when many persons go together armed with deadly weapons and fatal injuries are caused to the deceased, all of them are equally liable in view of section 34 I.P.C. In **Hari Ram Vs. State of U.P. 2004 (3) Allahabad Criminal Rulings 2061 (SC) and Anil Sharma Vs. State of Jharkhand 2004 (3) Allahabad Criminal Rulings 2295 (SC), Amit Singh Bhikam Singh Thakur Vs. State of Maharashtra (2007) 2 SCC 310 and Chaman Vs. State of Uttaranchal AIR 2009 SC 1036,** it has been held that section 34 I.P.C. is applicable even if no injury has been caused by the particular accused himself. For applying section 34 I.P.C. it is not necessary to show some overt act on the part of the accused. In these cases the law as laid down in **Willie (William) Slaney Vs. State of M.P. AIR 1956 SC 116, Dhanna Vs. State of M.P. AIR 1996 SC 2478 and Ch. Pulla Reddy Vs. State of Andhra Pradesh AIR 1993 SC 1899 was relied on. In Param Jit Singh @ Mithu Singh Vs. State of Punjab 2008 (1) ACR 1082 (SC) and Sewa Ram & others Vs. State of U.P. 2008 SCCrR 619,** it was again held that when

several wounds were found on the body of the deceased and there is no evidence as to which injury was caused by which accused, section 34 I.P.C. is applicable even if no injury has been caused by the particular accused. It was further held that for applying section 34 I.P.C. it is not necessary to show some overt act by the accused. As it originally stood section 34 was in the following terms:-

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone." In 1870, it was amended by insertion of the words- "in furtherance of the common intention of all", after the word 'persons' and before the word 'each', so as to make the object of section 34 clear". This position was noted in **Mahboob Shah Vs. Emperor AIR 1945 PC 118.** In **Mohan Singh Vs. State of Punjab AIR 1963 SC 174** and **Ram Dev Kahar Vs. State of Bihar 2009 (1) JIC 740 (SC),** it was observed that prosecution is not required to adduce direct evidence as regards formation of common intention. It must be inferred from surrounding circumstances. When a common intention is proved each of the persons showing the common intention is constructively liable for the criminal act done by one of them.

In **Rohtas Vs. State of Rajasthan (2006) 12 SCC 64,** it has been held that common intention to commit a crime can be gathered from the totality of the circumstances. In **Imtiaz Vs. State of U.P. 2007 (2) Crimes 159 (SC*)*,** it has been held that common intention may develop on the spot among the accused and a pre-concert in sense of distinct

previous plan is not necessary to attract section 34 I.P.C. In that case the law as enunciated in **State of U.P. Vs. Iftikhar Khan & others (1973) 1 SCC 512** was followed. In **Ram Tahal Vs. State of U.P. (1972) 1 SCC 136** and **State of Rajasthan Vs. Shobha Ram 2013 (81) ACC 466 (SC),** it was held that a state of mind of an accused can be inferred objectively from his conduct displayed in the course of commission of crime and also from prior and subsequent attendant circumstances. The same principle of law has been laid down in **Rama Swamy Ayyangar and others Vs. State of T.N. (1976) 3 SCC 779, Nadodi Jaya Raman & others Vs. State of T.N. (1992) 3 SCC 161, Suresh Vs. State of U.P. 2001 (42) ACC 770 (SC), Ramesh Singh Vs. State of A.P. (2004) 11 SCC 305 and Sarvanan and others Vs. State of Pondicherry (2004) 13 SCC 238.** In **Hari Ram Vs. State of U.P. (2004) 8 SCC 146,** it was observed that existence of direct proof of common intention is seldom available and therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In **Dharni Dhar Vs. State of U.P. (2010) 7 SCC 759,** it has been held that it is not mandatory for the prosecution to bring direct evidence of common intention on record. It is also not necessary for the prosecution to establish that there was pre-meeting of minds and planning before crime was committed. Section 34 involves vicarious liability and therefore, if intention is proved but no overt act is committed, the section can still be invoked. Recently in **Goudappa and others v**

State of Karnataka (2013) 3 SCC 675, it has been held that ordinarily every man is responsible criminally only for a criminal act done by him. No man can be held responsible for an independent act and wrong committed by other. However, Section 34 makes an exception to this principle. It lays a principle of joint liability in doing of a criminal act. Essence of that liability is to be found in existence of common intention, animating accused leading to doing of a criminal act in furtherance of such intention. It deals with doing of separate acts, similar or adverse by several persons, if all are done in furtherance of common intention. In such situation each person is liable for the result of that, as if he had done that act himself. Common intention is to be gathered from the manner in which the crime has been committed, conduct of accused soon before and after occurrence, the determination and concern with which crime was committed, weapon carried by the accused and from nature of injury caused by one or some of them. Therefore, for arriving at a conclusion whether the accused had the common intention to commit an offence of which they could be convicted, the totality of the circumstances must be taken into consideration.

Under section 313 Cr.P.C. both the accused have denied incriminating circumstances appearing against them. In **Joseph Vs. State of Kerala AIR 2000 SC 1608 (3JJ), Vasa Chandra Shekhar Rao Vs. Ponna Satyanarayana AIR 2000 SC 2138, Geetha Vs. State of Karnataka AIR 2000 SC 3475** and **Aftab Ahmad Ansari Vs. State of Uttaranchal (2010) 2 SCC 583,** it has been held

that blunt and outright denial of everyone and all incriminating circumstances by the accused provides missing links to connect him with death and the cause for death of the victim. In **Santosh Kumar Singh Vs. State through CBI (2010) 9 SCC 747 (Priyadarshini Mattoo's case),** it has again been held that if in case of circumstantial evidence false plea is taken by the accused then it will be another link in the chain of circumstances.

In **Sahadevan @ Sagadevan Vs. State 2003 SCC (Crl.) 382,** it has been held that false statements made by the accused to prosecution witness could be taken as a circumstance against the accused.

In **Anthony D'souza and others Vs. State of Karnataka 2003 (46) ACC 318,** it has been held by a Bench of Hon'ble three Judges that false answers to the questions in the statement under section 313 Cr.P.C. could be treated as missing link in the chain. In that case, the law as propounded in **Swapna Patra Vs. State of West Bengal (1999)9 SCC 242, State of Maharashtra Vs. Suresh 2000 (40) ACC 224 (SC)** and **Kuldeep Singh Vs. State of Rajasthan 2000 (41) ACC 48 (SC-3JJ)** has been followed. In **Surendra Chauhan Vs. State of M.P. (2000) 4 SCC 110 and Rajesh Govind Jagesha Vs. State of Maharashtra (1999) 8 SCC 428,** it has been held that when explanation of the accused under section 313 Cr.P.C. is inconsistent with the conduct and appears to be palpably false, it cannot be accepted. In **Pudhu Raja Vs. State 2012 (79) ACC 642 (SC),** it has been held that it is obligatory on part of accused to

furnish explanation in his examination under section 313 Cr.P.C. Such explanation to be taken note of by the court to decide whether chain of circumstances is complete or not.

In **Munish Mubar Vs. State of Haryana (2012) 10 SCC 464,** it has been held that it is obligatory on the part of the accused while being examined under section 313 Cr.P.C. to furnish some explanation with respect to incriminating circumstances associated with him. Court must take note of such explanation even in a case of circumstantial evidence so as to decide whether chain of circumstances is complete.

In **Dr. Sunil Clifford Daniel Vs. State of Punjab 2012 Cr.L.J. 4657 (SC)** and **Neel Kumar @ Anil Kumar Vs. State of Haryana 2012 (2) ACR 1744 (SC),** it has again been held that failure of accused to explain inculpating circumstances appearing against him or giving false answer in examination under section 313 Cr.P.C. provides missing link in chain of circumstances.

In **Munna Kumar Upadhyaya @ Munna Upadhayaya Vs. State of A.P. AIR 2012 SC 2470, Jagroop Singh Vs. State of Punjab AIR 2012 SC 2600, Anju Chaudhary Vs. State of U.P. (2013) 6 SCC 384** and in **Hari Vadan Babu Bhai Patel Vs. State of Gujarat (2013) 7 SCC 45,** it has been held that failure to offer appropriate explanation or a false answer can be counted as providing missing link for building chain of circumstances.

In **Vishnu Prasad Sinha Vs. State of Assam 2007 Cr.L.J. 1145 (SC), N.V. Subbarao Vs. State 2013 (1) SCCrR 10,** it has been held that statement under section 313 Cr.P.C. can be relevant consideration for the courts to examine particularly when the prosecution has been able to establish the chain of evidence.

Now is the time to say omega in this case. To perorate, it is proved beyond reasonable doubt that the accused are the perpetrators of the crime in question. The parents are the best protectors of their own children- that is the order of human nature but there have been freaks in the history of mankind when the father and mother became the killer of their own progeny. They have extirpated their own daughter who had hardly seen 14 summers of her life and the servant without compunction from terrestrial terrain in breach of Commandment **'Thou shall not kill'** and injunction of Holy Quran- **“Take not life, which God has made sacred”.** They are also found guilty of secreting and obliterating the evidence of the commission of the murders to screen themselves from legal punishment. In addition to that Dr. Rajesh Talwar is also found guilty of furnishing false information to the police regarding the murder of his daughter by Hemraj. ‘ धर्मो रक्षति रक्षितः ’ i.e. if we protect “Dharma”, Dharma will protect us. If we protect “Law”, law will protect us. Both the accused have flouted the ferocious penal law of the land and therefore, liable to be convicted under sections 302 r/w 34, 201 r/w 34 I.P.C. In addition to that Dr. Rajesh Talwar is also liable to be convicted under section 203 I.P.C. They

are on bail. Their bail is cancelled and sureties are discharged. Let both the accused be taken into custody and sent to jail. File be put upon 26.11.2013 for hearing on sentence. The accused shall be produced in the court on the next date.

Dated:

(S.Lal)
Addl. Sessions Judge/
Special Judge Anti-Corruption,
(C.B.I.), Ghaziabad.

Judgment signed, dated and pronounced in the open court today.

Dated:

(S.Lal)
Addl. Sessions Judge/
Special Judge Anti-Corruption,
(C.B.I.), Ghaziabad.

26.11.2013

File put up today. Both the accused have been produced in court from jail. Heard the learned counsel for the accused and the learned Senior Public Prosecutor on quantum of sentence and perused the records. It has most commiseratingly been submitted by the learned counsel for the accused that in view of the findings given in respect of grave and sudden provocation, destruction of evidence and furnishing false information to the police the case does not fall under the category of 'rarest of rare case' and therefore, lenity may be shown while awarding the punishment. Per contra it was submitted by the learned Senior Public Prosecutor that the manner in which the accused committed the murder calls for extreme penalty. I have considered the submissions of both the sides.

In State of Karnataka Vs. Krishnappa (2000) 4 SCC 75 (3JJ) it was held "The courts are expected to properly operate the sentencing system and to impose such sentences for a proved offence, which

may serve as a deterrent for the commission of like offences by others."

Thomas Reed Powell once said, "Judges have preferences for social policies as you and I. They form their judgment after the varying fashions in which you and I form ours. They have hands, organs, dimensions, senses, affections, passions. They are warmed by the same winter and summer and by the same ideas as a layman is." Justice John Clarke has also stated, "I have never known any judges ..... who discharged their judicial duties in an atmosphere of pure, unadulterated reason. Alas! We are all the common growth of the Mother-Earth even those of us who wear the long robes."

In Surjit Singh Vs. Nahara Ram and others (2004)6 SCC 513=AIR 2004 SC 4122 it was held "The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly there is a cross-cultural conflict where living law must find answer to new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, laws as a corner stone of the edifice of 'order' should meet the challenges confronting the society. In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public system in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc."

In State of M.P. Vs. Saleem @ Chamaru and others 2005 (5) SCJ 635 it was held that undue

sympathy to impose inadequate sentence would do more harm to the judicial system to undermine public confidence. It is the duty of every court to award proper sentence. Imposition of sentence without considering its effect on the social order will be a futile exercise. If adequate sentence is not awarded court will be failing in its duty.

In C. Muniappan & others Vs. State of T.N. (2010) 9 SCC 567 it was held that death sentence can be given in rarest of rarest case if the collective conscience of a community is so shocked that death penalty is the only alternative. The rarest of the rare case comes when a convict would be a menace and threat to the harmonious and peaceful existence of the society.

In State of Rajasthan Vs. Vinod Kumar (2012) 6 SCC 770 it has been observed that punishment should always be proportionate/ commensurate to the gravity of the offence. Religion, race, caste, economic or social status of the accused or victim are not the relevant factors for determining the quantum of punishment. The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed..... The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case.

In State of U.P. Vs. Sanjay Kumar (2012) 8 SCC 537 it was held that the survival of an orderly society demands the extinctive of the life of a person who is proved to be a menace to social order and security..... The courts should impose a punishment befitting to the crime so that the courts are able to accurately reflect public abhorrence of the crime. It is the nature and gravity of the crime and not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. Imposition of sentence without considering its effect on social order in many cases may be in reality, a futile exercise.

Of late in Shanker Kishanrao Khade Vs. State of Maharashtra (2013) 5 SCC 546 it has been held that

for imposing death sentence- Crime Test, Criminal Test and R-R Test (Rarest of Rare Test) must be applied and not the balancing test i.e. balancing of aggravating and mitigating circumstances. R-R test must be based on perception of society and must not be Judge-centric.

Keeping in view the entire facts and circumstances, I am of the view that both the accused are not menace to the orderly society this is not a fit case for inflicting death penalty under section 302 read with section 34 I.P.C. and, therefore, it appears just and proper to sentence the accused to rigoures imprisonment for life under section 302 read with section 34 I.P.C. with a fine of Rs.10,000/- each, to 5 years rigoures imprisonment with a fine of Rs.5,000/-each under section 201 read with section 34 I.P.C. It also appears expedient in the interest of justice to sentence the accused accused Dr. Rajesh Talwar under section 203 I.P.C. to simple imprisonment of one year with a fine of Rs. 2,000/-.

O R D E R

The accused Dr. Rajesh Talwar and Dr. Nupur Talwar are convicted under sections 302 read with section 34 and section 201 read with section 34 I.P.C. Dr. Rajesh Talwar is also convicted under section 203 I.P.C. Both the accused are sentenced to rigoures imprisonment for life under section 302 read with section 34 IPC with a fine of Rs.10,000/- each and in default of payment of fine to undergo six months simple imprisonment and to five years rigorous imprisonment under section 201 read with section 34 I.P.C. with a fine of Rs.5,000/-each and in default of payment of fine to undergo simple imprisonment of three months. Dr. Rajesh Talwar is also sentenced to one year simple imprisonment under section 203 I.P.C. with a fine of Rs.2,000/- and in default of payment of fine to undergo simple imprisonment of one month. All the sentences shall run concurrently. One copy each of the judgment be provided free of cost to the accused immediately. Both the accused shall be sent to jail under a

warrant to serve out the sentence as imposed upon them. Material Exhibits shall be disposed off as per rules, after expiry of the period of limitation for filing the appeal, if no appeal is filed. The accused shall be sent to District Jail under warrant of conviction. The copy of the judgement should be sent to the District Magistrate, Ghaziabad in terms of section 365 Cr.P.C.

Dated: 26.11.2013

(S.Lal)
Addl. Sessions Judge/
Special Judge Anti-Corruption,
(C.B.I.), Ghaziabad.

Judgment signed, dated and pronounced in open court today.

Dated: 26.11.2013

(S.Lal)
Addl. Sessions Judge/
Special Judge Anti-Corruption,
(C.B.I.), Ghaziabad.