SUPREME COURT OF INDIA

Sandeep

Vs.

State of U.P.

Crl.A.No.1651 of 2009

(Dr. B.S.Chauhan and Fakkir Mohamed Ibrahim Kalifulla JJ.)

11.05.2012

JUDGEMENT

FAKKIR MOHAMED IBRAHIM KALIFULLA, J.

1. These appeals arise out of the common judgment of the Division Bench of the High Court of Allahabad in Criminal Appeal No.4148/2007 along with Criminal Reference No.19/2007 by which, the High Court while accepting the Criminal Reference insofar as it related to appellant Sandeep in Criminal Appeal No.1651/2009, rejected the same insofar as it related to appellant Shashi Bhushan in Criminal Appeal Nos.1425-26/2011.

> In other words, while upholding the sentence of death awarded to Sandeep, the appellant in Criminal Appeal No.1651/2009, the Division Bench modified the sentence into one of life imprisonment insofar as it related to Shashi Bhushan, the appellant in Criminal Appeal Nos.1425-26/2011.

2. Shorn of unnecessary facts, the case of the prosecution as projected before the trial Court was that on 17.11.2004 I D.N. Verma (PW- 1) along with Sub-Inspector Chander Pal Singh (PW-2), Constable Rambir Singh, Constable Sukhram, Constable Ashok Kumar and Driver Yashvir Singh were on patrolling duty; that when they reached ahead of Badsu on Khatoli Road leading towards Falut, they met Constable Rajesh Kumar and another Constable Ramavtar who informed PW-1 and other persons accompanying him that one Indica car took a turn for going towards Falut road and that they heard some screaming noise from that vehicle. PW-1, accompanied by the other personnel referred to above, proceeded towards Falut road and after a distance saw an Indica car. They stated to have seen through

the focus light of the police jeep two young men trying to pull out a girl in an injured condition by opening the rear door of the car. It is stated that it was around 21.30 hours. The police jeep in which PW-1 and others were proceeding stopped ahead of the Indica car and caught hold of the two young men and also noticed a girl, with injuries all over, on whom acid was also sprinkled. The girl had also sustained injuries on the head as well as on her right cheek. On noticing the above, according to PW-1, when he questioned her, she responded by stating that her name was Jyoti and she is the daughter of one Baljeet Singh, R/o Lane No.16, House No.56, Jagatpuri, P.S. Preet Vihar, New Delhi and that her mothers name was Varsha whose cell number was 9871020368. Inspector D.N. Verma (PW-1) stated to have gathered information from her that she developed friendship with the appellant Sandeep while she was working in a mobile shop. She also stated to have revealed that she was pregnant. According to the information gathered from Jyoti, accused Sandeep had called her on that evening and asked her to come to Laxmi Nagar market, Delhi, around 6 p.m. promising her that he will marry her at Haridwar. Believing his words, she went to Laxmi Nagar market from where she was taken in a car and that while they were moving in the vehicle, accused Sandeep asked Jyoti to get the foetus aborted at Meerut, to which she disagreed. On this, he started beating her inside the vehicle right from the point of Modinagar. She stated to have further informed PW-1 and others that she told accused Sandeep that she would reveal all facts to his family members as well as to the police and that when the vehicle in which they were travelling turned towards an isolated place near Khatoli, they tried to throw her into the sugarcane field at which point of time PW-1 and other police members reached the spot. According to her information to PW-1, accused Sandeep and Shashi Bhushan caused the injuries on her with the aid of a jack and pana (spanner) apart from cutting her with a blade and also by pouring acid on her head. PW-1 stated that on noticing the condition of the girl, he arranged for shifting her to Muzaffarnagar Government Hospital in the police jeep along with Constable Rambir Singh and the driver of the jeep. It was further stated that accused Sandeep and Shashi Bhushan, on being apprehended, also revealed their names and informed that accused Sandeep used to visit deceased Jyoti while she was working in a mobile shop in Mayur Vihar Phase-I for the last six months prior to the date of occurrence and developed friendship with her, and that in course of time, deceased Jyoti pressurized him to marry her. On the date of occurrence, around 6 p.m. he stated to have called her over phone to meet him at Laxmi Nagar red light, that she responded to his call and came to Laxmi Nagar red light where accused Sandeep was waiting along with his friend Shashi Bhushan who drove the vehicle Indica car bearing registration No. DL 3CR 6666 which belonged to his mother.

Accused Sandeep stated to have extended a promise to marry her at Haridwar. While the vehicle started moving, accused Sandeep asked Jyoti to get the foetus aborted to which she did not agree instead threatened him by saying that she will reveal all facts to his parents as well as to the police and that as they reached Modinagar, he started beating her.

According to the version of accused Sandeep, as told to PW-1, at Modinagar he purchased two bottles of acid and four shaving blades, that when they reached Khatoli, on seeing an isolated place, they tried to pull out the injured Jyoti from the vehicle and that at that point of time they were apprehended by the police. It is the case of the prosecution that while both the accused were taken into custody, the vehicle in which they were travelling was also seized along with the jack and pana, four blades and two acid bottles. The articles, namely, blood stained floor mat, empty bottles of acid, one pair of ladies footwear were stated to have been seized after preparing a seizure memo. A copy of the seizure memo was stated to have been handed over to the accused.

It is the specific case of the prosecution that since it was late in the night and it was a lonely place, there were no independent witnesses other than the police personnel. The seizure memo was marked as Exhibit K-1.

3. The statement of PW-1 was registered as FIR No.Nil/2004 on the files of P.S. Ratanpuri on 17.11.2004 against both the accused persons for offences under Sections 307, 326, 324 and 328, Indian Penal Code (in short IPC) which came to be subsequently altered later on as one under Sections 302/34 IPC after the victim was declared dead by the hospital authorities. On the above set of facts, District and Sessions Judge, Muzaffarnagar framed charges against both the accused persons for offences under Section 302, IPC read with Section 34, IPC and Section 316, IPC read with Section 34, IPC and proceeded with the trial. In support of the prosecution as many as 10 witnesses were examined.

4. When the accused persons were questioned under Section 313, Cr.P.C. for offences under Section 304, IPC read with Section 34, IPC and Section 316 read with Section 34, IPC, both the accused pleaded not guilty and also filed a written statement to that effect. The trial Court in its judgment dated 02.06.2007 ultimately found the accused persons guilty of offences under Section 302 read with Section 34, IPC and 316 read with Section 34, IPC and after hearing both the accused persons on the question of sentence, took the view that having regard to the magnitude and the diabolic manner in which the offences were committed by them

and also having regard to the various principles laid down in the decisions of this Court in relation to the award of death penalty concluded that, the case on hand was one such case which fell under the category of rarest of rare casein which the accused deserved to be inflicted with the capital punishment of death under Section 302, IPC read with Section 34, IPC. Ultimately, the trial Court convicted and sentenced both the accused persons to death under Section 302 read with Section 34, IPC apart from imposing a fine of Rs.30,000/- each and also sentenced them to undergo 10 years rigorous imprisonment and pay a fine of Rs.10,000/- each for offences under Section 316 read with Section 34, IPC and in default of payment of fine sentenced them to undergo further rigorous imprisonment for one year. The sentences were to run concurrently. On realization of fine from the accused persons, a sum of Rs.50,000/- was directed to be paid to the parents of the deceased Jyoti as compensation.

5. While hearing the Criminal Reference No.19/2007 as well as Criminal Appeal No.4148/2007 preferred by the appellants, the High Court while confirming the death penalty imposed on appellant Sandeep held that the case of accused Shashi Bhushan was distinguishable and that the gravity of the offence did not warrant infliction of extreme punishment of death and consequently altered the same into one of imprisonment for life.

6. We heard Mr. Sushil Kumar, learned senior counsel for the appellant in Criminal Appeal No.1651/2009 assisted by Mr. Daya Krishan Sharma and Mr. D.P. Chaturvedi, learned counsel for the appellant in Criminal Appeal Nos.1425-26/2011 for appellant Shashi Bhushan. We also heard Mr. Ratnakar Dash, learned senior counsel assisted by Mr. Rajeev Dubey, for the State.

7. Mr. Sushil Kumar, learned senior counsel in his elaborate submissions after referring to the evidence of the prosecution witnesses and medical evidence as well as expert witnesses submitted that the so called dying declaration of the deceased Jyoti was not proved, that the confessional statement of the accused cannot be relied upon, that there were very many missing links in the chain of circumstances and therefore the guilt of the accused cannot be held to be made out. According to the learned senior counsel there were discrepancies in the timing of registration of the F.I.R., delay in sending of the report to the Magistrate apart from vital contradictions in the evidence of the police witnesses.

8. Learned senior counsel also contended that there were serious lacunae in the preservation of foetus samples and, therefore, the ultimate D.N.A. test result cannot be accepted.

9. Learned senior counsel further contended that non-examination of some of the cited witnesses caused prejudice to the accused and on that ground also the case of the prosecution should be faulted. He further contended that the case of the accused about the theft of the Indica car was not properly appreciated by the Courts below. It was also contended that there were infirmities in regard to the recoveries which were not properly examined by the Courts below. Lastly, it was contended that it was not a case for conviction and in any event not rarest of rare casefor imposition of capital punishment of death sentence.

10. Mr. D.P. Chaturvedi, learned counsel appearing for the accused Shashi Bhushan apart from adopting the arguments of Mr. Sushil Kumar, learned senior counsel contended that out of 17 injuries alleged to have been sustained by the deceased Jyoti, at least 7 to 8 injuries were serious and in such circumstances there would not have been any scope for the deceased Jyoti to have made any statement as claimed by the prosecution. According to him there was absolutely no overt act attributed to the accused Shashi Bhushan in the matter of infliction of injuries on the body of the deceased Jyoti and consequently even the imposition of life sentence was not warranted.

11. As against the above submission, Shri Ratnakar Dash, learned senior counsel appearing for the State contended that evidence of the prosecution witnesses who were all police personnel was fair, impartial and natural and there was no reason to doubt their version. He would contend that when there was no independent witness present at the place of occurrence, there was no question of examining any such private witness. According to him, the deceased was alive at the time when the accused were apprehended by the police on 17.11.2004 at 21.30 hrs. and the injuries noted by the doctor would show that the deceased was capable of making a statement and, therefore, the recording of such statement by PW-1 in his complaint was perfectly in order. He further contended that even in the statements of the accused such of those versions made by them which did not in any way implicate them in the offence was admissible under Section 8 of the Evidence Act while the rest of the statements which are likely to implicate them can be distinguished and eliminated from consideration.

12. Learned senior counsel relied upon the decision of this Court in State of W.B. v. Mir Mohammad Omar & Ors.- 2000 (8) SCC 382 and Somappa Vamanappa Madar & Shankarappa Ravanappa Kaddi v. State of Mysore (1980) 1 SCC 479] in support of his submissions.

13. Learned counsel also contended that no prejudice was demonstratively shown by the non examination of the cited witnesses.

Learned counsel contented that going by the version of the expert witnesses, the preservation of the foetus was according to the prescribed norms and the D.N.A. result having been proved in the manner known to law cannot be doubted. He also contended that when the registration of the F.I.R. was promptly made, simply because there was minor delay in the alteration of the offence from Section 307, IPC to Section 302, IPC and the subsequent forwarding of the express report to the Magistrate cannot be fatal to the case of the prosecution.

14. Learned counsel relied upon the decision in Sunil Kumar and Anr.

Delhi- [(1999) 9 SCC 149, Tej Prakash v. The State of Haryana - (1995) [1995] INSC 560; 7 JT 561 in support of his submissions.

15. Having heard learned Senior counsel for the appellants and learned senior counsel for the State and having perused the material papers, original records and the judgments of the trial Court as well as the Division Bench of the High Court, we wish to note the broad spectrum of the appellantschallenge to the conviction and sentence which can be noted as under:

(I) The case of the prosecution which was mainly based on the so-called dying declaration of the deceased and the confessional statement of the accused cannot be accepted as the same was not proved.

(II) The accused were able to demonstrate that they were not present at the time of the commission of the alleged offence on 17.11.2004, as there were very many disruptions in the chain of circumstances to rope in the appellants.

16. When the submissions made on behalf of the appellants are analyzed, the following facts were claimed to support their stand:-

a) The entire case of the prosecution was dependent on the version of witnesses, majority of whom were police personnel and there was no independent witness to support the version of the police.

b) The source of the FIR was the alleged dying declaration of the deceased which was not proved and the so-called confession of the accused Sandeep was inadmissible under Section 25 of the Evidence Act.

c) If the confession is inadmissible, the whole case depended on circumstantial evidence.

d) The case which was originally registered under Section 307, IPC was altered into one under Section 302, IPC belatedly.

e) There were very many missing links in the chain of circumstances.

f) There were serious infirmities in the tests conducted in the samples of the foetus which seriously undermine the case of the prosecution.

g) Though the occurrence took place in a public place near a crusher unit where number of labourers were working, the absence of examination of independent witnesses was fatal to the case of the prosecution.

h) Non-examination of some of the key witnesses cited in the charge- sheet whose evidence would have otherwise supported the case of the accused caused serious prejudice and on that ground the case of the prosecution should fail.

i) The delay in sending the express report was a serious violation of Section 157, Cr.P.C. which would again vitiate the case of the prosecution.

j) The alleged seizure of materials from the car was highly doubtful, having regard to certain vitiating circumstances.

k) Accused Sandeep was roped in falsely by creating a link with his mothers car, which according to Sandeep, was stolen on the date of occurrence, which was omitted to be considered in the proper perspective.

l) When admittedly there was a pending rape case relating to the deceased in which certain persons were accused of having committed rape on the deceased on 17.04.2004 which was tacitly admittedly by Baljeet Singh (PW-8), father of the deceased, there was every scope for the aggrieved persons in the said criminal case to have involved in the crime against the deceased.

17. As against the above, when the stand of the learned counsel for the State is analyzed, the following points emerge for consideration:-

i) The relationship of Sandeep (A-1) with the deceased and the carrying of the foetus in the womb of the deceased was not in dispute.

ii) Merely because the key witnesses were police personnel, that by itself cannot be a ground to eschew that evidence from consideration.

iii) The case of the prosecution based on the statement of the deceased as spoken to by the witnesses cannot be doubted.

iv) The statement of the deceased to the police insofar as it related to the incident and such of those admissions of the accused not implicating them to the offence was admissible in evidence under Section 8 and not hit by Section 25 of the Evidence Act.

v) when there were no independent witnesses present at the place of occurrence, the grievance of the accused on that score does not merit consideration.

vi) The medical evidence, in particular, injuries noted in the post-mortem certificate show that the deceased was capable and did make the statement as demonstrated by the prosecution.

vii) The forensic report established the presence of blood on the weapons used as well as in the car which was one of the clinching circumstances to prove the guilt of the accused.

viii) The outcome of the DNA test established the link of the accused with the deceased to prove the motive for the crime.

ix) The claim of theft of the car was not established before the trial Court in the manner known to law.

x) The presence of the accused at the time and place of occurrence was proved beyond all reasonable doubts.

xi) The handling of the samples sent for chemical and forensic examination was carried out in accordance with the prescribed procedure.

xii) The accused failed to show that the non-examination of any of the cited witnesses caused prejudice to them before the trial Court and, therefore, the grievance now expressed will not vitiate the case of the prosecution.

xiii) The various other discrepancies alleged were all minor and the same do not in any way affect the case of the prosecution.

18. Keeping the above respective submissions in mind, when we analyze the case in hand the following facts are indisputable:-

a. The relationship of Sandeep with deceased, prior to the date of occurrence, namely, 17.11.2004 as his girlfriend;

b. The deceased was carrying the foetus of six months old in her womb;

c. The Indica car in which the deceased was found on the date and time of occurrence belonged to the mother of accused Sandeep;

d. At the time when the deceased was secured by the police on 17.11.2004 at 21.30 hours she was seriously injured but was alive;

e. The death of the deceased was ascertained by the Dr. B.S. Chaudhary (PW-6) at 10.55 p.m.

f. As per the post-mortem certificate, there were as many as 17 injuries which were caused by blunt weapons like jack and pana (spanner), shaving blades and also chemical acid.

g. Police witnesses were all on patrol duty on the date of occurrence.

h. The DNA test disclosed that accused Sandeep was the biological father of the foetus found in the womb of the deceased.

i. The theory propounded by the accused i.e. the car was stolen on 17.11.2004 was not established before the trial Court in the manner known to law.

> j. The statement of the accused as stated to have been made to PW-1 contained various facts unconnected to the crime and also the self incriminating facts which could be distinguished.
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> k. The absence of any independent witness at the place of occurrence.

19. Keeping the above factors, the existence of which is borne out by acceptable legal evidence, when we examine the submissions made on behalf of the appellants, in the foremost, it was contended that the deceased could not have made a statement as claimed by Inspector D.N. Verma (PW-1) since according to Constable Ramavatar Singh (PW-3), he noticed acid injuries in the inner mouth of the deceased. However forceful the above submissions may be, we find that such a submission merely based on the version of PW-3 alone cannot be accepted. Whatever injuries sustained by the deceased were borne out by medical record, namely, post-mortem certificate and the evidence of the doctor who issued the said certificate. As many as 17 injuries were noted in the post- mortem certificate. According to the version of PW-3, injury in the mouth was caused by acid. When we examine such of those injuries caused by acid and as spoken to by PW-6, doctor, injury Nos. 4 and 17 alone were stated to have been caused by acid. Injury Nos.4 and 17 have been described as under:-

> 4. chemical burn injury from all over head, hair were charring and skin burnt chemically.
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> 17. Chemical burn injury all over body ranging from 12cm x 8cm to 2cm x 4 cm except upper part of chest.

20. Going by the above description of the injuries, as noted by the doctor who conducted the post-mortem, it is difficult to accept the statement of learned senior counsel for the accused that the injury in the mouth was such as the deceased could not have made any oral statement at all to the witnesses. It is true that by the pouring of the acid, injury might have been caused on the head and other parts of the body of the deceased but by no stretch of imagination, those injuries appear to have caused any severe damage to the mouth of the deceased, much less to the extent of preventing her from making any statement to the witnesses.

> In this context, when we peruse the evidence of the Doctor (PW-6), he has specifically expressed an opinion that he was not in a position to state whether after receipt of injury on the body of the deceased she would have been in a position to speak or not. In other words, the doctor who had

> examined the injuries sustained by the deceased did not rule out the possibility of the deceased making any statement irrespective of injuries sustained by her. In this context, when we refer to the submission made on behalf of the appellants themselves before the Division Bench of the High Court, we find that it was specifically contended that the deceased sustained multiple injuries and except one injury, all other injuries were simple in nature and none of the injuries were sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, even going by the stand of the appellants, the condition of the deceased, even after sustaining multiple injuries, was such that she was alive, conscious and her death was not instantaneous.

21. Having regard to the above factors, we are convinced that the case of prosecution that the deceased made a statement about the sequence of the occurrence was really made as spelt out by the witnesses PW Nos. 1 to 5.

22. With this, we come to the next submission of learned counsel for the appellants, that in the absence of independent witnesses, no reliance can be placed upon PW Nos.1 to 5, who were all police personnel. To deface the evidence of PW Nos. 1 to 5, it was contended that near the place of occurrence, a crusher unit was existing, and at that point of time, the crusher unit was also working. It was suggested to PW-1 that the crusher unit was around 100 yards away from the place of occurrence.

> It was also suggested to PW-2 that the crusher unit was running at that point of time which was 100 yards away from the place of occurrence. In another place, it was stated by PW-3 that the crusher unit was around ½
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> KM away from the bridge and it was working. It was also stated by him that at that point of time, 3-4 persons were working in the crusher unit.
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> From what has been stated by the above witnesses, what all that can be inferred was that a crusher unit was at least 100 yards away from the place of occurrence and that even at that point of time, namely, at 21.30 hours, the unit was working with at least 3-4 labourers. Beyond the above fact, it was not the case of the appellant that any worker from the crusher unit was present at the spot and yet he was neither shown as a witness nor examined and thereby any prejudice was caused to the appellants. It is also not the case of the appellants that apart from the labourers working in the crusher unit,

> any other independent witness was present at the spot who was not cited nor examined as a witness.
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> Therefore, when the above facts are clear, we are at a loss to understand as to how the grievance of the appellants as regards non-examination of any independent witness can be taken as a factor to put the case against the prosecution and to hold that the whole case of the prosecution should be set at naught. Apart from the above, no other point was raised as regards the non-examination of any independent witness as to the occurrence narrated by the prosecution.

23. One other submission made by the learned senior counsel was that after finding out the cause of the occurrence from the deceased and after noting that she was seriously injured, the police party arranged for shifting her to the hospital in the police jeep along with Rambir Singh and the driver of the jeep within 2-3 minutes and that there was no justifiable ground for not examining Rambir Singh who was also cited as a witness but yet not examined and also for the non-examination of the driver of the jeep. The contention of the learned senior counsel was that after shifting the deceased from the Indica car to the jeep in a serious condition, the jeep would have travelled for at least an hour or so to reach the hospital and Constable Rambir Singh who accompanied her would have been in a better position to state as to what transpired during that period and what was heard by him from the deceased which would have thrown much light on the occurrence. The learned senior counsel, therefore, contended that serious prejudice was caused to the accused by non-examination of the said Rambir Singh as well as the driver whose version would have otherwise been favourable to the appellants.

24. Learned senior counsel appearing for the State, however, contended that in every criminal case it is not a rule that all cited witnesses should be necessarily examined. He also contended that the non- examination of a witness can be put against the prosecution if non- examination would have caused any serious prejudice to the defence. He also relied upon the decision reported in Tej Prakash (supra) in support of his submission. As far as the said submission is concerned, when we examine the sequence of events, we find that after gathering whatever information from the deceased, as regards the occurrence implicating the accused, which were the required details for PW-1 to lodge the necessary complaint, his immediate priority was to attend on the injured person in order to save her life. Such a course adopted by PW-1 and other police personnel at the place of occurrence was quite natural and appreciable.

Visualizing what had happened at the place of occurrence as narrated by the prosecution witnesses, it was brought out that whatever basic information required to ascertain the cause of occurrence was gathered by the prosecution witnesses as disclosed in the complaint, which was registered as FIR and also as stated by the witnesses before the Court.

The contention that the examination of Constable Rambir Singh and the driver of the jeep, who took the injured deceased to the hospital, would have disclosed very many other factors favourable to the accused was only a wishful thinking. In any case, what those persons would have deposed as a witnesses and to what extent it could have been advantageous to the appellants was not even highlighted before us. We ourselves wonder what other evidence, much less, favourble to the accused could have been spoken to by Constable Rambir Singh who was entrusted with the task of admitting the injured victim in the hospital in order to give necessary treatment for her injuries. Since PW-1 thought it fit to shift the injured to the hospital after noticing her serious condition, and the further fact that by the time they reached the hospital around 10.55 p.m., doctor found that the deceased was dead, it can be safely held that nothing worthwhile could have been drawn from the mouth of Constable Rambir Singh or the driver of the jeep except stating that they dutifully carried out the task of admitting the injured in the hospital as directed by their superiors. We, therefore, hold that the appellants could not demonstrate as to any prejudice that was caused by the non-examination of Constable Rambir Singh and the jeep driver in order to find fault with the case of the prosecution on that score. In this context, reliance placed upon by the learned senior counsel for the State in Tej Prakash (supra) can be usefully referred to. In para 18 of the said decision, this Court made it clear that all the witnesses of the prosecution need not be called and it is sufficient if witnesses who were essential to the unfolding of the narrative are examined. Applying the said principle to the case, it can be safely held that the witnesses who were examined were able to unfold the narration of events in a cogent and convincing manner and the non-examination of Constable Rambir Singh and the jeep driver was, therefore, not fatal to the case of the prosecution.

25. Learned senior counsel for the appellants then contended that the appellants were not present at all at the time of occurrence, that the appellant Sandeep was called to the police station in furtherance of the complaint lodged by him as regards the theft of his mothers car on 17.11.2004 and that for that purpose when he went to the police station, he was falsely implicated into the offence. According

to the appellants, the deceased was already involved in a case of rape committed by one Manoj on 17.04.2004. In that case, the complaint preferred by the deceased was at the stage of trial before the Court of Sessions Judge.

> It was contended that by misusing the stolen car of the appellants (Sandeep) mother, the crime could have been committed by somebody else but unfortunately the appellants were implicated into the offence. In order to appreciate the said submission of the appellant-Sandeep, in the first place, when we examine the stand that his mothers car was stolen on 17.11.2004, we find that except the ipse dixit statement made in the written statement to the questioning made under Section 313 Cr.P.C. and reference to an alleged report as regards the theft of the car, there was no other fact placed before the trial Court. The trial Court while dealing with the said contention has noted as under:- the accused Sandeep filed a photo copy of the report which is neither proved nor it can be taken into consideration. No FIR has been filed nor the same is proved by any police officials. The accused has also not examined himself or any other person in support of his above contention. The contention of the accused Sandeep that the car was stolen on 17.11.2004 from Geeta Colony is totally false and frivolous. ADGC contended that father of accused Sandeep is in police department posted as Sub-Inspector and had tried to manipulate a false story. The recovery of Indica car, namely, DL 3CR 6666 on the spot along with accused persons by Inspector D.N. Verma (PW-1) of PS Ratanpuri with the injured Jyoti is a very important factor which proved the involvement of the accused person and strengthens the prosecution case.

26. We see no reason to differ from the above conclusion of the trial Court. If the theory of theft of Indica car is ruled out and the presence of the car on the spot was indisputable, it should automatically follow that the car could have been brought at that place along with the deceased, driven by accused Shashi Bhushan along with Sandeep only in the manner narrated by the prosecution. Apart from merely suggesting that the Indica car was stolen which was not fully supported by any legally admissible evidence, no other case was suggested by the appellants.

27. When the accused Sandeep took a positive stand that he was not present at the place of occurrence by relying upon a fact situation, namely, he was not responsible for bringing the Indica car belonging to his mother at the place of occurrence along with the deceased, the burden was heavily upon him to establish the plea that the car was stolen on that very date of occurrence, namely, 17.11.2004 and, therefore, he could not have brought the deceased in that car at that place.

Unfortunately, by merely making a sketchy reference to the alleged theft of the car in the written statement and the so-called complaint said to have been filed with the Geeta Colony police station nothing was brought out in evidence to support that stand. In this situation, Section 106 of the Evidence Act gets attracted. When according to the accused, they were not present at the place of occurrence, the burden was on them to have established the said fact since it was within their special knowledge. In this context, the recent decision of this Court reported in Prithipal Singh referred to where it has been held as under in para 53 :

> In State of W.B. v. Mir Mohammad Omar, this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused The contention of accused Sandeep was, therefore, bound to fail and the said defence taken was not proved to the satisfaction of the Court.
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> The failure of the accused Sandeep in not having taken any steps to prove the said fact strikes at the very root of the defence, namely, that he was not present at the place of occurrence. As a sequel to it, the case of the prosecution as demonstrated before the Court stood fully established.

28. Having regard to the above conclusion that the deceased did narrate the occurrence right from the invitation made by the accused Sandeep to her over phone at 6 p.m. under the guise of taking her to Haridwar to marry her, that after she responded to the said call and met him from where she was picked up by both the accused in the Indica car belonging to the mother of accused Sandeep, and the other sequence of events, namely, the threat posed to the deceased to get the foetus aborted and her refusal ultimately enraged the appellants to cause the assault with the weapon, namely, jack and pana, shaving blades and chemical acid was quite convincing and there were no good grounds to dis- believe her statement. No other

motive or any other basis was shown to disbelieve her statement. In that respect, when we consider the reliance placed upon the admissible portion of the statement of the accused, we are unable to reject outrightly the entirety of the statement by application of Section 25 of the Evidence Act. According to learned senior counsel for the appellants, the prosecution could not have relied upon the confessional statement of the accused implicating themselves in the offence alleged against them by virtue of Section 25 of the Evidence Act.

29. As against the said submission, Mr. Ratnakar Dash, learned senior counsel appearing for the State rightly pointed out that Section 25 of the Evidence Act can be pressed into service only insofar as it related to such of the statements that would implicate himself while the other part of the statement not relating to the crime would be covered by Section 8 of the Evidence Act and that a distinction can always be drawn in the statement of the accused by carefully sifting the said statement in order to identify the admission part of it as against the confession part of it. Learned senior counsel drew our attention to the evidence of PW-1 where the said witness narrated the statement made by accused Sandeep which consisted of mixture of admission as well as confession.

> In that learned senior counsel pointed out that the accused Sandeep made certain statements, namely; that Jyoti was working in a mobile shop in Mayur Vihar, Phase I where he used to visit; that during that period around six months before he developed physical relations with her; that the deceased Jyoti was applying pressure on him to marry her, and that around 6 p.m. on the date of occurrence, he called her over telephone to meet him at Laxmi Nagar red light. He further told the witness that the Indica car bearing registration NO.DL 3CR 6666 was owned by his mother and that promising to marry her at Haridwar, he took the deceased Jyoti along with him. He also told the witness that while the car was moving he asked the deceased Jyoti to get the foetus aborted to which she did not agree. According to PW-1, Sandeep also told him that he purchased two bottles of acid and four blades at Modinagar, that when they reached Khatoli, he saw a road free from disturbance towards which the vehicle was driven and that in that place they were apprehended by the police.
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> Learned senior counsel also referred to certain other statements made by Sandeep to PW-1, namely, that on that day he planned with his friend Shashi Bhushan to eliminate Jyoti from his life and that when Jyoti told him that she was going to reveal the fact of carrying his child in her womb to his family members and the police, he started beating her along with his friend.

> Learned senior counsel fairly stated that while the last part of the statement would fall under the category of confession, which would be hit by Section 25 of the Evidence Act, the former statements which do not in any way implicate the accused to the offence, would be protected by Section 8 of the Evidence Act and consequently the said part of the statement was fully admissible. We find force in the submission of learned senior counsel for the State. It is quite common that based on admissible portion of the statement of accused whenever and wherever recoveries are made, the same are admissible in evidence and it is for the accused in those situations to explain to the satisfaction of the Court as to the nature of recoveries and as to how they came into possession or for planting the same at the places from where they were recovered. Similarly this part of the statement which does not in any way implicate the accused but is mere statement of facts would only amount to mere admissions which can be relied upon for ascertaining the other facts which are intrinsically connected with the occurrence, while at the same time, the same would not in any way result in implicating the accused into the offence directly.

30. In that view, when we examine the statements referred to by learned senior counsel for the State which were stated to have been uttered by the accused to PW-1, we find the first statement only reveals the fact of accused Sandeeps friendship developed with the deceased Jyoti six months prior to the occurrence and the physical relationship developed by him with her. Accepting the said statement cannot be held to straightway implicate the accused into the crime and consequently it cannot be construed as a confessional statement in order to reject the same by applying Section 25 of the evidence Act. In this context the reliance placed upon the decision of this Court reported in Bheru Singh S/o Kalyan Singh v. State of Rajasthan [1994] INSC 87; (1994) 2 SCC 467 is quite apposite. In the said decision, this Court in paragraph 16 and 19 has held as under:- 16. A confession or an admission is evidence against the maker of it so long as its admissibility is not excluded by some provision of law. Provisions of Sections 24 to 30 of the Evidence Act and of Section 164 of the Cr.P.C deal with confessions. By virtue of the provisions of Section 25 of the Evidence Act, a confession made to a police officer under no circumstance is admissible in evidence against an accused. The section deals with confessions made not only when the accused was free and not in police custody but also with the one made by such a person before any investigation had begun. The expression "accused of any offence" in Section 25 would cover the case of an accused who has since been put on trial, whether or not at the time when he made the confessional statement, he was under arrest or in custody as an accused in that case or not inadmissibility of a confessional

statement made to a police officer under Section 25 of the Evidence Act is based on the ground of public policy. Section 25 of the Evidence Act not only bars proof of admission of an offence by an accused to a police officer or made by him while in the custody of a police officer but also the admission contained in the confessional statement of all incriminating facts relating to the commission of an offence. Section 26 of the Evidence Act deals with partial ban to the admissibility of confessions made to a person other than a police officer but we are not concerned with it in this case.

> Section 27 of the Evidence Act is in the nature of a proviso or an exception, which partially lifts the ban imposed by Sections 25 and 26 of the Evidence Act and makes admissible so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, when made by a person accused of an offence while in police custody. Under Section 164 Cr.P.C. a statement or confession made in the course of an investigation, may be recorded by a Magistrate, subject to the safeguards imposed by the section itself and can be relied upon at the trial.(emphasis supplied)
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> 19. From a careful perusal of this first information report we find that it discloses the motive for the murder and the manner in which the appellant committed the six murders. The appellant produced the blood stained sword with which according to him he committed the murders. In our opinion the first information report Ex. P-42, however is not a wholly confessional statement, but only that part of it is admissible in evidence which does not amount to a confession and is not hit by the provisions of Section 25 of the Evidence Act. The relationship of the appellant with the deceased; the motive for commission of the crime and the presence of his sister-in-law PW11 do not amount to the confession of committing any crime. Those statements are non-confessional in nature and can be used against the appellant as evidence under Section 8 of the Evidence Act. The production and seizure of the sword by the appellant at the police station, which was blood stained, is also saved by the provisions of the Evidence Act. However, the statement that the sword had been used to commit the murders as well as the manner of committing the crime is clearly inadmissible in evidence. Thus, to the limited extent as we have noticed above and save to the extent only the other portion of the first information report Ex. P-42 must be excluded from evidence as the rest of the statement amounts to confession of committing the crime and is not admissible in evidence. (Emphasis supplied)

31. Another submission made on behalf of the appellants was that there was inordinate delay in sending the express report as well as in altering the offence. The crime was initially registered as one under Section 307, IPC and subsequently altered as one under Section 302, IPC.

> It was pointed out that immediately after registration of the FIR based on the complaint of PW1 at 23.15 hours on 17.11.2004, the crime was registered under Section 307, etc., the same came to be altered only on 20.11.2004 even though the factum of the death of the deceased was intimated by PW-6 on 19.11.2004 itself by 1 p.m. It was further contended that the registration of the complaint after its alteration on 20.11.2004, the express report was forwarded to the Magistrate only on 25.11.2004 which was in derogation of the prescription contained in Section 157, Cr.P.C. Based on the above discrepancies, it was contended that the purported delay was only to antedate the FIR to suit the convenience of the prosecution. The submission is on the footing that the prosecution developed the case for implicating the accused while the accused were not really involved in the offence and, therefore, they took their own time to register the complaint. In order to support the said stand, learned counsel also went on to rely upon the statement of PW-1 as compared to Soubir Singh (PW-5), that while PW-1 stated in his evidence that they reached back the police station at around 23.45 hours, PW-5 in whose presence the complaint was stated to have been registered mentioned the time as 23.15 hours. We do not find any serious infirmity based on the said statement. When the preference of the complaint by PW-1 and its registration cannot be doubted in the absence of any flaw in its preference and registration, minor difference in the timing mentioned by the witnesses cannot be taken so very seriously to hold that the very registration of the complaint was doubtful. In fact PW-1 in his chief examination in another place has also referred to the registration of the FIR at 23.15 hours though the appellants counsel wanted to rely on the statement of the said witness to the effect that they all reached back the police station at around 23.45 hours. Apparently, there appears to be some mistake in recording the timing as stated by PW-1. Therefore, nothing turns much on the said submission of learned counsel for the appellants. As far as the contention that there was considerable delay in altering the offence from Section 307, IPC to Section 302, IPC was concerned the said submission was made by referring to the evidence of the Doctor (PW-6) who conducted the post-mortem that by 10.55 p.m. on 17.11.2004 itself the death of the deceased was confirmed when the victim was admitted to the hospital which was also known to Constable Rambir Singh who accompanied the victim to the hospital. It was

> also pointed out that PW-6 sent the intimation about the death of the deceased to the police station at 23.10 hours while keeping the body in the mortuary. To the above submission, on behalf of the State, it was sought to be explained that even though the death intimation was dated 17.11.2004 itself, since the post-mortem was held only on 19.11.2004 and the post-mortem report was received on 20.11.2004 the offence came to be altered based on the post-mortem report on 20.11.2004. Though the said explanation cannot be said to be fully satisfactory, it will have to be stated that when there was no serious infirmity in the registration of the FIR based on the complaint on 17.11.2004 (i.e.) immediately after the occurrence and every follow-up action was being taken meticulously, we hold that such a minor discrepancy in the timing of alteration of the crime by itself cannot be held to be so very serious to suspect the registration of the crime or go to the extent of holding that there was any deliberate attempt on the part of the prosecution to ante date the FIR for that purpose. We have already held that the accused miserably failed to substantiate the stand that he was not present at the spot of occurrence whereas he was really apprehended on the spot by the prosecution witnesses and was brought to the police station from whom other recoveries were made. The submission by referring to certain insignificant facts relating to the delay in the alteration of crime cannot be held to be so very fatal to the case of the prosecution.

32. It was also feebly contended on behalf of the appellants that the express report was not forwarded to the Magistrate as stipulated under Section 157, Cr.P.C. instantaneously. According to learned counsel FIR which was initially registered on 17.11.2004 was given a number on 19.11.2004 as FIR No.116 of 2004 and it was altered on 20.11.2004 and was forwarded only on 25.11.2004 to the Magistrate. As far as the said contention is concerned, we only wish to refer to the reported decision of this Court in Pala Singh and Another v. State of Punjab - [1972] INSC 180; AIR 1972 SC 2679 wherein this Court has clearly held that where the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the Court then, however improper or objectionable the delay in receipt of the report by the Magistrate concerned, in the absence of any prejudice to the accused it cannot by itself justify the conclusion that the investigation was tainted and prosecution insupportable. Applying the above ratio to the case on hand, while pointing out the delay in the forwarding of the FIR to the Magistrate, no prejudice was said to have been caused to the appellants by virtue of the said delay. As far as the commencement of the investigation is concerned, our earlier detailed discussion discloses that there was no dearth in that aspect. In such circumstances we do not

find any infirmity in the case of prosecution on that score. In fact the above decision was subsequently followed in Ishwar Singh v. State of Uttar Pradesh- AIR 1976 SC 2423 and Subhash Chander etc. v. Krishan Lal & Ors. -AIR 2001 SC 1903.

33. Another submission made on behalf of the appellant was that there were serious infirmities in preserving and testing of the sample of the foetus and the consequent DNA report implicating the accused Sandeep to the destruction of the foetus whose biological father was found to be the accused himself. The infirmity pointed out was that the sample of the foetus of the child was taken as early as on 17.11.2004 while it was sent for forensic lab only on 25.01.2005 and that since there was a long gap in between, the prosecution ought to have disclosed as to how the samples were properly preserved in order to ensure proper test to be conducted for ascertaining the correctness of its outcome. Though such submission was made with some emphasis, it was not pointed out as to what was the nature of procedure to be followed in regard to the preservation of the samples taken apart from what was followed in taking the samples by the prosecution. It is not in dispute that at the time of post- mortem, when the foetus was discovered, the same was preserved by taking two samples one in the Formalin solution and the other one by ice preservation. It is borne out by record that there was an FSL report dated 5.1.2005 as per which the SSP of Muzaffarnagar was informed that the foetus which was preserved in Formalin solution was not accepted since laboratory had no standard protocol for extracting the amplifiable DNA of Formalin preserved tissues.

34. Therefore, in the evidence of PW-10 Junior Scientific Officer of Central Forensic Laboratory, Chandigarh, it was brought out that the blood samples of accused Sandeep and the foetus received by him on 27.01.2005 and that necessary test was conducted based on which a report on 13B/1, 13A/2 and 13C/3 were forwarded which confirmed that the accused Sandeep was the biological father of the foetus. He also confirmed in the cross examination that the earlier sample of foetus preserved in Formalin solution received on 05.01.2005 was returned back without opening the seal as the same was kept in Formalin solution and standard protocol analysis was not available in the laboratory. He further confirmed that when the sample on second time was received along with the letter dated 25.1.2005, the same was preserved in ice separately which they were able to test in their laboratory for finding out the result.

> It has also come in his evidence that the collection of samples, preservation of samples and transportation of samples if not carefully done, it may affect the result, but in the case on hand the result reported by him was not based

> on wrong facts. In the light of the said expert evidence of the Junior Scientific Officer it is too late in the day for the appellant-Sandeep to contend that improper preservation of the foetus would have resulted in a wrong report to the effect that the accused Sandeep was found to be the biological father of the foetus received from the deceased Jyoti. As the said submission is not supported by any relevant material on record and as the appellant was not able to substantiate the said argument with any other supporting material, we do not find any substance in the said submission. The circumstance, namely, the report of the DNA in having concluded that accused Sandeep was the biological father of the recovered foetus of Jyoti was one other relevant circumstance to prove the guilt of the said accused.

35. There were certain other submissions made on behalf of the appellants, namely, the seizure of materials from the car were highly doubtful etc. We do not find any serious lacunae pointed out in support of the said submissions. As rightly submitted on behalf of the learned senior counsel for the State, the discrepancies were minor in character and we do not find any serious infirmity based on the said discrepancies argued on behalf of the accused/appellants. In the light of the above conclusion, we find that the chain of circumstances alleged against the appellants was conclusively proved without any missing link. We, therefore, do not find any scope to interfere with the conviction arrived at against the appellants by the trial Court as confirmed by the Division Bench of the High Court.

36. We, therefore, do not find any scope to interfere with the sentence of life and other sentences imposed against accused Shashi Bhushan under Section 302, IPC read with Section 34, IPC by the High Court and the other sentences under Section 316 read with Section 34 IPC.

37. When we come to the question of sentence of death as imposed by learned Sessions Judge, which was also confirmed by the Division Bench as against the accused Sandeep, the same will have to be examined in the light of the principles laid down in the various decisions of this Court right from Bachan Singh v. State of Punjab [1980 (2) SCC 684], Machhi Singh v. State of Punjab [1983] INSC 80; [AIR 1983 SC 957], Swamy Shraddananda v. State of Karnataka [2008 (13) SCC 767], Santosh Kumar Satishbushan Bariyar v. State of Maharashtra [2009 (6) SCC 498], Mohd. Farooq Abdul Gafur v. State of Maharashtra [2010 (14) SCC 641], Haresh Mohandas Rajput v. State of Maharashtra [2011(12) SCC 56], State of Maharashtra v. Goraksha Ambaji Adsul [AIR 2011 SC 2689]. The principle of rarest of rare caseenunciated in Bachan Singh(supra) has been restated and emphasized time and again in the above referred to decisions. In order to

appreciate the principle in a nutshell, what is stated in Haresh Mohandas Rajput (supra) can be usefully referred to which reads as under:- 20. The rarest of rare case comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of the rarest of the rare case. There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the- moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power of political ambition or indulging in organized criminal activities, death sentence should be awarded. It is, therefore, well-settled that awarding of life sentence is the rule, death is an exception. The application of the rarest of rare caseprinciple is dependant upon and differs from case to case.

> However, the principles laid down earlier and restated in the various decisions of this Court referred to above can be broadly stated that in a deliberately planned crime, executed meticulously in a diabolic manner, exhibiting inhuman conduct in a ghastly manner touching the conscience of everyone and thereby disturb the moral fibre of the society would call for imposition of capital punishment in order to ensure that it acts as a deterrent. While we are convinced that the case of the prosecution based on the evidence displayed, confirmed the commission of offence by the appellants, without any iota of doubt, we are of the considered opinion, that still the case does not fall within the four corners of the principle of the rarest of the rare case.
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> However, considering the plight of the hapless young lady, who fell a victim to the avaricious conduct and lust of the appellant Sandeep, the manner in which the life of the deceased was snatched away by causing multiple injuries all over the body with all kinds of weapons, no leniency can be shown to the said appellant. In the decision reported in Swamy

> Sharaddananda (supra) even while setting aside the sentence of death penalty and awarding the life imprisonment, it was explained that in order to serve ends of justice, the appellant therein should not be released from the prison till the end of his life. Likewise, in Ramraj v. State of Chhattisgarh [AIR 2010 SC 420] this Court, while setting aside the death sentence, directed that the appellant therein should serve a minimum period of 20 years including the remissions and would not be released on completion of 14 years of imprisonment.

38. Taking note of the above decision and also taking into account the facts and circumstances of the case on hand, while holding that the imposition of death sentence to the accused Sandeep was not warranted and while awarding life imprisonment we hold that accused Sandeep must serve a minimum of 30 years in jail without remissions before consideration of his case for premature release.

39. Criminal Appeal No.1651/2009 and the Criminal Reference No.19 of 2007 thus stand disposed of modifying the punishments imposed on accused Sandeep as one for life and he should undergo the said sentence of life for a fixed period of 30 years without any remission to be allowed. The Criminal Appeal Nos.1425-26/2011 of accused Shashi Bhushan stand dismissed.