

Heading of Decision in Criminal Case

**IN THE COURT OF PATHAK ALOK KAUSHIK, ADDITIONAL
DISTRICT & SESSIONS JUDGE-VI-Cum- SPECIAL JUDGE,
POCSO COURT, SUPAUL**

DISTRICT- SUPAUL, BIHAR

POCSO Case No.-54/2019
Pratapganj P.S. Case No.-100/19
Tr. No.- 06/2022

In The Matter of:

State _____ Prosecution

Versus

1. Anmol Yadav.....Aged about 32 years.
2. Ali Sher.....Aged about 27 years.
3. Md.Jamal.....Aged about 32 years.
4. Md. Ayyub @ Md.Ejub..Aged about 27 years.

Police Station : Pratapganj P.S.

F.I.R. no. : 100/19

F.I.R. U/S : 341, 342, 324, 307, 379, 376D/34 of IPC & 27
Arms Act & 04/06 POCSO Act.

Cognizance U/S : 341, 342, 323, 394/34, 376(D), 302/34 of IPC & 27
arms Act & 04/06 POCSO Act.

Charge U/S : 341, 342, 323, 394/34,376(D), 302/34 of IPC & 27
arms Act & 04/06 POCSO Act.

DISTRICT :Supaul

Prosecution represented by _____ Smt. Neelam Kumari, Special
P.P., POCSO

Defence represented by _____ Adv. Birendra Kumar Jha @
Bachchan Jha, Adv. N.N. Thakur,
Adv. Sanjay Kumar Singh & Adv.
Jawahar Jha

Dated of Judgment : 26th Day of April 2022

Present:- **Pathak Alok Kaushik**

Special Sessions Judge, POCSO-cum- Additional District & Sessions Judge-VI,
Supaul

Pathak Alok Kaushik
Special Judge,
POCSO Court, Supaul

J U D G M E N T

1. The above named accused persons stand charged and tried for committing the offenses U/S 341,342,323,376(D),302/34 of IPC 27 arms Act and 04/06 POCSO Act.

2. The prosecution case in brief, as per F.I.R goes like this :

The FIR has been filed by one Chandradeo Mandal husband of one of the victim Radha Devi and maternal uncle of the minor victim girl and deceased Victim Kanchan Devi. It was stated by the informant that on 9th of October 2019 at about 10:30 PM he had given his statement before the police. He has stated that on **08.10.2019** at about **8 PM** he was going to enjoy the village fair alongwith his family members and relative and while they were moving towards Tintoliya Mandir from home and when they were nearby Chilauni north of Dhengadhar nearby Canal Bandh, on the road itself, nearby Gilebi tree, they saw that three persons were already sitting over there. They allowed them to move further and thereafter wrongfully restrained the path and narrated a false story that one master is about to pass from there ;who had kept Rs. 3 lacs of accused persons, it was further stated by the accused persons that they were waiting there to shoot that Master. The accused persons captured the whole family and told them that after shooting the master they would be released. Thereafter, they were forced to move towards river bank and thereafter ladies were also forced to sit around 20 minutes at the place of occurrence and thereafter snatched the ornaments and money from his wife and maternal daughters, thereafter after seeing the incidence of loot, the children started making hue and cry. One of the accused person shot a bullet on Kanchan Devi and All the accused persons had assaulted the minor victim and her sister Kanchan Devi and the lady namely Radha Devi. The informant had stated that Radha Devi was raped also.

3. Letter on the informant came to know that accused persons had made captive to Sandip Kumar, Ganesh Kumar and Prem Kumar also, nearby

place of occurrence. Their SIM cards were snatched bearing No.7643099143 and 8969936875. Letter on after hearing the noise of firearm shot these three persons who were made captive fled away. It was also stated by the informant that all the four accused persons were about 20 to 30 years old and they were wearing red west having black border, brownish west and brownish half shirt respectively.

4. On the basis of self statement of the informant, Chandradeo Mandal husband of one of the victim Radha Devi and maternal uncle of the minor victim and victim girl Kanchan Devi the FIR was filed the case was instituted as Pratapganj P.S. Case No.100/2019.
5. After the due investigation, the police filed the charge sheet No.192/19 U/S 341, 342, 323, 376(D), 302/34 of IPC & 27 arms Act & 04/06 POCSO Act; against the accused persons namely 1. Anmol Yadav 2.Ali Sher 3. Md.Jamal 4.Md. Ayyub @ Md.Ejub on 30.11.2019. Another two accused persons namely 5. Md. Naveer and 6. Sanmol Yadav were shown absconding in the charge-sheet.
6. Furthermore, on the basis of the aforesaid charge-sheet this court had taken the cognizance of the offences U/S U/S 341, 342, 323, 376(D), 302/34 of IPC & 27 arms Act & 04/06 POCSO Act; for the accused persons namely 1. Anmol Yadav 2. Ali Sher 3. Md.Jamal 4. Md. Ayyub @ Md.Ejub 5. Md. Naveer and 6. Sanmol Yadav.
7. The case record of the absconding accused persons namely Md. Naveer and Sanmol Yadav got separated on **10.01.2020** as their attendance could not have been procured, since they were absconding according to the police.
8. After appearance of these four accused persons had been completed before the court and subsequent to the compliance of the provision u/s 207 Cr.P.C., on **10.01.2020**, the charge U/S 341, 342, 323,

376(D), 302/34 and 394/34 of IPC & 27 arms Act & 04/06 POCSO Act , was framed against the accused persons namely 1. Anmol Yadav 2. Ali Sher 3. Md. Jamal and 4. Md. Ayyub @ Md. Ejub. and was read over to them in Hindi and in the open court and was explained also to the accused Persons namely 1. Anmol Yadav 2. Ali Sher 3. Md. Jamal and 4. Md. Ayyub @ Md. Ejub to which they pleaded not guilty and claimed to be tried.

9. After examination of prosecution witnesses, the prosecution evidence was closed on **08.01.2021** and thereafter, accused persons namely 1. Anmol Yadav 2. Ali Sher 3. Md. Jamal 4. Md. Ayyub @ Md. Ejub were examined u/s 313 Cr.P.C. On **02/02/2021**. All the incriminating facts and evidences were put to the accused persons to which they denied and claimed to be innocent.

10. On the request of advocate for defence, the defence evidence was closed on 06.03.2021.

11. Now the question before this court is ; whether the prosecution has been able to prove the charges levelled against the accused beyond the shadow of all reasonable doubts or not?

FINDINGS

12. Having heard the rival submissions of the parties and have gone through the records of this case this court finds that in order to substantiate the charges leveled against the accused, the prosecution has examined seven witnesses before the court, during the course of trial. They are:-

- | | |
|-------------------------------|------|
| 1. [REDACTED] (Minor Victim) | PW-1 |
| 2. Md. Sazzad | PW-2 |
| 3. Radha Devi | PW-3 |
| 4. Chandradeo Mandal | PW-4 |
| 5. Babloo Mandal | PW-5 |

6. Dr.Puja Bharti	PW-6
7. Dr. Manoj Kumar	PW-7
8. Dr.B.N. Bharti	PW-8
9. Dr.Reeta Singh	PW-9
10. Rajnish Kumar Keshari (S.I.)	PW-10
11. Vivek Kumar Raushan	PW-11
12. Dr.Rajiv Ranjan Das	PW-12

13. In documentary evidence, the prosecution has relied upon the following:-

1. **Exhibit-1**- Signature of the victim [REDACTED] on the second medical report
2. **Exhibit-2** -Signature of the minor victim on first 164 CrPC statement in the Court.
3. **Exhibit-3**- Signature of the minor victim on second 164 CrPC statement in the Court.
4. **Exhibit-4**-Signature of the minor victim on the medical report dated 09.10.2019.
5. **Exhibit-5**- Signature minor victim on the second medical report dated 17.10.2019
6. **Exhibit-6**- is signature of P/W-2 Md. Sajjad on the statement of 164 Cr.PC given in the court.
7. **Exhibit-7**- is Signature of Dr. Puja Bharti on the medical report on 09.10.2019.
8. **Exhibit-8**- is Signature of Dr. Puja Bharti on the medical report of dentistry of minor victim on 17.10.2019
9. **Exhibit-9**- is Signature of Dr. Puja Bharti on the medical report of dentistry of Radha Devi on 14.10.2019
10. **Exhibit-10** is signature and handwriting on the medical report of Dr. Manoj Kumar on the medical report of minor Victim
11. **Exhibit-11** is the signature and handwriting of Dr. Manoj Kumar on the medical report dt.14.10.2019 of Radha Devi.

12. **Exhibit-12-** is the signature and handwriting of Dr. B.N. Bharati on the medical report of minor victim.
13. **Exhibit-13** is the signature and handwriting of Dr. Reeta Singh on the medical report of minor victim dated 09.10.2019.
14. **Exhibit-14-** to the medical report, handwriting and signature of Dr. Rita Singh on the medical report of victim Radaha Devi dated 14.10.2019.
15. **Exhibit-15** is furd-bayan which is written by Bindeshwar Ram and identified by I.O. Rajnish Kumar Keshari.
- 16.**Exhibit- 15/1** endorsement on the FIR, which is in the handwriting of I.O. Rajnish Kumar Keshari and signed by him only.
- 17.**Exhibit-15/2** is formal FIR which is in the handwriting of I.O. Rajnish Kumar Keshari and identified by him.
- 18.**Exhibit- 16** is brass made cartridge along with four pieces of torn part of a red gamchhi (Towel) whose seizure list was prepared by I.O.Rajnish Kumar Keshari.
- 19.**Exhibit- 17** one digger made of steel and one mobile of M.I. Redmi Company which bearing IMIE No. 8664700369093121 and 8664700369339 in which SIM No. 7295091213 was there and a two SIM Mobile of LAVA Company having IMIE No.911618656901805 and 911618656161809.
- 20.**Exhibit- 18** A purse of black colour, photocopy of the Addahar card of Prem Kumar one Rs.500/- note, one Rs. 200/-note, and one Rs.100/- note and Rs.50/- note along with a mobile of Vivo Company bearing IMEI No. 869571041824574 and 86957104824566 bearing tow SIM no. 6200727355 and 9631469829 and one black coloured Hero Glamour motor-cycle bearing no. BR-38H-1404. A seizure of aforesaid articles was made in the handwriting of I.O. Rajnish Kumar Keshari which was prepared by signed by him only.

- 21.**Exhibit-19** the confessional statement of the accused before the police which in the handwriting of I.O.Rajnish Kumar Keshari and singed by him.
- 22.**Exhibit-20** the confessional statement of the accused Ali Sher before the police which in the handwriting of I.O. Rajnish Kumar Keshari and singed by him.
- 23.**Exhibit-21** the confessional statement of the accused Anmol Yadav before the police which in the handwriting of I.O. Rajnish Kumar Keshari and singed by him.
- 24.**Exhibit-22** One mobile of I-tel Company having two Sim slots bearing IMEI No. 911633402481325 and 911633402481333 this mobile was filled with SIM no. 7765931773. A seizure list of aforesaid articles were prepared by the I.O. Rajnish Kumar Keshari which is in his handwriting and singed by him.
- 25**Exhibit 23** the confessional statement of the accused Md. Jamal before the police which in the handwriting of I.O. Rajnish Kumar Keshari and singed by him.
- 26.**Exhibit-24**is four pieces of torn part of a red gamcha (Towel) whose seizure list was produced in the court in a sealed cotton pack prepared by I.O. Rajnish Kumar Keshari.
- 27.**Exhibit 25** is iron digger which was recovered from the possession of Md. Ayyub.
- 28.**Exhibit 26** is it is M.I. Redmi mobile bearing two Sim slots recovered from the possession of Md. Ayyub and which was lotted from one of the victim Prem Kumar.
- 29.**Exhibit-27** a mobile of LAVA Company which was recovered from the possession of accused Md. Ayyub bearing SIM No. 9006240506 was identified by the I.O. and marked as exhibited.
- 30.**Exhibit-28** is black colour purse and photocopy of Addhar card of Mahesh

Kumar and Prem Kumar which was looted from the place of occurrence identified by the I.O.

30.**Exhibit- 29** is a two Sim slots mobile of vivo company recovered from the possession of Ali Sher bearing SIM no. 6200727355 and 9631468929.

31.**Exhibit-30** it is a Glamour motor-cycle bearing no. BR-38H-1404 recovered from the house of Ali Sher and use in the crime. A part from that one I-tel company mobile having two Sim slots bearing no. 7765931177 recovered from the possession Md. Jamal identified by the I.O. Rajnish Kumar Keshari.

32.**Exhibit-31** it is memo no. 60/cyber dated 11.10.2019 which was typed by witness P.W-11 Vivek Kumar Raushan (Sipahi Cyber Cell) and identified by him only.

33.**Exhibit-32** it is memo no. 63/cyber dated 18.10.2019 which was typed by witness P.W-11 Vivek Kumar Raushan (Sipahi Cyber Cell) and identified by him only.

34.**Exhibit-33** is the FSL Report No. 2417/19 dated 18.09.2021 which is marked as exhibited under Section 293 Cr.P.C since it is report of FSL expert.

14. On the other hand the defence has adduced only one witness in his support, who is named and figures as under.

1. Sanjay Yadav DW-1

15. In documentary evidence, the defence has relied upon none of the document.

16. Determination of age of the Victim girl and Jurisdiction of this court :

In the medical examination the age of the victim was assessed between 16 to 17. In the statement of 164 Cr.PC her age was assessed as 17 years by the learned magistrate. In her ADHAR card her DOB was 15.01.2003 so on

the date of occurrence she is minor. Not only that she had filed a signed xerox copy of her Matriculation certificate according to which her DOB was 15.01.2003 as it is mentioned in the ADHAR; Therefore on the date of occurrence she is apparently minor. Hence, the age of the victim girl was assessed as between 16 to 17 by this court. However on the basis of aforesaid facts this court adjudicate the age of victim between 16 to 17 and declares her minor and thus this case falls, well with in the jurisdiction of this exclusive special court.

Prosecution Witnesses

17. This court would firstly take up the evidence of **PW-1** [REDACTED], who is the minor victim of this case, She has supported the case of the prosecution in her examination-in-chief, She says that on 08.10.2019 at about 8 PM to 8.30 PM she was going to enjoy the village fair and while they were moving towards Tintoliya Mandir from home and when they were nearby Chilauni north of Dhengadhar nearby Canal Bandh, on the road itself under the Gilebi tree and they saw that five persons were already sitting over there. They allowed him to move further the and thereafter wrongfully restrained the path and narrated a false story that one master is about to pass from there who had kept their 3 lacs Rs. They had further stated that they were waiting there to shoot the master.

18. The accused persons captured the whole family and told them that after shooting the Master they would be released. Thereafter, they were forced to move towards river bank and thereafter ladies were also forced to sit around few feet distant from each other from the place of occurrence and when she was not willing to go and thereafter snatched the ornaments and money from her Mami and elder Sister. Watching the loot the children started making hue and cry. One of the accused person shot a bullet on Kanchan Devi and all the accused persons had raped the minor victim, her sister Kanchan Devi and the lady namely Radha Devi. The main victim

had stated that she was raped also. She says that she was dragged at the place of occurrence and she got her finger broken in due course by the assailants. She further says that she was raped by three persons and her sister and her Mami was raped by all the assailants. She further says that the jewelries of her sister and Mami were snatched by the assailants and her sister was shot and received bullet injury by one of them. The minor victim says that her Payal and rounded pendant was also snatched. She also narrates as to when she requested the assailants to let them go so as to get her sister admitted for the treatment in the hospital the assailants threatened her to kill then she further narrates as to how did she silently instruct her sister to hold her breath and then only they thought that she was dead and then fled away from the place of occurrence. Furthermore, the victim says that her sister Mami along with herself were brought to police station and PHC centre and then they were sent to Sadar hospital Supaul for the medical examination and further treatment sister was referred to Patna and subsequently she succumbed to her injuries.

19. She clearly narrates that out of fear she did not give the true state of affairs in her first 164 statement and had given an application for her restatement u/s 164 CRPC and identifies the same which was marked as Annexure -1 she further identifies her signature on the first 164 the statement which was marked as Annexure-2. She had also identified her signature on the 2nd 164 statement which was marked as Annexure-3. The victim minor girl further says that on 09.10.2019, her medical test was conducted and she identifies that signature on the same and it was marked as exhibit number 4. On 17.10.2019 another medical test was conducted by the board and she identifies her signature on the same which is marked here as exhibit number- 5.

20. The minor victim identifies all the 4 accused persons while they

were standing in the dock and clearly says that the first accused person who is wearing a checked shirt had raped her and second accused person who is wearing a cap had raped then the person standing at no. three had also raped her. Furthermore, she says that the accused person standing at no.-4 has not raped her. When asked up on he was Jamal. However, she further says that all the 4 accused persons had raped her elder sister Kanchan Devi and Maami Radha Devi.

21. When the minor victim had identified all the 4 accused persons inside the Court then, thereafter, upon asked by the Court regarding their names. The accused standing at first and wearing checked shirt has disclosed his name as Ali Sher and the person standing at number two uttered his name as Anmol Yadav and the accused No. three was Md. Ayyub and fourth was Jamal.

Hence, she vividly says that Ali sher, Anmol and Ayyub had raped her.

[Here a demeanour was recorded by the Court that after watching all the four accused person in the court the minor victim girl started crying and she was apparently very frightened; upon receiving consolation from the Court and persuasion she became ready to depose further.]

22. However, in her cross examination again she reiterates that the accused persons raped her and three of them and not two raped her. She clearly narrates that this is the third time she is deposing in the court. She reiterates that out of fear she could not have given true state of affairs in her first 164 statement on 10.10.2019 and in the subsequent statement she had uttered the truth in her 164 statement. She further says that her 1st medical examination was conducted in the primary health Centre and then she was sent to Supaul.

23. She had further deposed that all the victims were being raped by

different accused persons, at different spots but at the same time and location where there was grass on the soil. She also says that in the previous year also and they had went to see the village fair. She further says that during the course of rape the assailants had broken her finger also;while they dragged her.

24. Most importantly, when the suggestion was given to her that no such occurrence had taken place, then this suggestion was vehemently denied by the witness. Therefore, in the facts and circumstances mentioned above the trustworthiness of the witness cannot be challenged. She reiterates, in her cross examination, the same story which she had stated in her 164 Statement and Examination in chief and the written statement (F.I.R.). Hence, the trustworthiness of this witness is unchallenged and she can be completely relied up on by the court.

25. PW-2 Md. Sazzad is a laborer. He used to work in Delhi and came back owing to recession and in the market; he came back to work at Rajgir. There only he met with one of the accused namely Md. Ayyub. Md. Ayyub was also working over there. There only Ayyub demanded a mobile Sim card and since he was a co-worker so he had given his Sim card to him. Ayyub told that he would return the Sim card after a while. However, unfortunately the accused person never gave back that Sim card. The witness says that subsequently he had forgotten this matter. Letter on when the police administration approached him then only he came to know about the occurrence and He remembered that he had given that Sim card to Ayyub. Subsequently, he came to the police station and got his Sim card closed. The statement of this witness was also recorded under the 164 CRPC which was marked exhibited as exhibit number- 6. He further says that the accused person is standing in the Court in the dock and he identified the accused person as Md. Ayyub.

26. In the cross examination the witness says that prior to giving the Sim card to the accused person he never got it closed. Nor applied for its closer. When the police had informed him he was at Dehri-on-sona. At Rajgir he was known to the accused only for 10 days prior to giving him his Sim card. He further says that he was unaware of the whereabouts of the accused person and his native place.

27. PW-3 Radha devi one of the victim of the case. At about 8 PM to 8.30 PM she was going to enjoy the village fair and while they were moving towards Tintoliya Mandir from home along with her husband Chandra deo Mandal, daughter Komal Kumari, Anjali Kumari, Shravan Kumar, Bhanji **Sudha Kumari** Kanchan Devi and her husband Bablu Mandal (Husband of Kanchan) and when they were nearby Chilauni River north of Dhengadhar nearby Canal Bandh, on the road itself under the Gilebi tree and they saw that three persons were already sitting over there. They allowed them to move further and thereafter wrongfully restrained the path and narrated a false story that one master is about to pass from here who had kept their 3 lacs Rs. The accused persons further stated that they were waiting there to shoot that master. The accused persons captured the whole family and told them that after shooting that Master they would be released. Thereafter, the whole family was forced to move towards river bank and thereafter ladies were also forced to sit around few feet of the place of occurrence. The male members were tied and accused persons had raped this witness Radha Devi, minor Victim **Sudha Kumari** and Kanchan Devi. Their Jewelry and Ornaments and money were also looted. One of the accused person shot a bullet on Kanchan Devi when she was trying to fly away and all the accused persons had raped all the females. The victim had stated that she was also raped by all accused persons. She further says that the jewelries of herself and her Bhanji were snatched by

the assailants and her Bhanji was shot and received bullet injury by one of them. The victim says that her Payal and rounded pendent was also snatched. She clearly says that total No. of assailants were six; and the same was charge-sheeted by the police.

28. The victim Radha Devi identifies all the four accused persons while they were standing in the dock and clearly says that these are all accused persons who had raped them. She further says the person who is wearing muffler had shot Kanchan Devi. Subsequently, when it was inquired upon by the Court finds that the standing accused with mufflar uttered his name as Anmol Yadav thus the victim Radha Devi had identified the assailant who had pumped bullets in to Kanchan Devi. She further says that this accused had raped all of us.

[Here also a demenour was recorded by the Court that after watching all the four accused person in the court the victim looks very frightened , weeping and upon asked regarding Rape the Lady again started crying and upon receiving consolation and persuasion from the Court she became ready to depose further.]

29. Furthermore, in the cross-examination again she reiterates the incidence of Rape and says that she had narrated the incidence to the police [*Again she starts crying*]. She further says that she had narrated about the incidence to the police and told them that there were six accused persons total in numbers. She clearly narrates as to how she had deposed her statement before the Court under section 164 CRPC. In the cross-examination itself she says that she was brought to the police station next morning but the Minor victim **Sudha Kumar** was brought to the P.S. on the same day as they were injured. See further deposed that she was having two sons and two daughters and after last child she had opted for family planning. Thereafter, she clearly narrates of all the location of the

river and River bed and says that all the three ladies were raped in proximity and all the accused persons had raped them. She further says that during the course of the rape she was badly beaten by the accused persons on head, arm, leg and nose and subsequently she became half senseless. Again she went to the police station after four days along with her husband who happens to be the informant of this case.

30. Most importantly when the suggestion was given to her that no such occurrence had taken place and this case was filed due to the village politics, then this suggestion was vehemently denied by the witness. Therefore, in the facts and circumstances mentioned above the trustworthiness of the witness cannot be challenged. She reiterates, in her cross examination, the same story which she had stated in her 164 Cr.P.C. Statement and Examination in chief written report (F.I.R.). Hence, she vividly says that Ali sher, Anmol and Ayyub and Jamal had raped her. Hence, the trustworthiness of this witness is unchallenged and she can be completely relied up on by the court.

31. PW -4 is Chandra Deo Mandal Mama of the Minor Victim and Kanchan Devi and husband of the victim Radha Devi. He has stated that on **08.10.2019** at about **8 PM** he was going to enjoy the village fair alongwith his family members and relative and while they were moving towards Tintoliya Mandir from home and when they were nearby Chilauni north of Dhengadhar nearby Canal Bandh, on the road itself, near the Gilebi tree, they saw that three persons were already sitting over there. They allowed them to move further and thereafter wrongfully restrained the path and narrated a false story that one master is about to pass from there ;who had kept Rs. 3 lacs of accused persons, it was further stated by the accused persons that they were waiting there to shoot that Master

32. The accused persons captured the whole family and told them that after

shooting the master they would be released. Thereafter, they were forced to move towards river bank and ladies were also forced to sit around 20 minutes at the place of occurrence thereafter the accused persons snatched the ornaments and money from his wife and maternal daughters, thereafter after seeing the incidence of loot, the children started making hue and cry. One of the accused persons shot a bullet on Kanchan Devi and All the accused persons had assaulted the minor victim and her sister Kanchan Devi and the lady namely Radha Devi. The informant had stated that his wife was raped also. His wife and deceased Bhanji Kanchan Devi were raped by all the accused persons whereas the minor victim was raped by three accused persons. Thereafter, they had snatched the ornaments and money from his wife and maternal daughters when the children started making hue and cry. One of the accused person shot a bullet on Kanchan Devi and All the accused persons had assaulted the minor victim and her sister Kanchan Devi and his wife namely Radha Devi.

33. In the cross-examination he had reiterated the incidence. he says that their hands were tied by the red "Gamchha"(Towel).He further says that their hands were tied for 1 hours.

34. In para 20 the witness gives a vivid description of the sequence of rape and says that Kanchan was tried for rape first and thereafter Radha Devi was raped then the minor victim was raped. He further says when his wife Radha Devi untied his hand though her condition was worst. Minor victim was not even able to talk. They were tied up for 1 hours and in the meanwhile all the ladies were being raped separately. He further says his wife had narrated every thing at the place of occurrence and at the police station also.

35. In the cross-examination it was also deposed by the witness that the condition of the minor victim was very deteriorated and she was even

unable to talk. After a regular treatment for two to three days she could have explained everything.

36. The witness says that he has seen the whole incidence of rape and murder which took place with Kanchan Devi and he was an eye witness. Thereafter, he says in para 27 that Kanchan Devi received bullet firearm injury and thereafter she was raped by all the accused persons, he further says that she did not die immediately and passed away latter on. He gives further detail that at the time of occurrence Kanchan Devi was wearing Saari, Saya and Blouse. He gives a vivid description that the incidence took place nearby Kadharwa Village. He gives a further description that he had seen Pistol which was about 1 Bitta (length of palm), barrel was thick and was unable to give description about the back site of pistol. He further says that Bablu Mandal was husband of his deceased Bhanji Kanchan. He went to Raghapur P.S. first and then he was sent to Pratapganj P.S. He further says that they are very poor people.

37. Most importantly when the suggestion was given to him that no such occurrence had taken place and this case was filed due to the village politics, then this suggestion was vehemently denied by the witness. Therefore, in the facts and circumstances mentioned above the trustworthiness of the witness cannot be challenged. He reiterates, in his cross examination, the same story which he had stated in her 164 Statement and Examination in chief and written report (F.I.R.).

38. Therefore, the statement of the informant in the FIR has got a neat corroboration with his statement under 161 Cr.P.C. and the statement given in the Court, as a witness; trustworthiness of the witness cannot be challenged and he can completely be relied up on by the court.

39. PW-5 is witness Bablu Mandal whose wife Kanchan Devi was raped and murdered according to the prosecution. It was stated by the

witness no-5 as prosecution witness that on 08.10.2019 at about 8 to 8.30 PM he was going to enjoy the village fair along with the family and while they were moving towards Tintoliya Mandir from home and when they were nearby Chilauni north of Dhengadhar nearby Canal Bandh, on the road itself under the Gilebi tree and they saw that three persons were already sitting over there. They allowed him to move further and thereafter wrongfully restrained. The accused persons captured the whole family. Thereafter, they were forced to move towards river bank and on the bank of river ladies were also forced get separated from each other and ladies were raped. His wife Kanchan Devi and minor victim were raped by the accused persons. He further says that these are the four accused persons, standing here, who had raped all the female members. Thereafter, they had snatched the ornaments and money from his wife and Mami Saas when the children started making hue and cry. One of the accused person shot a bullet on Kanchan Devi, his wife and all the accused persons had assaulted the minor victim her sister Kanchan Devi and the lady namely Radha Devi continuously.

40. Most importantly he says in para -1 that his wife was raped after receiving bullet injury by all the accused person and this is the most disgusting aspect of this occurrence. After committing the crime when the accused persons left the place of occurrence the whole family started making hue and cry. The witness says that he lifted his wife on his soldier and rushed to Raghopur police station and thereafter went to Simrahi hospital. From Simrahi his wife was referred to DMCH Darbhanga and from Darbhanga she was referred to Patna. At Patna she passed away and her Post-mortem was conducted in NMCH Patna.

41. The condition of his sister-in-law Sudha Kumari the minor victim and his maternal mother-in-law (Mamia Saas) Radha Devi was very

degraded they were treated in Supaul Hospital. He further says that his statement under section 164 Cr.P.C was recorded in the Court and he identifies his signature on the same which was marked as Exhibit- 7

42. The witness identifies all the 4 accused persons while they were standing in the dock and clearly says that these are the four persons who had committed rape with all the three female members at the place of occurrence. He further says that amongst the accused persons standing, the first accused person who is wearing a checked shirt had shot bullet to his wife.

*[When the name of the accused person was wearing a checked shirt was asked by the court he told that his name was **Anmol Yadav**.]*

43. In the cross-examination the witness was asked for many questions regarding his native place, date of marriage and offspring. He was asked questions about the detail description of his Mamia Sasural, to which he was unable to describe in detail.

44. Thereafter, he was asked about the detail of place of occurrence and he clearly utters that they were tied up and forced to lie down with their face downwards. However, he says that they were able to look at the ladies as ladies were only about 10 steps from the place of occurrence. Thereafter, the witness emphatically says that he knows that none else than the accused persons had raped his wife and other females.

45. The witness deposed that he could not say as to from what distance his wife was shot. He further says that he heard the noise of firearm while the accused persons started raping his wife. Moreover, he says that at the time of rape all the females were crying and shouting; the gents of the family were also shouting.

46. PW- 6 is Dr.Pooja Bharti; She is a dentist and she has adjudged the age of the victim on the basis of Dentistry. On 09.10.2019, she was posted

as Dental Surgeon in Sadar Hospital, Supaul, Sudha Kumari was examined on the said date. On checking her she found No of teeth 8/8-8/8 present. She says that the Age is determined on the basis of teeth. The report of the tooth is in her own handwriting and signature it is marked as exhibit-7.

47. On 17.10.2019, She was posted as dental Surgeon in Sadar Hospital, Sudha Kumari was again examined on the said date, in which No of Teeth 8/8-8/8 present age is determined on the basis of teeth. The tooth report is in her handwriting and signature. It is marked as exhibit-7.

48. Dated 14.10.2019 also She was posted as Dental Sureon in Sadar Hospital, Supaul. On the said date, Radha devi, W/o Chandradev Mandal were also examined, due to which No of Teeth 8/8-8/8 present upper and lower was examined by her. Age of Radha Devi is determined on the basis of teeth. The dentistry report is in her own handwriting and signature, it is marked as exhibit-9.

49. Dr. Manoj Kumar PW- 7; He says that he was posted at Sadar Hospital, Supaul on 09.10.2019. A medical board has been constituted under the Chairmanship of C.S-cum-CMO, Supaul with member Dr. Manoj Kumar and Dr. Rita Singh and Dr. Puja Bharti all M.O. Sadar Hospital, Supaul for determination of age of Sudha Kumari D/o Laxman Mandal at Mansi Piprahi, P.S- Birpur, District- Supaul. X-ray finding X-ray serial no. 182. Pelvic- illior crest fused. Elbo-Epiphysis fused Wrist- Distal end of rarious and ulna fused Physical Examination- Height 4 " Weight 36 k.g. complexion -fair, Built-average, No of Teeth 32 M.I.- Mole over forehead, Mole over forehead. On the basis of above finding the doctor says that all members comes to the conclusion that the age of victim about 19 to 21 years. He further says that he was posted at Sadar Hospital, Supaul on 17.10.2019.

50. Further again a medical board has been constituted under the chairmanship of C.S-cum-CMO Dr. Krishna Mohan Prasad and member Dr. B.N Bharti Dr. Priyanka Singh and Dr. Puja Bharti all M.O Sadar Hospital, Supaul for determination of age of Sudha Kumari D/o Laxman Mandal at Mansi Piprahi, P.S- Birpur, District- Supaul. X-ray- Pelvic- Show iliac crest fused. Elbow-Epiphysis Fused. Wrist-Listal end of radius and ulna fused. Physical Examination- Height-4"ft-11" weight 35 k.g complexion- fair. Built- average. No of Teeth 32.one mole on chin another right clavical. On the basis of above finding we all members comes to the conclusion that the age of victim was about 19 to 21 years. This report by D.r B.N. Bharti's handwriting is the signature that he recognize.

51. He further deposed that he was posted in Sadar Hospital, Supaul on 14.10.2019. A medical board has been constituted under the chairmanship of C.S-cum-CMO, Supaul and member Dr. Manoj Kumar, Dr. Rita Singh and Dr. Puja Bharti. All M.O Sadar Hospital, Supaul for determination of age of Radha Devi, W/o Chandradeo Mandal at Teri Husenabad, ward no. 12, P.S- Raghopur, District- Supaul.X-ray-finding-X-ray serial no. 320.Pelvic-iliac crest fused. Elbow-Epiphysis fused. Wrist- Distal end of radius and ulna fused. Physical examination weight 40 k.g height-4'1" Complexion- Swarthy, Built-Average M.I-Mole over it cheek ,M.I – Mole over left nose No. of Teeth 32.On the basis of above finding all members came to the conclusion that the age of victim about 20 to 22 years. This report is in his handwriting and signatory, it is marked as Exhibit-11. Radha Devi's report has been written by me in one part, the second part has been written by another doctor. The age of the victim has been determined on the basis of investigation and X-ray. The first part of the investigation report of the victim [REDACTED] has been written by me,

the second part has been written by the second doctor their age has also been determined on the basis of X-ray and dental examination.

52. **PW- 8 Dr. B.N Bharti;** He says that he was posted in Sadar Hospital, Supaul on 17.10.2019. A medical board has been constituted under the chairmanship of C.S-cum-CMO Dr. Krishna Mohan Prasad and member Dr. B.N Bharti, Dr. Priyanka Singh and Dr. Puja Bharti. All M.O Sadar Hospital, Supaul for determination of age of Sudha Kumari D/o Laxman Mandal at Manshi Piprahi, P.S- Birpur, District- Supaul. In the X-ray finding- Pelvic-Show iliac crest fused Elbow-Epiphysis Fused;Wrist-Listal end of radius and ulna fused Physical Examination- Height-4"ft-11" weight 35 k.g complexion- fair Built-average No of Teeth 32 M.I one mole on chin another right clavical. On the basis of above finding all members came to the conclusion that the age of victim about 19 to 21 years. This report was in his handwriting and signature, it is marked as Exhibit-12. One part of [REDACTED] report is in my handwriting, the second part is written by another doctor.

53. **PW-9 is Dr. Rita Singh.**

She was posted in Sadar Hospital, Supaul on 17.10.2019. A medical board has been constituted under the chairmanship of C.S-cum-CMO Dr. Krishna Mohan Prasad and member Dr. B.N Bharti, Dr. Priyanka Singh and Dr. Puja Bharti. All M.O Sadar Hospital, Supaul for determination of age of [REDACTED] D/o Laxman Mandal at Manshi Piprahi, P.S- Birpur, District- Supaul. X-ray- Pelvic-Show iliac crest fused. Elbow-Epiphysis. Fused Wrist- Listal end of radius and ulna fused. Physical Examination- Height-4"ft-11" weight 35 k.g complexion- fair ,Built-average, No of Teeth 32, M.I one mole on chin another right clavical. On the basis of above finding we all members came to the conclusion that the age of victim was about 19 to 21 years. This report is in the

handwriting and signature of Doctor, it is marked as Exhibit-12. One part of **Sudha Devi's** report is in her handwriting, the second part is written by another doctor. Examination the above victim named **[REDACTED]** admitted at Sadar Hospital on 09.10.2019 at 2:40 PM vide CRN 35331 as indoor No. 7370 after taking her written consent. Following findings are found as follows:

(1) No any injury present on her whole body including face forehead, neck back, breast abdomen all extremities, both thighs exhibiting slight swelling tenderness of left hand extensor side without any abrasion or any cut injury.

(2) Axillary hairs are present and black in colour

(3) both Breasts are normally developed having no any injury

(4) Abdomen and as no lump and is soft

(5) the hymen is not intact

(6) The pubic hairs are present, black in colour and not matted

(7) there is no injury to vulva and the labia majorae, minora, the posterior commissure, furrowed, and the perineum

(8) The uterus is normal in size and the cervix is round external – os anterior all the fornices are clear. All has no injury.

(9) The Medical Report of vaginal swabs, shown as follows

(i) pus cells-12-15/hpf

(ii) epithelial cells- full field/ hpf

(iii) RBC-03 to 05 /hpf

(iv) no spermatozoa found either living or dead- pathology Dr. M.K.

Verma.

(10) age it is 19 to 21 years (Nineteen to twenty one) years as per report by radiological examination and dental examination Dr. Manoj and Dr. Puja Bharti respectively M.I-one black till right side of front of neck. Another under the chin

(11) Opinion – No confirmatory findings of rape at present but the possibility of rape can not be excluded.

There is very slight swelling and tenderness of left hand on external side.

This report is in my handwriting and signatory, it is marked as Exhibit-13.

2. On the dated 14.10.2019 in Sadar Hospital Supaul, was posted on the post of female Doctor Medical Officer. Radha Devi was checked on the said date. A board was formed in which Dr. Manoj, Rita Singh, and Dr. Puja Bharti, Medical Officer's board was formed in which Radha Devi, husband Chandradev Mandal, vill- Teri Husenabad, ward no. 12, P.S-Raghopur, District- Supaul was examined to investigate and following was the finding:

After Examination the above victim named Radha Devi her details mentioned she is admitted Sadar Hospital, Supaul on 14.10.2019 vide CRN36071 as indoor No. 7472 at 4:20 PM on 14.10.2019 after taking her consent. Following is the report as following:

(i) There was no any mark of injury present on her whole body both breast, are pendgoulour, having black axilarys in both are pidds abdomen has lungs few linea albicalses is present and there is one linear scar about 2" lenth of family planning operation present in lower abdomen.

(ii) On the external examination of jenitalia pubic hairs black in colour was present and is not mated, no any injury and swelling bulba and perinea, hymen is not intact, and utres is normal in size and position, the external os is obliterated and all the fairness is clear.

(iii) the microspical examination the viginal swab report shown as follows

(I) the pus cells-04 to 06/HPF

(ii) apithelial cells-24 to 26 /HPF

(iii) RBC-04 to 06 /HPF

(iv) no spermatozoa found either living or date- report is also attached

(v) age it is 20 to 22 years (twenty to twenty two years) as per report by

radiological examination by dental examination by Dr. Manoj and Dr. Puja Bharti

(vi) M.I-One black till on rt side of nose another black till ½ " from first

Opinion- at Present, No confirmatory findings of rape is present. The victim is parous but the possibility of rape can not be excluded.

3. No injury was found on the private part of the body of both the victims.
 4. During investigation of both the victims, no conspicuous signs of rape were found.
 5. if a virgin girl is raped by three persons, then there may or may not be an injury on her private part.
 6. Sudha Kumari was checked on 09.10.2019 at 2:40 PM, first I did the test and then it was checked by a different specialist.
 7. The report is first written by Dr. Manoj before Dr. Puja Bharti and then by the Dr. herself has written. The report is signed by the Dr. and Dr. Manooj as on 09.10.2019 and by Dr. Puja Bharti on 10.10.2019.
 8. The Swelling found on Sudha Kumari's hand is not caused by a fall. Swelling will not happened due to insect bite.
 9. the investigation of the victim Radha Devi was done on 14.1.2019 at 04:20 PM, after investigation was done by Dr. Manoj in relation to the question asked by the court, the doctor gave the following answer.
 10. If a victim is raped, and she is examined within 12 hours, then it will be known whether rape has happened or not, within this 12 hours spermatozoa would be visible (living or dead) life of living spermatozoa is 2 to 6 hours, immediately after rape (ejaculation) and death occurs after 6 to 12 hours of ejaculation.
54. P.W.10- S.I. **Rajnish Kumar Kesheri** is P.W-10, In his examination-in-chief he says that he was posted as SHO Pratapganj on

09.10.2019 at about 11:30 Chaukidar of Raghapur P.S Tamna Pravej came with the informant Chandradev Mandal along with his Fardbyan on the basis of which Pratapganj P.S Case no. 100/19 was instituted against four unknown miscreants and subsequently he himself took over the charge of investigation. Thereafter, the I.O. gives a vivid description of the place of occurrence.

55. The first place of occurrence was the western embankment of Dhengadhar near by village Chilauni where upon the informant and his all the family members were captured by the accused persons and they were forced to go on the southern bank of Dhengadhar river, which is the second place of occurrence, where all the family members of the informant were tied up and female member were raped and looted.

56. Not only that he further says that on the inspection of place of occurrence he could have recovered one cartridge cover made of brass and four torn pieces of gamchhi (thin towel) which were used to tie up the hand and legs of male member of the family. These materials were seized and accordingly seizure list was prepared as per the legal provisions. The third place of occurrence is south of Dhengadhar river north of Chilauni where the miscreants have looted the mobile phone and purse containing 250 rupees and photographs.

57. The I.O. further says that he prepared a rough scatch map of the place of occurrence. He further says that he had recorded the statement of one of the victim Ganesh Kumar at the place of occurrence and he identified almost everything. The witness has narrated the whole incident as to how the female members were raped and male member were tied up while he was captured on the gun point. He narrates the same story which was deposed by the informant.

58. The I.O. further says that while he was inspecting his place of

occurrence S.P., Supaul and other senior Officers has visited the place of occurrence. He further says that as per para no. 13 of the police case diary the victim girl namely Kanchan Devi who received the fire arm injury was referred to D.M.C.H, Darbhanga, subsequently from Darbhanga she was referred to Patna, where she succumbed to her injury on the next day. Other victims were sent to Sadar Hospital, Supaul for their medical examination.

59. He further says that the looted mobiles were placed on track on the basis of their I.M.I.E number and subsequent calls after the occurrence, were also traced and it was also deciphered that the mobile no. 7295091213 was owned by one Md. Sajad whereas mobile no. 9006240560 was owned by Md. Ayyub. It was subsequently excavated that mobile no. 7295091213 was being used by Md. Ayyub only. Thereafter, the police party track the location of aforesaid mobile and went to Md. Ayyub's house at Narhaiya, ward no. 1 P.S- Chattapur and conducted a raid and upon further enquiry it was found that two mobiles phones one of Redmi Company another made by Lava Company were recovered from the possession of accused Md. Ayyub and thereafter he was arrested and in his confessional statement before the police. He accepted his guilt and named other five accused persons namely 1. Ali Sher, 2, Anmol Yadav, 3. Sanmol Yadav, 4. Md. Jamal, and 5. Md. Nabir.

60. Thereafter, on the identification of the first accused the police party went out and arrested Md. Ali Sher and one black colour purse containing 750 rupees and Addahar card of Prem Kumar and photocopy of Addahar card of Mahesh Kumar and one mobile phone of Vivo Company having two Sim cards slots bearing no. 6200727355 and 9634169829 was recovered from his possession of the person. Like wise a seizure list prepared in front of independent witnesses regarding aforesaid articles.

Moreover, the Glamour motor cycle which was used in the crime bearing BR38H 1404 was also recovered from the house of accused Ali Sher. The seizure list was prepared accordingly as per the legal norms.

61. The IO has conducted raids but Anmol and Sanmol Yadav were not found. Later on the IO came to know that One Anmol Yadav is trying to fly away and on the basis of information he was nabbed and arrested from the auto stand. From the active possession of the accused Anmol Yadav one country made pistol and one mobile of Vivo company having two sim cards bearing nos. 9798473098 and 8521409264 was recovered.

62. He says that he had collected the medical reports of victim minor girl from the hospital by post. Thereafter the IO had tried to collect the the CDR and CAF of mobile nos.7633034412 and 7258926563 of accused persons namely Sanmol Yadav, Mobile No.9006240560 and 7295091213 of Md. Ayyub and 9798473098 of Anmol Yadav, 6200727355 of Ali sher, 6287829809 of Md. Nabir, 7765931773 and mobile no.7633034412 of Sanmol Yadav. The request was sent to the Cyber cell of SP Supaul.

63. Subsequently when the IO has consulted the informant he had narrated that his wife Victim Radha Devi was saying that she was also raped [REDACTED] came with her mother and had also said the same that she was also raped. After getting this information victim Radh Devi was medically examined and their statement U/S 164 Cr.PC was recorded. Apart from Radha Devi, minor victim's medical examination was also done and the IO had collected the inquest report of deceased Kanchan Devi from Agam Kuan PS. After the death of Kanchan Devi an application for addition of section 302 was filed by the IO before the court.

64. Victim Ganesh Kumar and Prem Kumar and Bablu Mandal gave their statement before the court U/S 164 Cr.P.C. Other witness were also

examined U/S 161 Cr.PC. Thereafter the IO had contacted the Cyber expert Vivek Kumar.

65. One Glamour motor-cycle BR-38H-1404 was recovered from the house of Ali Sher. After preparing the seizure list raid was also conducted to catch Md. Jamal and Md. Nasir but they were found absconding. Information was received that one of the accused Anmol Yadav wants to abscond therefore again a raid was conducted at Pratapganj Chowk and near by Tempo Stand one person tried to fly away but anyhow he was nabbed. Subsequently, when he was enquired upon it was found that he was none else than Anmol Yadav the prime accused of this case.

66. Thereafter, seizure was conducted before two independent witnesses and one country-made pistol and a mobile phone of vivo company bearing Sim no. 9798473098 and 8521409264 was recovered from the conscious possession of the accused Anmol Yadav. In his confessional statement the accused Anmol Yadav has accepted that this is the fire arm by which the murder was committed. Moreover, he has named the other accused persons also.

67. The I.O. Rajnish Kumar Keshari categorically made it clear and observed that the mobile no. 9798473098 was used by Anmol Yadav and mobile no. 7200727355 was used by Ali Sher and mobile no. 7765931773 by used by Md. Jamal, mobile no. 7633034412 was of Sanmol Yadav and mobile no. 9006240560 belong to Md. Ayyub and mobile no. 6287829809 belongs to Md. Nabir. C.D.R and S.D.R of all these numbers were collected and it was found that the mobile tower location of all these aforesaid numbers is at the place of occurrence at the time of commission of occurrence.

68. Furthermore, movement chart of all these numbers were traced and it was found that as per movement chart all these numbers were found near

by place of occurrence in the movement chart and this chart has been scanned him. Para 187 of the police case diary. One of the mobile no. 7295091213 was recovered from Md. Ayyub, which originally belong to Md. Sajad, who was co-worker of Md. Ayyub at Rajgir.

69. Furthermore, the I.O. had collected the X-rox copy of the matriculation certificate of minor victim which was signed by the minor victim girl and according to the certificate her D.O.B was 15.01.2003. It has been recorded in para 301 of police case diary. Furthermore, attachment was also done with the property of absconding accused persons namely Md. Nabir and Sanmol Yadav. Apart from that recovered country-made pistol and cartridge was sent to FSL for the examination.

70. In the cross-examination the I.O. says that he found blood stains at the place of occurrence but could not have collected the same. Sniffer dog was also called for but it was of no use. He further says that the victim girl and lady have washed their clothing that's why their undergarments and other clothing could not have recovered for the purpose of FSL examination. He further says that the 161 of Cr.P.C statement of the victim minor girl and victim Radha Devi was recorded by S.H.O, Mahila P.S, Supaul. In her statement on 09.10.2019 which is written in para 13. She did not named the accused persons rather she says that two people have committed raped unto her. However, Radha Devi said that she has seen the assault and not the rape with the minor victim.

71. The I.O. says that during the course of investigation the minor victim came with her father and said that she was raped by three persons. Nose pins, earrings made of silver and gold and one black purse containing 750 rupees and one photograph of lord Ganesha and two X-rox copy of Addahar cards were snatched. The I.O. accepts that no identification parade regarding accused persons or seized articles have

been done. It was also accepted by the I.O. that there were four accused persons as per FIR but indeed Six accused person were found during investigation and that's why four accused persons were charge-sheeted and two had been shown absconder by the police.

72. PW-11 is Vivek Kr. Raushan , the then expert Sipoy in the cyber cell; he says that he was posted in the cyber cell Supaul on the date of occurrence. He says that in Pratapganj P.S. Case No.100/19 he was the person who got the CDR (Call detail report) and SDR (subscribers detail report).He further says that he helped in the the analysis of CDR and SDR. He further says that CDR data from 01.10.2019 and 11.10.2019 was supplied by him on the request memo of 63/Cyber dated 18.10.2019.He further says that CDR certificate dated 11.10.2019 memo number 60/cyber, has been supplied by him only and marked as Ext. No-31. Moreover memo number 63/Cyber is also typed by him and bearing his signature which is marked as Ext No.32.

73. During the cross examination the witnesses says that in the CDR report chart he could have traced Anmol Yadav 9 times among which at 7 times he was found at Belhi, near the place of occurrence and 2 times at Bhagwanpur.

74. The witnesses that he cannot describe the catching radius of both the towers and cannot name the subscribers name of the numbers on whom the calls were made. He further stated that he can not give the boundary of the house of accused Anmol Yadav. The witness further says that on the request of investigating officer he got the printout of CDR and SDR and did not got it certified by the superior officer.

75. The witness further says that he is unable to give the exact tower location and house address of the mobile number of other accused persons. All the numbers on which the accused persons talked together has been

mentioned in the CDR. subscribers name is written over here but the name of the persons whom the call were made is not written.

76. Furthermore the witness had refuted the suggestion that the Cyber report has been generated Due to undue influence of investigating officer.

77. PW-12 is Dr. Rajeev Ranjan Das who had conducted the autopsy of the body of deceased Kanchan Devi.He says that on 10th of October 2019 he was posted as associate professor FMT Department NMCH and about 11:45 AM he had conducted the post-mortem examination of the dead body of Kanchan Devi W/O Bablu Kumar Mandal.The body was brought, and identified by the Chaukidar Ram Bali Paswan.

78. The Doctor had found following anti-mortem injuries and features which were seen and noted down

I) Stitched wound (a) on front of Abdomen Extending from 2 inch above umbilicus to 5 inch below it and slightly to right of midline(b)1/4" in left lower abdomen in the left illiac region.

II) The wound of entry 1/4" X 1/4" cavity deep on left back of chest with inverted margin, presence of abrasion collars and presence of tattooing over area of 4"X3" around the wound approximately. , Situated on the left back of chest, about 3.5 inch from vertebrae coloum at a level of T9/T10 vertebrae.

III) Wound of Exit 1/2" X 1/4" X cavity deep on right right Front of chest just 1/4" from midline and about 1/2 from upper part of stitched wound no. A with the everted margin, tissues were protruding and blood oozing out. Wound no.2 and 3 were corresponding and in the intervening portion of projectile after entering from the wound of entry, broke the tenth rib of left side of chest posteriorly, lacerated the tissues and muscle of the region and ruptured the spleen and upper part of liver, pierced the diaphragm while making the exit through the wound of exit on the right of front of chest after breaking the right, 7th and 8th ribs and T-7 and T-8 vertebra with presents of blood and dark blood cloud

and thor-abdominal cavity right lung was contused.

79. Abrasion a) 1.25 " and 1/4"X1/4" and (b)1.25 "X1.4 " on left front of the chest 3.5" from left nipple. All vesra were pale heart and bladder were empty. Stomch was raptured and stitched. Liver was also repaired with stitches. Two Swabs were taken from the vagina and slides made, studied under the microscope no spermatozoa dead or alive could be seen.

80. Doctor in his opinion finds that wound No.-2 and 3 are wound of entry and wound of exit of bullet respectively. However the wound number 4 with caused due to harden blunt substance impact. The stitched wound was due to re operative process done by the treating doctor/surgeon.

81. In his clear-cut opinion the doctor says that death was due to shock and hemorrhage as a result of firearm wound.

82. Furthermore, the doctor says that during the course of Departmental academic activity. He found that his his opinion, which ought to have been "sexual assault is not ruled out"; it is mistakenly written that the "sexual assault is ruled out."

The Doctor says that old hymeneal tear,Absence of perennial injuries and absence of spermatozoa can not form the basis of no sexual intercourse; because in so many circumstances nor injury or no spermatozoa are possible,Even if sexual intercourse has taken place.

83. The Doctor says that on the basis of aforesaid three facts. He cannot comment on sexual assault and cannot say that sexual assault has taken place.

84. The Doctor as a witness says that old hymenal tear is generally found in the dead body of a lady who is married and furthermore he added that if gang rape is committed by three to four person usually we find injuries in the private part in normal course of event.

85. At this juncture a court question was put to the Doctor that if gang rape has been committed after shooting a bullet injury to a lady whether still she will have injury in her private part after the gang rape.

The doctor says it is very difficult to ascertain whether injuries would be caused due to gang rape after sustaining bullet injury in the chest.

86. When the body was brought before me its abdominal wound was covered by bandage. He further says that he did not mentioned anything about the age and colour of the injuries. Regarding age of stitched wound he was unable to say any thing. He further says that he did not send the viscera of the body because the doctor was having no doubt in his mind regarding cause of death of the deceased. Rigger mortise was developed all along the body.

Defense Witnesses

87. **DW-1** Sanjay Yadav is the only defence witness in this case. He says that he knows Anmol Yadav and he has got good reputation in the Society. He has got his own farming land and it is unheard-of any complaint against him.

88. In the cross examination he says that he was brought by Anmol Yadav to depose as witness he says that he is not here in the Court to give certificate of good and bad deeds to the people. He further says that he is unaware of the fact that as to why Anmol Yadav is in the court. He further says that he is unaware that Anmol Yadav is facing trial for murder and rape in this case. Furthermore he has refuted the suggestion that he is concealing the facts because the accused person belongs to his village.

Judicial Reasoning and Appreciation of Evidence

89. **Presumption of guilt under POCSO Act:** POCSO act is an exception to the rule in the ambit of criminal jurisprudence. It is another basic principle of criminal jurisprudence that an accused is presumed to innocent, unless

and until his guilt is proved beyond the shadow all reasonable doubts. However, the dictum of POCSO Act is just opposite to the rule of presumption of innocence in criminal Jurisprudence.

90. **Presumption of Innocence (ei incumbit probatio qui dicit, non qui negat)**- According to this Latin legal maxim, the burden of proof is with the person who declares the facts, not the person who denies the fact. The presumption of innocence is the legal principle which means every person should be considered as an innocent person unless it is proven guilty or until court believes that the person is in charge of acts prohibited under law.

91. Like some other exceptional special Laws; **Reverse onus clauses** are usually found in criminal statutes where the burden of proving innocence is shifted on to the defendant or the accused after certain foundation and fundamental facts have been proven by the prosecution. Under the POCSO Act, Section 29 and 30 deal with reverse onus clauses and are stated as under:

92. Section 29 of POCSO Act states that whenever a person is prosecuted for committing, abetting to commit or attempting to commit an offence under Sections 3, 5, 7 and 9 of the Act, the Special Court shall presume that the offence has been committed, abetting or attempted to commit the offence unless the accused can prove to the contrary.

93. Section 30 deals with presumption of culpability of the mental state of the accused with regards to any offence committed under the POCSO Act until the defence proves it otherwise. Further, sub-clause (2) states that the defence has to prove the innocence of the accused beyond reasonable doubt and not on the basis of preponderance of probabilities. Some of the critics of this special law argue that both the Sections 29 and 30 of the Act should be held to be ultra-vires of the Constitution as they violate the

fundamental rights of the accused and principles of procedural fairness under the common law where the burden of proof lies on the prosecution to prove the case against the accused beyond any reasonable doubt. Until this is proved, there is a presumption of innocence in the favour of the accused.

94. However come what may the result and repercussion in the legal arena, this Court, being a Court of law and not the Court of Justice, bound by the prevailing norms of judicial discipline and available dictum's of statute. Hence, the pair of presumptions lead to the commencement of proceedings against the accused with a presumption of guilt. Therefore, it is not the prosecution which should prove the concurrent presence of mens rea and actus reus beyond a reasonable doubt.

95. The differentiation can only be made on the basis of intelligible differentia and the differentiation should have a nexus with the object of the legislation. There is no rational connection between 'object and restriction' as determined by the statute. The object of the Statute is to 'protect children from sexual abuse and sexual exploitation' and not increase the conviction rate even if it is erroneous. The Legislature was aware that there were chances of false accusation and hence had put Section 22 of the POCSO which punishes the persons who falsely accuse the others of offences punishable under the Act. It might be for the best interest of the child that such provisions have a statutory recognition but the rights of the accused are equally important and have to be balanced against the rights of the victim and that's why through section 22 the legislature has tried to strike a semblance between the right of accused and right of victim.

96. However we must keep in our mind that the presumption of innocence has been struck down by the virtue of Section 29 that states that the Court

‘shall’ presume that the offences under section 3, 5, 7 and 9 have been committed by the accused. The word ‘shall’ as opposed to ‘may’ puts an obligation on the Courts to presume that the accused has in fact committed the offence.

97. In *Yogesh Maral v State of Maharashtra*, the Hon'ble Court had stated that the ambit of Section 29 is quite wide and due care and precaution shall be used before applying it to any of the cases hinted towards its unconstitutionality. The Court further stated that a plain reading of Section 29 would suggest that it is beyond the normally accepted principles of criminal jurisprudence. In *State of Maharashtra v Dilip Gajbhare*, the High Court of Bombay did not acquit the accused stating that discharging burden of proof based on a mere preponderance of possibilities is not sufficient and accused has to discharge his proof beyond a reasonable doubt.

Recent guidelines on POCSO

98. *Section 29 runs as follows “Presumption as to certain offences- Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of this Act, the special court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.”*

99. The aforesaid provision enshrined in Section 29 of POCSO Act has been explained in a recent Judgment passed by Calcutta High Court in C.R.A. No. 736/16, ***Sahid Hossain Biswas Vs. State of West Bengal 2017 SCC Online Cal 5023***. In the aforesaid Judgment in Para 22 and 23 it is observed by the Calcutta High Court that:

100. *The law, therefore, provides for a reverse burden upon the accused in a prosecution under Sections 3, 5, 7 and 9 of the aforesaid Act, The*

statutory presumption creates an exception to the ordinary rule of presumption of innocence available to an accused in a criminal trial and puts the onus on the accused to rebut such presumption and establish his innocence. Presumption of innocence is a basic human right which is a vital facts of fair trial rights enshrined in various international covenants like the Universal Declaration of Human rights and the International covenant of Civil a Political Rights (to which India is a signatory) but is not a fundamental right under Part III of the constitution [see Noor Aga V. State of Punjab, (2008) 16 SCC 417]. the concept of presumption of innocence has , in recent times, been reversed in any situations by creating statutory presumption like under Sections 113A, 113B or 114A of the Evidence Act shifting the burden on the accused to prove his innocence. Section 29 of the POCSO is, therefore, a species of such exception to the ordinary rule of presumption of innocence and must be borne in mind while appreciating the evidence of prosecution witnesses in a trial under the POCSO Act. The expressions “shall presume” and “unless contrary is proved” in the aforesaid provision creates a reverse burden on an accused to prove his innocence to earn an order of acquittal and absolves the burden of the persecution to prove his guilt beyond reasonable doubt. How is the accused to discharge such burden? Sections 3 and 4 of the Evidence Act define the words 'proved', ' shall presume' and 'disproved' as follows:

101. Section 3:-

“Proved”- A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

102. “Disproved”- A fact is said to be disproved when, after

considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

103. Section 4:-

“Shall presume”.- whenever it is directed by this act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.”

104. 23“ *A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would show that in a prosecution under the POCSO Act an accused is to prove 'the contrary', that is , he has to prove that he has not committed that offence and he is innocent. It is trite law that negative cannot be proved [Sait Tarajee Khimchand v. Ykelamatri Satyam, (1972) 4 SCC 562, Para-15]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.”*

105. In the light of Section 29 of POCSO Act as well as aforesaid principle laid down by the Calcutta High Court, it is essential to examine in this case that whether fundamental facts of the prosecution case has been established by leading legal evidence or not by the prosecution ? In this regard, firstly it is required to examined that whether the victim minor was minor or not at the relevant date of alleged occurrence i.e. dated 08.10.2019. This has been discussed at length at paragraph no.16 of this Judgement.

106. In POCSO Act U/S 30, there is another presumption against the

accused with respect to culpable mental state. Section 30 runs as follows:

107. *“Presumption of culpable mental state-(I) In any prosecution for any offence under this Act which require a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*

108. *For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.*

Explanation:- In this section, “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.”

109. IN the instant case accused person has been charged with the following sections:

341, 342, 323, 376D, 394, 302/34 IPC & 27 Arms Act & 4/6 POCSO Act

110. There is sufficient evidence on record as such to establish that the victim minor girl and other victims were wrongfully restrained by the accused persons. The definition of wrongful restraint goes like this in the code :

Section 339 IPC- Wrongful restraint.—*Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.*

[Exception.—The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.]

Meaning thereby there is sufficient evidence on record which shows that

the accused persons restrained the movement of the victim girl and other victims while they were going for the village fair at the time of occurrence for the purpose of loot, rape and murder . Hence, the charge as alleged U/S 341 does get evidenciary support from all corners, hence the charge under section 341 IPC stands proved and likewise the accused persons are to be convicted as per law.

111. **Wrongful confinement.—**

Whoever wrongfully restrains any person in such a manner as to prevent that person from proceedings beyond certain circumscribing limits, is said “wrongfully to confine” that person.

112. Here in the instant case also all the accused persons after wrongfully restraining the victims prevented them from proceedings beyond certain circumscribing limits as they were forced to remain confined to the river bank till the incidence.

Appreciation of Evidences

In “*Pudhu Raja v. State*”, (2012) 11 SCC196, the Hon'ble Supreme Court held that :

113. “While appreciating the evidence, the court has to take into consideration whether the contradictions / omissions were of such magnitude so as to materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements in relation to trivial matters, which do not affect the core of the case of the prosecution, must not be made a ground for rejection of evidence in its entirety. The trial court, after going through the entire evidence available, must form an opinion about the credibility of the witnesses, and the appellate court in the normal course of action, would not be justified in reviewing the same again without providing justifiable reasons for the same. Where the omission(s) amount to a contradiction, creating a serious doubt regarding the truthfulness of a witness, and the other witness also makes material improvements before the court, in order to make the

evidence acceptable, it would not be safe to rely upon such evidence.”

In ***“Jaswant Singh v. State of Rajasthan***

(2000) 4 SCC 484, it was held by the Hon'ble Supreme Court that :

114. “Now the explanation to Section 162(2) provides that an omission to state a fact in the statement may amount to a contradiction. However, the explanation makes it clear that the omission must be a significant one and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

115. “Reading Section 161(2) of the Criminal Procedure Code with the explanation to Section 162, an omission in order to be significant must depend upon whether the specific question, the answer to which is omitted, was asked of the witness.

116. Thus, the law discussed above amply makes it clear that the contradictions which do not affect the core of the prosecution case or the omissions which are not put to the Investigating Officer in his evidence are not material and need be ignored. Here, the court would also like to refer to ***“Akhtar v. State of Uttaranchal”, (2009) 13 SCC 722***, wherein it was held that :

“if the prosecution case is supported by two injured eyewitnesses and if their (injured eyewitnesses) testimony is consistent before the police and the court and corroborated by the medical evidence, their testimony cannot be discarded.

Similarly, in ***Surender Singh v. State of Haryana*** this court has opined that :

“the testimony of an injured witness has its own relevancy and efficacy. The fact that the witness is injured at the time and in the same occurrence, lends support to the testimony that the witness was present during occurrence and he saw the happening with his own eyes.”

117. One of the arguments placed by the defence counsel regarding second medical examination of the victim minor girl and her second 164

of Cr.P.C examination. It is apparent and set principle of law that if be needed the court can opt for the second opinion by the medical board and here also the same was done by the predecessor court. Moreover, there is no bar in the section 164 Cr.P.C which prohibits the court from the second 164 Cr.P.C statement of the victim if be needed and the victim says that she was frightened and depressed at the time of first 164 Cr.P.C statement.

118. The argument was also placed forward by the defence counsel that no TIP was conducted by the police but it was argued by the prosecution that the victim of rapes were not in the condition to go for TIP rather they were under treatment and soon thereafter the trial begins. This court feels that identification of accused person in the court by the victim during her deposition as witness is more fortified and substantive piece of evidence rather than Test identification parade (TIP) in the jail.

119. It was also argued by the defence that some of the important witnesses who were charge-sheeted were not examined by the prosecution. However, it was submitted by the prosecution that in the trial of a heinous crime like that of this case, the prosecution and court cannot wait for indefinite time for the appearance of all the listed witnesses; because the trial has to be concluded well with in stipulated period in the POCSO Act. Had there been no COVID -19 spell the trial would have concluded earlier. Ld. Special P.P Smt. Nilam Kumari submits that all those witnesses who were important to prove the case beyond all reasonable doubt have been examined.

120. The argument was also placed by the defence that the minor victim and another victim Radha Devi had uttered in their first 164 statement that no absurdity was done with them however in their subsequent statement they said that they were raped. It is worthwhile mentioning here that it is settled principle that 164 Cr.P.C statement is only a corroborative piece of

evidence and not a substantive one. Moreover, both the victims have deposed in a clear manner in their deposition as a witness in the court that they were raped by three and four accused persons respectively. It is also noteworthy that both the victims have identified the accused persons in a very conspicuous manner and pointed out as to who are the persons who raped with them.

121. It was also pointed out by the defence that during the 161 statement minor victim did not name any of the accused rather said that they committed rape one by one. Moreover, the another victim Radha Devi in her 161 statement says that she has not seen occurrence of rape with the minor victim. It also worthwhile mentioning here that had there been any contradiction in 161 statement and the subsequent deposition before the court it ought to have been proved by the defence in a crystal clear manner but here the defence miserably failed. Hence, the presumption of guilt doctrine against the accused in the POCSO cases has not been demolished by the cogent evidence by the defence.

122. The next argument was placed forth by the defence that after the elapsed of two years a period it is next to impossible to identify the culprit in the court. Here the court feels that in the natural course of action a common human being can identify the person who has devastated once prestige and life ,even after several years. Worthwhile mentioning here that rape is such a horrific and thought haunting process that it leaves a scar on the mind and soul of the victim which cannot be wiped out even after several years.

123. Regarding the number of accused persons there might have been some contradictions in the statement of victims under 164 of Cr.P.C. However, when it comes to deposition of victims and eye-witnesses in the court there is no ambiguity at all. All the witnesses says that in total there

were six persons and out of which four had committed rape. That too the persons who are facing trial before the court had committed the act of rape undoubtedly

124. The case becomes crystal clear , per contra to the other reported cases of rape because some of the victims of rapes are survivors here and they have been brave enough to depose before the court and identified the rapist also. Moreover, this case has plethora of direct evidences as we have many eye-witnesses in this case who were tied up and thrown on the ground to witness the horrific crime by the accused persons. The court also feels that the trustworthiness of these eye-witnesses are immaculate and impeccable because they have narrated almost the same piece of evidence which was uttered by the victims.

125. The place of occurrence has been well established by all the prosecution witnesses as there is no ambiguity on the place of occurrence and all the witnesses have deposed in a coherent manner that the occurrence of assault rape and murder took place near by the bank of the Dhengadhar river.

126. The time of occurrence is also mention by all the witnesses between 8-8:30 pm and all the witnesses have given almost the same time for the occurrence of crime.

127. As far as the occurrence of manner is concerned it is also established by the coherent deposition of the witnesses that the whole family was criminally restrained to move forward and they were forced and confined on the bank of river in a very planned and per-mediated manner and initially they were looted and subsequently females were raped and one of the lady victim was murdered.

128. It was also observed by the court that the then Ld. Special Judge Pocso had noted demeanors of the victim while they were deposing; it was

jotted down by the Ld. Judge that at the time of their deposition they were sobbing, crying and very frightened. These demeanors narrates an untold story of the whole crime in a latent manner.

129. The deceased Kanchan Devi was being raped, as per evidence, by one of the accused persons but since she was newly married she was struggling a lot and fighting with the rapist and in due course she was brutally assaulted by all the rapist which damaged her internal organs including liver, spleen, intestines, stomach and other internal parts. She was badly damaged and caused hemorrhage and internal bleeding ; moreover during fight she tried to escape from rape and she was shot by one accused and thereafter, even after having sustained bullet injury, she was subject to gang rape. Hence, the whole incident is not only a thought haunting process but she was murdered by all the accused persons in a very barbaric and ghastly manner.

130. Hence, it goes without saying that since she was brutally assaulted by all the accused persons which resulted into damaging her internal organs and caused internal bleeding (Haemorrhage), which was one of the cause of her death therefore all the four accused persons undoubtedly committed the act of murder in furtherance of common intention.

131. It is also apparent and sufficient evidence is available on record that the deceased Kanchan Devi was subject to gang rape after having sustained bullet injury by all the four accused persons, which consequently resulted into her death. Hence, all the four accused persons undoubtedly committed the act of murder in furtherance of common intention. Hence all the accused persons are hereby held guilty u/s 302/34 of IPC.

132. It is also worthwhile mentioning that all the victims were brutally assaulted during the course of rape. Even hand of one of the minor victim was fractured which mentioned in the PHC Report.

133. Raping a young newly married girl who is just above 18 and entered into adulthood is almost akin to raping a minor. Moreover, in the instant case the deceased was first brutally assaulted which resulted into damage of organs and internal bleeding and subsequently when she tried to escape from the place of occurrence she was pumped bullet injury, not only that she was dragged back, again assaulted and gang raped even though she was struggling for her life and even for a single breath. Therefore, on the whole, the whole incident is not only rare but an act against the humanity and society at large, which is practically beyond the stretch of imagination. The whole incident impacted adversely on the mind soul of the common citizenry of the area. It was mentioned in the order sheet that mass procession and protest of the common people was going on just after occurrence and this incidence made the normal life jeopardized in the area concerned. A wave of shock, fear, discontent and abhorrence was said to have spread in the psyche and soul of the common people.

6 POCSO ACT

134. In the instant case Section 6 PocsO Act has been attracted by the virtue of definition of Section 5(g) of PocsO Act, which makes it clear that who ever commits a gang penetrative sexual assault on a child shall be punished under Section 6 of PocsO Act. As per the evidence adduced the minor victim clearly says that out of four accused persons three had committed aggravated penetrative sexual assault with her or in simple terms raped her. She says that Ali Sher, Anmol Yadav and Md. Ayyub had committed raped with her. However, Md. Jamal did not commit raped with her. This description comes at the end of para- no. 1 at page no. 4 of deposition of victim minor girl. P.W-4 Chandradev Mandal has also reiterated this fact that his Bhagni the victim minor girl was raped by only

three accused persons in paragraph no. 1 and subsequently, it was reiterated in paragraph no. 3 of the cross-examination.

135. Hence, on the basis of evidence adduced by the witnesses it is well-established that accused Ali Sher, Anmol Yadav and Md. Ayyub had committed raped with her. However, Md. Jamal did not commit raped with her. Therefore, Ali Sher, Anmol Yadav and Md. Ayyub are hereby held guilty under Section 6 of Pocso Act and they will be sentenced for the same in the like manner. However, the accused Md. Jamal was not found guilty under Section 6 of Pocso Act and on the benefit of doubt acquitted from Section 6 of Pocso Act.

Section 302 I.P.C Murder (R/W Section 221(2) of Cr.P.C

136. It stands proved that the prosecutrix died due to injuries inflicted by the accused while committing various offences. Such injuries have been described by the doctor as dangerous ; extremely bad for definite repair ; sufficient in the ordinary course to cause death. Now, the moot question of vital importance is as to under which clause of Sec. 299 or 300 IPC, these acts will fall.

137. In both these Sections i.e. in 299 and 300 IPC, the “intention” is a basic ingredient. Such intention may be for causing death or for causing bodily injury as described in Section 299(b) or Section 300(2) or (3) of the IPC. since the injuries were caused in such a brutal manner which leaves no scope for discussing the case from the point of view of knowledge. The death was also not an accidental death. So the issue which is to be adjudicated is as to whether these acts were done with the “intention of causing death” or with “the intention to cause bodily injuries” which are covered under Section 299(b) and 300(2)/(3) of IPC. Sections read as under :-

Section 299 – Whoever causes death by doing an act

(a) with the intention of causing death or (b) with the intention of causing such bodily injury as is likely to cause death or (c) with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Section 300 – Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done (1) with the intention of causing death or (2) with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused or (3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in ordinary course of nature to cause death or (4) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

138. By the language of Sec. 300 of IPC, it is much clear that “Culpable Homicide” is the genus and “Murder” is one of its species. Since clause (a) of Sec. 299 is identical to clause (1) of sec. 300, the acts resulted in death if done with the intention of causing death will always be murder. This act will fall within the ambit of sec. 299 r/w sec. 304 IPC if it falls in any of the exceptions mentioned in sec. 300 of IPC. The State has argued that the present case does not fall in any of the exceptions mentioned in Sec. 300 nor has any such exception been proved by any of the accused during the trial, so these exceptions are not applicable. The State argued that the acts of all these accused are squarely falling in the first category of Section 300 as these acts were done with the intention of causing death.

139. The prime accused Anmol Yadav who said to have fired bullet on deceased Kanchan Devi is charged with Section 302/34 of I.P.C. However, he has been identified as a prime accused during the trial in court as all the eye-witnesses and victims have categorically said that he is

the person who pumped bullet on the back of deceased Kanchan Devi while she was trying to fly away from the place of occurrence after due struggle.

140. P.W-3 Radha Devi clearly says that the accused persons who is wearing scarf in the court was the person who fired bullet and caused deadly injury to her Bhagni Kanchan Devi. Subsequently, the accused was identified as none other than the accused Anmol Yadav.

141. Even P.W-4 Chandradev Mandal has also pointed out and identified the accused Anmol Yadav, who was wearing scarf (muflar), as a person who fired bullet on Kanchan Devi.

142. P.W-5 Bablu Mandal has also categorically stated in the court an identified Anmol Yadav as an accused who had killed his wife by shooting her with fired arm bullet. He says that the person who was standing that day in the court and wearing the check shirt was the person who killed his wife. Later on when the name of that person was asked he uttered that his name was Anmol Yadav.

143. It is clear that the accused Anmol Yadav who had fired bullet unto deceased Kanchan Devi was well aware of this fact that this fired arm injury will be of such a nature that she is going to cause death to the deceased. Hence, the accused Anmol Yadav thereby caused such bodily injury, which is in his all knowledge was going to cause death. He was aware of this fact that if someone is shot from such a close proximity then in ordinary course of nature it is sufficient to cause death. Moreover, the act was obviously so imminently dangerous that in all probability it was sufficient to cause death and that to without any excuse for incurring the risk of causing death. Hence, the accused Anmol Yadav is hereby held guilty 302 of I.P.C for committing murder and like wise he will be convicted and get punishment of murder under 302 I.P.C.

144. Although, the accused was charged with Section 302/34 of I.P.C but after elucidating the whole set of evidence the court fees that apart from 302/34 of I.P.C. he has committed murder of the deceased victim Kanchan Devi. Therefore, this court holds him guilty of murder of victim Kanchan Devi under 302 I.P.C R/W 221(2) Cr.P.C also and like wise he will be convicted and get punishment of murder under 302 I.P.C.

145. It is evident that the whole act was per-meditated and in furtherance of common intention by all the accused persons because they hatched a horrific plan to rape the victims and during the course of rape all of them was aware of this facts that after sustaining brutal assault and shot by fired arm injury in likelihood she is going to die. Even though all of them committed rape with her and consequent to all her injuries she passed away. There is evidence that at this point of time the accused Anmol Yadav with all knowledge of intention have also raped her, thereby caused such bodily injury, which is in his knowledge was going to cause death. He was aware of this fact that if someone is being raped after sustaining bullet injury then in ordinary course of nature it is sufficient to cause death. Moreover, the act was obviously so imminently dangerous that in all probability it was sufficient to cause death and that to without any excuse for incurring the risk of causing death. Hence, the accused Anmol Yadav is hereby held guilty u/s 302/34 of I.P.C for committing murder in furtherance of common intention of several people and like wise he will be convicted and get punishment of murder under section 302/34 I.P.C.

Section 302/34 of I.P.C

146. It is evident that the whole act was per-meditated and in furtherance of common intention by all the accused persons because they hatched a horrific plan to rape the victim Kanchan Devi and during the

course of rape all of them was aware of this facts that after sustaining brutal assault and shot by fired arm injury in likelihood she is going to die. Even though all of them committed rape with her and consequent to all her injuries she passed away. There is evidence that at this point of time the accused Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal with all knowledge and intention have raped her, thereby caused such bodily injury, which is in his knowledge was going to cause death. All the accused persons were aware of this fact that if someone is being raped after sustaining bullet injury then in ordinary course of nature it is sufficient to cause death. Moreover, the act was obviously so imminently dangerous that in all probability it was sufficient to cause death and that too without any excuse for incurring the risk of causing death. Hence, the accused persons Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal hereby held guilty 302/34 of I.P.C for committing murder in furtherance of common intention of several people and like wise they will be convicted and get punishment of murder under 302/34 I.P.C.

147. According to the rule laid down in *Virsa Singh vs. State of Punjab (AIR 1958 SC 465)* even if the intention of accused was limited to the infliction of bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be of murder. To judge as to whether act was done with the intention of causing death, all the acts, utterances and circumstances will be counted together otherwise there will be no difference in cases falling in clause (1) and clause (3) of Sec 300. To clarify the position the discussion held in the House of Lords in *R V. Moloney (All England Law Reports 1025 HL 1985)* will be significant wherein the point of consideration was whether the accused was having the necessary intent either to kill or to cause really serious bodily harm. The following passage

quoted from this judgment clarifies the position:

“In deciding the question of the accused man’s intent, you will decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances. Members of the jury, it is a question of fact for you to decide. As I said I think when I was directing you originally you cannot take the top of a man’s head off and look into his mind and actually see what his intent was at any given moment. You have to decide it by reference to what he did, what he said and all the circumstances of the case. An intent may be an impulsive intent or it may be premeditated. Nobody has suggested in this case that there was that element of premeditation. What the prosecution have said is that when he pulled the trigger of that gun it must have been pointing at the deceased and that the accused knew that it was pointing at him, knew it was loaded and when he by a deliberate act pulled the trigger and fired the live barrel of that gun at his stepfather then, say the Crown, he must have intended at the very least to have caused him some really serious bodily injury. To constitute murder what had now to be proved was either an intention to kill (express malice) or an intention to do grievous bodily harm (implied malice). The admirably clear and simple directions to the jury given by Hinchdiffe J., the trial judge, were expressly approved as ‘impeccable’. Those directions several times indicated that to support a conviction for murder an intention to kill or do grievous bodily harm must be proved.

148. The next case I must consider is *DPP Vs Smith (1960) All ER 161, (1961) AC 290*.

The case is important for three reasons. The first is that the House, reversing the court of criminal appeal, approved a direction by the trial judge, Donovan J, in a capital murder case, in the following terms:

“The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the

presumption of law that a man intends the natural and probable consequences of his acts.”We respectfully accept [the counsel for the apellant’s] submission, based on the dictum of Lawton LJ. In the *R v. Beer (1976 Cr) 1976 R 222 at 225*, that in most cases there is no need, indeed it is undesirable to give a jury any definition of intent or intention in a murder case. It is usually sufficient to direct them, as indeed the learned judge after the passage to which I have already referred, that intent or intention is a question of fact for them to determine, taking into account all the circumstances of the case.”

Section 394/34 of I.P.C. and Section 323 IPC

149. It was deposed by all the victims as well as eye-witnesses that prior to commission of rape all the victim where subject to assault by the all accused person and during the commission of robbery accused persons have caused hurt to the victims and there is coherent evidence on this point by all the victims. Even they had broken the finger of the minor victim and brutally assaulted Radha Devi and deceased Kanchan Devi also. All the ornament and jeweleries of female were snatched and looted by the miscreants. Hence, all the four accused persons namely Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal hereby held guilty u/s 323/34 and 394/34 of I.P.C for committing murder in furtherance of common intention of several people and like wise he will be convicted and get punishment of murder under 323/34 and 394/34 of I.P.C.

150. **Section 27 Arms Act. and FSL Report**

Section 27 of the Arms Act deals with the persons who uses any arms of ammunition any contravention of Section 5 Shall be punished with

imprisonment from the 3 to 7 years. Sub-Section 2 & 3 describes about use of prohibited arms and ammunitions in contravention of Section 7 of the Arms Act.

151. In the instant case country-made pistols were used by the accused persons and in due course one pistol was recovered from the possession of accused Anmol Yadav. On the basis of confessional statement of accused, which says that this was the arms used for shooting the deceased.

152. The FSL Report Exhibit-33 clearly indicates that material Exhibit-Y i.e. a fired shell was indeed fired from the material Exhibit-X. Therefore, on the basis of FSL examination there is no doubt that the same pistol was used for the purpose of committing murder of the deceased.

153. Since all the accused persons were using country-made pistol for the threat and coercion sake as per evidence adduced therefore all the accused persons namely Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal hereby held guilty under Section 27 of Arms Act for committing murder in furtherance of common intention of several people and like wise he will be convicted and get punishment of murder under 323/34 and 394/34 of I.P.C.

154. All the accused persons have been charged with section 4 of POCSO Act which is a penal section of section 3, Which reads as follows:
POCSO Section - 3. Penetrative sexual assault.— “A person is said to commit "penetrative sexual assault" if— (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part

of body of the child or makes the child to do so with him or any other person; or (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

155. Here the point to be noted that all the accused persons have committed such an act that they might have been charged separately u/s 4 pocso Act but since they have committed an offence of gang rape with the minor so they are guilty u/s 6 of pocso act and will be punished under the same section. Hence the section 4 pocso act can not be proved guilty against these accused persons since section 6 pocso act has been proved as per statement of the witnesses and the evidences adduced.

156. The burden to prove innocence is on the accused only, in the POCSO act. Unfortunately, during the course of these minute observations of the Court; the accused have been failed to brought forward his rebuttal and thus failed to save their innocence also.

157. The next charge against the accused person is Punishment for Rape, under section 376 D of IPC, which has been clearly and is defined in the section 375 of IPC which goes here as under :

158. **376D/34 Gang Rape**

159. The act of gang rape has been supported by all the eye-witnesses as well as victims of this case. P.W-1 the minor victim in her para -1 and para no. 4 of the cross-examination has categorically stated that she was subject to gang rape. P.W-3 Radha Devi in her paragraph no. 1, 3, 5 and 15 has also stated in a clear cut manner that she subject to gang rape. P.W-4 Chandradev Mandal in his para no. 3 & para no. 17, 19, 20 & 21 of the cross-examination again reiterated the incidents of gang rape. P.W-5 Bablu Mandal has also reiterated the incidence of gang rape in para no. 1, 19, 20, & 22 of the cross-examination. The oral examination was supported by the medical examination.

160. In the case of

“Pramod Mahto and others vs. StaBihar”, 1989 Sup (2) SCC 672, it was held that :

“This Explanation has been introduced by the legislature with a view to effectively deal with the growing menace of gang rape. In such circumstances, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims where there are more than one in order to find the accused guilty of gang rape and convict them under Section 376 IPC.”

In *“Ankush Maruti Shinder v. State of Maharashtra”, (2009) 6 SCC 667*,

wherein the Hon'ble Supreme Court held that :

“in a case of gang rape and murder the liability of all the accused is equal.” Hence, if the accused person had participated in the incident then the question as to who committed rape or who could not complete the act of rape becomes irrelevant for conviction of gang rape.

161. Hence, all the accused in furtherance of common intention committed gang rape with the prosecutrix and thus are convicted under section 376 D

162. Hence, the accused persons Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal hereby held guilty 376D/34 of I.P.C for committing Gang Rape in furtherance of common intention of several people and like wise they will be convicted and get punishment of Gang Rape under section 376/D I.P.C.

To understand the crime of Gang rape we must understand and evaluate the crime of Rape “Rape”

163. **375. Rape.**— *“A man is said to commit “rape” if he—*
(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
(b) inserts, to any extent, any object or a part of the body, not being the penis,

into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person;

or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

164. Following portions of the definition of “Rape” are quite

conspicuous for this instant case and they are as follows:

375(d) ----

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words,gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Proviso---

[Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.]

165. **[Against her will.]**

Against her will:

166. The word 'will' implies the faculty of reasoning power of the mind that determines whether to do an act or not. There is a fine distinction between an act done 'against the will' and 'an act done without consent.' Every act done 'against the will' is obviously 'without the consent.' But every act 'without the consent' is not 'against the will.' Clause (1) of this section applies where the woman is in possession of her senses and therefore, capable of consenting. In *State of Uttar Pradesh v. Chottey Lal (2011) 2 SCC 550.* the Supreme Court explained that the expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition.

167. In *State of Punjab v. Gurmit Singh (AIR 1996 SC 1393.)* a young girl below the age of 16 years was abducted from her school by the three accused in a car, and she was threatened with death if she raised an alarm. Despite her refusal, she was made to drink liquor. Then she was raped by each one of them in turn under the threat of being killed if she persisted in raising an alarm. Due to the threat, she kept quiet. After repeatedly committing sexual assault on her, they left her the next morning near the place from where she had been abducted. Surprisingly, the additional judge, Ludhiana acquitted all the accused on both counts of abduction and rape disbelieving the version of prosecutrix regarding rape and because of delay in FIR. Allowing the State appeal, and holding the accused persons liable for rape since at no point of time the prosecutrix willingly cooperated with the act, the Apex Court held that the sexual intercourse was against her will for which the accused are liable for committing rape under Section 376, IPC.

168. In addition to this, the Apex Court laid down the following guidelines for trial in such cases:

- # Delay in lodging FIR is not material when properly explained.
- # Testimony of victim in cases of sexual assault is vital and unless there are

compelling reasons which necessitate looking for corroboration of her statement, the Court should find no difficulty in convicting the accused on prosecutrix's testimony alone.

Trial of sexual offences should be *in camera* and invariably by a lady judge whenever available.

Court must restrain making observations that probably the prosecutrix is a girl of loose moral character.

Court is under an obligation to see that prosecutrix is not unnecessarily harassed and humiliated in cross-examination in case of rape trial.

169. It is apparent that the sexual intercourse done with the victim minor girl and all the females was obviously against their will and supported by the direct evidence of the eye witnesses and by the medical evidence too.

170. **[Without her consent]**

171. The essence of rape is the absence of consent. Consent means an intelligent, positive concurrence of the 'will' of the woman. The policy behind the exemption from liability in the case of consent is based on the principle that a man is the best judge of his or her own interest, and if a man (includes woman) decides to suffer harm voluntarily, he or she cannot complain of it when it comes about.

172. According to Explanation 2, of the definition of Rape; consent means an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication, communicates a willingness to participate in the specific sexual act. Thus, to absolve a person of criminal liability, consent must be given freely and it must not be obtained by fraud or by mistake or under a misconception of fact. This clause operates where a woman is unresponsive whether because of the influence of drink or drugs or any other cause, or is so imbecile that she is incapable of giving any rational consent. Consent of the woman has to be obtained prior to the act.

173. The burden of proof: In case of charge of rape the onus lies upon the prosecution to prove that the sexual intercourse was without the consent or against the will of the woman. It would not be necessary for the defence to prove that the sexual intercourse was with the consent of the woman. However in the POCSO cases reverse onus lies on the defence owing to presumption of guilt in the POCSO Act as discussed above.

174. Rape is presumed if occurrence of sexual intercourse is proved and the woman claims the act was committed without her consent, the Supreme Court has held:

175. “Section 114-A of the Indian Evidence Act, 1872 deals with the presumption as to absence of consent in certain prosecution for rape. A reading of the Section makes it clear that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent,

176. ***Consent and submission- A dichotomy demystified and distinguished:***

A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent may be either expressed or implied depending upon the nature and circumstances of the case. However, there is a difference between consent and submission. An act of helpless resignation in the face of inevitable compulsions is not consent in law.

In Rao Harnam Singh, Sheoji Singh v. State, (AIE 1958 Punj 123) Kalu

Ram, tenant of the accused was required to provide his wife aged 19 years to satisfy the carnal lust of the accused Rao Harnam Singh and his guests on the eve of entertainment party arranged on the occasion of transfer of Ch. Mauji Ram, Dy. Superintendent, Jail, Gurgaon. The girl protested vehemently against this outrageous demand, but under pressure of her husband, was induced to surrender.

Three accused persons- Rao Harnam Singh, Ch. Mauji Ram, and Balbir Singh ravished her during the night and she died almost immediately. Her shrieks were heard by some advocate living in the neighborhood. Refuting the defense contention, that the girl was a consenting party and she surrendered her body to the three persons willingly and with approval of her husband, the High Court while holding the accused liable for the offence of rape distinguished between 'consent' and 'submission':

1. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law.
2. Consent on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.
3. Submission of her body under the influence of fear or terror is no consent. Although each consent involves a submission, the converse does not follow and a mere act of submission does not involve consent.
4. A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in the manner she wants. Consent implies the exercise of a free and unhampered right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed

to be done by another and concurred in by the former.

Therefore in the instant case also even if at a point of time, it seems that the ladies and minor victim have given consent as they were not fighting violently but that is not so it is a submission under the pressure, that she would be subject to fear of life.

[With or without her consent, when she is under eighteen years of age.]

Consent of a girl under 18 not valid in law:

Sexual intercourse with a woman with or without her consent when she is below 18 years of age amounts to rape. A woman under 18 is considered incapable of giving consent for sexual intercourse. The age of consent was raised from 16 to 18 by the Criminal Law (Amendment) Act of 2013.

The Apex Court in *Harpal Singh (AIR 1981 SC 361)* held that even if the girl of 14 is a willing party and invited the accused to have sexual intercourse with her, the accused would be liable for rape under this clause

In *Mana Ramchandra Jadhav v. State of Maharashtra, (1984 CriLJ 852 (Bom))* the prosecutrix left her mother's house and joined the accused because her mother had turned down the proposal of her marriage with the accused on the ground that she was too young. While she was with the accused he had sexual intercourse with her against her will. The act of intercourse with the prosecutrix will be covered under this clause

177. In the case of *Parminder @ Ladka Pola vs. State Of Delhi (ILC-2014-SC-CRL)* the Hon'ble the Apex court held:

In this case, the prosecutrix, a 14-year-old, who had gone to meet her friend who lived near her house, was raped by the friend's brother and threatened with death if she raised an alarm or narrated the incident to anyone. That evening she narrated the incident to her mother and a

complaint was filed against the accused. The court found that the conduct of the accused at the time of the commission of the offence of rape, the age of the prosecutrix and the consequences of rape on the prosecutrix are some of the relevant factors which the Court should consider while considering the question of reducing the sentence to less than the minimum sentence. In the facts of the present case, the Court found that the prosecutrix was a student of eighth class and was about 14 years on 28.01.2001 and she was of a tender age. She had gone to the house of the appellant looking for her friend- the sister of the appellant. When she asked the appellant as to where the sister of the accused was, he told her that she was in the room and when she went inside the room, he followed her into the room, bolted the room from inside and raped her. As a result of this incident, her parents stopped her from going to the school and asked her to study eighth class privately. Considering the age of the prosecutrix, the conduct of the appellant and the consequences of the rape on the prosecutrix, the Court did not think that there were adequate and special reasons, in this case, to reduce the sentence to less than the minimum sentence under Section 376(1), IPC. The appeal against his conviction was dismissed.

178. In the instant case explanation-2 of section 375 IPC is very important, However in the instant case it should be dealt with the subsequent proviso because in the evidence prima facie it pertains that since the victim minor girl is not resisting and opposing the act of penetration that means she has consented but if we read the explanation with the help of proviso and keeping in view the doctrine of harmonious construction. We find that the mere fact that the girl has not resisted and opposed the act of penetration does not mean by the reason of only of that fact that she had consented for sexual intercourse.

179. *Therefore in the instant case even if at a point of time, it seems that the girl has given consent but that becomes immaterial in the eyes of Law because the girl is below the 18 years of age.*

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Proviso---

[Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.] [With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.]--Section 375 IPC

This explicit sexual act has been committed by all the accused persons that too together. We have plethora of evidence on the record that all the accused are guilty U/S 376D of gang rape and they will be punished accordingly.

180. **Guilty and Punishment U/S 6 of POCSO Act and 376 D whether sustainable in Law:**

181. In the above-mentioned sections minimum punishments are the same after 2018 criminal amendment act; And this Court finds that as per the bare readings of the sections and aforesaid discussions of the crime has been committed in both the sections therefore accused should be punished under board the sections. Section 42 POCSO act, merely makes it clear that the punishment should be awarded, in the section, in which, greater punishment has been mentioned. However, it no where underpins and restricts that the accused should be held guilty and punished, only in the either of the sections. However for the sake of convenience and for the clear understanding of both the parties following discussion is being made.

182. It is pertinent to note Section 42 of the POCSO Act also clarifies that when an **act or omission** committed by the accused constitute an offence punishable under this Act and also under Sections 166A, 354A to 354D, 370, 370A, 375, 376, 376A, 376C to 376E or under Section 509 of IPC, then notwithstanding anything contained in any law for the time being in force, that the offender found guilty of such offence shall be liable for punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree. Section 42A also mandates that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of inconsistency. Thus the Legislature has taken many safeguards to overcome any technical objections relating to trial of the case under the provisions of this Act by the Special Court along with the offences under the Indian Penal Code including the sentence to be passed in such a situation. It has also taken care under Section 42A in dealing with the inconsistency between the provisions of this Act and the provisions of the other enactments stating that says that the provisions of the said Act shall be in addition to and not derogation to any other law for the time being in force. It is clear that when the acts committed by the accused constitute offences under both the enactments, they can be tried for both the offences under both the enactments. The proposition of law that when the acts or omissions committed by the accused constitute two offences under two different enactments that they can be tried for both the offences under both the enactments has been well settled. In the case of T.S. Baliah v. ITO1, the question that arose for consideration before the Supreme Court was whether the 1 AIR 1969 SC 701 27 CLR, appellant therein could be

simultaneously prosecuted for the offence under Section 177 of IPC and also for violation of Section 52 of the Income Tax Act, 1922. Considering the provisions of Section 26 of the General Clauses Act, the Supreme Court held as under: “A plain reading of the section shows that there is no bar to the trial or conviction of the offender under both enactments but there is only a bar to the punishment of the offender twice for the same offence. In other words, the section provides that when an act or omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both the enactments but shall not be liable to be punished twice for the same offence.”

183. However, the law is also well settled that when the same act committed by the accused constitute an offence under more than one Act, if they are two distinct and separate offences with different ingredients under two different enactments, a double punishment is not barred. The said proposition of law is laid down in the case of *State of NCT of Delhi v. Sanjay*; *State of Gujarat* At para-28 it is held as follows:

184. “ If there are two distinct and separate offences with different ingredients under two different enactments, a double punishment is not barred.

185. In the instant case, the acts committed by the accused as alleged by the prosecution constitute distinct and separate offences u/s 376 D IPC and Section -6 of POCSO Act ; with different ingredients under various enactments viz., the POCSO Act, Therefore, they can be tried simultaneously for the said offences under all the aforesaid enactments and double punishment is also not barred.

186. The explanation appended to Section 30 of the Act makes it clear that “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact. Therefore, as per the said

explanation, even when the accused commits an act of sexual assault and sexual harassment, with knowledge or reason to believe that such act committed by him would result into.

187. The defence case, on the basis of trend of cross-examination and arguments advanced, is that there was no such occurrence took place and the true prosecution witnesses have not supported the case of the prosecution as they are interested witnesses. The further case of the defense is that the prosecution has failed to bring any independent witnesses as all the witnesses are keith and keen of the victim .

188. All twelve prosecution witnesses, as discussed above, have supported the case of the prosecution in their examination-in-chief as well as in their cross examination. All the prosecution witnesses are not the eye witness but have deposed on the point of facts of occurrence and at least some of them have supported the prosecution case on the point of date, month, year and time of occurrence, place of occurrence and manner of occurrence. The investigating officer has also supported the prosecution case and manner in which she has conducted the investigation. The defence has not been able to demolish the credential and trustworthiness of these prosecution witnesses. There are certain wears and tears in their evidence but that occurred due to passage of time. The defence has not been able to discredit the testimony of the prosecution witnesses. As far as defence contention with respect to the independent witness are concerned, this court find that the witnesses are dedicated and in the present days it is very hard to find independent witnesses who have courage to turn up before the court against the criminals and buy their enmity for no gain.

189. Hence, this court finds and hold the above named accused namely Anmol Yadav, Ali Sher, Md.Ayyub and Md. Jamal guilty of committing the offense punishable guilty under sections 341,342,323,394/34,302/34

and 27 Arms Act. However Anmol Yadav, Ali Sher, Md. Ayyub are found guilty U/S 6 POCSO Act also and Md. Jamal was not found guilty u/s 6 of POCSO Act. Anmol Yadav is found guilty of 302 IPC.Hence thereby to convict them thereunder aforesaid sections.

190. [Pronounced in the open court on this 26.04.2022 by Pathak Alok Kaushik, Special Sessions Judge POCSO and fixed for arguments on sentence on 11.05.2022.]

Written, Typed, corrected

and pronounced in open court by me:

Sg:

Sd/-

Pathak Alok Kaushik
Special Sessions Judge
POCSO Court, Supaul

Sd/-

Pathak Alok Kaushik
Special Sessions Judge
POCSO Court, Supaul

HEARING ON THE POINT OF SENTENCE ON 11.05.2022

Heard both sides on the point of sentence. and perused the record. Ld.Counsel for the convict submitted that the circumstances of the convicts in their life and in relation to the offence does not merit any hard sentence The learned lawyer of the convicts submits that this is first offence of the convicts and they are poor and young boys, so a lenient view may kindly be taken in awarding the sentence.

Heard both sides on the point of sentence from defence and prosecution. The accused and guilty Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal are having a family after them *and they* to take care of their old parents and are having otherwise a settled life. Their *entire life and future is ahead*. They are facing the menace of trial for about three years. No previous conviction has been proved against them. Hence lenient view should be taken.

191. Per-contra, the learned Special PP Smt. Neelam Kumari has submitted that maximum punishment shall be awarded to the convict and demanded the sentence of capital punishment only. The learned Special P.P. appearing on behalf of state submits that convicts have committed heinous offence of Murder in furtherance of common intention, in order to fulfill their sexual fervor. They have committed rape upon a minor victim girl aged about 16 years. Not only that they have committed murder of a young lady. Moreover brutality had been done with the deceased girl after committing rape. Rape has been committed after shooting the girl. Therefore, the offence comes under the category of rarest of rare cases and thus convict serves capital punishment for the offence.

Place the record after lunch for passing order on the point of sentence. The convict is sent back to court hazat to be produced after lunch..

ORDER ON THE POINT OF SENTENCE

192. Having considered with regards to the fact and circumstances of the case and nature of the offence, and after hearing the rival contentions of the both the counsels, I do think it proper to pass substantive punishment to the convict. This court would try to strike a balance and semblance in sentencing the accused and shall certainly take care of aggravating and mitigating factors for the punishments, as brought before the cognizant view of the court. This court do feels that the accused persons have got all his pious obligations as remainder, which would have credited in the bag of fortune of the accused persons. However this court can not abdicate from its own pious obligation to impart justice, as a court of law; keeping in view that the crime which was committed here was a crime against society at large and the sentence awarded would have far reaching consequences, towards this sort of crime in the changing society at large.

193. After hearing the learned counsels of both the parties, it is essential to examine that whether the offence of the convict falls under the category of rarest of rare case or not? Hence, this court is required to look into the manner of commission of the murder, the motive for commission of the murder, socially abhorrent nature of the crime, magnitude an enormity of the crime and un-protected state of the minor victim at the time of occurrence.

194. These circumstances, broadly, are alleged to be the mitigating circumstances put forth by the convict person and hence, it is argued that the death sentence be not awarded to them.

195. Various judgments were referred to by the Id. Counsel from either sides. The crux of the judgments is to award a death penalty the court has to first weigh the aggravating circumstances against the mitigating circumstances and if there are no mitigating circumstances then the court need to apply the Rarest of Rare test to find if the case falls within such

category.

196. The law on this aspect has been developed by the Hon'ble Supreme Court in the following judgments viz;

197. In “**Bachan Singh v. State of Punjab: (1980) 2 SCC 684**, the Hon'ble Supreme Court held that **extreme depravity constitute legitimate special reason** for award of death sentence. It has been held that;

198. “In many cases, the extremely **cruel** or **bestly** manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments.”

It was also held that : “if a murder involves exceptional depravity, it shall be an **aggravating circumstance** for imposition of penalize of death.”

199. Further in *Machhi Singh v. State of Punjab (1983) 3 SCC 470*, the Hon'ble Supreme Court held that ;

200. “ In the first place, the very humanistic edifice is constructed on the foundation of “reverence for life” principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community if able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it”.

201. It was further observed that;

“When the **community feels** that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection

by sanctioning the death penalty. But the community will not do so in every case. It may do so in rarest of rare cases when its **collective conscience** is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entrain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance :

- (i) **manner** of commission of Murder i.e. , when the murder is committed in an extremely **brutal, grotesque, diabolical, revolting, or dastardly** manner so as to arouse intense and extreme indignation of the community;
- (ii) whether the victim is subjected to **inhuman acts of torture** of cruelty in order to bring about his or her death.

202. In **Devender Pal Singh vs. State (NCT of Delhi) (2002) 5 SCC 234**, the Hon'ble Supreme Court held that :

“ Principle culled out from the judgments in Bachan Singh (supra) and Machhi Singh (supra), is that when the **collective conscience** of the community is so shocked, the court must award the death sentence.”

In **Ram Singh v. Sonia & Ors. (2007) 3 SCC 1**, the Hon'ble Supreme Court once again held that :

“It would be a failure of justice not to award the death sentence in a case where the crime was executed in the most **grotesque and revolting manner**”.

In **C. Muuniappan v. State of Tamil Nadu (2010) 9 SCC 567**, the Hon'ble Supreme Court held:

“Stressing upon the manner of commission of offence, if extremely brutal, the diabolical, grotesque killing, shocking to the collective conscience of the society, the death sentence should be awarded.”

In **Ajitsingh Harnamsingh Gujral v. State of Maharashtra (2011) 14 SCC 401**, the Hon'ble Supreme Court held;

“the distinction has to be drawn between ordinary murders and murders which are gruesome, ghastly or horrendous. While life sentence should be given in the former, the latter belongs to the category of the rarest of rare cases, and hence death sentence should be given.”

In **Sunder v. State (2013) 3 SCC 2015**, the Hon'ble Supreme Court held;

“inter alia, the following factors to be the aggravating circumstances :

- a) The accused have been held guilty of two heinous offences, which independently of one another, provide for the death penalty;
- b) **No previous enmity** between the parties, no grave and sudden provocation which compelled the accused to take the life of the prosecutrix;
- c) **Extreme mental perversion**;
- d) The **manner** in which the victim was murdered, and the approach and method **adopted** by the accused, disclose the traits of outrageous criminality in the behavior of the accused;
- e) Well planned and **consciously motivated** crime;
- f) **Extreme misery** caused to the aggrieved party.

203. As observed earlier the Id. Counsels for the convicts had referred to (a) their young age; (b) their socio-economic status; (c) their clean antecedents and re-formative approach; as the mitigating circumstances in favour of the convict. However, one needs to add that the hon'ble Supreme Court had repeatedly held that the young age of the accused is not a determinative factor by itself against the award of the death sentence. Rather all the circumstances need to be taken together and proper weightage to be given to each circumstance. The Hon'ble Supreme Court rather has re-held the death sentence in the following cases despite the

young age of the convict;

- (a) *Mohammed Ajmal Mohamad Amir Kasab @ Abu Mujahid v. State of Maharashtra (2012) 9 SCC 1;*
- (b) *Atbir v. State (NCT of Delhi) (20010) 9 SCC 1;*
- (c) *Vikram Singh v. State of Punjab (2010) 3 SCC 56;*
- (d) *Shivu v. High Court of Karnataka (2007) 4 SCC 713;*
- (e) *Jai Kumar v. State of M.P. (1999) 5 SCC 1 ;*
- (f) *Dhananjoy Chatterjee v. State of West Bengal (1994) 2 SCC 220.*

204. Similarly the **socio-economic status** of the convict; or the convict being under any **intoxication** cannot be the determinative factors in sentencing as has been held in;

- a) *Shimbhu v. State of Haryana 2013 (10) SCALE 595;*
- b) *State of Karnatak v. Krishnappa (2000) 4 SCC 75.*

I would like to refer to the contents of **Para 18** of **Krishnappa's** case, wherein the Hon'ble Supreme Court has held that ;

205. “The reasons that accused an unsophisticated and illiterate citizen belongs to the **weaker section** of the society; that he a **chronic addict to drinking** and had committed rape of a girl where in the state of “**intoxication**” and that his family comprise of a old mother, wife and children depends upon him. These reasons are **neither special nor adequate**. The measure of punishment in the wake of rape cannot depend upon the social status of the convicts or the accused. It must depend upon the **conduct of the accused**, the state and **age** of the sexually assault **female** and the **gravity** of the criminal act. The crimes of violence upon women needs to the severally dealt with. The social economic status, religion, race, caste or creed of the accused or the victims are **ir-relevant consideration** in sentencing policy. The protection of society and

detering the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing court are expected to consider all relevant facts into consideration bearing on the questions of sentence and proceed to impose a sentence commensurate with the gravity of the sentence. Court must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. To show **mercy** in the case of such a heinous crime would be a **travesty of justice** and the plea of leniency would be wholly misplaced.

206. In the infamous **Nirbhaya Case** (Criminal Appeal Nos. 607/2017) *Mukesh and another Vs. State N.C.T. of Delhi and others*, the Hon'ble Apex Court has recently decided and observed that punishment should be befitting the crime reflecting public abhorrence of the crime-crimes like the instant one cannot be looked with magnanimity- Factors like young age and poor back ground of the accused not mitigating circumstances- Likewise, post- crime remorse and post-crime good conduct of the accused, absence of criminal antecedents and their good conduct in prison, also not mitigating circumstances- Aggravating circumstances out weighing the mitigating circumstances- Case falls in the category of “rarest of rare case”- Death sentence confirmed. (Para140, 145, 146).

207. In the aforesaid Judgment in para 340, the case of Naresh Mohanda Rajpoot Vs. State of Maharashtra (2011) 12 SCC 56, in which the principle of the case of Bachan Singh and Machhi Singh has been referred and reproduced by the Hon'ble Apex Court which are as follows-“19. In

Machhi Singh V. State of Punjab this court expanded the “rarest of rare” formulation beyond the aggravating factors listed in *Bachan Singh* to cases where the “collective conscience” of the community is so shocked that it will expect the holders of the judicial power center to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in case and a just balance had to be struck between the aggravating and mitigating circumstances.”

After so stating, the Court rules thus:-

“20. The rarest of the 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 “rarest or rare cases”. There must be no reason to believe that the accused can not be reformed or rehabilitated and that he is likely to continue criminal act 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 a extremely **brutal, grotesque, diabolical, revolting and dastardly** manner, where his

act affects the entire moral fiber of the society e.g. crime committed for power or political ambition or indulging in organized criminal activities, death sentence should be awarded.

“21. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether the death sentence should be awarded, would depend upon the factual scenario of the case in hand.”

In the aforesaid judgment of Nibhaya case in para 343, the principle laid down in case of Laxman Nayak Vs. State of Orissa (1994) 3 SCC 381 has also been referred and reproduced which is as follows:-

“The present case before us reveals a sordid story which took place some time in the after noon of February 17, 1990, in which the alleged sexual assault followed by brutal and merciless murder by the dastardly and monstrous act of abhorrent nature is said to have been committed by the appellant herein who is none else but an agnate and paternal uncle of the deceased victim Nitma, a girl of tender age of 7 years who fell a prey to his lust which sends shocking waves not only to the judicial conscience but to every one having slightest sense of human values and particularly to the blood relations and the society at large.”

In the aforesaid decision the case of ***Kamta Tiwary*** has also been discussed in para 345 and the propositions culled out in Machhi Singh's case has also been expressed as follows:-

“Taking an over all view of all the facts and circumstances of th instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances-but found aggravating circumstances aplenty. The evidence on record clearly establishes that the appellant was close to the family of Pareshwar and the deceased and her siblings used to Call him 'Tiwary Uncle'. Obviously her closeness with the appellant encouraged her to go tot this shop, which was near

the saloon where she had gone for a haircut with their father and brother, and ask for some biscuits. The appellant readily responded to the request by taking her to the nearby grocery shop of Bhudhsen and handing over a packet of biscuits apparently as a prelude to his sinister design which unfolded in her kidnapping., brutal rape and gruesome murder -as the numerous injures on her person testify, and the final was the dumping of her dead body in a well. When an innocent helpless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his capability assumes the proportion of extreme depravity an arouses a sense of revulsion in the mind of the common man. In find, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this a “rarest of rare “cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious rimes but also to give emphatic expression to society's abhorrence of such crimes.”

In a recent case of Dhananjay Chatterjee Vs. State of West Bengal SCC (2) 220, the Hon'ble Apex Court laid down following principel of punishment in para 15 of the judgment which is as follows-

“In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime, the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.”

On the anvil of aforesaid principles laid down by the Hon'ble Apex Court in various land mark judgment , it is essential to examine the mitigating and aggravating circumstances emerging from the facts of this case.

MITIGATING CIRCUMSTANCES

According to argument of learned defence counsel and from the case record, these are the mitigating circumstances in favour of the convict. A. The young age of convict person viz.,

B. Poor socio-economic conditions of the convict person,

C. Clear antecedents and be given chance of reformation;

D. The presumption of innocence being in their favour;

E. Life imprisonment being the rule and death being an exception and there being no special reasons to award death sentence;

F. They being convicted only on the ground of conspiracy and not of their individual acts;

AGGRAVATING CIRCUMSTANCES

From the facts of the case and taking note of the totality of the circumstances, the following facts emerges as aggravating circumstances from the factual scenario of this case:-

I. Offence in the present case has been committed in a extremely brutal, grotesque, diabolical, revolting and thus dastardly manner so as to arouse **intense and extreme indignation of society.**

II. Demonstration of **exceptional depravity and extreme brutality;**

III. **Extreme misery** inflicted upon the prosecutrix before her death :

IV. Grave **impact** of the crime on **social order. Moreover:**

A. The murder of a young lady has been committed in this case who was newly married and in need of love and affection from the people.

B. The convicts had deliberately per-planned the ghastly crime and meticulously executed it. They hatched a plan to rape the young girls during festival days and had a plan to kill them if they protests.

C. The murder committed by the convicts was not in a spur of the moment rather it was in a planned way and it involves extreme brutality. Since the deceased was firstly tried for rape when forcefully opposed she was brutally assaulted and when tried to escape she was shot and again she was gang raped.

D. At the time of alleged occurrence of rape and murder, the victim was injured with bullet and She was totally helpless and defenseless. All the family members were tied up There was no one else to protect her in the lonely bank of river at night.

E. The victims and their family members have reposed faith and complete confidence on the convicts and that is why, they moved with the convicts on the bank of river and later-on the convicts have betrayed the victim as well as her family members misusing their confidence or trust.

F. The ante-mortem injuries found to the person of the deceased by the doctor supported with ocular evidence of P.Ws. Confirms the brutality of the offence and dastardly act of the convicts.

G. By this conduct, the accused persons have deceived the human relationship of trust and worthiness. The entire gruesome act of the convicts reflects the most unfortunate and abusive facet of human conduct.

H. The magnitude of perversity of the victim's mind can be imagined from this fact that they have raped a minor girl, her Mami together and in front of children and raped an injured lady having brutal assaults and gunshot injury. In this factual scenario, no reasonable man can expect the slightest possibility of reformation of the convict.

Rarest of Rare

208. Lastly I would like to refer to “**Gurvail Singh @ Gala & Anr. vs. State of Punjab**”, AIR 2013 SC 1177, wherein the Hon'ble Supreme Court held that;

209. “to award the death sentence, the aggravating circumstances (**crime test**) have to be fully satisfied and there should be no mitigating circumstance (criminal test) favouring the accused. Even if both the tests are satisfied as against the accused, then the court has to finally apply the Rarest of Rare Cases test (**R-R Test**), which depends on the **perception of the society** and not “**judge-centric**”.

210. This is whether the **society** will **approve** the awarding of death sentence to certain types of crime or not. While applying this test, the Court has to look into variety of factors like society's **abhorrence**, **extreme indignation** and **antipathy** to certain types of crimes like **rape and murder** of minor girls and the court award death sentence, because situation demands, due to constitutional compulsion, reflected by the will of the people”.

211. A case of murder with rape itself is sufficient to place a case in the category of “rarest of rare”. However, as discussed in the some of the authorities of the Hon'ble Apex Court this court has to settle that in the instant case, the victim was brutally raped and murdered. Moreover, as per the evidence adduced by the witnesses the deceased Kanchan Devi who was a young lady was brutally assaulted by the assailants and in that course of action her internal organs including liver, spleen, intestines, stomach and other internal parts were badly damaged and caused hemorrhage and internal bleeding moreover during fight she tried to escape

from rape and she was shot by one accused and thereafter even after having sustained bullet injury she was subject to gang rape. Hence, the whole incident is not only a thought haunting process but she was murdered by all the accused persons in a very barbaric and ghastly manner.

212. “More over in the instant case three gang rapes were committed including a gang rape with the minor and barbaric murder of a rape victim having bullet injury.”

213. On the whole, the facts and circumstances of the case is more aggravated, grievous and inhuman in comparison to the leading case of Dhananjay Chatterjee. In which capital punishment has been upheld by the Hon'ble Apex Court and also executed.

214. After evaluating the above mitigating and aggravating circumstances of the case keeping in mind the principles governing the sentence as laid down by the Hon'ble Courts, I find that the above mentioned aggravating circumstances are such in number and quality which outweighs the mitigating circumstances in this case. It is well settled law that the punishment should commensurate with the gravity of the offence committed by the convict. When the crime is brutal, shocking, and collective conscience of the community, sympathy and magnanimity in any form would be misplaced and it would shake the confidence of the public in the administration of public criminal justice system. The above principle laid down in case of Om Prakash Vs. State of Harayan (1999) 3 SCC 19 is fully applicable in this case.

Verdict

After going through the above entire facts and considering the heinous nature of the offence, enormity of the crime and aggravating circumstances of the case, this case falls in the category of “rarest of rare case” and there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which emerges in favour of the convicts. So, in this case justice demands imposition of death sentence to the convict. Hence in the facts and circumstances mentioned above this would be apt to award the extreme form of punishment, therefore for the ends of justice optimum punishment shall be awarded.

Accused Anmol Yadav is punished with death sentence and Rs. Twenty thousands fine u/s 302 of IPC. In case of default in payment of such fine, the convict has to serve S.I. for two months.

Moreover, the convicts Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal are hereby punished with death sentence U/S 302/34 of IPC and a fine of Rs. Twenty thousands each U/s 302/34 of I.P.C. and In case of default in payment of such fine, the convict has to serve S.I. for two months.

The convicts Anmol Yadav, Ali Sher, Md. Ayyub were held guilty U/S 6 of pocso Act and are hereby punished with death sentence U/S 6 of pocso Act.

The convicts Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal were held guilty U/S 376D of pocso Act and are hereby punished with imprisonment for Life that shall mean the remainder of their natural life and a fine of Rs. Fifty thousands each U/s 376D of I.P.C. and In case of default in payment of such fine, the convict has to serve S.I. for Six months. The Fine imposed shall be paid to the victims equally.

All the four accused persons were found guilty U/S 394/34 of IPC and accordingly the convicts Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal is sentenced to undergo R.I. For 10 years and fine of Rs. Thirty thousands each and in default of payment of fine shall have to undergo S.I. For 1 year.

Furthermore, all the four accused persons were found guilty U/S 341/34 of IPC and accordingly the convicts Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal are to be punished for the offence committed U/S 341/34 of IPC they are sentenced to undergo simple imprisonment for one month and a fine of Rs. Two hundred only in default of payment of fine shall have to undergo S.I. For seven days.

All the four accused persons were found guilty U/S 342/34 of IPC and accordingly the convicts Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal are to be punished for the offence committed U/S 342/34 of IPC they are sentenced to undergo simple imprisonment for one year and a fine of Rs. five hundred only, in default of payment of fine shall have to undergo S.I. for one month.

All the four accused persons were found guilty U/S 323/34 of IPC and accordingly the convicts Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal are to be punished for the offence committed U/S 323/34 of IPC and they are sentenced to undergo simple imprisonment for one year and a fine of Rs. five hundred only, in default of payment of fine shall have to undergo S.I. for one month.

All the four accused persons were found guilty U/S 27 of Arms Act and accordingly the convicts Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal are to be punished for the offence committed U/S 27 of Arm Act and they are sentenced to undergo rigorous imprisonment for seven years and a fine of Rs. Five thousand only, in default of payment of fine shall have to

undergo S.I. for one year.

215. For the execution of death sentence all the accused persons shall be hanged by their neck till they be dead.
216. Furthermore, all the sentences awarded in all the sections shall run concurrently, however the sentences which would be inflicted in case of default of payment of fine shall run consecutively.
217. The period already undergone by the convict in connection with this case shall be set-off under the provision of S.428 of the Cr.P.C.
218. The total Fine inflicted on the accused shall be paid to the victim in her personal Account and only she can withdraw it personally after attaining the age of 18 years.
219. All the earlier pending applications in this case is hereby ordered to be disposed off by this Judgment and order.
220. The sentence of death passed U/S 302 I.P.C,302/34 IPC and section 6 of the POCSO Act shall remain suspended and it shall not be executed unless it is confirmed by the Hon'ble High Court. The O.C. is directed to submit proceedings/case record to the Hon'ble High Court, Patna in compliance of section 366 Cr.P.C for confirmation of the death sentence passed against the convicts Anmol Yadav, Ali Sher, Md.Ayyub and Md. Jamal .
221. Compensation to the victim is an integral part of judgment /order in a criminal trial as per scheme of Cr.P.C and victim compensation scheme of government. The trial court is legally required to pass some order regarding compensation. Proper compensation can not be imposed upon the convict either as a part of the fine or independently thereon, seeing lack of financial capacity of the convict. Therefore, the victims, as they are so declared hereby this court, and legal guardian of the deceased deserves some succor from the state.

222. Apart from fine inflicted on the accused the victims shall be awarded a compensation of Rs. Eight lacs fifty thousands each to be paid by the State Government through the District Magistrate, Supaul in accordance with Sub Section (4) of Rule 9 of POCSO Rules 2020. It shall be paid to the victims of rape in their personal Accounts and only they can withdraw it personally after attaining the age of 18 years. If any compensation has been paid earlier by the state government that shall be deducted from this amount. of Rs 8.5 lacs.

223. The victim of rape and murder, deceased Kanchan Devi shall get a compensation of Rs. Ten Lacs for her death and Rs. Eight lacs fifty thousands for the gang rape. It shall be paid to the victim's husband and parents equally i.e. 50% of the amount to the parents and remaining to the husband. If any compensation has been paid earlier by the state government that shall be deducted from this amount of Rs 18.5 lacs.

224. In this view of the matter it is essential to make recommendation to the Supaul District Legal Service Authority to pay awarded compensation to the victims. Hence, DLSA Supaul is recommended to pay adequate compensation to the victims as directed.

225. A copy of the judgment/order be supplied to the DLSA, Supaul and the D.M, Supaul in terms of the Section 365 Cr.P.C for information and needful.

226. The convicts are also informed that they can file an appeal against the judgment and order on sentence within a period of 30 days as per article 115 of the Limitation Act, 1963.

227. True copy of the judgment including order on sentence, copy of charge, evidence statement under Section 313 Cr.P.C, be given to the convicts, free of cost.

228. The exhibits be preserved for the confirmation of death penalty by

the Hon'ble High Court and for the same a "Death Reference " of this case is being sent forthwith to the Hon'ble High Court u/s 366 Cr.P.C.

229. Office is directed to send the "Warrant of commitment under Sentence of Death" to the Jail Authorities to keep the accused person in safe custody until they shall receive the further warrant or Order of this court, carrying in to effect the order of the Hon'ble Patna High Court. Warrant of imprisonment shall also be sent forthwith.

Written, Typed, corrected

and pronounced in open court by me:

Sd/-

Pathak Alok Kaushik
Special Sessions Judge
POCSO Court, Supaul

Sd/-

Pathak Alok Kaushik
Special Sessions Judge
POCSO Court, Supaul