[REPORTABLE]

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 87 OF 2007

Santosh Kumar Singh ....Appellant

Versus

State thr. CBI ...Respondent

J U D G M E N T

HARJIT SINGH BEDI,J.

This appeal arises out of the following facts:

1. The deceased, Priyadarshini Mattoo, was residing with her parents at B-10/7098, Vasant Kunj, New Delhi and was a student of the LL.B. course at the University of Delhi Campus Law Centre, and had at the relevant time completed the 5th Semester and was in the final 6th Semester. The appellant, Santosh Kumar Singh had also been a student in the same faculty and had completed his LL.B. in

December 1994. It appears that the appellant had been attracted to the deceased and even though he had passed out from the Law Centre in 1994, he had continued to visit the campus even thereafter on his Bullet Motorcycle bearing Registration Number DL-1S-E/1222.

2. As per the prosecution story, the appellant harassed and intimidated the deceased and despite her requests and then her remonstrations, did not desist from doing so. The deceased thereupon made several complaints against the appellant in different Police Stations during the year 1995 on which he was summoned to the Police Station and was advised to behave properly and a Personal Security Officer, Head Constable Rajinder Singh PW-32, was also deputed for the security of the deceased. It appears that as a

consequence of the complaints against him, the appellant too retaliated and made a report to the University on 30th October 1995 alleging that the deceased was pursuing two courses simultaneously which was in violation of the University Rules and when no action was taken he sent two reminders dated 4th December 1995 and 20th December 1995 to the University as well. A show cause notice was issued to the deceased and in response thereto she submitted her reply dated 1st December 1995 and during the pendency of these proceedings, the result of her LL.B. 5th Semester examination was withheld. On 23rd January 1996 PW Head Constable Rajinder Singh, the PSO, did not turn up at the residence of the deceased at the stipulated time on which she left for the University in her car along with her parents PW-1 Mr. C.L. Mattoo and PW-44 Mrs. Rageshwari Mattoo

who had to visit the Tis Hazari Courts to attend to some civil proceedings. The parents were dropped off at Tis Hazari at 10.15 a.m. Head Constable Rajinder Singh, however, reached the Faculty of Law directly and saw the appellant present there. The deceased attended the class from 11.15 a.m. to noon and thereafter accompanied by the Head Constable left the faculty for Tis Hazari but finding that her parents had already left the court, she returned to her residence at about 1.45 p.m. and directed Head Constable Rajinder Singh to report again at 5.30 p.m. The deceased then had her lunch whereafter Virender Prasad, the domestic help, left the house at about 2.30 p.m. to meet his friend Vishnu Prasad @ Bishamber at the residence of PW-6 Lt.Col S.K.Dhar at Safdarjung Enclave and returned to Vasant Kunj at 4.55 p.m. He then took the dog for a walk in the colony. The

appellant came to the residence of the deceased at about 4.50 p.m. carrying his helmet in his hand and was seen by PW-2 Kuppuswami. PW-3 Jaideep Singh Ahluwalia, Security Supervisor in the colony also saw the appellant at 5.30 p.m. near the residence of the deceased, PW-43 and O.P.Singh, Advocate also noticed the appellant riding out of the park area of B-10, Vasant Kunj at the same time. Head Constable Rajinder Singh PW reached the residence of the deceased at about 5.30 p.m., as directed, along with Constable Dev Kumar. The Head Constable pressed the call bell but eliciting no response from inside, he went to another door which opened onto the courtyard and knocked but again to no effect. As the door was slightly ajar the two entered the bedroom of the deceased and found her dead body lying under the double bed. The Head Constable immediately

informed Police Station, Vasant Kunj about the incident on which SHO Inspector Surinder Sharma arrived at the site and a daily diary report (rojnamcha) to the above facts Ex.PW-18/A was also recorded at 5.45 p.m. Inspector Lalit Mohan, Additional SHO, Vasant Kunj was entrusted with the investigation on which he along with Sub-Inspector Sushil Kumar, Sub-Inspector Padam Singh, Head Constable Satish Chand and several other police officers too reached the residence of the deceased and found her dead body lying under the double bed with the cord of the electric heat convector tied around her neck. He also noticed blood stains around the body. A case under section 302 of the IPC was thereafter registered at Police Station, Vasant Kunj, on the complaint of the father of the deceased, in which the day's happenings were spelt out. It was further noted that after completing

their work in the Tis Hazari Courts he and his wife had visited Safdarjung Enclave and from there he had gone on to attend an official meeting at Vikas Kuteer, ITO whereas his wife had visited the All India Institute of Medical Sciences and it was on returning to his residence at 7.30 p.m. that he found that his daughter had been murdered.

3. During the course of the inquest proceedings initiated by Inspector Lalit Mohan the crime scene was photographed and some hair found on the dead body, broken pieces of glass and blood stains near the dead body were recovered. The electric cord of the heat convector which had been used for the strangulation was also taken into possession. The statements of PW-6 Lt. Col. S.K. Dhar, PW-1 Mr. C.L. Mattoo, the complainant, and PW-44 Mrs. Rageshwari Mattoo, the

mother of the deceased, and several others were recorded by Inspector Lalit Mohan and the dead body was then sent to the Safdarjung Hospital. In her statement, Mrs. Rageshwari Mattoo raised the suspicion that the appellant was the culprit and he was joined in the investigation during the night intervening 23rd and 24th January 1996. He was also brought before Inspector Lalit Mohan and he noticed tenderness on his right hand and an injury which was not bandaged or plastered. He was also sent for a medical examination and PW-23 Dr. R.K. Wadhwa of the Safdarjung Hospital examined him at 3.45 a.m. and found two injuries on his person - one a swelling on the right hand dorsum lateral aspect, tenderness with crepitus and the second, scar marks old and healed multiple both lower limbs and on the chest. The Doctor also advised an X-ray of the right hand.

Nail scrapings and hair samples of the appellant were also taken and handed over to Sub-Inspector Shamsher Singh and after the X-ray, a fracture of the 5th metacarpal bone of the right hand was detected and as per Dr. Wadhwa's opinion the injury was grievous in nature and caused by a blunt weapon. The appellant was thereafter allowed to go home and was directed to visit the Police Station at 9 a.m. on the 25th January 1996. The dead body was also subjected to a post-mortem on 25th January 1995 at the Safdarjung Hospital by a Board of Doctors consisting of Dr. Chander Kant, Dr. Arvind Thergaonkar and PW-33 Dr. A.K. Sharma who in their report Ex.PW33/B found 19 injuries on the dead body and also observed that the private parts showed black, curly non-matted pubic hair, the hymen intact with no tearing present and admitting only one finger. The Doctors also took

two vaginal swabs and slides were duly sealed, the swabs and slides in a glass bottle as well as samples of the blood and hair. The clothes of the deceased were also taken into possession and sealed. The Board also opined that the death was a result of strangulation by ligature and that the injuries on the dead body were sufficient to cause death in the ordinary course of nature.

4. On the 25th January 1996 itself, after the completion of the post-mortem proceedings, Inspector Lalit Mohan searched the house of the deceased and picked up a greeting card Ex.PW 29/B said to be written by the appellant from her room. The Inspector also seized a helmet with the visor missing and indicating that it had broken and the Bullet motorcycle belonging to the appellant. The specimens

of his handwriting Exs.PW48/E1, E2 and E3 were also taken by the Inspector.

5. It appears that as the murder had taken place in very sordid circumstances and the fact that the appellant was the son of very senior police officer serving in the State of Jammu & Kashmir and was on the verge of a posting as Additional Commissioner of Police, Delhi, led to a hue and cry which was endorsed by the parents of the deceased as they apprehended that they would not get a fair deal from the Delhi Police. Faced with this situation, the Delhi Government itself requested the Central Bureau of Investigation vide letter dated January 24, 1996 that the investigation be taken over by that agency. As per the prosecution, this decision was taken by the Government on the specific request of the

Commissioner of Delhi Police to the Lt. Governor who referred the same to the Delhi Government.

6. Inspector Lalit Mohan thereupon produced the appellant before PW-50 DSP Shri A.K.Ohri of the CBI and the subsequent investigation was made by the DSP with the assistance of several other officers from the CBI. The underwear of the appellant was also seized by the CBI as he represented that he had been wearing the same underwear for the last couple of days. DSP Ohri also visited the crime scene on the 26th January 1996 but did not find Mr. C.L.Mattoo, the father of the deceased, present. On the next day, he recorded the statement of Virender Parshad, the domestic servant and also directed Shri D.P.Singh, DSP to conduct the house search of the appellant. On the 28th January 1996, a request Ex.PW34/A was

made by Mr. S.K.Bhatnagar Additional Director of the CBI to Dr.A.K.Gupta, Medical Superintendent, Dr.R.M.L. Hospital for procuring the blood samples of the appellant. DSP Ohri along with the other staff took the appellant to the hospital and met PW-34 Dr. N.S.Kalra, Head of the Biochemistry Department and two blood samples of 10 ml. each were taken by Ms. Godavari Mangai, Lab Assistant and were handed over to Dr. Kalra. These samples as well as the other case property collected by DSP Ohri or entrusted to him by Inspector Lalit Mohan were deposited with the Moharrir Malkhana on the 29th January 1996 and preparations were made to refer the matter for a DNA test. Specimen hand writings Ex.PW24/A1 to A21 of the appellant were also obtained once again this time by the CBI. On 30th January 1996 Shri M.L.Sharma, Joint Director, CBI addressed a letter to the Director,

CCMB, Hyderabad requesting for DNA profiling. Several articles were accordingly entrusted to PW-39 Sub-Inspector R.S.Shekhawat on 31st January 1996, they being:

1. One sealed parcel containing clothes of the deceased such as T-shirt, brassiere, jeans and underwear.

2. One sealed packet containing underwear of the accused Santosh Kumar Singh.

3. One sealed jar containing vaginal swabs/vaginal slides of the deceased and

4. The blood samples of the appellant taken in the Dr.R.M.L.Hospital.

The Sub-Inspector thereafter flew to Hyderabad on 31st January 1996 and deposited the aforementioned articles in the Office of Dr. Lalji Singh, Officer on special duty at the CCMB, Hyderabad on the next morning and an acknowledgement Ex.PW49/A relating to the following articles was obtained:

1. One sealed parcel containing clothes supposed to be of the deceased, namely, T-Shirt, brassiere, jeans and underwear.
2. Vaginal swabs/vaginal slides supposed to be of the deceased.
3. One thermocole box containing 4 vials marked as S-1,S-2,S-3 and S-4 supposed to be blood of the accused.

The underwear of the appellant was, however, returned by Dr. Lalji Singh as it was not relevant for the DNA finger printing test. On the 1st February, 1996 DSP Ohri re-visited the house of the deceased and recorded the statement of Mrs. Rageshwari Mattoo and Hemant Mattoo, the brother of the deceased who told the investigating officer that the appellant had been noticed by PW-2 Shri Kuppuswami standing near their house shortly before the time of the murder. The DSP then went to the house of Shri Kuppuswami but he was away. He, however, recorded his statement on the 4th February 1996. During the course of the

investigation, the appellant disclosed that he had received the injury on the metacarpal bone in an accident on the 14th January 1996 and had been treated at the Nirmay Diagnostic Centre and Hindu Rao Hospital. Inspector Terial was thereupon sent to the Centre to collect his medical records. They were duly collected on the 9th February 1996 and 16th February 1996 and deposited in the malkhana of the CBI. On 20th February 1996 a letter Ex.PW27/A was addressed to the Medical Superintendent, Safdarjung Hospital seeking an opinion about the injury suffered by the appellant on his hand. An opinion was rendered by PW-28 Dr. Mukul Sinha and PW-27 Dr. G.K.Choubey on the 22nd February 1996 that the injury seemed to be fresh as there was no evidence of any callus formation. On the completion of the investigation, the appellant was charged for offences

punishable under Sections 376/302 of the IPC. He pleaded not guilty and claimed trial.

7. As there was no eye witness to the incident, the prosecution placed reliance only on circumstantial and documentary evidence. After 51 witnesses had been examined by the prosecution and final arguments were being heard, the trial court decided that it would be in the interest of justice to call Dr. G.V.Rao of the CCMB as a court witness as he, in consultation with PW-48 Dr. Lalji Singh, had conducted the DNA test. His statement was recorded as CW -1.

In the course of a rather verbose judgment, the trial court noted that there were 13 circumstances against the appellant. We quote herein below from the judgment:

"1.The accused had been continuously harassing the deceased right from the end of 1994 to January 1996, a few days before her death.

2. The accused had more than once given an undertaking that the accused would not harass the deceased in future while admitting that the accused had been doing so earlier.

3. The motive of the accused was to have the deceased or to break her.

4. On the day of occurrence, the accused was seen in the premises of Faculty of Law, University of Delhi in the forenoon, where the deceased had gone to attend LL.B. class. While the accused was no more a student of Faculty of Law at that time.

5. At the crucial time before murder, i.e. about 5 p.m. on 23.1.96, the accused was seen outside the door of the flat of the deceased, i.e. B-10/7098 with helmet in his hand which had a visor.

6. On the day of occurrence after murder, the accused had reached late to attend class at Indian Law Institute, Bhagwan Dass Road, where the accused was a student too.

7. Immediately after the murder, the mother of the deceased had raised suspicion that the accused had a hand in the murder of her daughter.

8. When the accused joined investigation on the night between 23/24.1.96, the accused had an injury

on his right hand. There was swelling and fracture on 5th metacarpal of right hand. There was no plaster or bandage on his hand. That injury was fresh, having been caused 24 to 38 hours. The blood pressure of the accused at that time was high which showed anxiety.

9. DNA Finger Printing Test conclusively establishes the guilt of the accused.

10. On 25.1.96, the helmet Ex.P.3 of the accused which was taken into possession had broken visor. On 23.1.96 before murder, it was found by PW2 Shri Kuppuswami, PW Personal Security Officer Rajinder Singh that the helmet of the accused had a visor. Violence was detected on both sides of visor. Helmet was besmeared with a spec of blood. At the spot pieces of visor were found near the body of the deceased besmeared with her blood.

11. The deceased had 19 injuries on her person besides three broken ribs. These injuries were suggestive of force used for rape. A tear mark over the area of left breast region on the T-shirt of the deceased suggested that the force was used for molestation.

12. The accused took a false defence that fracture on the hand of the accused was sustained by the accused on 14.1.96 and it was not a fresh injury. The accused also gave false replies against proved facts.

13. The influence of the father of the accused resulting in deliberate spoiling of the case."

The Trial Court rendered its opinion on the circumstances 1 to 3 as under:-

(i) "The accused in January, February 1995 tortured the deceased by following her upto the residence at Safdarjung Enclave at the place of Colonel SK Dhar and also by telephoning at All India Institute of Medical Sciences and at her residence.

(ii) On 25.2.95 the accused followed the deceased and tried to stop the car of the deceased by shouting at her which was the cause of lodging the report Exh. PW6/A. The accused submitted the apologies Exh.PW6/B and Exh.PW6/DB.

(iii) The accused took the false plea that the accused was going to IIT on the said date. The accused also took a false stand that there was no friendship between the accused and the deceased. The plea of the accused that such report was result of refusal of accused to allow the deceased to sing in the Cultural Festival of the University has not been substantiated. The plea is false to knowledge of the accused.

(iv) The subordinate staff of Delhi Police attempted to assist the accused during investigation and during trial. Sh. Lalit Mohan Inspector was instrumental in creating false evidence and false defence of the accused. The witness of

police including Rajendra Kumar Sub Inspector deposed falsely with respect to role assigned as an agent of law in the matter of complaints in writing preferred by the deceased. The subordinate staff of Delhi Police has not discharged the agency of law in accordance with basic principles of fair play in action. Had Rajinder Kumar SI and the SHO of Police Station RK Puram, SHO Vasant Kunj, ACP Satinder and Parbhati Lal acted in accordance with law vis-à-vis accused, as they act towards an ordinary citizen whose father is not a senior officer in police department perhaps the incident would not have occurred.

(v) The accused went to the house of the deceased at B-10, Vasant Kunj, New Delhi and banged the door of the house of the accused when the deceased was alone at home.

(vi) On 6.11.95, the accused tortured the deceased in the Campus Center of Law which resulted in lodging of FIR at police station, Maurice Nagar, Delhi.

(vii) The accused even mentally tortured the deceased in December, 1995.

(viii) The accused preferred petition against the deceased to the University against her appearing in both examinations of M.Com and LLB in order to pressurize the deceased to

succumb to the ulterior design and motive of the accused.

(ix) The accused had the intention to have the deceased and to convert the said intention in reality and if it is not possible on account of attitude of the deceased not allow the deceased to be of anybody else. The facts proved and the acts of the accused lead to inference that the accused had the motive to have the deceased at all event and failing to not to allow her to be of anybody else. The state has established the motive."

8. The court observed that the continuous stalking of the deceased by the appellant despite complaints to the police showed his utter disregard of the rule of law and in conclusion held that "circumstances No.1, 2 and 3 are thus held to have been proved beyond any shadow of doubt by the prosecution." The court then examined circumstances Nos.4, 5 and 10 cumulatively and held that the appellant had indeed been seen in the University Campus Law Centre on the 23rd

January 1996 riding his motorcycle wearing a helmet with an intact visor and that on the same day in the afternoon he had been seen by PW2 Sh. Kuppuswami at the gate of the house of the deceased carrying a helmet with a visor. The court further opined that when the helmet had been seized on the 25th January 1996 it was seen to be in a badly damaged condition and that the broken pieces of the visor which had been recovered from the site of the crime besmeared with the blood of deceased conclusively proved that the visor had been broken during the commission of the murder as it had been used to bludgeon the deceased into submission.

9. The court, accordingly, held that these circumstances showed that the appellant had been seen around the house of the deceased at 4.50 pm.

The High Court also supplemented these findings by pointing out that as the appellant was no longer a student of the Law Faculty of the University of Delhi he had a duty to explain as to why he had visited the University on the 23rd January 1996. The trial court nevertheless did not find any conclusive evidence against the appellant with respect to circumstance No.6 observing that in view of the uncertain traffic in the National Capital Territory of Delhi the timing factor could not be taken as a conclusive one. The High Court, however, differed with trial court on this aspect as well and held that the appellant had attended his classes in the Indian Law Institute on 23rd January 1996 and had been late for the class and this circumstance showed that this had happened as he had been involved in committing the rape and murder. While dealing with circumstance No.8, the trial court

observed that DSP Ohri had not taken into account the defence story that the appellant had suffered an injury on the metacarpal about 10 days prior to the murder and had thereby not given an opportunity to the court to review the evidence on this aspect and had, thus, not acted in a fair manner. The court then went on to say that "the accused too has not assisted the court in discharging the onus which was upon him to justify the defence taken by him in the matter of alleged injury. Consequently, on the face of an injury, on 5th metacarpal on the date of crime of murder, with swelling and tenderness, the court is of the view that the injury possibly is fresh but on account of lack of fair play on the part of the CBI, it cannot say that the defence of the accused is not plausible." This finding too has been reversed by the High Court in appeal on the plea that the onus to prove his defence lay on the

appellant and he had admittedly not led any evidence to support his plea. The High Court, accordingly, held that the finding of the trial court was perverse on this aspect. The trial court then went on to circumstance No.9 and evolved its own theories and after a huge discussion, rejected the DNA report given by the CCMB, Hyderabad as also the evidence of Dr. Lalji Singh and Dr. G.V. Rao. This finding has also been reversed by the High Court by observing that though there appeared to be no physical evidence of rape on the body but the DNA test conducted on the vaginal swabs and slides and the underwear of the deceased and the blood sample of the appellant, it was clear that rape had been committed, and that too by him. The High Court held that it would be a dangerous doctrine for the court to discard the evidence of an expert witness by referring to certain texts and books without

putting those texts to the expert and taking his opinion thereon. The High Court also reversed the finding of the trial court that the vaginal swabs and slides and the blood samples of the appellant had been tampered with. The trial court and the High Court both held circumstance No.11 in favour of the prosecution and it was observed that the deceased was alone at the time of incident and that she had been brutally attacked with the helmet which had been used with great force to cause as many as 19 injuries, including three broken ribs. On circumstance No.12, the trial court gave a finding that there was no conclusive evidence to show that the injury on the metacarpal had been suffered by the appellant in the incident on the 14th January 1996 as the evidence of Dr. Ashok Charan, the Radiologist was not entirely credible. The High Court has, however, reversed this

finding. The Trial Court then examined circumstance No.13 and found that though there was nothing on record to show the direct interference of the father of the appellant in the investigation but as he was likely to be posted as a senior police officer in the Delhi Police, the possibility that the lower investigating staff were influenced by his status was a factor which could not be ruled out. The trial court also held that Inspector Lalit Mohan, the first investigating officer and a member of the Delhi Police had done no credit to himself but lauded the Commissioner of Police, Delhi for suggesting that the matter be handed over to the CBI, to obviate any suspicion of an unfair investigation.

10. A perusal of the above discussion would reveal that the trial court had itself held circumstances 1 to

5, 7 and 10 to 13 in favour of the prosecution, circumstance No.8 has been held in a manner which could fall both ways whereas circumstance No.6 has been held to be of no consequence. The High Court has, however, held all 13 circumstances as having been proved in favour of the prosecution. The trial court, accordingly, on the basis of findings recorded particularly circumstance No.9, held that the case against the appellant could not be proved and acquitted him. The matter was taken in appeal to the High Court and the High Court has reversed the judgment of the trial court, as already indicated above and awarded a death sentence. It is in this background that this matter is before us. We have dealt with the arguments in the sequence in which they have been projected by Mr. Sushil Kumar, the learned senior counsel for the appellant.

11. Mr. Sushil Kumar has first and foremost submitted that circumstances 8 and 12 with regard to the defence story projected by the accused were first required to be considered and in the light of the fact that the trial court had, in a manner, rejected these circumstances as supporting the prosecution, it could not be said that the injury suffered by the appellant on his right hand fixed his presence at the spot. He has referred us to the document D-61 an opinion dated 24th January 1996 of PW-23 Dr. Ranjan Wadhwa which revealed a swelling on the right hand on the dorsal and lateral aspect, tenderness plus crepitus of the 5th metacarpal and had suggested an X-ray of the right hand. He has also taken us to the evidence of the Doctor to argue that the X-ray had, indeed, been done and the film had been examined by Dr.

A.Charan, PW-28 Dr. Mukul Sinha and PW-27 Dr. G.K.Chobe. He has referred to the statement of Dr. Mukul Sinha to point out that the X-ray performed on the 14th January 1996 at Nirmay Diagnostic Center and the other one at the Safdarjung Hospital on 24th January 1996 could not be said to be of the same person as the picture had been taken from different angles. Mr. Sushil Kumar has, further, brought to our specific notice that as the callus formation had set in, the injury could not be of the 24th January 1996 and would have been sustained much earlier. He has also referred us to the statement of Dr. Chobe who had examined the X-rays of the appellant taken on 14th January 1996 and 24th January 1996 and pointed out that even this Doctor could not give a categoric opinion as the instructions given by him to the investigating agency to probe the matter further in a particular

direction, had not been complied with. It has, accordingly, been submitted that in the face of no other evidence produced by the prosecution, there was nothing to suggest that the fracture of the metacarpal had happened on the 24th January 1996 and the evidence on the contrary indicated that this fracture had been suffered during an accident on the 14th January 1996.

12. Mr. P.P. Malhotra, the learned ASG has, however, controverted the plea raised on behalf of the appellant. It has been pointed out that the evidence of Dr. Wadhwa, Dr. Mukul Sinha and Dr. G.K.Chobe, when read cumulatively, proved that the injury had been suffered by the appellant on the 24th January 1996 and was, therefore, fresh at the time when the Doctors had examined him on that day.

13. We now examine the evidence on these two circumstances. As already mentioned above, the medical report dated 24th January 1996 recorded by Dr. Wadhwa refers to a swelling on the right hand at the 5th metacarpal. In the very next line in the same report there is a reference to a scar mark old healed multiple lower ribs. It is apparent therefore, that the Doctor himself noticed that the scar mark was an old and healed injury, whereas the swelling on the right hand revealed tenderness and presence of the crepitus. When this Doctor came into the witness box as PW23, an attempt was made to show that the condition of the injury indicated that it was about 10 or 15 days old. This plea was specifically denied by the Doctor. Dr. Mukul Sinha was, however, more categoric when he stated that the presence of swelling

on the right hand was symptomatic of a recent injury and that after the inflammation slowly subsided the soft provisional callus would start forming from the third to the fourteenth day and due to the absence of any callus formation on the 24th January 1996, it appeared that the injury could not have been sustained on the 14th January 1996. Dr. G.K.Chobe was still more emphatic. After reviewing the medical report dated 24th January 1996 he put the maximum duration of the injury between 48 to 72 hours and further deposed that a fracture of the 5th metacarpal was generally produced by direct violence, the most common factor being the striking of the hand against an opponent during an altercation. He further clarified that in the case of a fracture of the metacarpal the swelling would not remain for more than 3 to 4 days and that the callus formation had not yet started

as the clicking sound which was known as crepitus was still noticeable and which always remained till the callus was formed. Dr. Chobe also made another significant statement. He pointed out that had the incident happened on 14th January 1996 a plaster or bandage would have been applied to the fracture but there was no indication as to whether this line of treatment had been adopted. A perusal of this evidence would reveal two striking facts, one, it confirms the deposition of the other two doctors that because the injury was recent the swelling on the fracture had not settled down, and two, the callus formation had not yet started as the crepitus was still present.

14. We see that the positive stand of the appellant was that he had sustained the injuries on the 14th of

January 1996 in the course of a road accident in which the visor of his helmet had also been broken. Inspector Terial of the CBI accordingly collected certain documents from the Nirmay Diagnostic Centre and the Bara Hindurao Hospital where the appellant had allegedly been treated for the injuries suffered by him. Statements of several doctors were also recorded. These documents were deposited in the CBI Malkhana on the 9th February 1996 and 16th February 1996. In the course of his evidence PW DSP Ohri gave the above facts and further clarified that the appellant's father had produced an X-ray film before him on the 20th February 1996 and that he had also issued a notice to him to produce the treatment record of the appellant within two days. We see that the documents seized by Inspector Terial have been exhibited as defence documents. We further see that a reading of these

documents does indicate that an X-ray was taken on the 14th January 1996. Significantly however no Doctor of the Nirmay Diagnostic Centre or Bara Hindurao Hospital had been summoned as a witness. The trial court has held that the omission to produce the defence evidence in Court was unbecoming of the investigating agency but that the appellant himself was also guilty of not producing any evidence in his defence and by some curious reasoning has opined that :

> "The accused too has not assisted the court in discharging the onus which was upon him to justify the defence taken by him in the matter of alleged injury. Consequently, on the face of an injury, on 5th metacarpal on the date of crime of murder, with swelling and tenderness, the court is of the view that the injury possibly is fresh but on account of lack of fair play on the part of the CBI, it cannot say that the defence of the accused is not plausible. Therefore this circumstance will have to be considered in both ways in the

> cumulative effect of various circumstances to consider if the case is proved beyond reasonable doubt."

15. We are indeed astonished at these remarkably confusing and contradictory observations, as the CBI was not called upon to prove the defence of the appellant. The CBI had fairly secured the documents which could prove the appellant's case and they were put on record and it was for the defence to use them to its advantage. No such effort was made. Moreover, we are unable to see as to how these documents could have been exhibited as no one has come forward to prove them. It has to be kept in mind that the appellant was a lawyer and his father a very senior Police Officer, and we are unable to understand as to why no evidence in defence to prove the documents or to test their veracity, had been produced. In this background, we find that the medical evidence clearly

supports the version that the injury had been sustained by the appellant on the 24th of January 1996 during the course of the rape and murder. This finding raises yet another issue. It has been held time and again that a false plea taken by an accused in a case of circumstantial evidence is another link in the chain. In **Trimukh Maroti Kirkan vs. State of Maharashtra** 2006 (10) SCC 681 it has been held :

> "The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the

> guilt of the accused and inconsistent with their innocence.

and again

> "If an offence takes place inside the privacy of a house and in such circumstances, where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the

> knowledge of any person, the burden of proving that fact is upon him."

16. We, accordingly, endorse the opinion of the High Court on circumstances 8 and 12. The onus to prove his defence and the circumstances relating to his injury and treatment were within the special knowledge of the appellant. He could, therefore, not keep silent and say that the obligation rested on the prosecution to prove its case.

17. Mr. Sushil Kumar has then argued with emphasis, that the case rested primarily on the factum of rape and if it was found that there was no evidence of rape, the case of murder would also fall through. He has, accordingly, taken us to circumstance No.9 which the trial court noted as under:

> "DNA finger printing test conclusively established the guilt of the accused."

He has first pointed out that the post-mortem did not reveal any evidence of rape. Reference has been made to the statement of PW33 Dr.A.K.Sharma, who along with a Board of two other Doctors had performed the post-mortem on the dead body on the 25th January 1996 at the Safdarjung Hospital and it was observed that the deceased was wearing a full sleeved high neck pinkish T-shirt with a small tear on the breast, blue coloured jeans, one brassiere and underwear and woolen socks and though there were a large number of injuries on the dead body and the local examination of the private parts showed black, curly non matted pubic hair, and an intact hymen, with no tearing. The Doctor was also questioned as to whether the hymen would always be torn and ruptured during the first sexual encounter and he explained that though this

would be the normal case but it was not always so and that the hymen could remain unruptured even after repeated sexual intercourse for certain reasons which he then spelt out. It has, accordingly, been submitted that there was absolutely no evidence of rape detected during the course of the examination. He has also pointed out that as there were no semen stains on the dead body of the deceased or her clothes and as the underwear of the appellant sent to the CCMB, Hyderabad had been returned without examination and had been examined thereafter in the Central Forensic Science Laboratory, Delhi and the semen's stains found were of group A which was not the blood group of the appellant, there were no evidence suggesting rape.

18. It has, finally, been submitted that the observation of the High Court that the DNA test conclusively proved the involvement of the appellant in the rape was not tenable as it appeared that the vaginal swabs and slides which were allegedly taken from the dead body at the time of the post-mortem examination and the blood samples of the appellant taken under the supervision of PW Dr. N.S.Kalra had been tampered with. It has been argued that as per the findings of the trial court the record of the Malkhana with respect to the vaginal swabs and slides had been fudged and though these items had been handed over to the CBI officers on the 25th January 1996 they had been deposited in the Malkhana on the 29th January 1996 and no explanation was forthcoming as to how and why this delay had happened. It has also been submitted that as per the

evidence of Dr. N.S.Kalra a request had been made to him by the CBI to take 2 samples of blood of 10 ml. each from the appellant but 2 samples of 10 ml. had been taken and transferred to 4 vials and when the vials had been opened at the CCMB, only 12 ml. of blood had been found, and this too cast a doubt on the prosecution case. It has finally been submitted that the tests conducted by the CCMB, Hyderabad were faulty and could not be relied upon.

19. The learned Additional Solicitor General has, however, controverted the above submissions and has pleaded that they were based on the supposition of a bias against the appellant and that all those involved including the officials of the CBI, the Doctors who had conducted the post-mortem examination, those who had taken the blood samples and the Scientists of the

CCMB were in league to implicate him in a false case. He has further argued that there was no evidence of tampering with the vaginal swabs and slides which had been sealed by the Doctors and handed over to the police and had been collected from the Malkhana by PW-39 Inspector Shekhawat and taken to the CCMB, whereas the blood samples, on the contrary, had been retained in the office of Dr. N.S. Kalra in the RML Hospital and that Inspector Shekhawat had taken them from there and gone straight on to Hyderabad and delivered them to the CCMB with seals intact.

20. At the very outset, we must dispel Mr. Sushil Kumar's rather broad argument that the primary allegations were of rape whereas murder was a secondary issue in the facts of the case and that the

proof of murder would depend on proof of rape. We see from the record that there is very substantial evidence with regard to the allegations of murder simpliciter and have been dealt with under circumstance No.11. We first see that right from the year 1994 to January 1996, that is a few days before the murder, the appellant had been continuously harassing the deceased and that this allegation has been proved by ocular and documentary evidence. We also see that the appellant had been seen in the Faculty of Law, University of Delhi on the morning of the incident and had no business to be present at that place as he had passed out in the year 1994. He was also seen by PW-2 Shri Kuppaswami outside the house of the deceased at about 5 p.m. and was carrying a helmet with an intact fixed visor, and was seen moving out of the Vasant Kunj Colony by two witnesses soon after 5 p.m.

(though these witnesses ultimately turned hostile). The only argument against PW-2 is that his statement under Section 161 of the Code of Criminal Procedure had been recorded after three days. We find nothing adverse in this matter as there was utter confusion in the investigation at the initial stage. Moreover, PW-2 was a next neighbour and a perfectly respectable witness with no bias against the appellant. In addition, the recovery of the helmet with a broken visor and the recovery of glass pieces apparently of the visor from near the dead body and the fact that the appellant himself sustained injuries while mercilessly beating the deceased with his helmet (as per the F.S.L. Report Ex.PW50/H4) and causing 19 injuries including three fractured ribs, are other circumstances with regard to the murder. Assuming, therefore, for a moment, that there was some uncertainty about the

rape, the culpability of the appellant for the murder is nevertheless writ large and we are indeed surprised at the decision of the Trial Judge in ordering an outright acquittal.

With this background, we now examine the evidence leading to the charge of rape.

21. It is the primary submission of Mr. Sushil Kumar that the vaginal swabs and slides taken from the dead body at the time of the post-mortem examination had been tampered with and as there was some suspicion with regard to the blood samples taken by Dr. N.S.Kalra on the 25th January, the DNA report too could not be relied upon. This is a rather far fetched plea as it would mean that not only the investigating agency, that is the senior officers of the CBI and DSP Ohri in particular, the doctors who had taken the

vaginal swabs and slides, the doctors and other staff who had drawn the blood samples, and the scientists in Hyderabad had all been in a conspiracy to harm the appellant. To our mind, this premise is unacceptable. We see from the post mortem report Ex.PW33/B dated 25th January 1996 and the endorsement thereon that one bundle containing a full sleeved high neck pinkish violet colour T-shirt having a cut mark over the area of the left breast region, one blue coloured jeans, one pair of woolen socks, one white coloured brassiere and one blue coloured underwear had been sealed and handed over to the investigating officer, Inspector Lalit Mohan. It also finds mention that these items along with two vaginal swabs and two slides had also been handed over to the I.O. It has been submitted by Mr. Sushil Kumar that these items had been retained by Inspector Lalit Mohan till the 25th of January 1996 and

then handed over to PW-38 Inspector Sunit Kumar of the CBI. Inspector Sunit Kumar, however, deposed that on the 29th January 1996, and on the direction of DSP Ohri, he had gone to the department of Forensic Medicine, Safdarjung Hospital, and taken the bundle of clothes and one jar containing vaginal swabs and slides duly sealed and several other items as well and that a specimen of the seal had also been obtained by him. It is, therefore, obvious that till 29th of January 1996 the aforesaid articles remained in the custody of the Safdarjung Hospital and that they were deposited in the malkhana on the 29th January 1996.

22. We notice from the cross-examination of Inspector Sunit Kumar that not a single question had been put to him in the cross-examination doubting the receipt of the aforesaid items from the hospital on the 29th

January 1996. DSP Ohri confirmed the evidence of Inspector Sunit Kumar Sharma that he had received the case property from the hospital and it had been deposited in the malkhana the same day. We have also examined the photocopy of the Ex.PW47/A, which is the malkhana register. It first refers to the various items taken by Inspector Sunit Kumar from the hospital earlier that day including the clothes and there is some overwriting with respect to the vaginal swabs and slides. Mr. Sushil Kumar has thus raised a suspicion that the entry with regard to the vaginal swabs and slides was an interpolation with no sanctity attached to the semen samples. We are unable to accept this submission for the simple reason that the post-mortem clearly refers to the aforesaid samples along with several other items which had been taken from the dead body on the 25th January 1996 and

which had been retained at the Safdarjung Hospital till 29th January 1996 when they had been handed over to Inspector Sunit Kumar who had handed them over further to PW Ohri who had deposited them in the malkhana. Furthermore, a perusal of the post-mortem report Ex.P33/B bears an endorsement that three items that is a copy of the report, the inquest proceedings and the dead body had been handed over to the Constable at 6 p.m. on 25th January 1996 but all the other items had been taken by the CBI on the 29th January. Significantly we find an acknowledgement at the top right hand corner of the post-mortem report which reads as under:

> "issued against authority letter No.399/3/1(S)/SIV V SIC-II dated 29.1.96 from CBI – authorizing Shri Sunit Sharma Insp. CBI."

Inspector Sunit Kumar had also acknowledged the receipt of the articles on the 29th at Point X. It is thus clear that the three first mentioned items had been handed over to the Constable on the 25th January at 6 p.m. but the other items had been handed over to the Inspector on the 29th. It bears notice that the 26th to 28th January 1996 were holidays which was perhaps the cause as to why some of the items including the semen swabs and stains and the clothes of the deceased remained in the custody of the hospital authorities till the 29th. We have also perused the evidence of PW47 Constable Rajinder Singh of the CBI who was the In-charge of the malkhana on the day in question. He admitted that there was no mention that the swabs and slides were contained in a glass jar, but the fact that the entries had been interpolated has been emphatically denied. It is also significant that

these items had been taken by Inspector Shekhawat from the malkhana on the 31st January 1996 in a sealed condition and in a glass jar and handed over to the CCMB Hyderabad in an identical condition. In this connection, we have gone through the evidence of PW49 Dr.Lalji Singh who deposed on oath that all the aforesaid items along with several others, (which we will deal with later) had been received in a sealed condition as his organization did not accept any item which was without a seal. He further stated that along with samples he had received the sample seals which had been affixed on the bundle of clothes and the bottle carrying vaginal swabs and slides. It is also of significance that the vaginal swabs and slides find mention on the third page of the post-mortem report whereas the other items taken from the dead body are on internal page one. This raises the possibility that

the Head Constable had, at the initial stage, missed the articles on page 3 and thereafter rectified the mistake. No adverse inference against the prosecution can, thus, be drawn with regard to the retention of the items in the malkhana. It is also pertinent that no suggestion was put either to the Doctors or to DSP Ohri or to Sub-Inspector Shekhawat that the seals of the aforesaid articles had been tampered with.

23. We now come to the suspicion with regard to the taking and storage of the blood samples of the appellant. PW Dr. N.S.Kalra who was the Head of the Bio-Chemistry Department of Ram Manohar Lohia Hospital at the relevant time deposed that by letter Ex.34/A a request had been made to the hospital to take blood samples of the appellant in two vials totalling 20 ml. Ms. Godawari, a Laboratory

Assistant, was accordingly directed to take the blood samples in two 10 ml. syringes whereafter the blood was transferred to 4 vials each containing 5 ml. which were duly sealed and tape applied over them which was signed by Dr. Kalra, Dr. S.K.Gupta and DSP Ohri and a memo Ex.PW34/B to that effect was prepared. He further deposed that the said vials had been kept in a refrigerator under his supervision and were taken by the CBI officers on January 31, 1996 from him and that while the vials remained in his custody, they were not tampered with in any manner. He also testified that whenever blood was kept in a refrigerator, as in the present case, there was little possibility of evaporation if the rubber cork was air tight and in cross-examination he deposed that the watery constituent of blood would not evaporate in the cool atmosphere of a refrigerator. Mr. Sushil Kumar

has accordingly argued that though the CBI had requested for two samples of 10 ml. each yet the 20 ml. blood had been divided into four vials, and that when the samples had been opened in the Laboratory at Hyderabad, only 12 ml. blood in all had been recovered from the four vials. We, however, find that no suspicion can be raised with regard to the sanctity of the samples. It has come in the evidence of Dr. Lalji Singh that 12 ml. of blood said to be that of the appellant Santosh Kumar Singh in four sterile vials containing about 3 ml. each had been received through Inspector Ranbir Shekhawat along with other items. He further explained that in cross-examination that if the blood samples were kept in a refrigerator and handed over to the Inspector on the 31st January and received in the laboratory the next day, it was not likely that 2 ml. out of each of the four vials would

evaporate although some blood could have evaporated. He further stated that there appeared to be some leakage in the vials as traces of blood appeared to be in the material with which the vials had been sealed although this fact did not find mention in his report. Here too, we must emphasize that the blood samples were in the custody of the hospital till they were received by the Inspector Shekhawat for the first time on 31st January 1996 and he had left for Hyderabad the same day and handed over the samples and other items to the laboratory on 1st February 1996. The trial court has had much to say on this aspect. It has held that Dr. N.S.Kalra was a doctor who could be influenced in the matter. Reliance has also been placed on the document PW34/A of Shri Bhatnagar addressed to the Medical Superintendent of RML Hospital that two samples of blood of 10 ml. be taken

from the accused and then goes on to say that 20 ml. blood was taken but it had been divided into four vials of 5 ml. each which was against the requisition. The trial court observed that as per the deposition of CW1 Dr. G.V.Rao of the CCMB, Hyderabad the samples had been received in the laboratory but only 12 ml. blood had been found in the vials which raised serious questions and the prosecution was thus called upon to explain as to how 8 ml. of blood had disappeared and in the absence of a proper explanation, the possibility that the said samples had been tampered with, could not be ruled out. The trial court has, accordingly, rejected the evidence of Dr. N.S.Kalra, Dr. Lalji Singh and Dr. G.V.Rao as to why and how the quantity of the blood may have been reduced. The court also examined the document PW-34/B, which is the memo relating to the taking of the blood samples, and by

some very curious reasoning concluded that some additions had been made in the document as some words were not in their proper place and sequence and appeared to have been squeezed in and that the handwriting was also not identical. We have minutely perused the document ourselves and can find no such flaw. We also find absolutely no reason to accept the very broad and defamatory statement of the trial court that Dr. N.S.Kalra was a convenient witness for the prosecution as there is no basis for this finding. On the other hand, there is ample evidence to suggest that the blood samples had been kept in the hospital in a proper way and handed over to Inspector Shekhawat who had taken them to the CCMB, Hyderabad and that the explanation tendered by Dr. Lalji Singh and Dr. G.V.Rao as to why the quantity of blood may have been reduced, merits acceptance. The High Court

was, therefore, fully justified in holding that the trial court's conclusions on the question of the retention and dispatch of the swabs and slides and the clothes of the deceased the blood samples was faulty, and based on a perverse assessment of the evidence.

24. We now come to the circumstance with regard to the comparison of the semen stains with the blood taken from the appellant. The trial court had found against the prosecution on this aspect. In this connection, we must emphasize that the Court cannot substitute its own opinion for that of an expert, more particularly in a science such as DNA profiling which is a recent development. Dr. Lalji Singh in his examination in chief deposed that he had been involved with the DNA technology ever since the year 1974 and he had returned to India from the U.K. in

1987 and joined the CCMB, Hyderabad and had developed indigenous methods and techniques for DNA finger printing which were now being used in this country. We also see that the expertise and experience of Dr. Lalji Singh in his field has been recognized by this Court in **Kamalantha & Ors. Vs. State of Tamil Nadu** 2005 (5) SCC 194. We further notice that CW-1 Dr. G.V.Rao was a scientist of equal repute and he had in fact conducted the tests under the supervision of Dr.Lalji Singh. It was not even disputed before us during the course of arguments that these two scientists were persons of eminence and that the laboratory in question was also held in the highest esteem in India. The statements of Dr. Lalji Singh and Dr. G.V. Rao reveal that the samples had been tested as per the procedure developed by the laboratory, that the samples were sufficient for the purposes of

comparison and that there was no possibility of the samples having been contaminated or tampered with. The two scientists gave very comprehensive statements supported by documents that the DNA of the semen stains on the swabs and slides and the underwear of the deceased and the blood samples of the appellant was from a single source and that source was the appellant. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of text books and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court

had not been put to the expert witnesses. In **Bhagwan Das & Anr. vs. State of Rajasthan** AIR 1957 SC 589 it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert.

25. The observations in **Gambhir vs. State of Maharashtra** AIR 1982 SC 1157 are even more meaningful in so far as we are concerned. In this case, the doctors who had conducted the post-mortem examination could not give the time of death. The High Court, in its wisdom, thought it proper to delve deep into the evidence and draw its own conclusions as to the time of death and at the same time, made some very adverse and caustic comments with regard to the conduct of the Doctors, and dismissed the

appeal of the accused. This Court (after the grant of special leave) allowed the appeal and reverting to the High Court's opinions of the doctors observed:

> "The High Court came to its own opinion when the doctors failed to give opinion. The Court has to draw its conclusion on the basis of the materials supplied by the expert opinion. The High Court has tried to usurp the functions of an expert."

This is precisely the error in which the trial court has fallen. It is significant that at the initial stage only Dr. Lalji Singh had been summoned to prove the DNA report and it was during the course of final arguments that the court thought it fit to summon Dr. G.V.Rao as a court witness. This witness was subjected to an extra-ordinarily detailed examination-in-chief and even more gruelling and rambling a cross-examination running into a hundred or more pages spread over a period of time. The trial court finally, and in

frustration, was constrained to make an order that the cross-examination could not go on any further. We are of the opinion that the defence counsel had attempted to create confusion in the mind of CW-1 and the trial court has been swayed by irrelevant considerations as it could hardly claim the status of an expert on a very complex subject. We feel that the trial court was not justified in rejecting the DNA Report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in **Smt. Kamti Devi v. Poshi Ram** AIR 2001 SC 2226. . In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with,

as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on circumstance No.9.

26. Mr. Sushil Kumar, has almost at the fag end of his arguments, dealt with the question of motive. He has pointed out that it was by now well settled that motive alone could not form the basis for conviction as in a case of circumstantial evidence the chain envisaged was to be complete from the beginning to the end and to result in the only hypothesis that the accused and the accused alone was guilty of the crime. In this connection, he has pointed out that the oral and documentary evidence relied upon by the prosecution raised some misgivings and confusion in the relationship of the appellant and the deceased

inter-se, but they could not have been the cause for the rape and murder. The learned ASG has, however, taken us to the evidence to argue that there was absolutely no doubt that the appellant felt frustrated as the deceased was not giving in to his overtures despite having been pursued relentlessly over two years, and had in anger and frustration, committed the rape and murder. It has been reiterated that the finding of the trial court and the High Court on the motive (which were circumstances Nos.1, 2 and 3) has been concurrent inasmuch that the appellant had the motive to commit the murder.

27. We have gone through the evidence on this score. As already observed, this comprises ocular and documentary evidence. The relevant documents in this connection are Ex.PW6/C, a complaint dated 25th

of February 1995 in which the deceased referred to an earlier incident in which the appellant had been harassing her either at her residence B-1/4 Safdarjung Enclave or in the Faculty of Law and then pointed out that on that day as well when she had left her house at 10.30 a.m. to go to a friends place she had found the appellant following her and trying to stop her at every traffic light and harassing and shouting at her on which she had made a complaint at the R.K.Puram Police Station and as a consequence thereof the appellant had tendered two apologies Ex.PW6/DB, and an undertaking not to harass her any more either himself or through his friends or to spoil her reputation. These apologies also dated 25th of February 1995 were witnessed by PW Lt. Col. S.K.Dhar and Sub-Inspector Rajinder Kumar. This was followed by another complaint Ex.PW 11/A

regarding some incident at the Khyber Petrol Pump and another undertaking was given by the appellant that he would not harass her on which she withdrew her complaint. The trial court further noticed that yet another incident had happened at about 3 p.m. on 16th August 1995 when the appellant had followed her home all the way from the University. A message was accordingly flashed from a PCR and received at Police Station, Vasant Kunj, and was recorded in the Daily Entry Register as Ex. PW12/A. An enquiry was entrusted to PW-12 Head Constable Vijay Kumar who went to the house of the deceased and took a report Ex.PW1/A dictated by her to her father and the appellant was thereafter arrested and taken to the police station along with his motorcycle. In this report the deceased wrote about the earlier incidents of harassment and also the apologies that had been

tendered by the appellant from time to time. It appears, however, that the police was under some influence and instead of pursuing the complaint to its logical end, several police officers, including the SHO, ACP Parbhati Lal and ACP Satender Nath persuaded the deceased to compromise the matter on which the deceased was compelled to state that the complaint be kept pending for the time being. We also find that an incident had happened on 16th February 1995 which led the deceased to file an FIR against the appellant under Section 354 of the IPC at Police Station, Maurice Nagar in which she wrote that despite the fact that a PSO had been attached with her because of the appellant's misconduct, he had still continued to chase and harass her and that as she was entering her class room he had caught hold of her arm and threatened her and tried to forcibly talk to her and

that she had immediately called her PSO who made a call to the Maurice Nagar Police Station and the police had come and taken him away. In addition to this, we find that the appellant had made a complaint against the deceased to the University authorities and followed it up with a reminder that she was pursuing two courses in the University at the same time which was against the rules with the result the University had issued a show cause notice to her and that the matter was still under enquiry with the University when the present incident happened. There is ocular evidence as well. PW1 Shri C.L.Mattoo, deposed that when he visited Delhi in December 1995 he noticed that the appellant and two or three boys were passing lewd remarks at his daughter. Likewise, it has come in the evidence of PW44 Smt. Rageshwari Mattoo, who testified that while she was admitted in the AIIMS, the

appellant had repeatedly called the deceased on telephone despite the fact that she was not taking his calls. The courts below have also placed reliance on the evidence of three witnesses in support of the telephone calls i.e. PW10 Tanwir Ahmed Mir, PW13 Satender Kumar Sharma, Advocate and PW16 Ms. Manju Bharti, Advocate who came into witness box to state that the deceased had told them that the appellant was harassing her on the telephone as well. We also notice other evidence with regard to the sexual harassment. PW44 deposed that when she had visited Lt. Col. S.K.Dhar's home Delhi in January 1995 (with whom the deceased was then residing), the appellant had tried to forcibly enter the house while she was present on which she had told him that as the deceased was already engaged, he should not harass her. She also referred to the fact that in February

1995 when she had visited Delhi again, Bishamber, the domestic servant of Lt. Col. S.K.Dhar had brought a bouquet from the outside with a chit reading "Valentines Day - with love from Santosh". These incidents of harassment were confirmed by Lt. Col. S.K.Dhar as well who deposed that the appellant had been harassing the deceased from November 1994 onwards and would repeatedly come to his house on his black Bullet motorcycle. In the light of the above evidence, the motive stands proved beyond any doubt. It appears that as the appellant's overtures had been rebuffed by the deceased, he had resorted to harassing her in a manner which became more and more aggressive and crude as time went by. It is evident that the appellant was well aware of her family background and despite several complaints against him and the provision of a PSO, he had fearlessly and

shamelessly pursued her right to the doorsteps of her residence ignoring the fact that she had first lived in the house of Lt. Col. S.K.Dhar, an Army Officer from the end of 1994 onwards and after January 1996 with her parents, her father too being a very senior officer in a Semi-Government Organization. It has come in the evidence of PW Smt. Rageshwari Mattoo that the police officers before whom the appellant had been brought on the complaints had desisted from taking any action against him and had, on the contrary harassed her, her husband and the deceased by summoning and detaining them in the Police Station at odd hours and for long periods of time. It was this behaviour that led the trial court to comment very adversely on the conduct of some of the police officers involved. We endorse the findings of the trial court that the conduct of these officers deserves to be

condemned as reprehensible.

28. We are, therefore, of the opinion that circumstances 1 to 3 which have been found by two courts against the appellant and in favour of the prosecution constitute a very strong chain in the prosecution's case. We agree with Mr. Sushil Kumar's broad statement that motive alone cannot form the basis of conviction but in the light of the other circumstances, the motive goes a very long way in forging the links in the chain.

29. A few additional submissions made by Mr. Sushil Kumar while arguing the matter in reply must now be dealt with. He has first pointed out that the trial court had acquitted the appellant and the High Court had reversed the judgment and the matter before us was, therefore, in the nature of a first appeal and the

guiding principles relating to interference in such an appeal by the High Court postulated in **Arulvelu & Anr. vs. State & Anr.** (2009) 10 SCC 206 had to be adhered to. He has also submitted that it was now well settled that all circumstances which were to be used against an accused in a criminal case were to be put to him in his statement under Section 313 of the Cr.P.C. failing which the said circumstance could not be taken into account. Reliance for this plea has been placed on **Ishwar Singh vs. State of U.P.** (1976) 4 SCC 355 and **Ashraf Ali vs. State of Assam** (2008) 16 SCC 328. Elaborating on this aspect, it has been pointed out that the allegation that the appellant had strangulated the deceased with the use of a wire of the heat convector and the fact that the helmet had been used for causing the injuries to the deceased had not been put to him. The learned ASG too has placed

reliance on a large number of judgments to the effect that the omission to put a question to an accused would not ipso-facto result in the rejection of that evidence as the onus lay on the accused to show prejudice. These judgments are **Sharad Birdhichand Sarda vs. State of Maharashtra (1984) 4 SCC 116 and Suresh Chandra Bahri vs. State of Bihar 1995 Supp (1) SCC 80.**

30. We first examine the argument with regard to the propriety of the High Court's interference in an acquittal appeal assuming the present matter to be a first appeal. Undoubtedly, a judgment of acquittal rendered by a trial court must be given the greatest consideration and the appellate court would be slow in setting aside that judgment, and where two views are possible, the one taken by the trial court would not be

disturbed. On the contrary if the trial court's judgment was perverse, meaning thereby that it was not only against the weight of evidence but was all together against the evidence, interference was called for. The High Court was alive to its limitation in such a matter and while dealing with this argument first expressed its shock and observed that though virtually all the findings were in favour of the prosecution, yet curiously, the decision had been rendered in favour of the accused. The judgment of the trial court was accordingly held to be perverse and against the evidence. The High Court (in paragraph 28) observed thus:

> "We have carefully and extensively gone through the material on record with the aid of counsel for the parties. Since this is an appeal from judgment of acquittal we can interfere only if we are satisfied that the findings of the trial court are perverse and have resulted in grave miscarriage of

> justice. High Court while hearing an appeal against acquittal has the power to reconsider the whole evidence and to come to its own conclusion in place of the findings of the trial court but only if the decision of the trial court is such which could not have been arrived at all by reasoning."

31. We too believe from a perusal of the evidence that the High Court's observations were justified on the facts. In other words, even assuming that the matter before us was to be treated as a first appeal, we too would have interfered in the matter and set aside the judgment of the trial court, as it was against the evidence and to desist from doing so would cause great injustice not only to the prosecution but even to the deceased victim and her family.

32. We now come to the argument with regard to the omission in putting certain questions to the appellant.

It does appear from the circumstance that it was the appellant who had strangulated the deceased and that too with the convector wire had not been put to the appellant but it is clear from question No.86 that the fact that death had been caused by asphyxiation as a result of strangulation by ligature and that the ligature material was one with a soft surface, had been put to him. We also see that when the injuries at serial Nos.1 to 11 in the post-mortem report Ex.PW33/B had been put to the appellant, he had merely made a statement that he did not know anything. We further notice from the evidence of PW-33 Dr.A.K.Sharma that the cause of death was strangulation and that the nature of injury Nos. 4 and 5, which referred to the ligature marks on the neck, had been pointedly asked of the Doctor in cross-examination. Likewise, the fact that the helmet had been used as weapon of offence,

had not been specifically put to the appellant but here again we find absolutely no prejudice to the appellant on this score as the death had been caused not by the use of the helmet but by strangulation and that the appellant and his counsel were fully alive to the prosecution story that the helmet had been used as a weapon to beat the deceased into submission. Ishwar Singh's case (supra) cited by Mr. Sushil Kumar was not dealing with a statement under Section 313 of the Cr.P.C. The facts show that the ballam or bhala which were alleged to be the murder weapons had not been shown to the doctor and this Court held that in this situation, it was not possible to convict the accused (who had been charged under Section 302/149) under Section 302 IPC simpliciter. This present case does not fall within this category. Mr. Sushil Kumar has, however, placed greater reliance on

Ashraf Ali's case (supra) whereby this Court relying on a large number of judgments observed as under:

> "The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in S.Harnam Singh v. State (Delhi Admn.) while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facts by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

33. Undoubtedly, the observations are extremely relevant for the purpose of this case but each case has to be seen on its own facts, more particularly that the omission had caused prejudice to the accused as would be clear from the rider put by the court in this very case (and highlighted by us). On the contrary, we find that prejudice must ensue has been reiterated by this Court in Suresh Chandra Bahri's case (supra) and a very large number of other cases. This is what the Court has to say in Bahri's case:

> **"**Learned Senior Counsel Shri Sushil Kumar appearing for the appellant Raj Pal Sharma submitted that in view of the fact that no question relating to motive having been put to the appellants on the point of motive under Section 313 of the Code of Criminal Procedure, no motive for the commission of the crime can be attributed to the appellants nor the same can be reckoned as circumstance against the appellants. It is no doubt true that the underlying object behind Section 313 CrPC is to enable the accused to explain any circumstance appearing against him in the evidence and this object is based on the maxim *audi alteram partem* which is one of the principles of natural justice. It has always been regarded unfair to rely upon any incriminating circumstance without affording

the accused an opportunity of explaining the said incriminating circumstance. The provisions in Section 313, therefore, make it obligatory on the court to question the accused on the evidence and circumstance appearing against him so as to apprise him the exact case which he is required to meet. But it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance but he must also show that such non-examination has actually and materially prejudiced him and has resulted in failure of justice. In other words in the event of any inadvertent omission on the part of the court to question the accused on any incriminating circumstance appearing against him the same cannot ipso facto vitiate the trial unless it is shown that some prejudice was caused to him. In *Bejoy Chand Patra* v. *State of W.B.,* this Court took the view that it is not sufficient for the accused merely to show that he has not been fully examined as required by Section 342 of the Criminal Procedure Code (now Section 313 in the new Code) but he must also show that such examination has materially prejudiced him. The same view was again reiterated by this Court in *Rama Shankar Singh* v. *State of W.B.* In the present case before us it may be noted that no such point was raised and no such objection seems to have been advanced either before the trial court or the High Court and it is being raised for the first time before this Court which appears to us to be an afterthought. Secondly, learned counsel appearing for the appellants was unable to place before us as to what in fact was the real prejudice caused to the appellants by omission to question the accused/appellant Suresh Bahri on the point of his motive for the crime. No material was also placed before us to show as to what and in what manner the prejudice, if any, was caused to the appellants or any of them.

Apart from what has been stated above, it may be pointed out that it cannot be said that

> the appellants were totally unaware of the substance of the accusation against them with regard to the motive part. In this regard a reference may be made to Question Nos. 5, 6 and 7 which were put to the appellant Suresh Bahri in the course of his statement recorded under Section 313 CrPC. The sum and substance of these questions is that from the prosecution evidence it turns out that the acquitted accused Y.D. Arya the maternal uncle of the appellant Suresh Bahri was living in a portion of the upper storey of his house at Delhi. He with the consent of Santosh Bahri the mother of Suresh Bahri, was interfering in the family affairs as well as in business matters by reason of which the maternal uncle had to leave the house and that having regard to the future of her children Urshia Bahri not only wanted to manage the property but also to dispose of the same which was not liked by Suresh Bahri and with a view to remove Urshia Bahri from his way the appellant Suresh Bahri wanted to commit her murder. In view of these questions and examination of Suresh Bahri, it cannot be said that he was totally unaware of the substance of the accusation and charge against him or that he was not examined on the question of motive at all. In the facts and circumstances discussed above it cannot be said that any prejudice was caused to the appellant. The contention of the learned counsel for the appellants in this behalf therefore has no merit."

34. We see that the facts of each case have to be examined but the broad principle is that all incriminating material circumstances must be put to an accused while recording his statement under

Section 313 of the Code, but if any material circumstance has been left out that would not ipso-facto result in the exclusion of that evidence from consideration unless it could further be shown by the accused that prejudice and miscarriage of justice had been sustained by him. We see from the case in hand that not only were the questions pertaining to the helmet and the ligature marks on the neck put to the Doctor and even in a way to the appellant but the defence counsel had raised comprehensive arguments on these core issues not only before the trial court and the High Court but before us as well. The defence was, therefore, alive to the circumstances against the appellant. No prejudice or miscarriage of justice has, thus, been occasioned.

35. We have also kept in mind the broad principle that a particularly nasty and revolting a crime imposes a yet greater caution on the Court which must resist the tendency to look beyond the file and not be swayed by the horror of the crime or the character of the accused. In **Kashmira Singh vs. State of Madhya Pradesh** AIR 1952 SC 159 it has been observed thus:-

> "The murder was a particularly cruel and revolting one and for that reason /it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law."

36. Likewise the observations in **Ashish Batham vs. State of Madhya Pradesh** (2002) 7 SCC 317 too are relevant:

> "Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the

> alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely, carried away by the heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however, strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and graver the charge is, greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between "may be true" and "must be true" and this basic and golden rule only helps to maintain the vital distinction between "conjectures" and "sure conclusions" to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record."

The aforesaid principles have been scrupulously adhered to by us while hearing this matter over almost 5 days.

37. We now come to the question of sentence. It has been submitted by Mr. Sushil Kumar that the present case was not one which fell in the category of the 'rarest of rare cases' as several mitigating circumstances with respect to the sentence were discernable. He has first pointed out that the High Court had reversed an acquittal judgment based exclusively on circumstantial evidence. He has further argued that the appellant was a young man about 24/25 of age on the date of incident and had been led astray by the vagaries of youth and that after his acquittal in December 1999, he had got married (in the year 2003) and a baby girl had been born to him and his wife before the judgment of the High Court had been delivered in October 2006. These submissions have been stoutly opposed by the learned

ASG who has submitted that even the trial court had given a positive finding that the motive and murder were truly barbaric and revolting and had been preceded by continuous harassment of the deceased over a period of two years and the appellant was an advocate with an over indulgent police officer father who had repeatedly come to the rescue of his son.

38. We have considered the arguments of the learned counsel and have also gone through the judgments relied upon by them in support of their respective cases.

We think that the answer on the question of the sentence can be found in the judgment of the High Court itself. We quote from paragraph 3 of the sentencing part of the judgment delivered on 30th October 2006:

"We have heard learned counsel for the parties and have given our consideration to what has been placed before us. We need hardly say that sentencing is the most difficult part of a judgment and this indeed has been a case here. There is absolutely no doubt in our mind that what was required of Santosh Singh was exemplary behaviour being a son of a police officer and also a lawyer himself yet with a premeditated approach he continued to harass the victim for nearly two years and ultimately in spite of repeated warnings by the police and his undertakings to them went about committing a most ghastly act. The act itself sent ripples in the society and showed how insecure a citizen can get against this kind of a person. In the various judgments which have been referred to by counsel from both sides we find the principles laid down to the considered while deciding the question of sentence are best reported in 'Bachan Singh vs. State of Punjab' AIR 1980 SC 898 and 'Machhi Singh vs. State of Punjab, 1983 SC 211. These cases sum up the law on the subject of death penalty which we have kept in mind. Evaluating the circumstances in favour and against the convict which have already been enumerated above, we find that the aggravating circumstances referred to by

> the Additional Solicitor General for outweigh the circumstances which according to the counsel to the convict are mitigating circumstances, although we do not consider them to be so. We are thus of the opinion that for a crime of this sort which has been committed with premeditation and in a brutal manner the convict deserves no other sentence but death."

The underlined words themselves give a hint as to the sentence that should be awarded in this case. Undoubtedly the sentencing part is a difficult one and often exercises the mind of the Court but where the option is between a life sentence and a death sentence, the options are indeed extremely limited and if the court itself feels some difficulty in awarding one or the other, it is only appropriate that the lesser sentence should be awarded. This is the underlying philosophy behind 'the rarest of the rare' principle. Furthermore, we see that the mitigating circumstances need to be

taken into account, more particularly that the High Court has reversed a judgment of acquittal based on circumstantial evidence, the appellant was a young man of 24 at the time of the incident and, after acquittal, had got married and was the father of a girl child. Undoubtedly, also the appellant would have had time for reflection over the events of the last fifteen years, and to ponder over the predicament that he now faces, the reality that his father died a year after his conviction and the prospect of a dismal future for his young family. On the contrary, there is nothing to suggest that he would not be capable of reform. There are extremely aggravating circumstances as well. In particular we notice the tendency of parents to be over indulgent to their progeny often resulting in the most horrendous of situations. These situations are exacerbated when an accused belongs to a category

with unlimited power or pelf or even more dangerously, a volatile and heady cocktail of the two. The reality that such a class does exist is for all to see and is evidenced by regular and alarming incidents such as the present one. Nevertheless, to our mind, the balance sheet tilts marginally in favour of the appellant, and the ends of justice would be met if the sentence awarded to him is commuted from death to life imprisonment under Section 302 of the Indian Penal Code; the other part of the sentence being retained as it is. With this modification in the sentence, the appeal is dismissed.

.....J.
(HARJIT SINGH BEDI)

.....J.
(CHANDRAMAULI KR. PRASAD)

DATED: OCTOBER 6, 2010
NEW DELHI.