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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CONFIRMATION CASE NO. 2 OF 2014

The State Of Maharashtra
(through DCB,CID, Unit-III, Mumbai) ... Appellant.
C.R. No. 83/2013.
N.M. Joshi Marg Police Station CR NO. 244/13

v/s.

1 Vijay Mohan Jadhav @ Nanu,
Age 18 years,
R/o Indira Nagar,
Next to Agnidut Building Lane,
Dhobighat, Satrasta, Mumbai.

2 Siraj Rehmat Khan @ Sirju,
Age: 24 yrs. R/o Saibaba Nagar,
"B" Committee, Dhobighat,
Satrasta, Mumbai.

3 Mohd. Kasim Mohd. Hasim Shaikh
@ Bangali,
Age: 20, R/o. Zopda No.
118, Opp. Bharat Petrol Pump,
Maulana Azad Road, Kalapani,
Agri Pada, Mumbai.

4 Mohd. Salim Abdul Kuddus Ansari
Age 27, R/o. Vishnu Nagar,
Building No. R/2, 3rd floor,
Room No. 307, Near Datta
Mandir, Mahul Village,
Vashi Naka, Mumbai-74. ... Respondents.

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Mr. D.N. Salvi, Spl. P.P. a/w. Mr. J.P. Yagnik, APP a/w. Mr. Sahil Salvi a/ w. Mr. Sagar Redkar, advocate for appellant-State.

Dr. Yug Mohit Chaudhry, Advocate appointed a/w. Ms. Payoshi a/w. Mr. Siddharth Sharma a/w. Ms. Chandni Chawla, Advocate for respondents.

CORAM : SMT. SADHANA S. JADHAV & PRITHVIRAJ K. CHAVAN, JJ.

RESERVED ON : OCTOBER 14, 2021.

PRONOUNCED ON : NOVEMBER 25, 2021.

JUDGMENT (PER SMT. SADHANA S. JADHAV, J)

> "*The world has never yet seen a truly great and virtuous nation because in the degradation of woman the very fountains of life are poisoned at their source." Lucretia Mott.*

Women are the backbone of every nation and therefore, they deserve their due respect and honour. Honour and Respect for women are the marks of a civilized Society. The Legislature has introduced several laws in order to ensure safety and security to women in society. After the brutal gang rape coupled with murder of a young girl on 16/12/2012 in Delhi, the Parliament by notification dated 23/12/2012 constituted a committee headed by Former Justice J.S. Verma, Justice Leila Seth and former Solicitor General of India

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Gopal Subramanium. The Committee so constituted was set up with the objective of recommending steps to be taken for the protection of honour and dignity of women, to deal with crimes against women, to recommend penalties which would act as a real deterrent to potential offenders of crimes against women and for providing speedy justice. The Committee after taking into consideration the opinions of all the stakeholders submitted its report and recommendations to the Government on 23/1/2013. The Parliamentary Standing Committee of Home Affairs, Government of India, after considering the report submitted by Justice Verma Committee, reports of Ministry of Home Affairs, 172nd Report on Review of Rape Laws of Law Commission of India, the Criminal Law (Amendment) Bill, 2012, the Criminal Law (Amendment) Ordinance, 2013, opinions of all concerned women organisations, NGOs, suggestions of State/UT Governments and Members of Parliament prepared a Report and expressed the necessity to give effect to the revised laws as expeditiously as possible vide their report dated 26th February, 2013. The report was tabled before the Parliament on 1st March, 2013. The Government drafted the Criminal Law(Amendment) Bill, 2013, by which -

(i) definition of rape was broadened.

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(ii) The ambit of aggravated rape was also broadened and the punishment thereof was enhanced.

(iii) Punishment was prescribed for enhancing the sentence to death penalty, for an offence where in the course of commission of an offence of rape, the offender inflicts any injury, which causes the death of the victim or causes the victim to be in a persistent vegetative state.

(iv) **To punish the repeat offenders of rape with imprisonment for life, which shall mean the remainder of the person's natural life, or with death.**

(v) Prescribe punishment for the offence of gang rape with rigorous imprisonment for a minimum of twenty years extendable to life (which shall mean the remainder of that person's natural life) and fine; to be paid to the victim to meet the medical expenses.

2 There were several other recommendations made to ensure that no lenient view is taken in respect of offence of rape. There is recommendation of stringent punishment in order to see that the punishment shall act as a deterrent. Earlier section 376D of Indian Penal Code was substituted by Act 43 of 1983 and the new amendment was brought in effect from 3/2/2013. Similarly, section

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376E Indian Penal Code was inserted in the Statute by Act 13 of 2013.

3 After insertion of Section 376D and 376E of the Indian Penal Code, the punishment prescribed under the newly introduced law i.e. Section 376D and 376E of the Indian Penal Code was given effect for the first time in a case popularly referred to as "Shakti Mill's Case" vide Judgment and Order dated 21st March, 2013 and 4th April, 2014 in Sessions Case No. 914 of 2013 and Sessions Case No. 846 of 2013 respectively. **Both the cases are tried simultaneously.** The sentence inflicted upon the accused was life imprisonment of that person's natural life and with fine in Sessions Case No. 914 of 2013, whereas in Sessions Case No. 846 of 2013, accused were ordered to be hanged by neck till they are dead. The present case is seeking confirmation of the Judgment and Order dated 4th April, 2014. The trial court decided both the cases within 7 months and 13 days from the date of incident. Hence, there was speedy justice.

4 In the case at hand, the State is seeking confirmation of the Judgment and Order passed by the City Civil and Sessions Court, Mumbai in Sessions Case No. 846 of 2013 wherein the respondents

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herein are convicted and sentenced as follows :

1. Accused No. 1 Vijay Mohan Jadhav @ Nanu, accused No. 3-Mohd. Kasim Mohd. Hasim Shaikh @ Bangali and accused No. 4-Mohd. Salim Mohd. Abdul Kaddus Ansari are convicted as per section 235(2) of Cr. P.C. for the offence punishable **under section 376(E) of IPC and each of them be hanged by the neck till they are dead.**
2. Accused No. 1-Vijay Mohan Jadhav @ Nanu, accused No. 2-Siraj Rehmat Khan @ Sirju, accused No. 3-Mohd. Kasim Mohd. Hasim Shaikh @ Bangali and accused No. 4-Mohd. Salim Mohd. Abdul Kaddus Ansari are convicted as per section 235(2) of Cr.P.C. for the offence punishable under Section 376(D) individually and also r/w. 120-B IPC and each of them is sentenced to suffer Rigorous Imprisonment for life, which shall mean the imprisonment of remainder of their naturl life and to pay fine of Rs. 5,000/- (Rs. Five Thousand only) each, in default R.I. for 1(One) year each.
3. Accused Nos. 1 to 4 are further convicted as per section 235(2) of Cr.P.C. for the offence punishable under

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section 120-B of IPC and each of them is sentenced to suffer Rigorous Imprisonment for life and to pay fine of Rs. 3,000/- (Rs. Three Thousand only) each, in default R.I. for 1(One) year each.

4. Accused Nos. 1 to 4 are further convicted as per section 235(2) of Cr. P.C. for the offence punishable under section 377 individually and also r/w. 120-B of IPC and each of them is sentenced to suffer Rigorous Imprisonment for life and to pay fine of Rs. 3,000/- (Rs. Three Thousand only) each, in default R.I. for 3 (Three) months each.

5. Accused Nos. 1 to 4 are further convicted as per section 235(2) of Cr.P.C. for the offence punishable under Section 354-A(iii) individually and also r/w. 120-B of IPC and each of them is sentenced to suffer Rigorous Imprisonment for 3(Three) years.

6. Accused Nos. 1 to 4 are further convicted as per section 235(2) of Cr.P.C. for the offence punishable under section 354(B) individually and also r/w. 120B of IPC and each of them is sentenced to suffer Rigorous

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Imprisonment for 3(Three) years and to pay fine of Rs. 1,000/- (Rs. One Thousand only) each, in default R.I. for 3(Three) months each.

7. Accused Nos. 1 to 4 are further convicted as per section 235(2) of Cr.P.C. for the offences punishable under sections 341, 342 individually and also r/w. 120-B of IPC and each of them is sentenced to suffer Rigorous Imprisonment for 1(one) year.

8. Accused Nos. 1 to 4 are further convicted as per section 235(2) of Cr. P.C. for the offence punishable under section 323 individually and also r/w 120-B of IPC and each of them is sentenced to suffer Rigorous Imprisonment for 1(one) year.

9. Accused Nos. 1 to 4 are further convicted as per section 235(2) of Cr. P.C. for the offence punishable under Section 506(II) individually and also r/w. 120-B of IPC and each of them is sentenced to suffer Rigorous Imprisonment for 5(five) years.

10. Accused Nos. 1 to 4 are further convicted as per section 235(2) of Cr. P.C. for the offence punishable

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under section 201 r/w 120-B of IPC and each of them is sentenced to suffer Rigorous Imprisonment for 3 (Three) years and to pay fine of Rs. 1,000/- (Rs. One Thousand only) each, in default R.I. for 3 (Three) months each.

11. Accused No. 4 individually and accused Nos. 1, 2 and 3 read with Section 120-B of IPC are convicted as per section 235(2) Cr. P.C. for the offence punishable under section 67 of the Information Technology Act, 2000 and this being the first conviction, each of them is sentenced to suffer Rigorous Imprisonment for 5(five) years and to pay fine of Rs. 5,000/-(Rs. Five Thousand only) each, in default R.I. for 3 (Three) months each.

12. All the substantive sentences of imprisonments of all the accused to run concurrently.

13. As per the Proviso laid down under section 376(D) of IPC, the entire fine amount, if recovered, shall be paid to the prosecutrix, if she is ready to accept it, after appeal period is over.

14. Accused Nos. 1 to 4 are in jail, hence they are entitled

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for set off under section 428 of Cr.P.C. for the period already undergone in jail for the punishments of other offences except for punishment under section 376(D) as it implies that life imprisonment shall mean the imprisonment for remainder of their life.

15. In view of section 28(2) of Cr.P.C., the sentence of death shall be subject to confirmation by the Hon'ble High Court. Hence, entire proceeding be sent to the Hon'ble High Court at the earliest.

16. As regards Muddemal Property, it shall be required for the case in respect of juvenile-in-conflict-with-law, hence, it may be preserved till the decision of that case and thereafter, it being worthless be destroyed except mobile of prosecutrix (Art.4), Memory Cards of P.W. 17-Anurag (Muddemal Article Nos. 16 and 17) which may be returned to them and except mobiles of accused (Muddemal Article Nos. 12, 13, 24, 28), one unmarked sealed mobile, cash amount of Rs. 300/- (Muddemal Article No. 14) and cash of Rs. 21/- (Muddemal Article No. 15) and pen-drive received from FSL, which may be

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confiscated to State, after appeal period is over.

17. Issuance of certified copy of Judgment is expedited.

18. Sessions Case No. 846/2013 stands disposed of accordingly."

It is a matter of record that the respondents herein have not filed any appeal challenging their convictions or their sentence of being hanged by their neck.

5 In the present case, what falls for consideration before this Court is not the consideration, appreciation, analysis and determination of the fact as to whether it was the accused who committed the ghastly offence of gang rape upon a young, innocent photographer at Shakti Mill Premises; since the accused have not challenged their conviction for the offence committed by them while reserving their rights to be tried and punished in accordance with the "procedure as established by law". What falls for consideration is as to whether the death penalty is awarded to them after following the "**due procedure established by law."** We remind ourselves of the cardinal principle "The courts have to be aware that harsher the punishment, higher should be the standards." In the present confirmation case, the

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accused are not represented by any lawyer and therefore, the Court has requested Advocate Mr. Yug Mohit Chaudhary, an advocate of a fair standing on criminal side to espouse the cause of the respondents.

6 The present case is a sad saga of an young photo journalist. The survivor Miss X(P.W.6) was working with Time Out Magazine of Essar Group as a photo-journalist. Anurag Banerjee (P.W. 17) was working as her colleague and Ms. Tejal Pandey (P.W. 5) was the head of the department. Her job profile was to photo shoot, film-shoot etc. P.W. 17 had floated the idea of photo-shooting – old dilapidated structures and old articles in Mumbai. The idea was to artistically capture the subjects and to preserve it as memory for future generation. P.W. 6 therefore, decided to work with P.W. 17 on the said project.

7 On 22/8/2013 P.W. 6 and P.W. 17 left the office at 5 p.m. to proceed to Shakti Mills to photo-shoot and capture the dilapidated structure of Shakti Mills. The only way they knew to reach Shakti Mills was from Mahalaxmi Railway Station. When they reached the compound of Shakti Mills, they saw a dilapidated structure but could

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not find their way to enter. At that juncture, they were approached by two men- Accused No. 1 and Accused No. 4, who offered to guide them. When they reached inside, they started taking photographs. They did the photo-shoot for about 45 minutes. When they reached the end of the premises, the said two persons again met them. They were accompanied by a third person(Accused No. 3). They informed P.W. 6 and P.W. 17 that they had been seen by Senior Railway Officer in-charge of the premises and therefore, they will have to meet him. P.W. 6 and P.W. 17 wanted to speak to the Senior Railway Officer on cell-phone. However, they insisted upon them to meet them and offered to take them through a short-cut.

8 P.W. 6 and P.W.17 followed the three persons. P.W. 6 informed their boss that they were accosted by Railway personnel, on which they were directed to apologize and leave immediately. Thereafter, one of the accused blamed P.W. 17 of having committed murder in Shakti Mill premises. Charge of which was denied by P.W. 17. Thereafter, one of the accused called his associates by saying that "they have got a prey". Two persons immediately reciprocated to the call and reached P.W. 6 and P.W. 17. P.W. 6 and P.W. 17 offered their

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belongings to all 5 persons requesting them to let them go unharmed in lieu of their belongings. The offer was denied. P.W. 6 was taken to a dilapidated structure. Just near the structure, the hands of P.W. 17 were tied with a belt and 3 persons stood near him to guard him. P.W. 6 received calls from her mother. She was directed to speak in Hindi and inform about her well-being. P.W. 6 was threatened with a piece of broken glass. Her cell-phone was disconnected. At the point of broken piece of glass, she was directed to denude herself of her clothes. She was made to lie on a dilapidated cement platform. There P.W. 6 was ravished by all 5 persons one after another. They all had vaginal and anal intercourse with her. She was also coerced to have oral sex with one of the accused. She was shown a pornographic clip and then she was forced to imitate the same act as that in the pornographic clip. She was told not to attempt to file a complaint. She was also told that she is not their first prey to have satisfied their lust. There have been many in the past and they could never be apprehended.

9 **She was suffering from unenduring, agonizing pain.** On enquiry she told P.W. 17 what had happened to her. As she was suffering from excruciating pain, they took a taxi to Jaslok Hospital.

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On the way they called upon Tejal Pandey and informed her about the horrific trauma which they had undergone. At Jaslok Hospital, the survivor narrated the whole incident to the doctor. She was badly injured. She narrated the whole episode with tears in her eyes, pain in her muscles and disgust in her heart.

10 There she narrated the details of the incident to P.W. 39 Dr. Asmita Patki and P.W. 40 Dr. Nisha Singh. Since she had suffered from severe injuries on her vagina and anus and also other parts of her body, she was admitted in ICU. Information was given to N.M. Joshi Marg Police Station. Police rushed to Jaslok Hospital. Her statement was recorded by P.W. 38 WPSI Mhatre. On the basis of her statement, Crime No. 244 of 2013 was registered at N.M. Joshi Marg Police Station. Sketches of the accused were drawn on the basis of the description given by P.W. 17. The sketches were shown to a secret informant who identified the sketch of juvenile in conflict with law. On 23/8/2013 at 6.30 a.m., Spot panchanama was drawn. The juvenile in conflict with law was brought by Agripada Police Station. In the course of interrogation of the juvenile in conflict with law, the names of the miscreants had transpired and they were arrested on

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24/25th August, 2013. On 12/9/2013 the statement of P.W. 6 was recorded under section 164 of the Code of Criminal Procedure, 1974 before the Magistrate.

11 At the trial, the prosecution has examined as many as 47 witnesses to bring home the guilt of the accused. The accused has examined 5 defence witnesses i.e. the reporters of DNA Newspaper and Bombay Mirror, mother of accused Nos. 1 and mother of accused No. 4 and a friend who is not examined on any material point. Since the learned Counsel for the respondents admits the incident as alleged by the prosecutrix or investigated by the investigating agency, it would not be necessary to discuss the evidence of all witnesses except the relevant witnesses, who have proved the incident through their substantive evidence.

12 P.W. 4 happens to be the mother of survivor. She has deposed before the court that after completing the Master's course in Social Communication Media, her daughter was working as intern photographer in Time Out Magazine. She identified the cell phone of her daughter as she had gifted the same to her daughter. 22nd August

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2013 happened to be the birthday of P.W. 4. To celebrate the same, she was supposed to go for dinner with her daughter. Therefore, at about 6.40 p.m. she called upon her daughter to remind her of the dinner in the evening. The call went unanswered. On the second occasion, the call was received, and she could hear her daughter saying, "*Maa main theek hoon"*. The phone was then disconnected. Therefore, P.W. 4 called upon her daughter again and her daughter replied, "*Maa mai Mahalaxmi Station Hoon, main theek hoon*". She was surprised to hear her daughter talk in Hindi and not in English as usual. At about 7.30 p.m. she called her daughter again on phone and was shocked to hear her daughter crying. Her daughter told her that she was going to Jaslok Hospital. She then went to Jaslok hospital along with Mr. Agnel. She saw the colleagues of her daughter just outside the casualty room. She was directed to go inside the casualty room and meet her daughter. Upon seeing P.W.4, her daughter just hugged her crying and told her that she is finished. Upon enquiry, her daughter divulged that she had been forcefully and brutally raped by five unknown persons, but she could give their description. Her daughter seemed to be in a state of shock.

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13 P.W.5 Tejal Pandey happened to be the senior of the survivor and P.W.17. On the way to the hospital, the survivor and P.W.17 had called upon her and asked her to accompany them to Jaslok hospital. She was picked up by the survivor and P.W. 17 on their way to Jaslok Hospital. She has substantiated this fact and has stated that the survivor was crying in agonising and unenduring pain. Tejal Pandey stayed in the hospital along with other colleagues.

14 P.W. 6 Ms. X is the survivor. She has deposed before the Court that she was working as Photo-journalist with Times out Magazine. Her job profile was to photo-shoot, film shoot and photo exchange. According to her, on 22nd August, 2013 she along with her colleague P.W.17 had been to Shakti Mill premises to artistically capture the deserted, uninhabited Shakti Mill premises. The only way they knew to approach Shakti Mill premises was to pass through Mahalaxmi Railway station. She has deposed before the court that when they reached in front of Shakti Mill premises, they saw a dilapidated wall and could not find any place to enter. At that juncture, they met two men who took upon themselves the task of leading them inside the mill. Hence, they went inside by the way shown by those

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two men. As soon as they went inside, they started taking photographs. She identified before the court accused Nos. 1 and 4, as the persons who guided them inside Shakti Mill premises. She showed the photographs to the court. According to her, the two persons who had showed the way, returned with a third person, whom she identified as Kasim. They all told her that they would have to speak to the railway officer since he had seen them taking photographs. They insisted upon her to accompany them. Therefore, she was constrained to call upon P.W. 5 who advised them to apologise and return to office immediately. They had no alternative, but to follow the three strangers. She then heard accused No.3-Kasim calling upon two other persons by saying "Come here the prey has come." Soon thereafter, two boys reached there. They all first alleged that Anurag (P.W.17) has committed murder on the said spot a few days ago. The said allegation was not only denied, but both were taken by surprise and shock. She along with P.W. 17 requested the said persons to take their cell phone and camera, but allow them to go. Thereafter, they had tied the hands of P.W. 17 with a belt. When she tried to resist and raise cries, she was told by the molester that she was not their first prey and they had committed this act with many girls in the past, but they were never

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caught. They took her inside the enclosure of dilapidated walls and then she was physically and sexually assaulted. They ravished her. They committed vaginal and anal intercourse with her. They had forced her to have oral sex by showing her a pornographic film. She received a call of her mother. The miscreants had asked her to receive the call, speak in Hindi and inform her mother that she is safe. Kasim had snatched the mobile and switched it off. She was subjected to the ghastly and grisly act. She identified all the accused before the Court and attributed overt act to each of them. The accused accompanied them till the gate. They asked the survivor and P.W.17 to go towards Mahalaxmi railway station and they went towards Lower Parel station.

15 P.W. 6 then told P.W.17 the traumatic and harrowing incident, which had taken place beyond the dilapidated walls. P.W.17 then called upon P.W.5. They took a cab and, on the way, picked up P.W.5 and Yashasvi. They went to Jaslok hospital. She divulged to the doctor the manner in which she was physically and sexually abused by the molesters. She then called upon her mother and told her to come to Jaslok hospital. She told the doctor that she had been brutally gang-raped by five men. The police approached her in Jaslok hospital, and

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she narrated the horrifying incident to them. The whole night, she was suffering from physical pain and mental trauma. She had handed over to the police the clothes worn by her at the time of incident. On 12th September, 2013, her statement was recorded under section 164 Code of Criminal Procedure, 1973 at her residence. P.W. 6 has proved the contents of the FIR which is marked at Exh. 39. She also identified her clothes, which she was wearing at the time of the incident. She has identified her cell phone too.

16 It is unfortunate that she had to vividly narrate the whole incident before the court. We deprecate the practice of the learned prosecutors adopting the process of asking the survivor to give minute details of the act of rape. In such matters, after having recorded the whole incident, the prosecutor ought not to have asked the survivor to give minute details of the incident, that too in the presence of the accused, and ask her what she had to say about the entire incident, which took place on that night. She was asked to point out the accused and narrate the particular acts done by each of the accused. She would naturally feel nauseated to live that episode again. The learned Special Public Prosecutor submits that the prosecution did not wish to leave

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any stone unturned and therefore, were constrained to ask about the same. The survivor felt so disgusted while narrating the incident that she had to be referred to the hospital, in the midst of recording of her evidence.

17 She had identified the accused at the test identification parade. She also identified the juvenile in conflict with law at Dongri Children Home. Her testimony has stood the test of the cross-examination and the defence could not shatter her sterling testimony. She actually lived the said moment before the court. She had to answer embarrassing questions. She was even cross-examined to the extent that it is a false case foisted upon the accused, whereas she was actually molested by P.W. 17. She has candidly denied the same. The defence pretended to be oblivious of the fact that it was P.W. 17 who was assaulted by the miscreants, he stood by P.W. 6 and arranged for speedy medical aid.

18 At the outset, we appreciate the courage of the survivor of bringing offenders before the Court. The patience shown by her is commendable. She had put at stake her reputation, her identity and

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the embarrassment to herself and her family and all concerned and the risk of having to face social obloquy when she set the law into motion. That she had lived the ghastly, horrendous, and horrifying experience where she was reduced to an object of desire to fulfill the lust of the sadistic molesters. It was traumatic for her to not just set the law into motion, but to seek justice not only for her alone, but for the victims like her, who had gone through the same experience. In order to prove her victimisation as an object of desire, she had to narrate the incident firstly to her mother P.W. 4, to her associates P.W.5 and P.W.17 and Yashasvi, then to the medical officer, who examined her clinically, then to the police on two occasions and also when she gave her clothes for forensic examination, then to the Magistrate while recording of her statement under section 164 of Code of Criminal Procedure, 1973, then at the stage of Test Identification Parade and then before the court especially when she was facing the accused and identifying each of them while attributing each of the accused with the overt acts attributed to them. It was not only traumatic, but each time she narrated the horrendous incident, she would be living the same incident. It was natural on her part to feel nauseating in the midst of recording her evidence. Moreover, there was vast publicity to the

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incident in print, electronic and digital media. Needless to say, she needed no sympathy, but justice for herself, for victims like her and social awareness. The conscience of the society was shocked because she brought the incident to light.

19 P.W.17 Anurag Banerji was in the company of P.W. 6. He has reiterated the facts as narrated by P.W. 6. He has given the description of all those five persons, who tied his hands with leather belt, forced P.W.6 into the dilapidated structure and sexually abused her. That, upon inquiry, P.W. 6 had candidly told P.W.17 that she had been brutally raped by all the five persons on the cement platform. On the way to Jaslok hospital, they have picked up P.W. 5 and Yashasvi. He was also assaulted by the miscreants. He was treated at Jaslok hospital. At his instance, the sketches of the miscreants were drawn by sketch artist Siddiqi and Nitin Yadav. On the basis of which, the juvenile in conflict with law was picked up by Agri pada police. He has spelt before the court the dialogue between the molesters at the time of the incident. The synonym used by them for sexual abuse was “inquiry”. His sterling testimony could not be shattered despite lengthy cross examination.

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20 The prosecution has examined P.W. 36 Akash Ganesh Swami, who claims to be a witness to the fact that Sirju and Kasim had received a phone call from Salim informing them that “the prey has come.” At that relevant time, he was playing cards with Kasim and Sirju and he had even asked them as to what are they shooting at and Kasim had reacted by saying that the prey was a “Deer”(Hiran). He had given the cell phone number of Kasim. The said fact was investigated and established.

21 P.W. 38 Priyanka Mhatre was a WPSI of Crime Branch Mumbai. According to her, on 22/8/2013 at about 9.00 p.m. she had received a call from PI Patil. She was directed to go to Jaslok Hospital and inquire into the case of offence registered at N. M. Joshi Marg Police Station. The victim of rape was admitted in ICU and undergoing treatment. With the permission of the doctor in charge, she recorded the statement of the victim girl. PSI Patil scribed the statement. At the time of recording of statement, the victim girl was crying and suffering from the pain. Her statement was recorded during the period from 9.30 p.m. to 11.40 p.m. Her signature was obtained, and the said statement is exhibited at Exh. 39.

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22 P.W. 39 Dr. Asmita Patki upon information by Dr. Nisha Singh had visited the casualty ward, which is also called as emergency medical services. She saw the victim lying on bed, complaining of pain, and bleeding from private parts. The patient had informed that she had been gang-raped by five unknown men at Shakti Mill near Mahalaxmi railway station. That the said sexual assault was vaginal and anal. There were mud stains and blood stains on her clothes; blood and whitish stain on medial aspects of both the thighs and she was bleeding. There were abrasions on right elbow, on both the knees surrounded by bleeding point. On the back at the level of L1, L2 spine, there was abrasion surrounded by bleeding points and an abrasion on left buttock. The consultant Dr. Satoskar visited the patient. The history was narrated by P.W. 39. She was examined by Dr. Satoskar. On internal examination, they found minor abrasion in labia, minora and on vestibule. A tear of the hymen which was bleeding. In the anal area there was abrasion in 6 and 7 'o' clock position. They had collected the sample. It is clarified that a fresh tear at 6 'o' clock position indicates forceful penetrative sexual intercourse, the same is the case with anal area. The injury certificates are at Exh. 163 and 164.

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23 P.W. 40 Miss Nisha Pradeep Singh had informed P.W. 39 about the admission of the said victim. She had also examined P.W. 17. P.W. 41 Shamrao Patil was informed by the station house officer of N. M. Joshi Marg Police station about the said incident. He is the scribe of the statement of victim recorded by P.W. 38. On the next day i.e. on 23rd August, 2013 at about 6.30 a.m. the panchnama of scene of offence was conducted. The writing of the said panchnama was completed at 9.20 a.m. The spots were shown by P.W. 17. P.W. 17 had shown the spots from where they entered Shakti Mill premises, the route by which they were misled by the miscreants, the spot where he was tied and the spot where the survivor was gang-raped by 5 persons. The contents of the spot panchanama is proved by P.W. 2 Bajirao Hari Patil and is marked at Exh. 26.

24 The learned Counsel for the respondents does not dispute the occurrence of the incident. The learned Counsel most humbly submits that there is no room for doubting the veracity of the incident as narrated by the survivor. He admits that the said ghastly incident had no doubt caused grave harm to the survivor and that shocked the

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conscience of the society. However, according to the learned Counsel, in a criminal trial, it is necessary to uphold the "RULE OF LAW". The Statute has prescribed the procedure for conducting a criminal trial and it is incumbent upon the court to uphold the Rule of Law. It is submitted that the Constitution of India guarantees to its citizen the Right to Life. Article 21 reads as under :

> "*No person shall be deprived of his life or his personal liberty except according to "the procedure established by law.""*

It is further submitted that Article 21 is expanded in accordance with interpretative principle indicated in the case of ***Maneka Gandh v/s. Union of India*** [1], it would read as follows :

> *"No person shall be deprived of his life or his personnel liberty except according to fair, just and reasonable procedure established by valid law."*

True, the severity of punishment warrants strict application of "procedure established by law."

25 The learned Counsel for the Respondents has drawn our attention to several irregularities committed by the trial court in

1 *1978 AIR 597,*

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conducting Sessions Case No. 846 of 2013 in which the Respondents are awarded death penalty under section 376E of the Indian Penal Code. It is further submitted that the charge was also not framed according to law. It would be necessary to deal with all the submissions extended by the learned Counsel for the Respondents.

26 Submissions of the learned Counsel for the respondents in respect of the irregularities in framing the charge :

(i) The first objection is to the procedure adopted by the trial court in conducting both the trials simultaneously. It is submitted that Crime No. 244 of 2013 was registered on 22/8/2013. All accused were arrested on 24th and 25th August, 2013. This was a case pertaining to brutal gang-rape on a photo-journalist at Shakti Mill premises. The case was registered as Session Case No. 846 of 2013. On 3rd September, 2013 Crime No. 253 of 2013 was registered on the basis of a report lodged by a 'call operator' Miss Y alleging therein that she was also subjected to a brutal gang rape at Shakti Mill premises on 31st July 2013. After the incident on the same day, she went to Chhattisgarh and returned on 2nd September, 2013. Hence, there was a delay in filing the report.

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She had identified three arrested accused in Crime No. 244 of 2013 as her molesters. One of the accused was Ashfaq who was not an accused in Crime No. 244 of 2013. The said case was registered as Session Case No. 914 of 2013. It is submitted that the learned Trial Judge at the time of framing of charge on 11/10/2013 in Sessions Case No. 846 of 2013 was aware of the filing of the charge-sheet in Crime No. 253 of 2013 which was registered as Sessions Case No. 914 of 2013. Charge was framed in Sessions Case No. 914 of 2013 on 18/10/2013.

(ii) In Session Case No. 846 of 2013, charge was framed against the accused on 11/10/2013 whereas in Session Case No. 914 of 2013 charge was framed on 18/10/2013. That the charge is framed for the offence punishable under section 376D read with 120B of the Indian Penal Code, 376D read with 34 of the Indian Penal Code, 376 and 377 of the Indian Penal Code, 354(A)(iii) read with 376 of Indian Penal Code, 354(B) read with 120B of the Indian Penal Code, 341, 342 read with 120B of the Indian Penal Code, 341, 342 read with 34 of the Indian Penal Code, 323, 506 (ii) read with 120B of the Indian Penal Code,

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Section 67 of the Information Technology Act, 2000 read with 120B of the Indian Penal Code, Section 201 read with 120B of the Indian Penal Code. In Sessions Case No. 914 of 2013 also the charges were framed in the similar manner and the accused have been convicted on account of every charge that was framed.

27 It is rightly submitted that Section 34 and section 377 are implied in section 376 (D) of the Indian Penal Code. That the accused are convicted for 376(D) read with 120B of the Indian Penal Code and not simplicitor section 376 D of the Indian Penal Code. It is submitted that an offence of conspiracy to commit a substantive offence is different from substantive offence itself. Reliance is placed upon the Judgment of the Apex Court in the case of **Ajay Agarwal v/s. Union of India**[2], wherein it is held that –

> *"The question then is whether conspiracy is a continuing offence. Conspiracy to commit a crime itself is punishable as a substantive offence and every individual offence committed pursuant to the conspiracy is separate and distinct offence to which individual offenders are liable to punishment, independent of the Conspiracy. Yet in our considered view the agreement does not come to an end*

2 1993 AIR SC 1637

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> *with its making, but would endure till it is accomplished, abandoned or proved abortive."*

It is further held that –

> *"The question then is whether conspiracy is a continuing offence. The agreement does not come to an end with its making but would endure till it is accomplished or abandoned or proved aborted."*

28 It is submitted that the learned trial Court framed the charge against the respondents under section 120B as follows:

> "*You accused No. 1 to 4 alongwith Juvenile Offender Chandbabu Sattar Shaikh, on 22/8/2013 at about 17.30 hrs. or thereabout, agreed to do or cause to be done an illegal act to wit, viz. to commit sexual assault i.e. forcible sexual intercourse with ……*"

That in fact, it is mandatory to mention the offence which is created by law. That sexual assault and forcible sexual assault would be without any reference to context in the present case as they are vague and misleading and do not refer to specific offence under section 376D or 376 of Indian Penal Code.

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29 It is rightly submitted that Justice J.S. Verma Committee had specifically rejected a suggestion to replace or include the offence of rape as defined in the Indian Penal Code within the wider ambit of sexual assault. **Justice J.S. Verma Committee** has observed as follows :

> "*we are of the considered opinion that in the Indian context it is important to keep the separate offence "Rape". This is a widely understood term which also expresses society's strong moral condemnation. In the current context,* ***there is a risk that a move to a generic crime of "sexual assault" might signal a dilution of the political and social commitment to respecting, protecting, and promoting women's right to integrity, agency, and autonomy."***

30 In this background, it is necessary for us to examine the Criminal Law Amendment Bill, 2012. The offence of rape falls under chapter 16 dealing with "offences affecting human body". Section 375 to 376D of Indian Penal Code are put under the category of "Sexual offence". While courts have often used the expression "sexual assault" in dealing with not only rape cases, but also cases of "sexual abuse", the Indian Penal Code did not define the said expression. The definition of 'assault' is found under section 351 of Indian Penal Code,

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however, it cannot be said that use of wrong terminology has caused any prejudice to the accused since the charge was also explained to the accused in the language which they understood. **The reading out of the charge in vernacular is an exercise to give the accused a clear idea of the offences committed by them.**

31 It is true that section 212 Code of Criminal Procedure, 1973 mandates that a charge must contain particulars specifying the exact person against whom the offence has been committed. While framing the charge under section 376E Indian Penal Code, the charge refers to "a telephone operator". To name the victim of the offence would not cause any harm and would not be in violation of section 228A Indian Penal Code. While framing the initial charge in Sessions Case No. 846 of 2013, the name of the survivor is spelt out and therefore, the same exercise could have been undertaken while framing charge in Sessions Case No. 914 of 2013. However, it is a curable irregularity and cannot be said to have caused any prejudice to the accused, as the accused had admitted previous conviction and that was the only case which was concluded against them.

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32 We agree that it was not necessary to frame charge under section 34 i.e., 376D r/w 34 Indian Penal Code as common intention is implied in section 376D Indian Penal Code. Similarly, the ingredients of section 377 Indian Penal Code are implied in the definition of section of 375 Indian Penal Code and therefore, it was not necessary to frame an additional charge under section 377 Indian Penal Code either. However, the question before us is as to whether the irregularities in framing the charge go to the root of the matter, whether they have caused prejudice to the accused to such an extent, that it would vitiate the trial or result in miscarriage of justice. **We are of the opinion that irregularity in framing of the charge has not caused any prejudice to the accused and therefore, it cannot be said that certain irregularities in framing charge have resulted in miscarriage of justice.**

33 An omission to frame a separate, distinct, specific charge for a substantive offence or for an offence under constructive liability will not by itself vitiate the conviction or occasion failure of justice if the accused is not materially prejudiced in his defence. It is a cardinal principle that in judging as to whether there is a material prejudice caused to the accused, the courts must have a broad vision and must

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look to the substance and not adopt a pedantic approach. The charge was explained to the accused in vernacular also and therefore, it is clear that the substance of allegation were brought to the notice of the accused.

34 It is reiterated that the definition of section 376D of the Indian Penal Code contemplates as follows:

> "*376D. Gang rape.—Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:*
> *Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:*
> *Provided further that any fine imposed under this section shall be paid to the victim."*

35 Hence, common intention is implied in the offence under section 376D of the Indian Penal Code. Similarly, the ingredients of section 341 and 342 of Indian Penal Code are distinct and therefore,

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charging the respondents with both sections 341 and 342 of the Indian Penal Code under the same head is unsustainable in law. Having multiple charges for the same offence of section 376 of Indian Penal Code is wholly absurd and unsustainable in the eyes of law. **We agree that it was not necessary to frame a distinct and specific offence, however, it neither causes prejudice nor vitiates the trial. It can only be said that the said exercise was undertaken by way of abundant caution.**

36 It appears from the roznama that the learned Special prosecutor had given a draft charge and the same was accepted by the court. In any case, roving and fishing inquiry at the stage of framing charge is impermissible. The improper framing of charge cannot be said to be fatal by itself and prejudice will have to be made out, before a conviction for the substantive offence without a charge can be set aside.

37 The respondent Nos. 1 and 2 are convicted under sections 354A(III) and 354A(III) r/w 120B Indian Penal Code in the absence of a charge. It cannot be said that the same is unsustainable in view of

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section 464 Code of Criminal Procedure, 1973, which reads as follows :

> *"464. Effect of omission to frame, or absence of, or error in, charge.*
> *(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.*
> *(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-*
> *(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;*
> *(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."*

In view of section 222 of Code of Criminal Procedure, 1973, it cannot be said that the court was not authorised to record conviction for a minor offence although they are not charged with it.

38 The next question that arises is whether framing of charge under section 376E of the Indian Penal Code at the end of the trial is a gross violation of due processes and reasonable procedure guaranteed by Article 21 of Constitution of India. The learned Session Court had taken recourse to section 236 of Code of Criminal Procedure, 1973 only after the accused was convicted in Sessions Case No. 914 of 2013.

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That the prosecution had filed an application for framing of additional charge as contemplated under section 376E of Indian Penal Code, which prescribes enhanced punishment in view of the prior conviction. The judgment of conviction was pronounced and therefore it cannot be said that there was a complete exclusion of the knowledge of the accused about previous conviction when weighing the evidence in respect of the main charge.

39 It is submitted that the accused could have been charged under section 219 of Code of Criminal Procedure, 1973, wherein an accused person may be charged with three offences of the same kind in one trial if they were committed within a span of one year. Under section 219 of Code of Criminal Procedure, 1973, the accused would then be convicted for rape by a single judgment, and it would escape the ambit of section 376E Indian Penal Code, as he would have only a single conviction albeit for multiple rapes. **In facts of the present case, the accused could not have been tried with the aid of section 219 of the Code of Criminal Procedure, 1973.**

40 In view of the above discussion, the lengthy vehement

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objections of the learned counsel for the respondents as far as irregularities in framing charge is concerned, needs to be overruled. It is true that the applications filed by the learned counsel for the accused were rejected by the High Court and the advocates were also reprimanded for filing consecutive applications one after another. The Government had assured a speedy trial and therefore, any application engineered to protract the trial deserved to be rejected.

41 That on 24th of March 2014 an additional charge was framed against the accused in Sessions Case No. 846 of 2013 for offence punishable under section 376E of the Indian penal code. That the learned Judge has not followed the mandatory requirements contemplated under section 212 of the Code of Criminal Procedure and 228 of Indian Penal Code. The charge framed under section 376E of Indian Penal Code read as follows:

> "*….. have been previously convicted by this court in Sessions Case No. 914 of 2013 for the offence punishable under section 376 of Indian Penal Code in respect of the Rape committed by you accused No. 1, 3 and 4 constituting a group in between 7.30 p.m. to 8.30 p.m on 31/7/2013 at Shakti Mill premises on prosecutrix of that case namely Telephone Operator.*"

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42 It is argued that throughout the trial in Session Case No. 914 of 2013, the Prosecutrix was never referred as Telephone Operator as she never worked as a Telephone Operator. Therefore, the accused have pleaded “Not Guilty” to the Charge. However, in question No. 974 under section 313 of Code of Criminal Procedure, 1973, they have only admitted about prior conviction in Session Case No. 914 of 2013. But they have denied to have committed an offence under section 376D of Indian Penal Code on any Telephone Operator.

43 It is further argued that the learned Session Judge has not stated the particulars regarding the time, place and name of the person against whom the offence had been committed. Hence, there is a violation of section 228A of Indian Penal Code in as much as the name of the victim has not been mentioned. The name of a Rape victim should not be disclosed, ofcourse, unless it is absolutely unavoidable, as for example when framing the charge, the identity of the victim may be disclosed. In fact, it is the requirement of law that the accused shall have the clear idea of the person against whom the offence is committed. That charge of Rape in respect of two girls not stating

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names of accused who ravished a particular girl is defective in the eyes of law.

44 According to the learned Counsel, the charge under section 376E of Indian Penal Code is framed after pronouncement of the judgment of conviction and hence, it cannot be said that the accused were apprised of the sentence that may follow. In the light of the severity and irrevocable nature of death sentence, it is crucial that the accused has to have a complete notice of the sentence, he would be facing and has full and expansive opportunity to defend himself and conduct himself accordingly throughout the trial. Framing of charge under section 376E of Indian Penal Code at the end of the trial is gross violation of due processes and reasonable procedure guaranteed by Article 21 of the Constitution of Indian. That it is implicit in section 236 of Code of Criminal Procedure, 1973, that there must exist a previous conviction at the beginning of the trial in question. At the time of framing of charge in Session Case No. 846 of 2013 under section 376E of Indian Penal Code, whether it can be said that the respondents were previously convicted in view of the fact that the time span between both conviction judgments is just 30 minutes. The

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question of framing of charge for enhanced penalty in Sessions Case No. 846 of 2013 arose for the first time on 21st March 2014 just 30 minutes after pronouncement of judgment in Sessions Case No. 914 of 2013.

45 Section 236 of Code of Criminal Procedure, 1973 reads thus:

> *"236. Previous conviction. In a case where a previous conviction is charged under the provisions of sub- section (7) of section 211, and the accused does not admit that he has been previously convicted as alleged in the charge, the Judge may, after he has convicted the said accused under section 229 or section 235, take evidence in respect of the alleged previous conviction, and shall record a finding thereon: Provided that no such charge shall be read out by the Judge nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under section 229 or section 235."*

46 That soon after framing of charge, the advocates of the accused had filed an application dated 2/4/2014 stating that it is necessary to appoint Senior Advocate to make submissions, that is final

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arguments and arguments on the quantum of sentence. The said application was rejected, and the matter was kept for the final argument on the following day. On 3rd April 2014 the accused were given an opportunity to submit on the quantum of sentence. The evidence of the mother of accused No.4 was recorded. Once again, an application was filed for engaging senior counsel and the said application was rejected. And on the same day, the judgment was dictated and pronounced. All the applications filed by the Advocate for the accused were rejected including the one to recall witnesses after framing of charge under section 376E of Indian Penal Code with an observation that the said applications were being filed only to protract the trial. The Advocates therefore had got themselves discharged from appearing in the case. **Hence, the accused were without any legal assistance at the time of pronouncement of conviction and sentence. In order to show that the trial was conducted in a fair manner, the court should have appointed a senior advocate of a good standing at the Bar to give legal assistance to the convicts.**

47 Per contra, the learned Special Public Prosecutor has submitted :

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(i) that the reference to the errors of framing of charge is not only unwarranted, but is immaterial. The irregularity in framing charge is curable under section 215(3) of Code of Criminal Procedure, 1973.

(ii) The omission to mention the name of the person against whom the offence committed is immaterial. The accused had a fair opportunity to cross-examine the witnesses. Therefore, it cannot be stated that the omission per se has caused any prejudice to the accused. That the accused had not taken any objection at the trial. Hence, it cannot be said that the accused was misled. The omissions and irregularities in framing charge do not lead to miscarriage of justice and warrant interference, as irregularities in framing of charge would not vitiate the trial.

(iii) Section 228A of Indian Penal Code is an embargo to name the victim in a rape case. Sexual assault implies rape and therefore, the terminology would not mislead the accused.

(iv) A reference is made to section 216 of Code of Criminal Procedure, 1973, which contemplates alteration and addition of charge at any time before judgment is pronounced.

(v) Implicit reliance is place on the judgment of the Apex Court

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in the case of **Sambhaji and others versus Gangabai and others**[3] wherein the Supreme Court was considering a challenge to the order of not accepting written statement beyond the mandatory period of 90 days under Order VIII Rule 1 of CPC. wherein it was held that-

> "*no person has a vested right in any course of procedure. He has only the right of prosecution of defence in the manner for time being by or for the court in which the case is pending and if by any act of parliament the mode of procedure is altered he has no other right then to proceed according to the altered mode. A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid of justice.*"

48 In order to show that procedural law is handmaid of justice, the learned Special PP has relied on following judgments of the Apex Court:

(i) The State of Punjab & anr v/s. Shamlal Murari & ors. reported in AIR 1976 SC 1177.

(ii) Jamal Uddin Ahmad v/s. Abu Saleh Najmuddin and ors. reported in AIR 2003 SC 1917.

(iii) Smt. Rani Kusum v/s. Smt. Kanchandevi & ors. reported in AIR 2005 SC 3304.

3 2009 (1) Bom.CR 81

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(iv) Kailash v/s. Nanhku and ors. reported in AIR 2005 SC 441.

(v) Sambhaji & ors. v/s. Gangabai and ors. reported in 2009(1) Bom. C.R. 81.

(vi) Noor Mohammed v/s. Jethanand and anr. reported in AIR 2013 SC 1217.

(vii) Jagatjit Industries Ltd. v/s. The Intellectual Property Appellate Board and ors. reported in AIR 2016 SC 478.

However, it is not necessary to refer to the said judgments as we are bound to follow the statutory provisions as contemplated by law.

49 In short, what we understand is that, we are called upon to deliberate as to whether the trial court has considered the following issues:

(i) whether after undergoing the sentence of 20 years for a conviction under section 376D of Indian Penal Code, there is a possibility of reformation and rehabilitation of the accused.

(ii) Whether it is a rarest of rare case.

(iii) Whether the alternative option to give a lesser sentence would be foreclosed.

(iv) Whether the judgment in the case of Bachan Singh vs. State

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of Punjab needs to be followed in letter and spirit.

(v) Whether the case is of repetitive nature of offence or repetitive conviction which warrants death penalty.

(vi) Whether the ingredients of the alleged offence in the present case are so aggravating that they would attract a death sentence.

(vii) Whether it was not necessary to consider the circumstances in which the accused have grown to understand the cause for the commission of the offence i.e. mitigating circumstances.

50 **Submissions on Section 75 and section 376E of Indian Penal Code.**

The learned Counsel for the respondents has argued vehemently and demonstrated the analogy between section 75 of Indian Penal Code and section 376 of Indian Penal Code. However, this Court while deciding the Constitutional validity of section 367E of Indian Penal Code in Writ Petition No. 1181 of 2014 filed by the present respondent has held that -

"The principle of section 75 of IPC cannot be blindly

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adopted to a case under section 376E as they operate in different field. Section 75 restricts its applicability to chapter 12 and chapter 17 of IPC whereas chapter 16 which precedes chapter 17 was deliberately omitted from section 75 of IPC. Section 376E creates a new class of punishment for repeat offenders similar to section 31A of NDPS Act. These repeat offenders cannot fall under section 75 of IPC"

The learned Special Prosecutor. submits that the objections to the procedural aspects do not deserve any consideration. In fact, the judgment of this Court in Writ Petition No. 1181 of 2014 had made it amply clear that section 75 and section 376E of the Indian Penal Code operate in different field and that section 376E of Indian Penal Code is outside the ambit of section 75 of the Indian Penal Code.

The judgment of this Court in Writ petition No. 1181 of 2014 is not challenged before the Supreme Court by the respondents. Hence, the findings therein have attained finality. The learned Special PP submits that once the Writ court has held that section 376E of Indian Penal Code does not fall in the ambit of section 75 of Indian Penal Code, it is not necessary to take this aspect into consideration.

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51 Both section 75 and section 376E of Indian Penal Code provide enhanced punishment. Section 376E of Indian Penal Code reads as follows:

> *"376E. Punishment for repeat offenders.—Whoever has been previously convicted of an offence punishable under section 376 or section 376A or 1[section 376AB or section 376D or section 376DA or section 376DB,] and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.]"*

Section 75 of the Indian Penal Code reads thus :

> *[75. Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.—Whoever, having been convicted,—*
> *(a) by a Court in 2[India], of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, 3[***] 3[***] shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to 4[imprisonment for life], or to imprisonment of either description for a term which may extend to ten years.]*

52 The learned Counsel has placed reliance upon the judgment of the Apex Court in the case of:

(i) Sayeed Abdul Sayeed Imaam versus Emperor AIR 1926 Bombay 306.

(ii) Public Prosecutor Andhra versus Palapati Ramakishnaiah[4]

4 AIR 1955 Andhra 190

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AIR 1955 Andhra 190, wherein it was held that-

> "*The principle of section 75 is that if the previous sentence borne by the accused had no effect on it a more severe sentence should be awarded. But it does not follow as rigid and an inflexible rule that in all cases of previous conviction that an enhanced sentence should be awarded.*"

53 Implicit reliance is also placed on the judgment of the Supreme Court in the case of **Rajendra Pralhadrao Wasnik versus State of Maharashtra**[5]**,** wherein the Apex Court while dealing with section 376E Indian Penal Code has considered section 75 and section 376E of Indian Penal Code and has observed as follows :

> *"64. The history of the convict, including recidivism cannot, by itself, be a ground for awarding the death sentence. This needs some clarity. There could be a situation where a convict has previously committed an offence and has been convicted and sentenced for that offence. Thereafter, the convict commits a second offence for which he is convicted and sentence is required to be awarded. This does not pose any legal challenge or difficulty. But, there could also be a situation where a convict has committed an offence and is under trial for that offence. During the pendency of the trial he commits a*

5 **(2019) 12 SCC 460**

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> *second offence for which he is convicted and in which sentence is required to be awarded."*
>
> *65. Sections 54 of the Indian Evidence Act, 1872 prohibits the use of previous bad character evidence except when the convict himself chooses to lead evidence of his good character. The implication of this clearly is that the past adverse conduct of the convict ought not to be taken into consideration for the purposes of determining the quantum of sentence, except in specified circumstances."*

The Apex Court after considering the provisions under section 75 and section 376(E) of the Indian Penal Code and section 54 of the Indian Evidence Act has observed thus :

> *"70. It is worthwhile to note that the three provisions of law quoted above deal with instances where there is a prior conviction and do not deal with the pending trial of a case involving an offence. Therefore, while it is possible to grant an enhanced sentence, as provided by statute, for a recurrence of the same offence after conviction,* ***the possibility of granting an enhanced sentence where the statute is silent does not arise.*** *Consequently, it must be held that in terms of Section 54 of the Indian Evidence Act the antecedents of a convict are not relevant for the purposes of awarding a sentence, unless the convict gives evidence of his good character."*

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54 In view of the submissions advanced by the learned Counsel for the Respondents and after taking into consideration the procedure adopted by the trial court while conducting Sessions Case Nos. 846 of 2013 and 914 of 2013, we have noticed that the conviction in both the cases was recorded on the same day i.e. on 20th March, 2013, one after another, consecutively in succession. Both the convictions were on the same day and therefore, one would fail to understand which was the previous conviction. A highly pedantic approach was adopted by the trial court while considering that the conviction in Sessions Case No. 914 of 2013 amounts to previous conviction. The Special Prosecutor submitted the draft charge and the same was accepted. No time was lost in pronouncing the judgments of conviction in both cases.

55 The learned Special Prosecutor then submits that there could be one conviction after another and that by itself would amount to previous conviction. The learned Special P.P. submits that strictly speaking, time is not the essence to decide as to which was the previous conviction. All that is necessary, is the fact that one conviction is recorded before framing of charge under section 376E of

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the Indian Penal Code and hence, the learned trial court is justified in pronouncing conviction for offences punishable under section 376D, 120B, 377, 354-A(iii), 354(B), 341, 342, 323, 506(II), 201of Indian Penal Code and section 67 of Information Technology Act, 2000 in Sessions Case Nos. 914 of 2013 and 846 of 2013. The length of time cannot be taken into consideration between two convictions.

56 In this context, we would once again place reliance upon the observations of the Apex Court in the case of ***Rajendra Wasnik(cited Supra).*** The Apex Court has observed thus :

> *"79. It is therefore quite clear from the various decisions placed before us that the mere pendency of one or more criminal cases against a convict cannot be a factor for consideration while awarding a sentence. Not only is it statutorily impermissible (except in some cases) but even otherwise it violates the fundamental presumption of innocence – a human right - that everyone is entitled to.*
>
> *80. Insofar as the present case is concerned, it has come on record that there are two cases pending against the appellant for similar offences. Both these were pending trial. Notwithstanding this, the Trial Judge took this into account as a circumstance against the appellant. It would have been, in our opinion, far more appropriate for the*

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Sessions Judge to have waited, if he thought it necessary to take the pendency of these cases into consideration, for the trials to be concluded. For ought we know, the two cases might have been foisted upon the appellant and he might have otherwise been proved not guilty.

81. We may generally mention, in conclusion, that there is really no reason for the Trial Judge to be in haste in awarding a sentence in a case where he might be considering death penalty on the ground that any other alternative option is unquestionably foreclosed. The convict would in any case remain in custody for a fairly long time since the minimum punishment awarded would be imprisonment for life. Therefore, a Trial Judge can take his time and sentence the convict after giving adequate opportunity for the prosecution as well as for the defence to produce material as postulated in Bachan Singh so that the possibility of awarding life sentence is open to the Trial Judge as against the death sentence. It must be appreciated that a sentence of death should be awarded only in the rarest of rare cases, only if an alternative option is unquestionably foreclosed and only after full consideration of all factors keeping in mind that a sentence of death is irrevocable and irretrievable upon execution. It should always be remembered that while the crime is important, the criminal is equally important insofar as the sentencing process is concerned. In other words, courts must "make assurance double sure'."

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57 Both the cases were tried by the same judge. The Special Prosecutor and the Counsel for the accused were also the same and therefore, according to the learned Counsel, the learned Sessions judge was fully aware that the accused are being tried for a similar offence in a parallel case and therefore, an adverse finding would follow. As observed in the case of ***Rajendra Pralahadrao Wasnik (cited supra)*** the accused could have been tried in the said cases one after another. In any event, the accused would be undergoing imprisonment for life, which would be for the rest of their life. The accused were taken by surprise, when a proposal for addition of charge was made. In the facts of the case, there was no scope to place on record the mitigating circumstances.

58 There is no doubt that the golden rule of interpretation is that the words of Statute must prima facie, be given their ordinary meaning. It would be incumbent upon the court to give effect to the language of the Statute, which makes the intention of the legislature plain and unambiguous. It would be necessary to take into consideration the grammatical meaning of the words. In the course of interpretation of a Statute, it would be necessary to give their legal

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meaning and not merely grammatical meaning. It would be benevolent to place reliance upon the **Black's Law Dictionary**. Lord Wensley Dale stated the rule of interpretation as follows :

> "*in construing wills and indeed statute and all written instrument the grammatical and ordinary sense of the word is adhered to unless that would lead to some absurdity of some repugnance or inconsistency with the rest of the instrument in case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency but no further.*"

In other words, there is no scope to depart from the natural and ordinary meaning of the word unless the legal context requires a different meaning. In a judicial proceeding, the courts should refrain from giving a liberal construction to the rules of law, but shall adhere to grammatical meaning of the words in the Statute. All this has to be read in the context of present case. In order to follow a rule of law, the court must necessarily seek to apply the golden rule of construction, which means that the court should read the statutory language grammatically and terminologically in an ordinary sense without omission, subtraction or addition. It would be beneficial to read the words as defined in **Black's Law Dictionary**.

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The Black's law Dictionary defines -

(i) "Repeat offender" as a person who has been convicted for a crime more than once.

(ii) "Subsequent": (of an action, event) occurring later, coming after something else.

(iii) "Conviction": the act or processes of **judicially** finding someone guilty of crime, the state of having been proved guilty a strong belief or opinion.

As per the **Oxford Dictionary,** the word "previous" means,

"Existing or occurring before in time or order."

"Previous conviction" is understood as a criminal record.

59 In the above premises, 376E of Indian Penal Code was brought on the Statute as a mode of enhanced punishment, to be inflicted on a person, who had been convicted for a similar crime more than once. In the facts of the present case, it would be appreciated ,if one trial would precede another. In criminal law, "a prior conviction is when a person is being tried for a crime but their record indicates that they have been convicted and sentenced for a previous crime." However, liberally considered, previous conviction may imply any type of criminal violation in the past, before being tried in the subsequent offence. The word "subsequent" by itself would mean "occurring later,

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coming after something else". The Oxford dictionary defines word "subsequent" as after a particular thing has happened; afterwards, whereas the word "previous" is defined as "existing or occurring before in time."

60 In the present case, Sessions Case Nos. 846 and 914 of 2013 were tried simultaneously. The evidence of the survivor in Sessions Case No. 846 of 2013 commenced on 17/10/2013 and was concluded on 18/10/2013, whereas in Sessions Case No. 914 of 2013 the recording of evidence of the survivor commenced on 30/10/2013 and concluded on 31/10/2013. Thereafter, evidence of other witnesses was recorded and conviction in both the cases for offence under section 376D Indian Penal Code and other offences was pronounced in both cases on 20/3/2014.

61 With the help of the learned Counsel for the respondents as well as learned Special P.P., we have gone through the roznama to appreciate the submissions of the learned Counsel for the respondents that there was no time and opportunity to the accused to place before the court the mitigating circumstances on the point of imposition of

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sentence. It is true that the draft charge for addition of section 376E of the Indian Penal Code was submitted only after recording of conviction in both the cases. The records would show as follows :

Points	Sessions Case No.846 of 2013	Sessions Case No. 914 of 2013
Framing of charge	11/10/2013	18/10/2013
Recording of Evidence	14/10/2013	21/10/2013
Recording of victim's evidence	17/10/2013 18/10/2013	30/10/2013 31/10/2013
Judgment of conviction under section 376D pronounced on	20/3/2014	20/3/2014
Draft charge under section 376 E of the Indian Penal Code	21/3/2014	
Charge framed on	24/3/2014	
Evidence of P.W. 45 Mr. Nikumbhe, IO in Sessions Case No. 914 of 2013.	25/3/2014	
P.W. 46 produced certified copy of judgment in Sessions case No. 914 of 2013. P.W. 47 produced conviction warrant. Statement of all 3 accused under section 313 CR.P.C. was recorded. Application to recall	1/4/2014	

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P.W. 2, 3 and 4 allowed. Evidence to be restricted to previous conviction and not any other aspect.		
Evidence of P.W. 32, 37 AND 44 commenced and concluded in the absence of the accused.	2/4/2014	
The Court gives a finding that the prosecution has succeeded in proving additional charge under section 376E of Indian Penal Code.	3/4/2014	
Evidence of D.W. 4 mother of accused No. 1 was recorded. Evidence of DW 5 mother of accused No. 4 was recorded. Application by advocate for accused No. 1 and 4 for withdrawing from the proceedings was taken on record. Advocate for accused Nos. 1, 3 and 4 declined to make any submissions or advance arguments on the quantum of	4/4/2014	

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sentence. **Accused Nos. 1, 3 and 4 are convicted for the offence punishable under section 376E of the Indian Penal Code and each of them be hanged by the neck till they are dead.**		

In view of the above roznama, it is submitted by the learned Counsel for the respondents that the chronology of the events by itself would indicate that the trial is conducted hastily.

62 The next consideration before the Court is as to whether the accused were given any time to present before the court the mitigating circumstances and therefore, the same has resulted in violation of section 235(2) of Code of Criminal Procedure, 1973. In the case of **Allaudin Miya verses State of Bihar**[6], it is observed that -

> *"The choice of sentence has to be made after following the procedure set out in subsection 2 of section 235 of Cr. P.C. That subsection satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time, helps the court to choose the sentence to*

6 **1989 3 SCC 5**

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be awarded. The provision is mandatory and should not be treated as a mere formality. The choice has to be made after giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc. before the court, otherwise the court's decision would be vulnerable. In many cases, a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision; a fortiorari, therefore, the principle of fair play must apply with greater vigour in the case of the former than the later. An administrative decision having civil consequences if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of subsection 2 of section 235 of the Code of Criminal Procedure, 1973 in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. As a general rule the trial court should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender."

63 In the case of **Allaudin Miya(Cited supra),** the accused were

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sentenced to death penalty, but after considering judgment in the case of **Bachan Sing v/s. State of Punjab**[7] **and Machhi Singh v/s State of Punjab**[8] and in view of the violation of section 235 (2) of Code of Criminal Procedure, 1973, the death sentence was set aside and the same was remitted to imprisonment for life.

64 In the case of **Bachan Singh (cited supra),** the Court has emphasized the need for principle of sentencing and had further held that "special reasons" are required to be recorded while awarding death sentence means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. It was necessary to consider the aggravating circumstances and the mitigating circumstances before awarding death sentence.

65 In the case of **Bachan Singh(cited supra),** the Apex Court has issued guidelines and courts are specifically guided to draw a balance-sheet of aggravating and mitigating circumstances and in doing so, the mitigating circumstances have to be accorded full

7 (1980) 2 SCC 684.

8 AIR 1983 SC 957.

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weightage and just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

66 In the present case, the trial court was of the opinion that the evidence of D.W. 4 and D.W.5 is sufficient to present the mitigating circumstances. The accused were neither guided by their lawyers as they had withdrawn from the case on the date of hearing on the point of sentence, since the request for engaging senior counsel was turned down. The sentence of death penalty was pronounced on the same day, on which the evidence of D.W. 4 and D.W. 5 was recorded. It is observed by the trial court that the submissions made by the accused in person and the evidence of their mother are sufficient to bring on record the mitigating circumstances. The accused in fact, had submitted that they are stricken by poverty and hence, taking into consideration their young age, lenient view be taken. This cannot be treated as putting forth mitigating circumstances.

67 It is vehemently submitted that an effective hearing under section 235(2) of Code of Criminal Procedure, 1973 is the procedural pathway to arrive at an informed and fair articulation of such special

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reasons under section 354(3) of Code of Criminal Procedure, 1973 and therefore, the special reasons accorded for awarding the sentence of death and consequently, the death sentence itself are vitiated in the absence of an effective hearing. According to learned Special Prosecutor, the advocates had sought discharge since their application seeking permission to engage a senior counsel was rejected. However, the accused were heard and on the same day, the sentence was passed and the said exercise had passed the test of section 235(2) of Code of Criminal Procedure, 1973. The trial court has held that the evidence on record was sufficient to record mitigating circumstances. The trial court has observed as follows :

> "*The special P.P. has led exhaustive submission on sentence and has thrown light on all perspectives, those in favour of prosecution and also those which the defense could have shown in their favour.*"

68 It is true that on 4/4/2014 the advocates representing the accused filed an application seeking permission to examine the mother of accused No. 1 and accused No. 4. Both the witnesses were present in the court, they were taken in the box and their evidence was recorded. All that they said was their economic condition was such that their

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survival is hand to mouth, the mother was working as a housemaid and they had no time to look after their children and that the accused had barely attended primary school. The question is whether this would amount to mitigating circumstances. D.W. 4 and D.W. 5 had no time, even to consult the advocates and they were taken by surprise. The sentence of death penalty was pronounced on the same day.

69 Section 376(E) of Indian Penal Code is an enabling provision to award death penalty only to a "repeat offender" and therefore, before framing the charge under section 376E of the Indian Penal Code, it was necessary to determine as to whether the accused are "repeat offenders". Since the word used is "subsequently convicted of an offence punishable under section 376 or section 376A or section 376AB or section 376D or section 376DA or section 376DB of Indian Penal Code". Moreover, two options are given for exercising judicial discretion and that is punishment of imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or **with death.** The learned trial court has rightly observed that the act of the accused was barbaric, heinous and was committed with exceptional depravity and in a diabolic manner. **However, what was at**

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trial was not the crime, but the criminal. The learned trial judge has considered the antecedents of the accused and has observed that they had committed theft and were also tried by the juvenile court and that they could have improved their conduct, after they were already held guilty by Juvenile Justice Board twice each for the offences of the theft and were released on the bond of good behaviour. As far as accused No. 3 is concerned, it is observed that he has committed two offences of gang-rape before the expiry of the bond, for which he is being tried in Sessions Case Nos. 846 and 914 of 2013. The same is the case with Accused No. 1.

70 It is necessary to note that as per section 19 of the Juvenile Justice Act, a juvenile, who has committed an offence and has been dealt with under the provisions of this act shall not suffer disqualification, if any, attaching to a conviction of an offence of such law and the records of such convictions are to be removed after the expiry of the period of appeal. In any case, section 54 of the Indian Evidence Act reads as follows :

> *"54. Previous bad character not relevant, except in reply.—In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he*

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has a good character, in which case it becomes relevant. Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue. Explanation 2.—A previous conviction is relevant as evidence of bad character.]"

71 In the present case, the conviction is by juvenile justice board and the same cannot be taken into consideration. The learned trial court has fallen in error to observe that the accused had not learnt a lesson after they were convicted by the juvenile justice board. That, at that stage, the accused were juvenile in conflict with law and in any case, the said record ought not to have been taken into consideration in view of section 19 of the Juvenile Justice Act.

72 In the present case, it is apparent on the face of the record that the Court has only considered the aggravating circumstances.

73 The learned counsel for the Respondents further submits that to fall within the ambit of section 376E of the Indian Penal Code, the accused needs to be previously convicted under section 376, 376A or 376D of Indian Penal Code. It is reiterated that in the present case, both convictions are just 30 minutes apart. On 21st March 2014

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conviction was recorded in Sessions Case No. 914 of 2013 and the charge under section 376E of Indian Penal Code was framed on 24/3/2014. The learned counsel has drawn the attention of this Court to Form 32 (III) Schedule II of Code of Criminal Procedure, 1973, which refers to previous conviction. The learned counsel submits that the court has not followed the mandatory provision of procedural law.

74 It is submitted that the learned Session Judge was oblivious to the fact that section 376E of Indian Penal Code, as far as the present case is concerned, made the respondents vulnerable to death sentence for the first time after they were convicted for substantive offences on the same day. They could not demonstrate the mitigating circumstances. It is also submitted by the learned counsel for the respondents that as far as the procedural aspect is concerned, the learned trial court has made the trial just a formality as if it was an open and shut case.

75 Per contra, learned Special Prosecutor has placed reliance upon catena of judgments of Supreme Court to emphasis that there is no scope of interpretation of section 376E Indian Penal Code, and the

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plain meaning of the language has to be taken into consideration.

76 The learned Counsel has emphatically submitted that the trial Court has only considered aggravating circumstances and brutality of the crime, but has not considered the mitigating circumstances.

77 It is true that we are guided by the Supreme Court in the case of **Bachan Singh(cited supra),** where the Court has held that the sentencing policy must be principled sentencing policy. That while awarding death penalty the court shall assign "special reasons", which would imply "exceptional reasons" after considering the aggravating and mitigating circumstances. It would also be necessary to consider and analyse the aggravating and mitigating circumstances from the perspective of both the crime and the criminal.

78 Some of the aggravating and mitigating circumstances indicated in **Bachan Singh(supra)** are as follows:

> "*Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion:*
> *(a) if the murder has been committed after previous planning*

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and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if. the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed –

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

"Mitigating circumstances:- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. It the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused

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does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct."

79 At this stage, it would be apt to rely on the judgment of the Supreme Court in the case of **Santa Sing v/s. State of Punjab**[9] **wherein it is observed as follows:**

2. ……This provision is clear and explicit and does not admit of any doubt. It requires that in every trial before a court of sessions, there must first be a decision as to the guilt of the accused. The court must, in the first instance, deliver a judgment convicting or acquitting the accused. If the accused is acquitted, no further question arises. But if he is convicted, then ***the court has to "hear the accused on the question of sentence, and then pass sentence on him according to law".*** *When a judgment is rendered convicting the accused, he is, at that stage, to be given an opportunity to be heard in regard to the sentence and it is only after 4 (1976) 4 SCC 190 hearing him that the court can proceed to pass the sentence.*

9 AIR 1956 SC 526

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3. This new provision in Section 235(2) is in consonance with the modern trends in penology and sentencing procedures. There was no such provision in the old Code. Under the old Code, whatever the accused wished to submit in regard to the sentence had to be stated by him before the arguments concluded and the judgment was delivered. There was no separate stage for being heard in regard to sentence. The accused had to produce material and make his submissions in regard to sentence on the assumption that he was ultimately going to be convicted. This was most unsatisfactory. The legislature, therefore, decided that it is only when the accused is convicted that the question of sentence should come up for consideration and at that stage, an opportunity should be given to the accused to be heard in regard to the sentence. Moreover, it was realised that sentencing is an important stage in the process of administration of criminal justice- as important as the adjudication of guilt-and it should not be consigned to a subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the court.

…..The reason is that a proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances-extenuating or aggravating- of the offence, the prior criminal record, if any, of the offender, the age of

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the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of 'the offender, the prospects for the rehabilitation of the offender, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court in deciding upon the appropriate sentence, and, therefore, the legislature felt that, for this purpose, a separate stage should be provided after conviction when the court can hear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused.

4. ....The hearing on the question of sentence, would be rendered devoid of all meaning and content and it would become an idle formality, if it were confined merely to hearing oral submissions without any opportunity being given to the parties and particularly to the accused, to produce material in regard to various factors bearing on the question of sentence, and if necessary, to lead evidence for the purpose of placing such material before the court.

In the case of **Dagadu & Ors. v/s. State of Maharashtra**[10], the Apex

10 (1977) 3 SCC 68

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Court has observed as follows :

> *"79. … The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence."*

80 In view of the guiding principles in the case of **Santa Singh(supra) and Dagadu (Supra)** this Court has accepted the affidavit filed by the advocate for the respondents in order to give an opportunity to the convicts to file their say. The interim application is 266 of 2019. The respondents have placed on record the affidavits of the following expert witnesses:

(i) Dr. Ashis Nandy, Honorary Professor, Centre for the Study of Developing Societies, New Delhi.

(ii) Dr. Sanjay Srivastav, Professor Dept. of Sociology, University of Delhi, Institute of Economic Growth.

(iii) Dr. Amita Bhide, Dean, School of Habitat Studies, Tata Institute of Social Sciences, Mumbai.

(iv) Dr. Sanjeev Jain, Professor, Dept. of Psychiratry, Institute of Mental Health and Neuro Sciences (NIMHANS).

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The above named experts after reading the judgment of the trial court, appreciating the evidence of the survivor as well as transcript of interviews with the respondents have analysed the lived experiences of the three respondents, the value system of the world, they have grown up in an in its consequent behaviourial and psychological impact. All these factors would determine their virtues and values in life. Hence, an opportunity was given by this court to place mitigating circumstances on record.

81 Per contra learned Special PP has submitted as follows:

1) The counsel for the respondents at the appellate stage cannot place on record the expert evidence to demonstrate the mitigating circumstances as it would not be admissible nor permissible to set the clock back.

2) Sufficient opportunity was given to the accused to put forth the mitigating circumstances before the court.

3) Whether the rights of the accused prevail over the rights of the victim.

4) That section 376E of Indian Penal Code has been enacted

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as a deterrent since the cases of sexual violence are on the rise.

5) The accused had no remorse and therefore they have committed the repeat offence punishable under section 376D of Indian Penal Code on 22nd August of 2013.

6) The lapses on the part of the investigation and irregularities in procedure in conducting the trial would not entitle any benefit to the accused. Hence, no interference is warranted rather any interference with the judgment of the trail court would amount social injustice and injustice to the victim.

7) The learned Special PP has drawn the attention of the court to the observation of the High Court while rejecting the application of respondent for seeking transfer or stay to the trial and further observation of the high court that the trial should be concluded as per the schedule.

82 We have no doubt that despite all this, it cannot be said that they would have a right to offend the honour and chastity of a woman since it is not her fault that they grew up in such circumstances. At the same time, what is being tried before us is not the crime but the criminal who is imposed with a death penalty and

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the question before us is, as to **whether as constitutional court it would be proper on our part to eliminate or extinguish the flame of life of the convicts without following 'due procedure established by law'. The answer would have to be "emphatic NO". We cannot allow our emotions to outweigh the principles of criminal jurisprudence and the procedural mandate of the Statute.**

83 That after having read the judgment of the Trial Court in Sessions Case 846/13 and 914/13, the evidence of the survivor in the present case (P.W. 6) as well as transcripts of interviews with the Respondents, the above-named experts have analysed the lived experiences of the three Respondents, the value systems of the world they have grown up in and its consequent behavioural and psychological impact. Such a rich analysis and understanding of the socio-economic and psychological background of the Respondents persons bears great significance in determining the quantum of sentence to be imposed on them and their potential to reform.

84 The learned trial Court has observed as follows :

"*It is pertinent to note that though Justice Varma Committee has not suggested the penalty of death for*

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offence of rape simplicitor, it has approved the same in the case of extreme brutality, like when the victim is murdered or reduced to vegetative stage during the commission of the offence or in case of repeat offenders, meaning thereby for those offenders who are 'previously convicted'."

85 We need to observe that this would be an erroneous appreciation of **Justice J.S. Varma Committee report**, as Justice Varma Committee after extensive deliberation refused to extend the death sentence to any form of sexual assault, except when the accompanying violence leads to death or causes the victim to lapse into permanent vegetative state. The recommendations of the committee are as follows:

"*37. Thus, there is a strong case which is made out before us that in India in the context of international law as well as the law as explained in the American Courts, it would be a regressive step to introduce death penalty for rape even where such punishment is restricted to the rarest of rare cases. It is also stated that there is considerable evidence that the deterrent effect of death penalty on serious crimes is actually a myth. According to the Working Group on Human Rights, the murder rate has declined consistently in India over the last 20 years despite the slowdown in the execution of death sentences since*

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1980. Hence we do take note of the argument that introduction of death penalty for rape may not have a deterrent effect.

However, we have enhanced the punishment to mean the remainder of life.

23. In our opinion, such situations must be treated differently because the concerted effort to rape and to inflict violence may disclose an intention deserving an enhanced punishment. We have therefore recommended that a specific provision, namely, Section 376(3) should be inserted in the Indian Penal Code to deal with the offence of "rape followed by death or resulting in a Persistent Vegetative State".

24. In our considered view, taking into account the views expressed on the subject by an overwhelming majority of scholars, leaders of women's' organisations, and other stakeholders, there is a strong submission that the seeking of death penalty would be a regressive step in the field of sentencing and reformation. We, having bestowed considerable thought on the subject, and having provided for enhanced sentences (short of death) in respect of the above-noted aggravated forms of sexual assault, in the larger interests of society, and having regard to the current thinking in favour of abolition of the death penalty, and also to avoid the argument of any sentencing arbitrariness, ***we are not inclined to recommend the death penalty.***

25. We must therefore end this topic with a note of

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caution. Undoubtedly, rape deserves serious punishment. It is a highly reprehensible crime in the moral sense, and demonstrates a total contempt for the personal integrity and autonomy of the victim. Short of homicide, it is the "ultimate violation of self." It is also a violent crime because it normally involves force or the threat of force or intimidation to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the victim and can also inflict mental and psychological damage. We have no doubt that it undermines the communicating sense of security and there is public injury. However, we believe that such offences need to be graded. There are instances where the victim/ survivor is still in a position from which she can, with some support from society, overcome the trauma and lead a normal life. In other words, we do not say that such a situation is less morally depraved, but the degree of injury to the person may be much less and does not warrant punishment with death."

86 Per contra, the Special Prosecutor has placed reliance upon catena of judgments of Supreme Court and has emphasised that the facts of the present case warranted simultaneous trial. That Crime No. 235 of 2013 was registered during the pendency of investigation in crime no 244 of 2013. That the accused has failed to show that there

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was any prejudice caused to them nay, any miscarriage of justice.

87 The learned Special Prosecutor has further stated that the learned Counsel for the respondents has without any sound reason raised several objections to the procedure adopted by the trial court by ignoring the seriousness of the case, the gravity of the offence and the gravamen of the allegations levelled against the accused, coupled with the fact that the said incident has shocked the social conscience of the society. And hence the same need not be taken into consideration.

88 The learned Special Prosecutor has submitted that at this stage, that there is no scope for interpretation of Section 376E of the Indian Penal Code.

89 According to the learned counsel, the title of the section 376E of Indian Penal Code specifically contemplates 'punishment for a repeat offender'. The fact that the word used is 'repeat', it would necessarily mean that the conviction should precede the second offence. In the present context, it is stated that two judgments of conviction were given simultaneously, therefore it cannot be said that the accused were repeat offender and therefore, the conviction ought

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to have been under section 376D of the Indian Penal Code. That by no stretch of imagination, it can be said that they were repeat offenders, moreover, the earlier offence had not been reported till the second offence was registered and law was set in motion. It is submitted that **Justice Verma Committee** suggested to award enhanced punishment for those offenders, who had no remorse even after first conviction and were not amenable to reformation and therefore, the word used in it is "subsequent".

90 According to Learned Special Prosecutor, in the eventuality that the legislature intended to mean commission of an offence after conviction, the provision to be read as "previous offence" and not "previous conviction". Therefore, according to the learned Special Prosecutor, it is a duty of the court to follow the golden rule of law and not venture into giving an interpretation dehors the intention of the legislature.

91 The Special PP has submitted that the words used in section 376E of Indian Penal Code "has been" connotes subsequent conviction. All that is required is finding of guilt. Time is not the

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essence of the occurrence of the incident or recording of conviction. It is submitted that section 376E of Indian Penal Code is not a new offence and therefore, all that is required is that, there should be two convictions, that is "conviction after conviction". Any other interpretation would be an absurdity and would render the provision into nullity. That 'previous conviction' is first part and 'subsequently' is second part of the said section. Conviction is only finding of guilt and finding the person guilty on the second occasion attracts the provision under section 376E. There is no ambiguity in reading the intention of the legislature and all that is discussed by the learned trial court.

92 The last issue on sentencing to be considered should be the policy of sentencing a convict. It would be just to place reliance upon the judgment of the Apex Court in the case of **Mohd. Mannan @ Abdul Mannan v/s. State of Bihar**[11]. The Apex Court observed thus :

> *"72. ……. In deciding whether a case falls within the category of the rarest of rare, the brutality, and/or the gruesome and/or heinous nature of the crime is not the sole criterion. It is not just the crime which the Court is to take into consideration, but also the criminal, the state of his mind, his socio-economic background, etc. Awarding death sentence is an exception, and life imprisonment is the rule.*

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> *73. Therefore, before imposing the extreme penalty of death sentence, the Court would have to satisfy itself that death sentence is imperative, as otherwise the convict would be a threat to society, and that there is no possibility of reform or rehabilitation of the convict, after giving the convict an effective, meaningful, real opportunity of hearing on the question of sentence, by producing materials.*
>
> *75. The legal assistance provided to the convict at every stage including the stage of hearing on the question of sentence has to be effective and even if the accused has remained silent, the Court would be obliged and duty bound to elicit relevant factors. Opportunity should have been given to the convict to bring on record mitigating circumstances for reduction of the sentence and a balance struck between the aggravating and the mitigating circumstance."*

In the case of **Mohd. Mannan(supra)** the sentence of death penalty was commuted to life imprisonment.

93 **The submission that the learned judge had hastily conducted the trials in Sessions Case Nos. 846 of 2013 and 914 of 2013 simultaneously and framing of the charge under section 376E of the Indian Penal Code after recording conviction in both cases on the same day needs to be considered in view of the judgment of the Supreme Court in the case of *Rajendra Pralhadrao Wasnik (cited supra).*** The Apex Court has observed thus :

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> *"73. Insofar as the present case is concerned it has come on record that there are two cases pending against the appellant for similar offences. Both these were pending trial. Notwithstanding, this the trial judge took this into account as a circumstance against the appellant it would have been, in our opinion, far more appropriate for the sessions judge to have waited, if he thought it necessary to take the pendency of these cases into consideration, for the trials to be concluded. For ought we know, the two cases might have been foisted upon the appellant and he might have otherwise been proved not guilty.*
>
> *75. We may generally mention in conclusion that there is really no reason for the trial judge to be in haste in awarding a sentence in a case where he might be considering death penalty on the ground that any other alternative option is unquestionably foreclose. The convict was in any case to remain in custody for a fairly long time since the minimum punishment awarded would be imprisonment for life."*

94 Section 376(E) of Indian Penal Code is not an offence by itself. But it is an enhanced punishment for a repeat offender. The specific words used in the section are "previous" and "subsequent" and the said words have to be read in reference to context.

95 In order to emphasise that the accused may not be repeat offenders on the basis of the investigation in Crime No. 253 of 2013, it is submitted by the learned counsel of the respondents that upon registration of the offence in Crime No. 253 of 2013, the photographs

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of accused arrested in Crime No. 244 of 2013 were shown to the survivor. The respondents herein were identified besides accused Ashfaq, the accused in Sessions Case No. 914 of 2013. The photographs of the arrested accused were published in newspapers like DNA as well as Bombay Mirror and the electronic media. A presumption was drawn by the investigating agency that the present respondents must have been the molesters in Crime No. 253 of 2013. It is submitted that in fact, there were many such gangs operating in the desolate premises of Shakti Mills, but a shortcut is adopted by the investigating agency and therefore, they have been treated as "repeat offenders" even before the commencement of the trial in Sessions Case No. 846 of 2013. The very fact that the photos of the accused were shown to the survivor, the significance of Test Identification Parade as well as the identification before the court is lost. It is further submitted that the incident in Crime No. 253 of 2013 had occurred about 8.30 p.m. Light was not sufficient to identify the accused and therefore, upon seeing the photographs the survivor presumed that they may be the same molesters. This could be a case of mistaken identity. Moreover, the FIR itself was lodged after one month and three days. It is submitted that it is doubtful as to whether the original sighting of

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the accused was conducive to prosecution. There is no sufficient indication that they could identify facial feature of the molesters. The place is a playground for many gangs and anti-social elements. At the Test Identification Parade, the victim knew the names of the accused and hence, the identification in court loses its significance.

96 The learned counsel has placed reliance upon the judgment of the supreme court **Bolavaram P. N. Reddy and ors versus State of A.P.**[12]**,** wherein it is held that :-

> *"The credibility of the evidence relating to the identification depends largely on the opportunity the witness had to observe the assailant when the crime was committed and memorise the impression."*

97 The Special Prosecutor has submitted as follows :

(i) The photographs and names of the accused were not given to the print or electronic media by the police. (ii) The survivor had sufficient opportunity to see the facial features of the accused since there was light in the adjoining building as well as light from the passing train.

(iii) In addition, the victim could see the face of the molester in the lights of the cell phone.

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(iv) The incident was an unforgettable nightmare and the delay of one month in lodging the FIR would not erase the memory of such a ghastly incident and the molesters.

98 There are statutory safeguards, which are mandatory and directory in nature to try a criminal, but it is for the court to impart justice to the victim also and therefore, any and every irregularity cannot be said to occasion failure of Justice. In this case i.e., in Crime No. 244 of 2013 the immediate steps taken by the investigating agency need to be appreciated. They have called the sketch artist to the hospital immediately. On 23rd August, 2013 at 6.30 a.m. the recording of scene of offence panchnama commenced and it continued till 9.30 a.m. The juvenile in conflict with law was apprehended by Agripada Police Station, whose interrogation led to the arrest of the other accused by 24th August, 2013. The survivor was given immediate medical aid, which gave her some relief from her physical pain. It can be said in the facts of the case that the courage of Miss X to set the law into motion gave courage to Miss Y who had gone through same ordeal in the same premises 22 days prior to the registration of Crime No. 244 of 2013 to set the law in motion. Miss Y was also entitled to speedy

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justice.

99 In view of the ever-rising crime rate of sexual offences against women, it was intended to create a deterrence amongst the like-minded offenses. The investigating agency had not left any stone unturned in the investigation in Crime No. 244 of 2013 and investigation was in a right direction, which would aid the prosecution to bring home the guilt of the accused.

100 The learned Special Prosecutor has placed reliance upon the judgment of Supreme Court in the case of **Raja vs State by the Inspector of Police**[13], wherein it is observed thus:-

> *"What is important is the identification of the court and if such identification is otherwise found by the court to be truthful and reliable such substantive evidence can be relied upon by the court"*

101 It needs to be noted at threshold that there is no doubt that the incident as narrated by the survivor on 22nd August, 2013 had occurred in the backdrop and in the manner in which it was narrated. The courage of the survivor needs to be appreciated. That she had put

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at stake her reputation, her identity and the embarrassment to herself and her family and all concerned and the risk of having to face social obloquy, when she set the law into motion.

102 The **J. S. Verma Committee** was constituted for the purpose of ensuring a safe environment for women in country, thus preventing the recurrence of sexual violence has carved out a new section that is section 376E. The Law Committee has recommended enactment of Section 376E of Indian Penal Code and recommended punishment with imprisonment for life which means the rest of the person's natural life. However, the legislature in his wisdom and in pursuit of guaranteeing a life of dignity and honour to women and to improve the social norms for realising the constitutional promise of equality in all sphere for the women folk has contemplated death sentence. It was also necessary to give freedom to women to work in ones chosen profession or trade. The legislature upon realising its accountability and responsibility to guarantee to the women a safe environment and to eliminate repeat offenders has felt it appropriate to award death sentence in cases where the accused is previously convicted of offences punishable under section 376(1) or 376(2) or 376(3) or 376(A) or

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376B(1) or 376B(2) or 376C or 376D of Indian Penal Code and is subsequently convicted of an offence punishable under any of these sections with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life **or** death.

103 It could be said by inference that their existence was not conducive to a welfare society. In view of the rise in sexual violence against women in the society, the submission that section 376E of Indian Penal Code must be read harmoniously and in consonance with section 75 of Indian Penal Code cannot be countenanced.

104 It is true that the key words used in section 211(7) of Code of Criminal Procedure, 1973 are "previous conviction" and "subsequent offence" meaning thereby that a charge for enhanced punishment would only be framed if a previous conviction is in force on the date when the charge for enhanced punishment is framed. It would be in the facts of each case as to whether the offence is committed after previous conviction or not. As held in the case of **Rajendra Wasnik(cited supra)**, hypothetically there could be a case in which an accused is punished for life imprisonment and is undergoing a

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sentence during the pendency of some other case for a similar offence. In such cases, it would not be necessary to take a pedantic approach that the offence ought to have been committed after previous conviction. It was not necessary to conduct the trial simultaneously. The time span in pronouncing both the judgment was hardly 30 minutes. In any case, the punishment contemplated for offence punishable under section 376D of Indian Penal Code is not less than twenty years, but could be life imprisonment that is imprisonment for the remainder of that person's natural life.

105 The submission that the accused were being represented by incompetent lawyers cannot be taken into consideration for the reason that competency or incompetency of the lawyer pleading for the accused does not always fall for consideration within the domain of the court, since the pleaders are the choice of the accused. It may fall for consideration of the court only when the advocate is appointed through legal aid. It is true that when the said lawyers representing the accused had withdrawn from the case, the court could have given them legal aid in view of the complexity of the case. In any case, the lawyers were praying for appointing a senior counsel and the said

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prayer was rejected in limine in order to expedite the trial.

106 **As far as prejudice to the accused is concerned, it is submitted that the lawyers representing the accused were inexperienced and moreover, every objection raised by them was rejected in limine. The learned Special Prosecutor was asking leading questions to the witnesses. The objections raised by the counsel for the respondents were turned down. It was incumbent and expected from the court that the procedural law ought to be followed without expecting the counsel to raise objection to show that a prejudice is caused. It is the duty of the court to take abundant caution that there are no lapses in following the procedural law.**

107 That the respondent Nos. 1 to 3 had filed an application below Exh. 261 to examine 16 prosecution witness. However, leave was granted to re-examine only one witness. Similarly, respondent No. 2 filed an application seeking to recall P.W. 32, 37, 44 and 9. However the learned Session judge granted leave to re-examine P.W. 32, 37 and 44 only on the limited point of proving the previous conviction and not on any other aspect, holding therein that the witnesses could have no

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relevance to prove the previous conviction. As if the learned Session judge believed that the recalling of witnesses after addition of a charge under section 376E of Indian Penal Code can only be limited to the sole purpose of proving or disproving the previous conviction.

108 In the backdrop of the fact that the accused No. 1 calling upon the co-accused by saying that “a prey has come” or a reference to a woman as “prey” and then calling upon each other to accosting the prey is sufficient to hold that there was a conspiracy, which was soon accomplished by all. The use of the code word “prey” and understood by the co-accused would clearly establish that the said incident was not first of its kind to have committed by all the accused. Moreover, at least two of them had clearly told the survivor that she was not the first one and therefore, a charge under section 120B of Indian Penal Code was framed and they were convicted for the same.

10 It is settled criminal law that no person can be termed as a criminal unless found guilty of an offence. It is apparent that they did not get proper legal aid to assert their rights in order to bring the mitigating circumstances on record.

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110 In the case of **Machhi Singh (Cited Supra),** the Apex Court summarized the findings in **Bachan Singh's case (cited supra)** and observed as follows :

> *"'38. In this background the guidelines indicated in Bachan Singh case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case:*
>
> *(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.*
>
> *(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.*
>
> *(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.*
>
> *(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.*
>
> *39. In order to apply these guidelines inter alia the following questions may be asked and answered:*
>
> *(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?*
>
> *(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after*

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according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

111 In a case like the present one, the Court cannot ignore the fact that this incident had shocked the conscience of the society and there was public outcry. Every case of rape is a heinous offence. The damage done to the victim far outweighs the public conscience. A rape victim does not suffer just physical injury, but what is affected is her mental health and stability in life. Rape tantamounts to a serious blow to the supreme honour and dignity of woman. It is a violation of human rights.

112 In any case, a Constitutional Court cannot award punishment by taking into consideration only the public outcry. A sentence of death is irrevocable and therefore, basic principle in sentencing policy would be *life imprisonment is the Rule and Death Penalty is an Exception.* It is our bounden duty to consider the case dispassionately. We cannot be oblivious of the "procedure established by law", however, such incidents shock the conscience of the Society at large. But that by itself does not entitle us to ignore "the procedure established by law."

113 While considering as to whether a trial or Judgment should be influenced by public outcry, we are guided by the Apex Court in the case of

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Santosh Kumar Satishbhushan Bariyar v/s. State of Maharashtra[14], wherein it is observed as follows:

> *"71. It has been observed, generally and more specifically in the context of death punishment, that sentencing is the biggest casualty in crimes of brutal and heinous nature. Our capital sentencing jurisprudence is thin in the sense that there is very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index. There may be other factors which may not have been recorded.*
>
> *72 We must also point out, in this context, that there is no consensus in the court on the use of "social necessity" as a sole justification in death punishment matters. The test which emanates from Bachan Singh (supra) in clear terms is that the courts must engage in an analysis of aggravating and mitigating circumstances with an open mind, relating both to crime and the criminal, irrespective of the gravity or nature of crime under consideration. A dispassionate analysis, on the aforementioned counts, is a must. The courts while adjudging on life and death must ensure that rigor and fairness are given primacy over sentiments and emotions."*

It is further observed that –

> ***"80 It is also to be pointed out that public opinion is difficult to fit in the rarest of rare matrix. People's perception of crime is neither an objective circumstance relating to crime nor to the criminal. Perception of public is extraneous to conviction as also sentencing, at least in capital sentencing according to the mandate of Bachan Singh (supra).***
>
> *81 Rarest of rare policy and legislative policy on death punishment may not be essentially tuned to public opinion. Even if presume that the general populace favours a liberal DP policy, although there is no evidence to this effect, we can not take note of it. We are governed by the dictum of Bachan Singh (supra) according to which life imprisonment is the rule and death*

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punishment is an exception.

82 We are also governed by the Constitution of India. Article 14 and 21 are constitutional safeguards and define the framework for state in its functions, including penal functions. They introduce values of institutional propriety, in terms of fairness, reasonableness and equal treatment challenge with respect to procedure to be invoked by the state in its dealings with people in various capacities, including as a convict. The position is, if the state is precariously placed to administer a policy within the confines of Article 21 and 14, it should be applied most sparingly. This view flows from Bachan Singh (supra) and it this light, we are afraid that Constitution does not permit us to take a re-look on the capital punishment policy and meet society's cry for justice through this instrument.

83 The fact that we are here dealing with safeguards entrenched in the Constitution should materially change the way we look for reasons while awarding the death punishment. The arguments which may be relevant for sentencing with respect to various other punishments may cease to apply in light of the constitutional safeguards which come into operation when the question relates to extinguishment of life. If there are two considerations, the one which has a constitutional origin shall be favoured."

114 While setting aside the sentence of death penalty, it may appear to the public at large that we play a counter majoritarian role. However, the Constitutional Courts are bound to take into consideration the judicial mandate not by considering just individual rights or the rights of the criminal, but to follow "the procedure established by law". At the cost of reiteration, we would observe that Section 376E of the Indian Penal Code is not a substantive offence, but is a punishment contemplated for repeat offenders under section 376D, 376DA, 376DB of Indian Penal Code. We would not

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take a pedantic approach to mean that it contemplates commission of an offence after the first conviction as under section 75 of the Indian Penal Code. But it would mean that the sentence of death penalty may be awarded in a case which is tried after the first conviction for a similar offence as in the case of **Rajendra Wasnik(cited supra).** There can be no alternative but to follow the procedure laid down by the Statute, as a judicial mandate.

115 There is specific mandate of the Supreme Court that Courts cannot be influenced by public opinion in the process of imparting justice. We are further guided by the Supreme Court in the case of ***Chhannu Lal Verma v/s. State of Chhattisgarh***[15], wherein the Apex Court has held as follows :–

> *"It is also a matter of anguishing concern as to how public discourse on crimes have an impact on trial, conviction and sentence in a case. The court's duty to be constitutionally correct even when its view is counter-majoritarian is also a factor which should weight with the court, when it deals with the collective conscience of the people or the public opinion. After all the society's perspective is generally formed by the emotionally charged narratives. Such narratives need not necessarily be legally correct, properly informed or procedurally proper.* ***As stated in report No. 262 of the Law Commission, "the Court plays a counter-majoritarian role in protecting individual rights against majoritarian impulses. Public opinion in a given case may go against the values of Rule of law and constitutionalism by which the Court is nonetheless bound" and as held by this Court in the case of Santosh Bariyar(Cited supra) public opinion or people's***

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> ***perception of a crime is …… "neither an objective circumstance relating to crime nor to criminal." In this context, we may also express our concern on the legality and propriety of the people engaging in a "trial" prior to the process of trial by the Court. It has almost become a trend for the investigating agency to present their version and create a cloud in the collective conscience of the society regarding the crime and the criminal. This undoubtedly puts a mounting pressure on the Courts at all the stages of the trial and certainly they have a tendency to interfere with the due course of justice.***
>
> *28 Till the time death penalty exists in the Statute books, the burden to be satisfied by the Judge in awarding this punishment must be high.The irrevocable nature of the sentence and the fact that the death row convicts are, for that period hanging between life and death are to be duly considered. Every death penalty case before the Court deals with a human life that enjoys certain constitutional protection and if the life is to be taken away, then the process must adhere to the strictest and highest constitutional standards.* ***Our conscience as Judges which is guided by constitutional principles, cannot allow any thing less than that."***

116 Another question that is posed before us is whether the accused need to be eliminated or made to suffer imprisonment for life till their natural life to make them realise the injury that is caused to the survivor and repent for the same till their last breath. The accused have not preferred any appeal challenging the death penalty imposed upon them. Death puts an end to the whole concept of repentance, any sufferings and mental agony.

117 The trial Court has failed to answer as to whether the imposition of alternative sentence, as contemplated under section 376D of Indian Penal

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Code was unquestionably foreclosed. The statute has not prescribed mandatory death penalty. Although the offence is barbaric and heinous, it cannot be said at the threshold that the accused deserve only death penalty and nothing less than that.

118 We are of the opinion that in the facts of the present case, the convicts deserve the punishment of Rigorous Imprisonment for life i.e. the whole of the remainder of their natural life in order to repent for the offence committed by them. The convicts in the present case do not deserve to assimilate with the society, as it would be difficult to survive in a society of such men who look upon women with derision, depravity, contempt and objects of desire.

119 The conduct of the accused, and their bold confession to the survivor that she is not the first one to satisfy their lust, is sufficient to hold that there is no scope for "reformation" or "rehabilitation". In any case, the evidence of D.W. 4 shows that after this incidence, the family of the accused was ostracized from the society and they were forced to leave their hut and are residing on the footpath.

120 In view of the Judgment of the Apex Court in the case of

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Rajendra Wasnik (cited supra), Santosh Bariyar(cited supra) and Mohd. Mannan(supra), we hold that this is not a case of previous conviction, since both the Sessions Cases i.e. Sessions Case Nos. 846 of 2013 and 914 of 2013 were being tried simultaneously and the conviction in both the cases was recorded on the same day without giving an opportunity to the accused to place before the court the mitigating circumstances.

121 The accused do not deserve any leniency, empathy or sympathy. Hence, they deserve Imprisonment for life i.e. for the remainder of their natural life. Everyday the rising sun would remind them of the barbaric acts committed by them and the night would lay them with a heavy heart filled with guilt and remorse. Moreover, the Report of the Law Commission has after a due survey observed that **the death penalty does not serve the penological goal of deterrence any more than life imprisonment.** We therefore, feel that a sentence of rigorous imprisonment for the remainder of their natural life without any remission, parole or furlough would meet the ends of justice.

122 In Report No. 262 of Chapter VII of the Report, Law Commission concluded as follows :

"7.1.1. The death penalty does not serve the

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penological goal of deterrence any more than life imprisonment. Further life imprisonment in Indian law means imprisonment for whole life subject to just remission which in many states in cases of serious crimes are granted only after many years of imprisonment which range from 30 to 60 years.

7.1.2 Retribution has an important role in punishment. However, it cannot be reduced to vengeance. The notion of 'eye for an eye, and tooth for a tooth' has no place in our constitutionally mediated criminal justice system. Capital punishment fails to achieve any constitutionally valid penological goals.

7.1.3 In focusing on death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of. Reliance on the death penalty diverts attention from other problems ailing the criminal justice system such as poor investigation, crime prevention and rights of victims of crime. It is essential that the State establish effective victim compensation schemes to rehabilitate victims of crime. At the same time, it is also essential that courts use the power granted to them under the Code of Criminal Procedure, 1973 to grant appropriate compensation to victims in suitable cases."

123 Justice to the victim is equally important. As far as compensation is concerned, the learned trial court has observed in para-13 of the Operative order as follows:

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> "*As per the proviso laid down under section 376 D of IPC, the entire fine amount if recovered shall be paid to the prosecutrix if she is ready to accept it, after appeal period is over.*"

In fact, the accused are sentenced to death penalty. They hail from an economically weaker section of society, they do not have to undergo default sentence and therefore, there is no question of paying the fine amount.

124 The Hon'ble Supreme Court of India in **Writ Petition (C) No. 565 of 2012** titled as **Nipun Saxena v/s. Union of India,** opined that -

> "It would be appropriate if NALSA sets up a committed of about 4 to 5 persons who can prepare Model Rules for Victim Compensation for Sexual Offences and Acid Attack taking into account the submissions made by the learned Amicus.
>
> The learned Amicus as well as learned Solicitor General have offered to assist the committee as and when required. The Chair person or the nominee of the Chair person of National Commission of Women should be associated with the Committee."

In view of the above directions of the Supreme Court, NALSA set up a

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committee consisting of the experts from various fields for preparation of model scheme. The NALSA has submitted the compensation scheme for women victims/survivors of sexual assault/other crimes and submitted the report before the Supreme Court on 24/4/2018. According to that scheme, the schedule applicable to Women victims of Crimes shows that survivor of gang-rape would be entitled to Rs. 10 Lakhs. Besides this, the survivor would also be entitled to compensation under the Maharashtra State Victim Compensation Scheme. Accordingly, this Judgement be sent to the District Legal Service Authority(DLSA) forthwith and the DLSA shall issue notice to the survivor and disburse the said amount within 30 days from the date of receipt of the judgment.

125 At this juncture, we are reminded of the sestet of the Poet and Philosopher- Kahlil Gibran.

> *"And how shall you punish those whose remorse is already greater than their misdeed?*
> *Is not remorse the justice which is administered by that very law which you would fain serve?*
> *Yet you cannot lay remorse upon the innocent nor lift it from the heart of the guilty."*

126 In view of the above discussion and various judgments of the Supreme Court, we pass following order :

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ORDER

(I) The reference of confirmation of the death sentence is answered in the negative.

(II) The death sentence awarded to the respondents in Sessions Case No. 846 of 2013 vide Judgment and Order dated 4/4/2014 under section 376E of the Indian Penal Code is quashed and set aside.

(III) The conviction of the respondents for the offences punishable under section 376D of the Indian Penal Code is upheld.

(IV) The convicts shall suffer Rigorous Imprisonment for life for offence under section 376(D) of the Indian Penal Code which shall mean Rigorous Imprisonment for the remainder of their natural life. The convicts shall not be entitled to any remissions including parole and furlough.

(V) The conviction on all other counts is also upheld.

(VI) Dr. Yug Mohit Chaudhry, Advocate appointed to espouse the cause of the Respondents is entitled to the professional fees as per law.

(VI) Copy of this Judgment be sent to the convicts in jail.

(PRITHVIRAJ K. CHAVAN, J) **(SMT. SADHANA S. JADHAV, J)**