THE HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

BEFORE DIVISION BENCH: JUSTICE VIVEK RUSIA AND JUSTICE SHRI SHAILENDRA SHUKLA

Case No.	:	**CRRFC.No.14/2018 & CRA.Nos.7215/2018 and 7269/2018**
Parties name	:	**State of M.P. v/s. Irfan & Anr.** (CRRFC.No.14/2018)**,** **Irfan v/s. State of M.P.** CRA. No.7215/2018) and **Asif vs. State of M.P.** (CRA.No.7269/2018).
Date of Judgement	:	09/09/2021
Bench constituted of	:	Hon'ble Justice Shri Vivek Rusia and Hon'ble Justice Shri Shailendra Shukla
Judgement delivered by	:	Hon'ble Justice Shailendra Shukla
Whether approved for reporting	:	Yes
Name of counsels for the parties	:	Shri Pushyamitra Bhargava, learned Addl. Advocate General for appellant/State. Shri Amit Dube and Shri Noor Ahmad Sheikh, learned counsel for respondent/appellant Irfan. Shri Z.A. Khan, learned Senior counsel with Shri R.R. Bhatnagar, learned counsel for respondent/appellant Asif.
Law laid down	:	**Held: Conviction and sentence of appellants under Section 376(DB) of IPC –** (i) Prosecutrix, a child of seven years of age was proved to have been subjected to violent gang rape by appellants and prosecutrix was also inflicted life threatening injuries. *(Significant paragraph nos. – 46 to 51)* (ii) Conviction under Section 376(DB) of IPC and sentence of hanging by trial Court – Affirmed – Sentencing Policy Discussed – Legislature has imposed death penalty in incidents of child sexual abuse even though the victim has not died. There is shift in the policy of legislature in view of alarming rise in such cases. *(Significant paragraph nos. – 114 to 123, 128 to 141)* (iii) Dock identification of prosecutrix

		shortly after the incident – is reliable even though TIP not conducted. *(Significant paragraph nos. – 22 to 25)* (iv) Prosecutrix admitted in serious condition in hospital – Identified appellants through photo album containing photographs of appellants along with other persons – looking to the condition of prosecutrix, adopting this mode cannot be considered to be inappropriate. *(Significant paragraph no. – 26)* (v) The mobile of appellants was found to be switched off at the time of incident - is a relevant material under Section 8 of Evidence Act, as had the same not been switched off the location of appellants could have been traced. *(Significant paragraph no. – 76)* (vi) Mobile being sold off by the appellants, moments after the incident – is also a relevant fact against the appellants under Section 8 of Evidence Act. *(Significant paragraph no. – 77)* (vii) Objection by appellants that sentence was pronounced on the same day when they were convicted and thus they were not given opportunity to be heard on the question of sentence – held – it is not statutorily required to postpone the case to a future date for hearing on quantum of sentence. *(Significant paragraph nos. – 135 to 136)*

(VIVEK RUSIA)
JUDGE

(SHAILENDRA SHUKLA)
JUDGE

HIGH COURT OF M.P. BENCH AT INDORE

Criminal Reference No.14/2018

(*State of M.P. vs. Irfan & Ors.*)

In Reference

(Received from IInd Additional Sessions Judge / Special Judge, POCSO Act Mandsaur, District Mandsaur)

In reference – Versus – Irfan Mevati

Criminal Appeal No.7215/2018

Irfan @ Bhayu Mevati – Versus – State of Madhya Pradesh,
S/o. Jahir @ Jahid @ Kalu Mevati,
Aged 20 years, Caste Musalman,
Occupation Labourer.
R/o. - Chandan Ki Gali, Madarpura Mandsaur,
Distt. Mandsaur (M.P.)

In reference – Versus – Asif Mevati

Criminal Appeal No.7269/2018

Asif Mevati – Versus – State of Madhya Pradesh,
S/o.Julfikar Mevati, Aged 24 years, Caste Musalman,
Occupation – Centering work.
R/o. - Harijan Basti, Madarpura, Mandsaur,
Distt. Mandsaur (M.P.)

CORAM :

***Hon'ble* Shri Justice Vivek Rusia, Judge**
***Hon'ble* Shri Justice Shailendra Shukla, Judge**

Shri Pushyamitra Bhargava, learned Addl. Advocate General for appellant/State.

Shri Amit Dube, learned counsel and Shri Noor Ahmad Sheikh, learned counsel for respondent/appellant Irfan.

Shri Z.A. Khan, learned Senior counsel with Shri R.R. Bhatnagar, learned counsel for respondent/appellant Asif.

JUDGMENT

(Delivered on 09/9/2021)

***Per Shailendra Shukla*, J:-**

1. The present reference has been made for confirmation of order of capital punishment of death awarded which is arising out of

judgment dated 21.8.2018, pronounced in S.T.No.88/2018, passed by the 2nd A.S.J. Mandsaur / Special Judge (POCSO) Act whereby, the appellants/accused have been convicted under Sections 363, 366A, 376(2)(m), 376(DB) of IPC and as per Criminal Law (Amendment) Ordinance, 2018, 307 of IPC, (appellant Asif has been convicted and Section 307 read with Section 34 of IPC), as also under Section 5(g) (r) read with Section 6 of POCSO Act, 2012. The over all penal provisions under which the appellants have been convicted and sentenced is tabulated as under :-

Conviction		**Sentence**	
Sections & Act	**Imprisonment**	**Fine Amount**	**Imprisonment in lieu of fine**
363 of IPC	7	Rs.10,000/-	6 months
366(A)	7	Rs.10,000/-	6 months
307 of IPC (in respect of appellant Irfan)	L.I.	Rs.10,000/-	6 months
307/34 of IPC in respect of appellant Asif.	L.I.	Rs.10,000/-	6 months
376(DB) of IPC Criminal Law (Amendment) Ordinance, 2018	**To be Hanged by neck till death.**		

2. The accused/appellants have filed separate appeals (Criminal Appeals Nos.7215/2015 and 7269/2018 against the said judgment therefore, the reference and appeals are being taken up for hearing together and are being disposed of by common order.

3. As per prosecution story, on 26.6.2018, Kamlabai (PW7),

grand mother of the prosecutrix lodged a report at police station City Kotwali, Mandsaur that her grand – daughter studying in 3rd Std. at Saraswati Shishu Mandir School had been missing from her school premises after the classes were over for the day. The police registered case under Section 363 of IPC and enquiry was initiated. On the next day, ie., 27.6.2018, the prosecutrix was found in injured condition by the witness namely Karan (PW10). When police came to know, the prosecutrix was taken to civil hospital at Mandsaur and was examined. Looking to her serious condition she was referred to M.Y. Hospital at Indore. The prosecutrix was given treatment and operation was performed upon her. She narrated the story to the police as per which it was stated by her that on the day of the incident, after the school was closed down, she was waiting outside the school when a person came and forcibly put some sweet ('*Ladu*') in her mouth and took her to a secluded spot. He also called another person at the spot. Subsequently, she was undressed, forcibly raped by the person who had taken her while the other person had caught hold of her hands. The police sprung into action and fanned out in search of the miscreants. They searched the spot where the incident had taken place and collected incriminating items from there such as the underwear of the prosecutrix, rocks, a beer bottle, school bag, shoes, blood stained soil and normal soil and sealed the same and sent it to the FSL laboratory. The enquiry was also made from nearby shopkeepers and CCTV footages from 3 shops namely Mayank

Fashion Store, Esequare Showroom and Aman Mobile were collected and on finding suspicious movements, the persons and relatives known to the minor prosecutrix and appellant were shown the footages who identified the prosecutrix and the appellants. Panchnamas were drawn. Subsequently TIP parade was carried in jail premises where the appellants were identified by the witnesses who had seen the appellant accompanying the prosecutrix. The prosecutrix who was admitted in serious condition in M.Y. Hospital at Indore, was also shown photo albums carrying photographs of the appellants and other persons bearing similarity in countenances and the prosecutrix rightly identified the appellants from the album as the accused persons who had committed sinister offence against her. The specimens such as oral swab, vegenal slides, vulval pad etc of prosecutrix had been drawn at district hospital at Mandsaur. The sealed specimens were handed over to the Investigating Officer who dispatched them to FSL Laboratory and DNA analysis. The appellants who had been arrested were interrogated by police who gave their separate memoranda leading to recovery of clothes used by them at the time of incident, the vehicle used by appellant Asif were recovered by Investigating Officer. Their blood samples, semen slides, hair including pubic hair, nails etc were collected by Investigating Officer and the appellants were also subjected to medical examination. Appellant Irfan was found to have marks of scratches and teeth-bite on his body and it was also found that his

private organ carried redness which was pointer at forcible intercourse on his part. The medical examination of the prosecutrix has already been revealed that she had not only been subjected to violent sexual intercourse, but she was also subjected to very serious assault resulting in injuries to throat, stab injuries on private part and one of her eye was found to be bulging due to compression with affected visibility, the perineum and anus were found to be pierced through and through and a passage was created in her abdomen for bringing out her stools. Due to huge blood loss, her haemoglobin had also plummeted to 6.5. grms dl. After intensive care and operations, she slowly recovered. In the meanwhile, the residual investigation involving statement of witnesses was carried by the police and charge sheet was filed against the appellants.

4. The learned trial Court framed charges against the appellants under Sections 363, 366A, 376(2)(m), 307, 307/34 and Section 376(DB) of IPC under (Law Amendment Ordinance), 2018 as also under Section 5(g), 5(j)(iii)(m) and Section 5(r), read with Section 6 of POCSO Act. The appellants abjured their guilt and claimed innocence.

5. The prosecution has examined 37 witnesses along with documents including electronic evidence and forensic evidence. No defence witness had been produced by the appellants. After conclusion of the trial, the learned trial Court has framed charges shown in para 1 of this judgment and has awarded the sentences as

mentioned earlier.

6. Aggrieved, the appellants have preferred separate appeals against the order of conviction and sentence. Conjointly speaking the grounds mentioned in the appeals are that the appellants have been wrongly framed by the police as perpetrators of crime, that there is discrepancy in the statements of the prosecutrix and other witnesses regarding identifying the appellants, that their mobiles have been shown to be switched off deliberately by the police so as to wipe out their defence that they were nowhere near the school and at the spot, that there are mutual contradictions in the statements of the prosecutrix and other witnesses who have claimed to see the appellants, that the prosecution has not examined all relevant witnesses who had handled the specimens sealed samples of the prosecutrix and the appellants, rise to the possibility that these samples were tampered with, that the electronic evidence had not been proven as per mandate of Evidence Act, that CCTV footages of the school have not been collected, that there was suspected interpolation of school register in order to show the presence of the prosecutrix in the school on the date of the incident, that there are inherent infirmities in the evidence of prosecutrix vis-a-vis; her 164 and 161 Cr.P.C statements. It has been submitted that in the video footages the clear faces of the appellants are not seen and that the person who had conducted the test identification parade has not been examined. It has been further submitted that the impugned act does

not come within the purview of rarest of rare case and while appellant Asif is married with two children dependent upon the appellant, appellant Irfan is barely 20 years of age and only child of his parents and therefore, it was not proper for the trial Court to award death penalty on appellants.

7. The appellant have also filed an application under Section 367 of Cr.P.C for recording further evidence before adjudicating this reference. In the aforesaid application, it has been mentioned that CSP Rakesh Mohan Shukla (PW31) has stated that he had filed a scrutiny report of mobile numbers of the accused obtained from the Cyber Cell and has further stated in his testimony that as per the conclusion drawn on the basis of report, it was not proved that both the respondents had communicated amongst themselves on the date and time of the incident. This report although filed along with the charge sheet, has however not been marked as Exhibit for unknown reasons. This report is part of the soft copy of documents provided to counsel appearing for the appellant before the High Court and for just and fair decision in this case, the report of Cyber Cell referred to by Shri Rakesh Mohan Shukla (PW31) is required to be taken in evidence. The footages of the crime scene have also not been made part of the evidence taken and recorded during the course of the trial, although the same was before the learned trial Court, for a just and fair decision. These footages are also taken to be in evidence. Hence it has been prayed that appropriate orders be passed for recording

further evidence as mentioned in the application.

8. The question for consideration before this Court is ***(i)*** whether in view of the grounds contained in the appeals, the conviction of the appellants is liable to be set aside ?.

(ii) that whether the application filed under Section 467 of Cr.P.C by the appellants seeking recording of further evidence deserves to be allowed ?.

(iii) that whether in case of affirming the order of conviction, the sentence of death imposed upon the appellants is disproportionate to the crime committed and also considering the status of the appellants, does not come within the purview of rarest of rare case ?.

9. Kamlabai (PW7) is the grand – mother of the prosecutrix who states that her grand – daughter (prosecutrix) studies in Saraswati Shishu Mandir School and her school timings are from 11.00 AM to 4.30 PM, that on the date of the incident, she had gone to fetch her daughter from the school and was late by 10 minutes, that she did not find her grand – daughter in the school. She enquired her wherebaout and not been able to find about her whereabouts, the missing person report Exhibit P/14 was filed and the report is Exhibit P/13. Kaushalya Bai (PW4) is the mother of the prosecutrix who has stated that the grand – mother of the prosecutrix had gone to the school where her daughter could not be traced, pursuant to which the grand – mother called a witness on phone and asked as to whether the prosecutrix had returned. The witness, then accompanied by cousin

of the prosecutrix namely Ajay Mali and other relatives also came and searched for the prosecutrix which led to lodging of the report by grand – mother of the prosecutrix. Kailash Mali (PW6) is the father of the prosecutrix who has stated that after coming to know that his daughter was missing, he accompanied his mother Kamla Bai to police station where her mother lodged a report. Bhanu Pratap Singh (PW30) has stated that while he was posted as ASI at police station Mandsaur on 26.6.2018, a missing person's report was lodged which was recorded by him and his signatures are appended from A to A part on Exhibit P/14. He states that Aadhar Card and other documents regarding her age was given to him by Kamla Bai, on perusing which, he lodged the FIR Exhibit P/13 under Section 363 of IPC.

10. Rakesh Mukati (PW3) has stated that he was posted as Principal of Saraswati Shishu Mandir School situated at Keshav Nagar, Mandsaur and police had seized school attendance register of class 3 from 15.6.2018 to 26.6.2018. Seizure memo Exhibit P/6 and the register is Exhibit P/7. He states that the timings of the class 3 are form 11.00 AM to 4.30 PM. After perusing the relevant entry, he has submitted that the prosecutrix had marked her presence in the school on 26.6.2018. He admits that the attendance of the students in Exhibit P/7 has not been taken by him. In cross examination, he denied the suggestion that on 26.6.2018, the prosecutrix was absent. He admits that from 20.6.2018 to 22.6.2018 she was absent and again

admits that from 16.6.2018 to 17.6.2018 her attendance has been marked erroneously which has been scored off and actually she was absent on these days.

11. No suggestion to the mother, grand – mother and father of the prosecutrix has been given suggesting that prosecutrix was in fact, not present in the school on 26.6.2018. For the first time this suggestion has been given to the Principal Rakesh Mukhati (PW3). There is no reason to assume that there is any interpolation in the register Exhibit P/7 whereby the presence of the prosecutrix in the school on 26.6.2018 has been sought to be made out deliberately. Thus, it is proved that the prosecutrix had attended the school on 26.6.2018 and had gone missing from the school. It is also apparent that at the time of incident prosecutrix was a student of class 3 in the aforesaid school.

12. Kailash Mali (PW6), the father of the prosecutrix has stated that the age of the prosecutrix is 7 years. These statements have not been controverted in cross examination. Kaushalya Bai (PW4) mother of the prosecutrix has stated that her daughter is into the 8th year of her age and denies the suggestion that the daughter is aged between 12 to 14 years.

13. Mukesh Pathak (PW2) is acting Principal of Saraswati Shishu Mandir who has produced the scholar register showing the date of birth of the prosecutrix to be 14.12.2010. The birth certificate has also been certified by him. The scholar register is Exhibit P/5 and

seizure memo is Exhibit P/4. He in his cross – examination admits that the entries in scholar register are not in his own handwriting and there is no mention in the register as to who had got the prosecutrix admitted in the school then he says that it was done by father of the prosecutrix. As already seen, father Kailash Mali (PW6) has not been challenged in the cross – examination regarding his statement made by him earlier that his daughter was 7 years old at the time of incident. There is no reason to doubt his averment and also there is no reason to discredit the entries made in the scholar register. It has been found proved that prosecutrix was a student of class 3 in the school on the date of incident. Thus her age would appropriately between 7 to 8 years. It is thus proved that prosecutrix was below 12 years of age on the date of the incident.

14. It has been proved that the prosecutrix had gone missing from school. The prosecution story is that she was kidnapped from the school.

15. Prosecutrix (PW-5), being 8 years old, has been asked questions to determine her capability to understand. Having been satisfied with her capability, she has been put to examination-in-chief without affirmation on oath. She has stated that after her school she was waiting outside the gate on a bench at about 5 pm for her parents to come and fetch her. Thereafter a boy came and asked her to eat sweetmeat (Laddu), which offer was declined by her, then the boy took her to Jungle and there he called another boy and she thereafter

narrates the offence which was perpetrated by the offenders against her. She has stated in Para-3 that while she was sitting on the bench, Anand and Gajendra were playing in the garden. She has been given a suggestion that she was not taken from school to Jungle. This suggestion has been denied by her. Anand (PW.16), a student in the same school, has stated that on the date of the incident while he was in the garden, the prosecutrix was sitting on a chair inside the gate of the school after the school was over. At that time a person came and took the prosecutrix from there and handed over to another person. The person who had so taken the prosecutrix was wearing an orange coloured shirt and another person sported a beard. He has denied the suggestion in cross-examination that on the date of the incident he was not in the school and also denies that he does not study in the same school. He admits that prosecutrix is related to him as his cousin.

16. Learned counsel for the appellants has pointed out towards the lapse on the part of prosecution regarding not obtaining the CCTV footage from cameras installed in the school. Mukesh Pathak (PW-2) has admitted that CCTV cameras are installed in his school. This witness is acting Principal of the school Saraswati Shishu Mandir. It is admitted on the part of the prosecution that CCTV footage from the school have not been obtained. Learned counsel has pointed out that apart from the aforesaid lapse, there is variance in the deposition of prosecutrix (PW.5) and Anand (PW.16) in the sense that while

prosecutrix has stated that only one person had come and had taken her to the Jungle from school where another person had joined, Anand (PW.16) has stated that a person had come and taken the prosecutrix and handed over her to another person.

17. Considered.

18. This variance apart, one thread which runs commonly in the statements of these two witnesses is that the prosecutrix was indeed taken away from the school. This fact has not been challenged in cross-examination of these witnesses credibly. Hence, it is proved that the minor prosecutrix was kidnapped from her school.

19. The question for consideration is, whether it was the appellant Irfan, who had kidnapped the prosecutrix from school, or Asif was also involved in Kidnapping ?.

20. As already stated earlier, the prosecutrix has identified that it was Irfan who had kidnapped her.

21. Anand (PW.16) has stated that two persons had come inside the school gate, one of whom had taken out prosecutrix and handed over to another person. As far as witness Anand (PW.16) is concerned, he has admitted that when the incident had occurred, he was playing in the garden near gate No.1, which is shown in the map (Ex.P/15) as gate 'A' and the incident had occurred at gate 'B'. He has been asked a question that it is not possible to see from behind gate 'A' as to what has happened

at gate 'B'. The witness has denied such suggestion. Later on, the test identification parade has been carried out in which Anand (PW.16) has identified both the appellants. This identification has been carried out by Nayab Tehsildar Tejram Sharma (PW.17) and he has stated that vide test identification parade document (Ex.P/44), Anand (PW.16) had identified both the appellants. Anand (PW.16) in his cross-examination has admitted that before identification, he had seen the photographs of the accused in the newspaper. He also admits that he is relative of prosecutrix. In view of such statement to have seen both the accused in the photographs appearing in the newspaper, test identification parade looses its sanctity and it would be appropriate to consider the statements of prosecutrix.

22. The prosecutrix (PW.5), during her deposition before the Court recorded 1 month 4 days after the incident has pointed out that appellant Irfan as the one who had taken her away from the school. The doc identification of the accused barely 1 month 4 days after the incident is an important piece of evidence. As such, the doc identification document is a substantive piece of evidence contrary to test identification parade document, which can be used for corroborative purposes only.

23. There is no rule of law that in absence of test identification, the prosecution story would be rendered

unreliable leading to acquittal. The High Court of M.P. (Gwalior Bench) in ***Criminal Appeal No.653/2006*** (*Aftab Khan vs.State of M.P.*), proved the Apex Court judgments on the issue have been cited. It would be appropriate to reproduce the relevant paragraphs of the aforesaid judgment :-

> ***"15.*** *An identification parade is not mandatory,* ***[Ravi Kapur V/s. State of Rajasthan****, (2012) 9 SCC 284], nor can it be claimed by the suspect as a matter of right. [****R. Shaji v. State of Kerala****, (2013) 14 SCC 266]. The purpose of pretrial identification evidence is to assure the investigating agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim later in court at the trial. [****Rameshwar Singh v. State of J&K****, (1971) 2 SCC 715]. If the suspect is a complete stranger to the witness or victim, then an identification parade is desirable, [****Mulla v. State of U.P.****, (2010) 3 SCC 508],* ***[Kishore Chand v. State of H.P.****, (1991) 1 SCC 286], unless the suspect has been seen by the witness or victim for some length of time. [****State of U.P. v. Boota Singh****, (1979) 1 SCC 31]. In* ***Malkhan Singh v. State of M.P.****, (2003) 5 SCC 746, it was held:-*
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> > *"7.....The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact."*

24. The Supreme Court in the case of ***Sheo Shankar Singh*** *vs.* ***State of Jharkhand & Anr****.* reported in *(2011) 3 SCC 654* has held as under :-

*"**46**. It is fairly well-settled that identification of the accused in the Court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in the Court who claims to identify the accused persons otherwise unknown to him. Test Identification parades, therefore, remain in the realm of investigation.*

***47**. The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the Court. As to what should be the weight attached to such an identification is a matter which the Court will determine in the peculiar facts and circumstances of each case. In appropriate cases the Court may accept the evidence of identification in the Court even without insisting on corroboration.*

***48**. The decisions of this Court on the subject are legion. It is, therefore, unnecessary to refer to all such decisions. We remain content with a reference to the following observations made by this Court in Malkhansingh and Ors. v. State of M.P. (2003) 5 SCC 746 : -*

> *"**7**. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is*

> *accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad v. Delhi Admn. AIR 1958 SC 350, Vaikuntam Chandrappa v. State of A.P. AIR 1960 SC1340, Budhsen v. State of U.P. (1970) 2 SCC 128 and Rameshwar Singh v. State of J&K. (1971) 2 SCC 715)"*

25. In the present case, dock identification shortly after the incident enhances the credibility of the prosecutrix.

26. Prior to such doc identification, prosecutrix has also identified appellant Irfan when she was shown photo album marked as Article A-1. This album contained photographs of similar other persons from whom the prosecutrix had correctly identified appellant Irfan. During the Court deposition also, she was again shown the album and she correctly identified the appellant. This was done prior to her

actual seeing the appellant physically in the Court. The identification memo is Ex.P/11. Although the aforesaid method of identification has been challenged by the learned counsel submitting that it is not an appropriate method as various persons shown in the album are wearing different clothes and that appellant himself had no opportunity to see the manner in which this identification has been carried out, however, looking to the serious condition of prosecutrix, the aforesaid method was one of the reasonable and appropriate method. A perusal of the evidence of prosecutrix does not show that there is any contradiction or omission in her statements regarding identification through photo album. The appellants have not been able to show that prosecutrix had been shown photographs of the appellants before the album was shown to her.

27. It would further be appropriate to see as to whether there is any other corroborative piece of evidence which fortifies the doc identification of appellant Irfan by prosecutrix as the one who had kidnapped her.

28. The aforesaid corroborative piece of evidence has been gathered by Investigating Officer Mr. Gaurav Laad (PW.28) in the form of CCTV footages collected from various shops situated at Hazari Road at Mandsaur. This witness has stated that he had checked the CCTV footages in DVRs installed in various shops from which suspicious movements involving of prosecutrix and appellant could be traced. In the process, he found relevant CCTV footages in

the shops namely; Mayank Fashion Shop, Aman Mobile Shop and E-Square Plaza. The footages found in the Mayank Fashion Shop and Aman Mobile Shop were relevant for the purpose of identifying the kidnapper and the prosecutrix.

29. Gaurav Laad (PW.28) states that on checking the CCTV footage of Mayank Fashion Shop, he had seen the abductee girl / prosecutrix to be following a person. This footage was shown to Ajay Mali (PW.18) who is the cousin of prosecutrix, who identified the prosecutrix as seen in the footages to be his cousin and identification memo was drawn which is Ex.P/21. The aforesaid CCTV footage having been found relevant, the DVR of SRCHR Company carrying with camera and adopter was seized vide Ex.P/56.

30. Ajay Mali (PW.8) has stated that prosecutrix is her cousin and after her missing from school, she was being searched and he was called by the police to Mayank Fashion Shop where he had identified her vide identification memo Ex.P/21.

31. Gaurav Laad (PW.28) further states that the same CCTV footages were shown to Rashid (PW.18) who identified the person accompanying the prosecutrix and moving ahead of her to be Irfan @ Bhaiyyu and identification memo Ex.P/22 was drawn. In para 13 of the cross – examination, this witness states that Rashid works as a labourer in the bus-stand and has been called by Constable Digpal Singh. Rashid (PW.18) has stated that he knows Irfan @ Bhaiyyu who lives in Madarpur lane of Mandsaur and this lane is occupied by

Sheikhs. He states that he was shown CCTV footages of appellant Irfan @ Bhaiyyu in which he had identified Irfan, the signatures of this witness are on C to C part in Ex.C/22. Photo prints of the footages are Exs. P/51, P/52 and P/53. In cross-examination, he admits that he frequents the police-station, however he denies that he has deposed falsely under the influence of police. This witness cannot be brushed aside just because he frequents the police-station. The witness himself resides in Madarpur and it was natural for him to identify Irfan who also resides in the same locality.

32. The witness Gaurav Laad (PW.28) has further stated that on 04.07.2018 he had seen the CCTV footages of Aman Mobile Shop in which also appellant Irfan @ Bhaiyyu was visible along with prosecutrix and therefore Ajay Mali (PW.8) was again called. Ajay Mali (PW.8) saw the footages in which it was found that the hand of prosecutrix was being held by appellant Irfan. The identification memo is Ex.P/23. This CCTV footages found to be relevant, the DVR of SECURUS Company along with adopter were seized vide seizure memo Ex.P/24. These are articles A-9 and A-10. The timings of the CCTV footages and recordings are shown in the Aman Mobile Shop which is from 6:13 pm to 6:15 pm, while the recordings of Mayank Fashion Shop are from 5:39 pm to 5:44 pm.

33. The CCTV footages available in both the DVRs, as also in the DVR seized from E-Square Plaza does not have any relevance as far as kidnapping part is concerned and it shall be considered later on.

All these footages were downloaded in a pen-drive by Constable Rajesh Sharma (PW.29) posted in Cyber Cell, Police-Station, Ujjain. This witness states that Mr. S.S. Sisodiya had brought 3 DVRs and a mobile phone for the purpose of downloading it in a pen-drive which he did. The memo of opening of DVRs and resealing is Ex.P/144. He states that after downloading of the same he had prepared a certificate under Section 65(B) of Evidence Act, 1872 which is Ex.P/145. The pen-drive was seized from him by Mr. S.S. Sisodiya as per Ex.P/146.

34. S.S. Sisodiya (PW.35) has stated that on 07.07.2018, these DVRs were opened and again sealed and its contents were downloaded in the pendrive and the seizure memo is Exhibit-P/144 bearing signatures from B to B part. This witness and Rajesh Sharma (PW.29) both have admitted that when the DVRs were brought before Rajesh Sharma, they were not sealed and only after downloading in the pendrive, they were sealed.

35. Rajesh Sharma (PW.29) has admitted that before bringing the DVRs to him if any footages have been inserted by the police, then he does now know about the same. However, no such suggestion has been given to S.S. Sisodiya (PW/35). Gaurav Laad (PW/28), who had first checked the aforesaid footages and had called Ajay Mali, Rashid and Pradeep for identifying the accused has not been given any suggestion in cross-examination that he has inserted these footages in order to implicate accused Irfan. Thus, there is no reason

to nurse a doubt regarding the possibility of interpolation in the CCTV footages by the police deliberately in order to implicate accused Irfan.

36. The footages in the pendrive are admissible in view of the certificate executed in accordance with Section 65-B of the Evidence Act. The Investigating Officer has also exhibited certificates under Section 65-B of the Evidence Act of footages which have been contained in the DVRs. These certificates are Exs.P/54, P/56 and P/58. However, DVRs were the primary source containing the electronic evidence and there was infact no need to prepare such certificates which are necessary only when proving electronic through secondary evidence. The witness of seizure of DVRs are Sumit (PW.19), Tulsi (PW.20) and Mohd. Ayub (PW.21) and the seizure memos have been drawn by Gaurav Laad (PW.28).

37. Tulsi (PW.20) is the seizure witness of DVR from Mayank Fashion Shop of which he is the proprietor of the shop Sumit (PW.19) is the witness of DVR from E-Square showroom of which he is the employee whereas, Mohd. Ayub (PW.21) is the proprietor of Aman Mobile Shop, who has exhibited the seizure memo of DVR as Ex.P/24.

38. As already stated, Ex.P/145 is the certificate under Section 65-B of the Evidence Act showing downloading in the pendrive from the CCTV footages which is exhibited by Rajesh Sharma (PW.29). On perusal of these documents show that the DVRs of **SECURA**

Company shows that the same was recorded between 6.13 PM to 6.15 PM on 26.06.2018. These DVRs were installed in the Aman Mobile Shop in which accused has been shown to be holding hands of the prosecutrix while walking. Another DVR bearing Model No.9008N, which is recorded between 17.39 to 17.44 PM, which pertains to the DVR installed at Mayank Fashion Shop in which the prosecutrix has been shown to be following the accused Irfan and Irfan is shown to be keeping an eye on prosecutrix by side-way glance.

39. Thus from the footages of Mayank Fashion Shop, appellant Irfan is seen moving ahead of prosecutrix and he is keeping an eye over her and while the footages drawn from the Aman Mobile Shop, the appellant Irfan is seen holding the hand of prosecutrix.

40. The aforesaid corroborative piece of evidence along with doc identification by prosecutrix of Irfan as the one who had carried her proved that it was appellant Irfan who had kidnapped the prosecutrix.

41. Before proceeding to consider as to what other offences were committed upon the prosecutrix. It would be appropriate to consider as to how the prosecutrix was found and what was her condition and thereafter it shall be considered as to what kind of offence was committed upon her by the appellant Irfan @ Bhaiyyu.

42. The manner in which prosecutrix was traced has been described by witness Karan (PW.10) and Shakti Singh (PW.11).

Karan (PW.10) has stated that on 27.6.2018 (on the next day of kidnapping) at about 12 to 1 pm while the witness was coming back after handing over his father's tiffin, he saw prosecutrix coming in a lane from below a place called Laxman Darwaja. She was slowly walking taking support of the wall and asked the witness to take her to her home. Witness states that he saw that the girl was injured, there was cut mark on her throat, her eyes were swollen and there were injuries below her eye and over her cheek. Witness states that he told about the plight of the girl to a passerby, who called up the police. The witness in his cross-examination has stated that on the date of the incident he used to study in another school. He states that he starts for his school at about 12 pm and reaches at 1.00 pm. He denies that at the time of incident he was in his school.

43. Shakti Singh (PW.11) has stated that on 27.6.2018 at about 12 pm he was going on his bike *via* Bafna market towards fort road and as he crossed Bafna market, besides some shops located near a Nala he saw a child holding hand of a girl standing besides the road. He went near the girl and saw an identity card hanging on her neck. The condition of the girl was so serious that the witness started trembling. There was a huge cut on her neck and there were injuries on her eyes and cheek, her clothes were torn and soiled with mud. Witness states that he had known about missing of a girl on Whatsapp. He immediately made a call to police control room. The girl was taken in a vehicle by police to the hospital, which was followed by him. The

parents of the girl were also called over in the hospital after determining her identity from identity card and the recovery of the girl is exhibited as Ex.P/8. The seizure memo of identity card is Ex.P/27.

44. Kaushalya (PW.4) who is the mother of the prosecutrix has stated that her daughter had gone missing on 26.6.2018 and on 27.6.2018 the witness was called to the Government Hospital, where recovery memo (Ex.P/8) was drawn. The grand mother of prosecutrix (PW.7) has stated that while she was searching out for her grand daughter, an information was received that the daughter has been traced.

45. S.S. Sisodiya (PW.35) states that on 26.6.2018 he was posted as ASI in City Kotwali police station at Mandsaur. He received an information on 27.6.2018 that a girl child has been found near Laxman Darwaja. The witness states that he arrived at the spot and found that the prosecutrix had already been taken to hospital. There is no reason to discredit statements of Karan (PW.10) and Shakti Singh (PW.11). Thus it is found proved that prosecutrix was seen coming out from a lane which opens at Laxman Darwaja and physically she was in very weak condition and with various injuries on her person with her clothes soiled in mud.

46. Dr. Bahadur Katare (PW.27) states that on 27.6.2017 (wrongly mentioned as 2017 whereas in Ex.P/139 date 27.6.2018 is written) a constable namely Narayan had brought the injured girl child for

examination at 1.00 pm. Following injuries were found on her person:-

> *(i)* On the anterior part of throat an incised wound measuring *4" x 1/2" x 1/2"*.
> *(ii)* There was swelling in both the eyes. X-ray was advised.
> *(iii)* There was a lacerated wound on the left ear measuring *1 x ½ x ½* cm.
> *(iv)* There was a lacerated wound on her nose measuring *1/2 x 1/2 x 1/2* cm.

47. As per this witness, all these injuries were caused with hard and blunt object within 24 hours. Shirt of the school dress was brown in colour with light blue skirt, which were smeared in dirt and water and were wet carrying traces of blood. These items were sealed and given to the constable. The witness states that prosecutrix was not wearing any underwear. Report is Ex.P/139. Witness states that upon obtaining a query regarding the nature of injuries, he had termed the injuries to be dangerous to life. The query report is Ex.P/73 carrying signatures of the witness from B to B part. He admits in Para-13 that in the report (Ex.P/139) there is no mention of injuries apart from the injuries described by him in examination-in-chief. He also admits that if there were other injuries on prosecutrix, he would have mentioned the same in Ex.P/139. In para-16 he admits that such injuries could have been caused by fall from motorcycle. He denies that there were deliberate gaps perceptible in Ex.P/139 giving room for any suitable fabrication at a later stage.

48. Ex.P/139 was perused. Injury No.1 on the throat has been termed to be lacerated wound in the aforesaid report whereas the

witness, in his court statement, has stated that it was an incised wound. The aforesaid injury on neck is 10 cm long. It is doubtful as to whether such an injury can be caused by hard and blunt object.

49. Dr. Neha Jain (PW.23) has stated that on 27.6.2018 she was posted in emergency duty in District Hospital at Mandsaur. At about 2 pm constable Narayan (No.253) had brought the prosecutrix before the witness, whose medical examination was conducted by the witness after obtaining permission from the grand mother of prosecutrix namely Kamla Bai. The witness states that the general condition of the prosecutrix was not good and was serious in nature. There were marks of injuries on the body of the prosecutrix, specifically on her face and throat, her eyes were swollen, there was swelling in her legs and skin of her legs had developed wrinkles due to constantly being in wet condition. Her internal examination was then conducted by the witness. There were innumerable injury marks on her private parts. The vaginal part was swollen, number of injuries were there on her thighs with swelling, number of tree leaves were found to be stuck on her private parts, there was fourth degree perineal tear on her private part, there was fecal incontinence, which mean that the child was subjected to forcible vaginal and anal intercourse resulting in tearing off of her vagina and anal region. There was constant flow of blood from her private part. She was administered IV fluids and antibiotics and tetanus injection was administered. Her haemoglobin was found to have plummeted to 7.8

gm whereas it should have been 14 to 15 gms normally. The report is Ex.P/72 carrying her signatures. In the query report Exhibit P/73 she had found the injuries on the prosecutrix to be dangerous to life. In cross-examination on behalf of appellant Irfan, she admits that the condition of the girl was serious and, therefore, she was referred to Indore.

50. The statements made by Dr. Neha (PW.23) have not been subjected to such cross-examination which would render her an unreliable witness. Hence, it is proved that the prosecutrix had received such injuries on her person which had endangered her life. Further, the prosecutrix had been subjected to violent penetrative sexual assault leading to piercing of vaginal and anal region causing huge loss of blood.

51. Dr. Brajesh Kumar Lahoti (PW.25) has stated that he was posted as Professor Pediatrics Surgery from April 2018 onwards. On 27.6.2018 in the evening a girl child aged 7 years was referred to emergency ward of M.Y. Hospital, Indore. She was admitted in the pediatric surgery department and was found to be injured. Her admission document is Ex.P/75. As per the witness the initial examination was carried out and she was hauled into operation theater and was administered anesthesia. She was then subjected to operation and the wounds were repaired. The relevant document showing operation notes are Exhibit P/78. In the aforesaid report, it has been stated that there is a tear found in posterior wall of vagina,

complete perineal tear with tear of anterior rectal wall, urethral meatus found to be torn, posterior rectal wall tear and stab wound of size 1cm x 3cm deep was present over medial part of left thigh. The witness states that the girl child suffered numerous injuries on her face, eyes, throat and there were suture marks on her thigh. As per her C.T. Brain report Exhibit P/75(c) hemorrhagic collection was noted in visualized right maxillary sinus. As per this witness, there were serious injuries on the private parts of the girl child and had been subjected to perineal as well as anal injury. The perineal injury found to be present on the private parts of prosecutrix was of very serious nature. There was complete perineal tear. He states that the mouth of the passage of urine tract was repaired with stitches. The vaginal opening was also repaired with minute stitches, the injury on her anus was also repaired. The perineal body existing between vaginal orifice and anal portion was subjected to reconstruction. She underwent colostomy meaning creation of passage in abdomen to bring out feeal material as per Ex. P/80. The injuries on private parts were also serious in nature. The witness states that after operation, girl child was shifted to ICU. A paediatric surgeon was also called from Bombay and the girl child was still being subjected to treatment i.e. up to 6.8.2018 girl child was under treatment. From the testimony of Dr. Brajesh Kumar Lahoti (PW.25) which has not been adversely challenged, it becomes clear that the prosecutrix had suffered life threatening injuries, and it was also found to be proved that the girl

child was not only subjected to barbarous and violent act of rape.

52. Now the question before us is, whether the prosecution has duly proved the appellants as the perpetrators involved in committing gang rape of prosecutrix?

53. The prosecution has sought to prove the identity of the appellants by way of oral testimony of prosecutrix, in which there has been a dock identification of appellants preceded by showing her album containing photographs of appellants along with other accused persons, at the investigation stage.

54. The prosecutrix (PW.5) in her examination-in-chief has stated that the accused who led her to Jungle, opened up her lower clothing and other accused caught hold of her hands and legs and the accused who had taken off her clothes, committed dirty act upon her. She reiterates that extremely dirty act was committed upon her and the person committing such act had also closed her eyes and mouth, had scratched her hands and legs and taken off the nail of her right finger and had inflicted knife blows on her throat and on her private parts. The statements of prosecutrix have been recorded on 31.7.2018, just one month and 4 days after the incident. She has shown marks of her injuries to the presiding officer and presiding officer has noted injury marks on her throat and eye. There were bandages on her abdomen and waist. Witness states that she had lost her consciousness and regained the same next day. She states that in the hospital, photo albums had been shown to her. In the first album (Article A/1) she

has identified one of the accused whose photo has been marked as Article A/1(a) and the second album has been marked as Article A/2, in which second accused has been identified which has been marked as Article A/2(a).The aforesaid identification memo is Ex.P/11 carrying signatures of prosecutrix, from A to A part. The prosecutrix, during her deposition, has further been shown the faces of accused after withdrawing the curtain, which was drawn between her and the accused persons and has pointed out by name the accused showing that the first accused is Irfan and the another accused is Asif, both of whom had committed the offence against her. In the cross-examination she denies that all the persons shown in the album were made to wear the same type of clothes.

55. The objection pertaining to identification by photo album has already been considered earlier. To repeat, in the circumstances in which the prosecutrix was hospitalized in serious condition, the investigating agency appropriately considered this method for identification of accused. It would have been a different matter if there was only this piece of identification collected by an Investigating Officer. However, as can be seen the dock identification is another important substantive piece of evidence. The dock identification apart there are other corroborative piece of evidence also collected by Investigating Officer, which shall be discussed.

56. The dock identification has been conducted just a month after

the incident and looking to the short gap, the dock identification is a strong piece of evidence. The prosecutrix has in fact not been cross-examined in a manner showing any fault committed by her in dock identification. In the cross-examination the prosecutrix has been confronted with her 164 Cr.P.C. statements Ex.P/10, in which it has been stated that while the act was being committed upon her by Irfan, some 3 to 4 boys were standing at some distance and these 3-4 boys had held her. The witness during her examination, has denied to have given any such statements that there were 3 to 4 boys who had come on the spot. Moreover, in her police statements recorded on the same day i.e. Ex.D/1 there is no mention of there being 3 to 4 persons. Thus, the aforesaid discrepancy is not of serious nature.

57. The involvement of each of the appellants in respect to committing gang-rape of prosecutrix shall now be considered in view of evidence available against them. First of all, the evidence against Irfan would be considered. As already found earlier, it has been proved against Irfan that he had kidnapped the minor prosecutrix and taken her from the school on foot and his involvement through CCTV footages could be noted from 5.39 PM to 6.15 PM. The prosecutrix has stated that she was taken by this accused to a jungle and as already noted earlier, she has narrated that Irfan committed the brutal offence of sexual assault upon her. Regarding other accused Asif, prosecutrix (PW.5) has stated that the person carrying her (Irfan) had called other accused whom she has identified as Asif.

She states that while Irfan committed sexual assault upon her, Asif had held the hands and legs of prosecutrix.

58. Learned counsel for the appellant has submitted that mobile phone of Irfan had been found to be switched off and this fact has been admitted by the prosecution and the Investigating Officer also. Hence, the statements of prosecutrix is incorrect that Irfan had called Asif over phone. The question which arises is as to how Asif came on the spot. It may be seen that prosecutrix (PW-5) has not stated anywhere in her examination-in-chief that Irfan had called Asif on mobile phone. She simply states that Irfan had called Asif meaning thereby, that Irfan knew where Asif would be found and he called out on him. Although, in the 161 and 164 Cr.P.C. statements, the prosecutrix has stated that the aforesaid call to Asif by Irfan was made on mobile phone. However, aforesaid part in the police statements and magisterial statements in which mobile phone was stated to be used by Irfan has not been shown to prosecutrix to confront her. If the memorandum statements of Irfan and Asif, *i.e.,* Exs.P/33 and P/36 were perused, it would be found that both had given statements to the effect that both had arrived at the school together on motorcycle and Asif had drawn the prosecutrix out of the school and handed over her to Irfan and both had already decided that they would be meeting at the designated spot, *i.e.,* spot which leads to Laxman Darwaja. Infact Anand (PW.16) has stated in so many terms as well that both the accused were seen by him in the

aforesaid manner at the school. However, statements of Anand (PW.16) has not been found creditworthy earlier by this Court but the fact of the matter remains that it is the prosecution story that both the accused had arrived at the school premises and they hatched a plan in the aforesaid manner.

59. With offence of kidnapping having been proved only against Irfan, the question whether Asif was present on the spot and was actively participating and assisting Irfan in committal of aggravated penetrative sexual assault upon prosecutrix, is the fact which is the important material to be established. There is no ulterior motive on the part of child prosecutrix to falsely implicate Asif. The prosecution has collected other pieces of evidence also in order to establish presence of Asif on the spot which shall now be considered.

60. Mr. S.S. Sisodiya (PW.35) has stated that he was posted as ASI, he had gone to the spot of incident which was identified by Shakti Singh and had prepared the spot map Ex.P/28. The witness states that he had found a pair of socks on spot which is spot A, underwear of the prosecutrix is spot B, as also her shoes and he had found the blood stains and hair strands at spot C. These apart, he had found a school bag containing copies and tiffin. Apart from that beer bottle and bisleri bottle were also found on the spot of incident. The witness has stated that 10 – 12 hair strands were picked up by him from the spot with a forcep as also blood soaked soil. The seizure memo is Ex.P/29. In para 15, it has been noted that the sealed packet

carrying seal of FSL Sagar has been opened before this witness in which plastic container was found with a seizure chit embedded on it. Inside the container there are hair strands which have been seized from the spot and these are articalized as Article A/28. In cross-examination, he denies the suggestion that the aforesaid items were not sealed before him.

62. Learned counsel for the appellants has argued that the manner in which girl's clothes were found to be wet and mud was smeared on her clothes, there was no possibility of recovering blood soaked soil. The submission was considered. It has been found that the prosecutrix had suffered heavy loss of blood from her injuries and it cannot be conjectured that no traces of blood could have been detected in the soil.

63. Mr. Rakesh Mohan Shukla (PW.31) states that he was posted as CSP at Police-Station, Mandsaur and was heading the specially constituted SIT (Special Investigating Team) for conducting investigation in this matter and vide FSL Draft letter No.177-B, he had sent the hair strands for DNA Examination to FSL Sagar, the draft letter is Ex.P/156 and the DNA report is Ex.P/157.

64. Dr. Bahadur Katare (PW.27) states that he was posted as Medical Officer at District Hospital at Mandsaur. On 29.06.2018, when Constable Mukesh Singh brought Asif for medical examination, the same was conducted and he was found to be capable of performing sexual intercourse. His belongings and slides

were prepared. The investigation report is Ex.P/140. On that same day, he received a letter of SHO AJAK Police-Station, Mandsaur to take blood samples of both the accused i.e. Irfan and Asif in the jail premises only for DNA analysis. Such instructions to obtain blood samples in the police station premises had been given for security purposes. Subsequently the aforesaid letter is Ex.P/141. The witness states that he had signed the identification memorandum of Asif and Irfan which are respectively Ex.P/26 and Ex.P/25 and took 3 ML of blood of each of them in EDTA vial and handed over the same to Constable Mukesh Bhadoria. The same seal carries the impression of CH Mandsaur and the sealed impression was seized from him as per Seizure Memo Ex.P/143. Similarly the sealed sample and the sealed memo in respect of accused Irfan was seized as per Ex.P/142.

65. Ms. Pushpa Singh (PW/37) states that on 29.06.2018 while shewas posted as SHO in Police-Station AJAK [for Anusueshit Jati Janjati], she was included in the specially constituted SIT (Special Investigation Team) for investigating the present case. In para 12, she states that she had requested the Medical Officer, Mandsaur to obtain blood samples of accused/appellants Irfan and Asif vide Ex.P/141. Dr. Bahadur Katare (PW.27) had appeared in police-station AJAK and preserved the bloods samples of both the accused and filled up their identification forms which are Ex.P/25 and Ex.P/26 and had sealed the same on which the signatures of the witnesses are appended. She states that she had prepared the certificate Ex.P/185,

Ex.P/186 and Ex.P/187 authorizing the Director, FSL to use the samples for analysis either in full or in part. She states that the blood samples of Irfan and Asif were seized vide seizure memo Ex.P/142 and Ex.P/143 respectively.

66. Mr. Rakesh Mohan Shukla (PW.31) has stated that he in his capacity as the head of SIT had written a letter to Inspector General of Police for carrying out DNA analysis vide letter Ex.P/153 and then sent the draft letter Ex.P/154 along with the seized articles to Director, FSL, the letter is Ex.P/154. In this draft letter, Article 'F' has been shown to be the blood sample of Asif kept in the EDTA vial which is further stored and sealed in the thermocoal container. As per the witness the DNA report is Ex.P/157.

67. The mixed hair strands recovered from the spot of the incident were subjected to DNA analysis. The hair strands are articled as 'Y'. They were found to contain 'Y' chromosomes of different individuals. The DNA profile of the two varying hair strands were prepared. It was found that the aleels found in the genetic marker of autosomal STR DNA of hair were the same as aleels in the genetic marker of autosomal STR DNA profile of the blood sample of Asif articled as 'F'. Shortly speaking, the DNA profile in the source of Asif (blood sample) matched with DNA profile of the hair found on the spot (Article 'Y').

68. Thus, it is proved conclusively that accused/appellant Asif was present on the spot when the incident had taken place.

69. Ms. Pushpa Singh (PW.37) has stated that on 29.06.2018, she arrested the accused/appellant Asif and the arrest memo is Ex.P/35. In his memorandum, he proposed to recover the seized clothes worn by him as also the motorcycle bearing registration No.MP14MH-9143 Ex.P/36 is the memorandum and Ex.P/37 is the seizure memorandum. In the seizure memo, one red colored shirt and blue colored jeans and a motorcycle has been shown to be seized from Asif which carries the signatures of Asif (the witness). In cross-examination, the witness in para 34 is not able to state as to the colour of Almirah from where clothes were seized or as to how many rooms are there in the aforesaid house of Asif. She also does not know as to where are the staircases for going to the terrace of Asif are situated but she denies that these documents were prepared by her in the police-station.

70. Considered.

71. Just because of not minutely observing the number of rooms and the positioning of staircases or the color of an Almirah from where the clothes were seized does not tend to discredit the witness. When the whole focus was on obtaining the memorandum statement and seizure memo from accused Asif, the Investigating Officer was not required to minutely examine the aforesaid non-consequential details. There was no necessity to prepare the map of the house of the accused/appellant Asif.

72. The statement of witness Ms. Pushpa Singh (PW/37) regarding

the recovery of red colored shirt and the motorcycle assumes importance in view of the fact that the moments after the incident, Asif was found to be moving in a red shirt along with accused/appellant Irfan whose CCTV footages were captured in the CCTV Cameras installed in the shop called E-Square Plaza. The prosecution story is that after the incident both the accused persons had brought a mobile phone to the shop of Pradeep (PW15) who runs his mobile shop in the name of Rohit Mobile Parlour. This witness has stated that on 26.06.2018 in the evening two boys had come to the shop for selling the mobile of VIVO Company. He states that he was shown CCTV footage in a shop called ***E – Square Plaza*** which is 8 – 10 shops away from his shop. He had identified both the accused from their bike and shirt which is Ex.P/40. The aforesaid CCTV footage which has been downloaded in pen-drive also was shown to him and the photo-print of CCTV footage is Ex.P/41. The witness has further stated the mobile phone sold by the accused was seized from the witness along with its bill. The seizure memo of the mobile phone and mobile bill are Ex.P/20 and Ex.P/42 and on the back side of the bill it has been mentioned by accused Irfan that he is selling the mobile for Rs.5000/-. The witness in para 8 has stated that photographs of the accused started appearing in newspapers from 29.06.2018 onwards. The witness in para 13 admits that in the photo-print, *i.e.*, Ex.P/41 in which the faces of both the accused cannot be seen, he however states that in the CCTV footage, he had seen the

accused from both the sides and further they had also come to his shop and therefore it was easy for him to identify the accused. Tejram Verma (PW.17) is the Naib Tehsildar who has conducted the identification parade and has stated that the accused was identified by Pradeep vide Ex.P/43. Although Pradeep (PW.15) has admitted that he had seen the photographs of the accused in newspapers, however before conducting the identification parade it has also been found that the witness had ample time to see both the accused persons when they had come to sell their mobile phone at his shop and therefore the identification of both the accused by the witness does not become compromised because he had seen the photographs in the newspapers. Further the evidence of this witness had been recorded in the presence of accused persons on 02.08.2018, as can be seen in the order-sheet. This examination in the Court had taken place barely a month after the incident. Hence, no doubt remains that both the accused persons had come to his shop on 26.06.2018 at about 7:00 pm. Gaurav Laad (PW.28) who had checked the CCTV footages of shops has stated that on 01.07.2018, he had found the CCTV footages of E-Square Plaza to be relevant. He had shown the aforesaid footages to Pradeep (PW.15) who had identified both the accused persons as Asif and Irfan and had signed the identification memo Ex.P/40. The witness had seized the DVR of UNV Company along with its Adopter of ERD Company vide seizure memo Ex.P/54. The same were sealed and its articles are A/5 and A/6. Pradeep

(PW.15) has been shown the aforesaid CCTV footage before the Court and while deposing the aforesaid CCTV footage of the same has been downloaded in a pendrive which has been run in Court. The timings are from 7:05:31 to 7:05:44 pm.

73. As already stated earlier, the downloading of footages from DVR to pendrive was done by Rajesh Sharma (PW.29) who was posted as Constable in Cyber Cell has stated that he had downloaded the footages in the pendrive. As per instructions, the Sub-Inspector Mr. Surendra Singh has stated that he had opened the DVRs after downloading the same and had again sealed it. The memorandum of opening and sealing the DVR is Ex.P/144. The pendrive was seized from him by Surendra Singh vide Ex.P/146 and he had given certificate under Section 65-B of Evidence Act which is Ex.P/145. This witness in cross-examination has admitted that the DVR were not brought before him in a sealed condition and he cannot state that before being brought to him whether any interpolation was made in the DVRs by police. However, no such suggestion has been given to Surendra Singh (PW.35) before whom Ex.P/144 and Ex.P/146 was executed by Rajesh Sharma. It can be seen that the footages were recovered in the CCTV Cameras installed in the shop. The same were shown to Pradeep (PW.15) immediately after such detection and the spot identification memo Ex.P/40 was thereafter prepared. Thus, there was no scope for the police to make any interpolation in the CCTV footages by deliberately inserting the same in order to falsely

implicate the appellants.

74. From the aforesaid evidence, it is clear that right after the incident, the accused/appellant Asif was found to be moving wearing a red shirt with accused/appellant Irfan on a red colored motorcycle and it was the red colored shirt which was recovered from his possession as per the memorandum.

75. Thus against accused Asif, the doc identification by prosecutrix is the most relevant piece of evidence, his presence at the time of incident has been proved by matching of DNA present in hair found on the spot with DNA profile of his blood. Immediately after the incident, he was found to accompany the accused/appellant Irfan on motorcycle wearing the red colored shirt which has been seized from him.

76. It has already been seen that the mobile of accused/appellant Irfan which has been seized from Pradeep (PW.15) was found to be switched off. Ms. Pushpa Singh (PW.37) in para 48 has admitted that location of the accused from the mobile phone could not be traced because the mobile phone was found to be switched off at the time of incident. This piece of evidence that the mobile phone was switched off at the time of incident shows only one possibility that accused Asif was present on the spot when accused Irfan had committed the incident and he was ready at the beckon and call of Irfan at the spot. The mobile phone having been kept in a switched off mode is also a relevant piece of evidence against the appellants. It can be fathomed

that the mobile phone was kept in a switched off mode so that the location may not be traced as in the eventuality of any incoming call at the time of committing the offence, the mobile location could be traced if the mobile was not switched off. Thus the accused/appellant appear to have kept the mobile deliberately switched off in order to evade detection of their presence at the spot of incident. The accused/appellants themselves have not come forward to state as to where were they positioned at the time of incident. Evidence is already available against them regarding they being seen to be moving together after the incident. Hence onus was upon them to show as to whether they were coming from and where they were going to. This onus has not been discharged by the appellants. The factum of keeping the mobile phone switched off mode is a relevant fact against the appellants under Section 8 of Evidence Act, 1872.

77. Thus it has been seen that generally no person would keep his mobile phone in a switched off condition until and unless it is extremely necessary such as being in a meeting etc. It has further been stated that it was the appellants who had to clarify as to why the mobile phone was kept in a switched off mode at the time of incident and what was the necessity to sell the VIVO Company Mobile Phone purchased barely two months earlier on paying Rs.8500/- on 17.04.2018 and why the accused persons had sold off their mobile to Pradeep (PW.15) two months later just for Rs.5000/- only. (As per Ex.P/42). The only conclusion derivable is that the appellants may

have thought that keeping the mobile with them and using it after switching it off would land them in trouble later. This act of selling off mobile phone is also a relevant pience of evidence under Section 8 of Evidence Act against the appellants. Thus it is found proved against accused Asif that he was present on the spot when the offence against prosecutrix was being committed by accused Irfan and he had actively participated in the aforesaid offence which includes committal of aggravated penetrative sexual assault and causing life threatening injuries upon the prosecutrix. Now the involvement of accused/appellant Irfan would be considered in the light of evidence.

78. The statements of prosecutrix has already been considered in para-31, in which she has stated that the person who had escorted her from school had committed extremely dirty act upon her in the jungle and had also inflated number of injuries on her. It has been found proved that the person who had escorted the prosecutrix to the jungle is Irfan. The prosecutrix has identified Irfan in the doc identification and also in the photo album. The propriety of identification through photo album has already been found to be appropriate in the circumstances of prosecutrix who was injured in serious condition. It has also been found that the evidence of prosecutrix as far as involvement of Irfan is considered, has not been found to contain any contradictions or omissions in a manner so as to discredit her.

79. In the case of ***Vishnu @ Undrya vs. State of Maharashtra***, *2006 (1) SCC 289*, it has been laid down as under :-

> *"It is well settled by catena of decisions of this Court that there is no rule of law in practice that the evidence of prosecutirx could not be relied upon without corroboration and as such, it has been laid down that corroboration is not a sine qua non for conviction in a rape case. If the evidence of a victim does not suffer from any basic infirmity and the probability factor does not render it unworthy of law, as a general rule, there is no reason to insist on corroboration accepting medical evidence, where having regarding to the circumstances of the case, medical evidence can be expected to be put-forth.*

80. In this matter, the medical examination of prosecutrix has already been discussed in great detail and she has been found to be subjected to brutal penetrative sexual assault and life threatening injuries including stab injuries. Even though the aforesaid citation does not call for necessity for any other corroborative piece of evidence however, in view of such evidence available on record, it would be proper to appreciate the same.

81. Pushpa Singh (PW.37) has stated that she was posted as SHO, Police Station Ajak on 27.06.2018 and was a member of special constituted SIT team. She has stated that Irfan was taken to the spot on 30.06.2018 and the verification report of the spot was made at his instance, which is Ex.P/183.

82. Jaya Bharadwaj (PW-34) has stated that while posted as S.I. in Police Station Kotwali, District Mandsaur, she had conducted the investigation and had arrested Irfan vide arrest memo Ex.P/32 and Irfan was questioned before witnesses Hemant and Rocky Singh wherein Irfan proposed to recover the clothes worn by him at the time of incident along with knife and shoes and memo is Exhibit-

P/33. On the basis of this memo, shirt bearing blood marks on right sleeve, trousers bearing blood marks, knife bearing blood stains, banyan (vest) bearing blood traces, underwear bearing semen and blood traces, soles of pair of shoes with thorns embedded therein were seized by seizure memo Ex.P/34 as per FSL report. She also states that Head Constable Banshilal had handed her over a sealed packet containing clothes worn by the prosecutrix, which was recovered from her by the witness as per seizure memo Ex.P/163. The aforesaid packet has been opened before the Court. It contained skirt and shirt of prosecutrix on which mud and blood stains are visible. The seizure chit is also placed to be shown containing seal and signatures of Bahadur Katare, which is Article A/12. The items seized from Irfan have also been opened before the Court, which were kept in sealed packet bearing FSL seal. On opening, a shirt with black checks bearing light blood traces on the pocket and right sleeve has been found, which is Article A/14. Another such packet is Article A/15 which contains underwear of appellant Irfan, the packet A/15 has been seized as well which is a white coloured vest bearing blood traces. Article A/18 is a knife recovered from appellant Irfan. This witness in cross-examination has denied that the aforesaid seizure was made by her in the police station without going to the spot. No other substantial cross examination has been made in respect of memo and seizure.

83. The aforesaid seizure apart, his blood sample was also collected

by Dr. Bahadur Katare (PW.27). The manner in which the blood sample was collected is identical to that in respect of co-accused Asif, which has already been described earlier. The identification form in respect of Irfan executed by this witness is Ex.P/25. The blood sample of Irfan was seized as per seizure memo Ex.P/142.

84. Dr. Deepak Agrawal (PW.24) has stated that while he was posted in the emergency duty at District Hospital, Mandsaur on 28.06.2018, Constable Rameez Raja had brought Irfan at 3.10 AM for examination. On his examination, he had found that in the frenulum of the male organ of Irfan, there was redness present which occurs when forcible sexual intercourse is committed. He states that he prepared the semen slide and pubic hair of Irfan. He had also found number of nail marks on his chest and scratch marks on his back and it was also found that Ifran was having a teeth bite mark on his left shoulder, report of which is Ex.P/74. In the cross-examination, he admits in Ex.P/74 that it has not been specifically mentioned by him that the redness on the male organ was because of forceful sexual intercourse.

85. Non-mentioning of the reasons of redness in the report does not weaken the evidence made by the witness. The witness is a medical expert and he is expected to know the general cause of such signs as found on the person of Irfan. The aforesaid redness on the male organ of Irfan is a corroborative piece of evidence showing that he had recently committed forceful sexual intercourse. The nail marks

and scratches on his chest and teeth bite depict resistance on the part of the victim who tried to fight her way off when subjected to ghastly offence against her.

86. Jaya Bharadwaj (PW.34) has stated that the nails and hair strands drawn from the scalp of Irfan were handed over by her in a sealed condition to Saurav Mavariya by letter Ex.P/164 and the seizure memo of which is Ex.P/165.

87. All the articles so seized were sent by Rakesh Mohan Shukla (PW-31), CSP to FSL by draft Ex.P/154. The hair, nails and other items were sent vide draft Ex.P/156 and DNA report is Ex.P/157.

88. Before discussing the DNA report in respect of articles seized from Irfan, it would be appropriate to discuss the articles seized from the prosecutrix as well because DNA report is based upon matching of source from prosecutrix and Irfan.

89. Dr. Neha Jain (PW.23) has stated that while posted as Medical Officer at District Hospital, Mandsaur, after examining the prosecutrix on 27.06.2018, she had preserved the vaginal slide of the prosecutrix and leaves which were stuck on her private parts and had sealed and given the same to Constable Narayan.

90. Dr. Meena More (PW.26) states that on 02.07.2018, while she was posted as Resident Doctor in M.Y. Hospital, Indore, she had drawn blood sample of prosecutrix as well as oral swab sample and drawn identification memo vide Ex.P/13. EDTA vial in which blood sample was drawn along with oral swab was sealed in M. Y. Hospital

and the seized sample was sealed in her presence by ASI Dr. Vinay, who was the CMO and the seizure memo is Ex.P/138.

91. Dr. Bahadur Katare (PW.27) has stated that on 27.06.2018, while he was posted as Medical Officer, District Hospital, Mandsaur, he had examined the prosecutrix and her school dress containing brown and light blue skirt which were wet and smeared in mud carrying blood stains were sealed and given to Constable. The witness has stated that the prosecutrix was not wearing underwear. It would be recalled that the underwear of the prosecutrix was recovered from the spot by S. S. Sisodya (PW.35) and the seizure memo is Ex.P/29. The aforesaid sealed packet containing the underwear has been opened before the Court in the presence of the witness, which has been marked as Article A/25.

92. Jaya Bharadwaj (PW.34) has stated that while posted as S. I. at Police Station Kotwali, Mandsaur on 26.08.2018, she had received a message on wireless set at 12.40 PM to arrive at Mandsaur Civil Hospital immediately. On arrival, she found the prosecutrix to be in a serious condition. The recovery memo was drawn at Ex.P/8 and and I-card of Saraswati Shishu Mandir School which was worn around the neck by prosecutrix was seized by the witness and the seizure memo is Ex.P/27. She states that on 27.06.2018, on being produced by Head Constable Banshilal, the sealed packet bearing seal of CHMO, Mandsaur which contained vaginal slide of the prosecutrix and another sealed packet containing leaves drawn out of

the person of prosecutrix and the clothes worn by her were seized vide seizure memo Ex.P/163.

93. Learned counsel for the appellant has pointed out that Neha Jain has given the same slides and sealed packets containing leaves and clothes to Constable Narayan but Constable Narayan has not been examined and admits that the packets has changed hands and ultimately same packets were handed over to Jaya Bharadwaj (PW.34) by Head Constable Banshilal, who has also not been examined. Learned counsel submits that this lapse on the part of prosecution creates a doubt regarding possibility of tampering of evidence. Neha Jain has stated that she had examined and seized other items and given the same to Constable Narayan on 27.06.2018.

94. Jaya Bharadwaj (PW.34) has stated that on the same day on 27.06.2018, Head Constable Narayan had given her same packets in sealed condition. Submissions were considered. First of all, there was no motive to falsely implicate the appellants on the part of the prosecution. Secondly, the sealed packets had been handed over to Jaya Bharadwaj (PW.34) on the same day, *i.e.,* on 27.06.2018 and such items were contained in sealed packets by Neha Jain. There is no scope for intermeddling with the packets which were already handed over to the Constable and Head Constable in sealed condition. It is for the sake of exigency that packets had changed hands but no adverse inference can be drawn because of non-examination of Narayan and Banshilal, who were merely carriers of

sealed packets and no occasion for doubt arises regarding possibility of tampering of samples.

95. Sandeep Singh (PW.32) has stated that while he was posted as S. I. in Police Station Kotwali, District Mandsaur on 02.07.2018, he had prepared identification form for obtaining the blood sample and oral swab of prosecutrix at M.Y. Hospital which is Ex.P/13. After obtaining the sealed sample, it was placed in thermocol container and the sealed sample of M. Y. Hosptial was seized as per Ex.P/138.

96. Dr. Brijesh (PW.25) who was posted in M.Y. Hospital as Assistant Professor in Pediatric Surgery Department on the date of incident has performed the operation on the prosecutrix, who has stated in para-16 that he had been informed by the Gynecologist vide Ex.P/117 that the blood samples, perineal and vaginal swab, vulval pad, hair and nails of prosecutrix had been collected and sealed and handed over to the police.

97. Pushpa Singh (PW.37) has stated that on 29.06.2018, the Head Constable Laxmi Rathore had brought the sealed packet from M.Y. Hospital in which the smear tube, vulval pad, hair, nails and vulval smear tube sealed with M.Y. Hospital seal were seized by the witness along with sealed sample of M.Y. Hospital as per seizure memo Ex.P/181. All the sealed packets received from FSL, Sagar have been opened up before the Presiding Officer and its contents have been perused.

98. The witness Rakesh Mohan Shukla (PW.31) has stated the

blood sample and oral swab of prosecutrix was sent to FSL vide draft letter Ex.P/155. He has stated that along with this draft letter, other items were also sent for DNA examination vide letters Exhs.P/152 and P/153. In the draft letter, vaginal slide of the prosecutrix has been marked as Article 'O', shirt and her skirt as Article 'P', smear tube of prosecutrix drawn from M. Y. Hospital as Article 'Q', vulval pad of prosecutrix drawn from M. Y. Hospital are marked as Article 'F', smear drawn from M. Y. Hospital marked as Article 'U', underwear of prosecutrix marked as Article 'V' and blood mixed soil from the spot marked as Article 'W'. He has stated that the DNA report received from FSL, Sagar is Ex.P/157.

99. Vijay Purohit (PW-33) was posted as S. I. at Police Station Piplyamandi and was member of SIT team constituted for investigation in the matter. The witness states that samples from Article A to Y were deposited by him on 29.06.2018 along with draft letter in FSL laboratory of which receipt is Ex.P/160. Thereafter, he had deposited sealed packets on two further occasions in the matter. On 03.07.2018, he deposited Article 'Z-1 to Z-2' for FSL vide draft letter No.177-A/2018 of which receipt is Ex.P/161 and on 06.07.2018, he deposited Article 'Z-3 to Z-8' in FSL vide draft letter No.177-B/2018 of which receipt is Ex.P/162.

100. Now coming to the DNA report, same is placed as Ex.P/1. In the DNA report, it has been found that in the source of prosecutrix drawn from vulval pad (Article 'R') and her nails (Article 'T'), Y

chromosomes of one individual male were found in STR DNA profile. The alleles of each genetic marker and Y chromosome of STR DNA profile found in the vulval pad and nails matched with the alleles found in each genetic marker of Y chromosome STR DNA profile in the source of Irfan drawn from his blood sample (Article 'G'). The underwear seized from the spot bearing Article 'B' and blood soaked soil seized from the spot (Article 'W') were subjected to DNA profile and in the allele pairs found in each genetic marker of these samples matched with the corresponding alleles of each genetic marker in the Autosomal STR DNA Profiling of the blood samples of prosecutrix confirming thereby that the incident had occurred with the prosecutrix at the spot from where her underwear was sized. It has been further found that hair strands seized from the spot (Article 'Y') which contained mixed Autosomal STR DNA, when subjected to DNA profiling, alleles of each genetic marker of such profile matched with the corresponding alleles in the profile of blood sample of Irfan thereby confirming that the hair strands found on the spot was that of Irfan establishing his presence on the spot. The knife which had been seized from Irfan was also subjected to profiling but it was found to contain low interpretable Autosomal STR DNA Profiling. The pubic hair of Irfan which is Article 'I' when subjected to DNA profiling, it was found that in the alleles contained in each genetic marker of the Autosomal STR DNA Profiling of the pubic hair of appellant Irfan matched with the allele pairs of each genetic

marker determined from blood sample of prosecutrix, meaning thereby, that the pubic hair of Irfan contained traces of source of prosecutrix which corroborates the prosecution story that Irfan had committed rape upon the prosecutrix.

101. The jeans pant marked as Article 'K" seized from Irfan and banyan (vest) marked as Article 'N' were found to contain Autosomal STR DNA Profiling of the same female and it was found that the aforesaid allele found in the genetic marker of Autosomal STR DNA Profiling of the female found on jeans pant and banyan of Irfan had matched with those of prosecutrix whose source was her blood sample. The shirt marked as Article 'L' of Irfan seized from his house was also subjected to DNA profiling and in the aforesaid shirt, it was found that the allels found in each genetic marker had matched with the corresponding allels of each genetic marker in the Autosomal STR DNA Profiling drawn from the blood sample of prosecutrix, meaning thereby that shirt of Irfan also contained source of blood of prosecutrix.

102. Thus, the opinion of aforesaid DNA report conclusively shows that the source of prosecutrix was found in the source of Irfan and conversely, source of Irfan has been found to have contained source of the prosecutrix which further corroborates the evidence of prosecutrix that she was subjected to aggravated penetrative sexual assault (rape) by Irfan. The aforesaid evidence apart, the prosecution has also established presence of Irfan at the spot by way

of his fingerprints found on a beer bottle lying on the spot.

103. Jitendra Singh PW-36 has stated that on 28.06.2018, he while posted as Inspector in City Kotwali Police Station, Mandsaur, finger prints of accused Irfan was taken in three slips Ex.P/169, Ex.P/170 and Ex.P/171 on 29.06.2018. The finger prints of both hands of Asif were taken in three slips vide Ex.P/172, Ex.P/173 and Ex.P/174. The witness further states that the finger prints retrieved from the spot of incident and were sent to the finger print in-charge vide document Ex.P/179 for its analysis. He further states that he had received letter of Superintendent of Police on 04.07.2018 accompanied by expert report. The aforesaid letter is exhibited as Ex.P/175 and the expert report as Ex.P/177. In the expert report, it was found that the chance finger print of the beer bottle matched with the sample of finger print of Irfan. The thumb impression of right hand on the bottle were found to be matching with specimen fingerprint of Irfan. In cross-examination, he has been asked questions regarding credibility of picking up chance finger prints on the bottle, the witness has stated that the finger prints were not lifted by me but by Jitendra Singh (PW-36). Jitendra PW-36 has simply given a suggestion in cross-examination that no finger prints were lifted from beer bottle which he has denied.

104. During oral submission, it has been argued by learned counsel that photograph of beer bottle shows different name Monk which does not co-relate with the seized beer bottle on which the words are

Black Fort Premium Beer has been written. However, the officer Surender Singh (PW-35), who had seized the beer bottle has not been asked any such question in cross-examination even witness Mahesh Patidar (PW.12), witness of seizure memo Ex.P/29 has also not been asked any such question. So also, Shakti Singh (PW.11), has not been put to question regarding identity of beer bottle. Surender Singh (PW35) has admitted in para no.24 that at the spot where the incident had taken place, the neighborhood people do throw their garbage and bottles etc.

105. The finger print analysis is scientific analysis, credibility of which is not liable to be questioned without there being extraordinary reasons, which we are afraid, are not available in the present case.

106. The Apex court in its various judgments has laid out the importance of DNA profiling and has held that the DNA matching, due to its scientific character, conclusively nails the culprit. These citations are ***Dharam Deo Yadav v/s. State of Uttar Pradesh***, *(2014) 5 SCC 509*, ***Santosh Kumar Singh v/s. State through CBI***, *(2010) 9 SCC 747* and the ***Nirbhaya's case***, which is cited as ***Mukesh & Anr. v/s. State (NCT of Delhi) & Ors.***, *(2017) 6 SCC 1* etc. The Apex court in the case of *Santosh Kumar Singh* (supra) held that it would be dangerous doctrine to lay down that report of an expert witness could be brushed aside by making reference to some other text. In Nirbhaya's case, the Supreme Court commented on DNA profiling as

under :-

> *"**455**. Before considering the above findings of DNA analysis contained in tabular form, let me first refer to what is DNA, the infallibility of identification by DNA profiling and its accuracy with certainty. DNA – De-oxyribonucleic acid, which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. DNA is the genetic blueprint of life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA. DNA profiling is an extremely accurate way to compare a suspect's DNA with crime scene specimens, victim's DNA on the blood-stained clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match. A DNA finger print is identical for every part of the body, whether it is the blood, saliva, brain, kidney or foot on any part of the body. It cannot be changed; it will be identical no matter what is done to a body. Even relatively minute quantities of blood, saliva or semen at a crime scene or on clothes can yield sufficient material for analysis. The Experts opine that the identification is almost hundred per cent precise. Using this i.e. chemical structure of genetic information by generating DNA profile of the individual, identification of an individual is done like in the traditional method of identifying finger prints of offenders. Finger prints are only on the fingers and at times may be altered. Burning or cutting a finger can change the make of the finger print. But DNA cannot be changed for an individual no matter whatever happens to a body.*
>
> ***456**. We may usefully refer to Advanced Law Lexicon, 3rd Edition Reprint 2009 by P. Ramanatha Aiyar which explains DNA as under:-*
>
> > *"DNA.- Deoxyribonucleic acid, the nucleoprotein of chromosomes. The double-helix structure in cell nuclei that carries the genetic information of most living organisms. The material in a cell that makes up the genes and controls the cell. (Biological Term) DNA finger printing- A method of identification especially for evidentiary purposes by analyzing and comparing the DNA from tissue samples. (Merriam Webster)"*
> >
> > *In the same Law Lexicon, learned author refers to DNA identification as under:*

DNA identification- A method of comparing a person's deoxyribonucleic acid (DNA) - a patterned chemical structure of genetic information - with the DNA in a biological specimen (such as blood, tissue, or hair) to determine if the person is the source of the specimen. Also termed DNA finger printing; genetic finger printing (Black, 7th Edition, 1999).

***457**. DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes etc. recovered from the accused or from witnesses. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict the accused but also serves to exonerate. The sophisticated technology of DNA finger printing makes it possible to obtain conclusive results. Section 53A Cr.P.C. is added by the Code of Criminal Procedure (Amendment) Act, 2005. It provides for a detailed medical examination of accused for an offence of rape or attempt to commit rape by the registered medical practitioners employed in a hospital run by the Government or by a local authority or in the absence of such a practitioner within the radius of 16 kms. from the place where the offence has been committed by any other registered medical practitioner.*

***458**. Observing that DNA is scientifically accurate and exact science and that the trial court was not justified in rejecting DNA report, in Santosh Kumar Singh v. State (2010) 9 SCC 747, the Court held as under:*

461. As discussed earlier, identification by DNA genetic finger print is almost hundred per cent precise and accurate. The DNA profile generated from the blood-stained clothes of the accused and other articles are found consistent with the DNA profile of the victim and DNA profile of PW-1; this is a strong piece of evidence against the accused. In his evidence, PW-45 Dr. B.K. Mohapatra has stated that once DNA profile is generated and found consistent with another DNA profile, the accuracy is hundred per cent and we find no reason to doubt his evidence. As pointed out by the Courts below, the counsel for the defence did not raise any substantive ground to rebut the findings of DNA analysis and the findings through the examination of PW-45. The DNA report and the

findings thereon, being scientifically accurate clearly establish the link involving the accused persons in the incident."

107. Reverting to the application under Section 367 of Cr.P.C filed by the appellants regarding taking further evidence in respect of appellant Irfan's mobile phone having been found switched off, as also request for exhibiting the video footages of the spot map, the prayer was considered. Pushpa Singh (PW.37), in para 48 has stated that she did not trace the location of Irfan's mobile because his mobile has been found to be switched off. She has denied the suggestion that mobile had not been switched off at the time of incident. It is the case of the appellant that had this evidence been led, it would have been proved by the appellants that the seized mobile was in fact, not switched off, which would have proved that the appellants were not present at the spot at the time of incident.

108. This submission was considered.

109. It has not been the case of the appellants shown by way of suggestion or statements recorded under Section 313 of Cr.P.C, that at the time of incident they were elsewhere and not present on the spot. The appellants themselves could have proved their defence by way of examining the network provider company's officer to prove their alibi, which has not been done by them. Hence, no case is made out for leading any additional evidence in this regard. As far as request for exhibiting the video footages of the spot is concerned, the still photo prints have been produced by the prosecution and the

same has been exhibited as well. The appellants have themselves put their signatures in *'Tasdik'* (verification report) of the spot. The various incriminating articles have been seized from the spot. In police investigations, the spot map, seizure memo, still photographs etc., are generally considered to be sufficient pieces of investigation and there is no statutory requirement as such to exhibit each and every piece of investigative material by the prosecution. Thus, the aforesaid application deserves to be rejected.

110. There is another circumstance, against the appellants which is of relevance. The appellants in their accused statements have not been found to be forthcoming by way of offering any sort of explanation or clarification. Most of the answers have been given as ***"do not know".*** No explanation at all for any of the circumstances has been given by the appellants. In the case of ***Edmund S. Lyngdoh*** *vs*. ***State of Meghalaya***, reported as *(2016) 15 SCC 572*, it has been held that where the accused gives evasive answers in his cross – examination under Section 313 of Cr.P.C, an adverse inference can be drawn against him.

111. Reverting back to the DNA analysis, in the report, ie., Exhibit P/157, it has already been found that the same inculpates both the appellants.

112. From the aforesaid analysis, it is conclusively proven that the prosecutrix who was below 12 years of age at the time of incident was subjected to violent gang rape by appellants Irfan and Asif. She

was also subjected to life threatening injuries on her vital parts which includes stab injuries and serious injuries on her neck and also to her eyes. The charges against both the accused under Section 376(DB) is found proved. As far as offence punishable under Section 376(2)(m) of IPC is concerned, it has to be proved that while committing rape, the accused has caused grievous bodily harm or maims or disfigures or endangers life of woman. The same is found proved only against appellant Irfan. Appellant Asif is held guilty under Section 376(2)(m)/34 of IPC. It has been found proved that appellant Irfan had kidnapped the prosecutrix. It has further been found proved that appellant Asif was present on the spot when the offence of rape was committed therefore, offence of kidnapping under Sections 363 and 366A of IPC are found proved against appellant Irfan, but appellant Asif stands acquitted from the aforesaid charges. Charge under Section 307 of IPC is further found proved against Irfan and Asif is found proved to have committed offence under Section 307/34 of IPC. Charge under Section 5(g) read with Section 6 of POCSO Act prescribes the punishment for committing gang penetrative sexual assault on a child and the same is found proved against both the appellants. Further, both the accused also found guilty under Section 5(r)/6 of POCSO Act, which punishes act of penetrative sexual assault on a child and attempt to murder the child. The only difference is that while appellant Irfan is convicted under this substantive sentence, appellant Asif is liable under this section with

the aid of Section 34 of IPC. The final conviction of each of the appellant would be as under :-

(i) appellant Irfan is convicted under Section 363, 366A, 376(2)(m), 376(DB), 307 of IPC and also under Section 5(g) and 5(r), read with Section 6 of POCSO Act, 2015.

(ii) appellant Asif is convicted under Section 376(2)(m)/34, 376(DB), 307/34 of IPC and under Section 5(g), read with Section 6, 5(r)/6 of POCSO Act, read with Section 34 of IPC.

113. Coming to the question of reference seeking to confirm the death sentence, it is to be seen by this Court as to whether the sentence of death imposed upon the appellants is proper in the given circumstances or not?

114. One needs to travel through various Apex Court judgments on the issue. It has already been laid down that death penalty can be awarded only in rarest of rare case. The time tested judgments on this issue are the cases of ***Bachan Singh*** *vs.* ***State of Punjab***, *1980 (2) SCC 684*, ***Macchi Singh*** *vs.* ***State of Punjab***, *1983 (3) SCC 470*.

115. In ***Bachan Singh's*** case (supra), the Apex Court had laid down aggravating and mitigating circumstances against and in favour of accused and it was directed that a balance sheet of such circumstances be drawn up and a just balance has to be accorded while awarding such sentence. The court has to record exceptional reasons founded on exceptional grave circumstances of a particular act relating to the crime and the criminal.

116. In ***Macchi Singh's*** case (supra), the Apex court observed that before awarding death sentence following questions need to 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 according maximum weightage to the mitigating circumstances which speak in favour of the offender ? If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."*

117. The Apex court in the case of ***Shankar Kisan Rao Khade*** ***vs.*** ***State of Maharashtra***, *2013 (5) SCC 546*, has held that for awarding death penalty, the Crime Test, Criminal Test and R.R. Test have to be satisfied. Crime Test has to be 100%, Criminal Test 0% and R.R. Test, *ie.,* Rarest of Rare Test is also required to be proven. Crime Test is 100% when no iota of doubt remains regarding commission of offence by the accused. Criminal Test is 0% when there are no such mitigating circumstances in favour of the accused, which may call for a lenient view in his favour.

118. The Apex court in the case of ***Shankar Kisan Rao Khade*** (supra) took into account a number of Apex court judgments in which the offence of rape and murder of children had been committed by the accused and in some of which the extreme penalty of death was imposed and in others life imprisonment had been

imposed and observed that the reason for such variance was not considering the mitigating circumstances, ie., Criminal Test. The Apex court in para 47 has observed as under :-

> *"**47**. Bachan Singh is more than clear that the crime is important (cruel, diabolic, brutal, depraved and gruesome) but the criminal is also important and this, unfortunately has been overlooked in several cases in the past (as mentioned in Santosh Kumar Satishbhushan Bariya v/s. State of Maharashtra, (2009) 6 SCC 498) and even in some of the cases referred to above. It is this individualized sentencing that has made this Court wary, in the recent past, of imposing death penalty and instead substituting it for fixed term sentences exceeding 14 years (the term of 14 years or 20 years being erroneously equated with life imprisonment) or awarding consecutive sentences. Some of these cases, which are not necessarily cases of rape and murder, are mentioned below."*

119. The Apex court in the case of ***Purushottam Dashrat Borate vs. State of Maharashtra***, ***2015 (6) SCC 652*** has held that the age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be mitigating circumstances. It cannot also be considered as mitigating circumstance, particularly taking into consideration the nature of the heinous offence and cold and calculated manner in which it was committed by the accused person.

120. How the society would consider the nature of crime committed by an accused such as the appellant has been described by the Apex court in the case of ***Sham Narain*** *vs.* ***State (NCT of Delhi)*** reported as (2013) 7 SCC 77 wherein it has been observed as follows :-

> *"1. The wanton lust, vicious appetite, depravity of senses, mortgage of mind to the inferior endowments of nature,*

the servility to the loathsome beast of passion and absolutely unchained carnal desire have driven the appellant to commit a crime which can bring in a "tsunami" of shock in the mind of the collective, send a chill down the spine of the society, destroy the civilized stems of the milieu and comatose the marrows of sensitive polity".

121. A three Judges Bench of the Apex court in a judgment of ***Vasanta Sampat Dupare vs. State of Maharashtra***, ***(2015) 1 SCC 253*** maintained the death sentence and observed as under :-

"*58. Presently, we shall proceed to dwell upon the manner in which the crime was committed. Materials on record clearly reveal that the appellant was well acquainted with the inhabitants of the locality and as is demonstrable he had access to the house of the father of the deceased and the children used to call him "uncle". He had lured the deceased to go with him to have chocolates. It is an act of taking advantage of absolute innocence. He had taken the deceased from place to place by his bicycle and eventually raped her in a brutal manner, as if he had an insatiable and ravenous appetite. The injuries caused on the minor girl are likely to send a chill in the spine of the society and shiver in the marrows of human conscience. He had battered her to death by assaulting her with two heavy stones. The injured minor girl could not have shown any kind of resistance. It is not a case wherethe accused had a momentary lapse. It is also not a case where the minor child had died because of profuse bleeding due to rape but because of the deliberate cruel assault by the appellant. After the savage act was over, the coolness of the appellant is evident, for he washed the clothes on the tap and took proper care to hide things. As is manifest, he even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of the four year girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life- spark. The barbaric act of the appellant does not remotely show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the appellant is not only depraved and*

debased, but can have a menacing effect on the society. It is calamitous"

122. The Co-ordinate Bench of this High Court in the case of ***In Reference vs. Vinod @ Rahul Chouhtha***, *I.L.R. [2018] M.P. 2512 (DB)*, affirmed the death penalty imposed upon the accused while observing thus :-

*"**66**. In the light of the evidence and the judgments referred to hereinabove, we find that there is no mitigating circumstance in favour of the appellant in the present case. The appellant was young unmarried boy aged 22 years at the time of commission of offence but he breached the trust of a girl child of four years when he tempted her by offering biscuit to accompany him to meet her father. He violated her and took her life within3-4 hours of taking her with him. It is an act of extreme depravity when the appellant prompted a young child whose only fault was that she believed the appellant to be her well-wisher. The crime against the girl child are on rise, therefore, extreme punishment may deter the other criminals indulging in such crime. Such crime sends shock wave in the society when it is committed against a girl child. This Court has the social responsibility to make the citizen of this country know that law cannot come to the rescue of such person on the basis of humanity. The extreme punishment may convey a message to these predators that it is not a soft State where the criminals committing such serious crimes may get reprieve in the guise of humanity. The humanity is more in danger in the hands of the persons like the appellant. Therefore, we find that the capital punishment awarded to the appellant is one of the rarest of rare cases where the extreme capital punishment is warranted.*
***67.** In view of the foregoing reasons, we affirm the death sentence awarded to the appellant by the Trial Court while dismissing the appeal preferred by the accused against his conviction and sentence. We order accordingly."*

123. In the case of ***Omprakash** vs. **State of Haryana***, *(1999) 3 SCC 19*, it has been held that the court must respond to the cry of the society and to settle what would be a deterrent punishment for what

was an apparently abominable crime.

124. It would be appropriate to revisit Section 376(DB) of IPC which provides for imposition of death sentence. This provision is reproduced as under :-

> "**Section 376DB. Punishment for gang rape on woman under twelve years of age**.-Where a woman under twelve years of age 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 imprisonment for life, and with fine, or with death:
>
> 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.]"**

125. The aforesaid Section has been instituted by Act 22 of 2018 *w.e.f.* 21.4.2018. In fact the Criminal Law (Amendment Act, 2018) No.22/2018 is dated 11.8.2018 and Section 1(ii) of the aforesaid Act provides that it shall be deemed to have come into force on 21.4.2018. On 21.4.2018 the ordinance incorporating Section 376(DB) of IPC had come into force. By the Act of 2018, it has been deemed that this provision of Section 376(DB) of IPC had come into force from 21.4.2018 *i.e.,* the date of promulgation of ordinance. The offence in the present case was committed on 26.6.2018. On that date the ordinance was in force, which had brought in penal provision of Section 376(DB) of IPC. Thus, the ordinance was in force since two months prior to the date of incident. The Supreme Court in the case of ***Shatrughna Baban Meshram Vs. State of Maharashtra***, *[(2021) 1 SCC 596]*, while considering a case involving the murder and

Section 376(A) of IPC with the later offence prescribing for punishment of death, when in the course of committal of rape death has been caused or persistent vegetative state of affair has resulted, was of the opinion that as far as Section 302 of IPC was concerned, the offence of having been found proved under Section 300 fourthly of IPC, death sentence is rarely awarded in such case. However, as far as Section 376(A) was concerned, the Hon'ble Apex Court observed as under:-

> *"**83**. The second count on which death sentence has been imposed is under Section 376-A IPC. As noted earlier, the offence was committed on 11.2.2013 and just few days before such commission, Section 376-A was inserted in IPC by the Ordinance (3.2.2013). Ex-post facto effect given to Section 376-A inserted by the Amendment Act would not in any way be inconsistent with Article 20(1) of the Constitution. The appellant is thus definitely guilty of the offence punishable under Section 376-A IPC. But the question remains whether punishment lesser than death sentence gets ruled out or not. As against Section 302 IPC while dealing with cases under Section 376-A IPC, a wider spectrum is available for consideration by the courts as to the punishment to be awarded. On the basis of the same aspects that weighed with the Court while considering the appropriate punishment for the offence under Section 302 IPC, in view of the fact that Section 376-A IPC was brought on the statute book just few days before the commission of the offence, the appellant does not deserve death penalty for the said offence. At the same time, considering the nature and enormity of the offence, it must be observed that the appropriate punishment for the offence under Section 376-A IPC must be rigorous imprisonment for a term of 25 years."*

126. It can thus, be seen that the Apex Court refrained from confirming the death sentence on the ground that the ordinance prescribing for death sentence had been inserted in IPC just 9 days

before the date of incident. However the Apex Court went on to impose rigorous imprisonment for a period of 25 years under Section 376(A) of IPC only.

127. As far as the present case is concerned, the new provision of Section 376(DB) of IPC had come into force two months prior to the date of incident which is substantial period as against the period of only 9 days in the case of ***Shatrughna Baban Meshram*** (supra).

128. Over the years, cases pertaining to child rape have increased and the northward trend of the graph of such cases has not shown any signs of ebbing. This situation probably has arisen out of easily accessible porn material available to such persons, which further tends to deprave their mindset, resulting in such havoc in the lives of unsuspecting minor children who suffer lifelong trauma and ignominy. The legislature in such circumstances was compelled to bring in such stringent provisions in IPC which were not there earlier, not only in IPC nor in POCSO Act as well, as can be seen that similar provisions under POCSO Act only prescribed for Life Imprisonment. Consequential amendment was incorporated in Section 42 of POCSO Act on 21.4.2018 as well which is reproduced as under :-

> "**42. Alternate punishment**.-Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376DA, 376DB, 376E or Section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for the punishment which is greater in degree."

129. The Apex Court in the aforesaid case of ***Shatrughna Baban Meshram*** (supra) in Para-83 (reproduced earlier) has very specifically held that as against Section 302 of IPC while dealing with cases under Section 376(A) of IPC, a wider spectrum is available for consideration by the courts as to the punishment to be awarded.

130. Earlier while awarding death sentences, specially in the case of circumstantial evidence, the requirement of proving a case beyond residual doubt as prescribed in the earlier case of ***Ashok Dev Berma @ Achak Deb Berma vs. State of Tripura***, *[(2014) 4 SCC 747]* and in the case of ***Ravi Shankar vs. State of M.P.***, *[2019(4) JLJ 258 (SC))]* was considered by the Apex Court in the case of ***Shatrughna Baban Meshram*** (supra). The three judges Bench was of the view that theoretically, the concept or theory of residual doubt does not have any place in a case based on circumstantial evidence and the only thing required is to prove the case on the lines as held in ***Sharad Birdhichand Sarda vs. State of Maharashtra***, *[1984(4) SCC 116]*.

131. Although the present case is based on ocular evidence of prosecutrix, however, there are circumstantial corroborative pieces of evidence also available against the appellants. The substantial evidence against the appellants are in themselves form complete chain satisfying the standards of ***Sharad Birdhichand Sarda vs. State of Maharashtra*** (supra) and the case would stand proved on

the aforesaid basis of circumstantial evidence itself. As already stated, the theory of "residual doubt" would not arise for awarding the extreme penalty. In the present case, the ocular evidence of prosecutrix supported with medical evidence is in itself sufficient to prove the charge under Section 376(DB) of IPC against the appellants.

132. The facts of the present case reveal an ominous plot hatched by the appellants seeking to satiate their lust by breaching the confidence of the minor prosecutrix girl and then heaping miseries upon her by committing such forceful aggravated penetrative sexual assault which is most ruthless in nature. She had been assaulted mercilessly and had been left for dead in the Jungle, confident of escaping detection as they had taken all the precautions by choosing a desolated spot, switching off their mobile phone and escorting the prosecutrix from the school to the spot in such a manner so as not to raise any doubts in the minds of passerbys. It was only providence and inherent presence of mind on the part of prosecutrix that she survived the ordeal and lived to tell the story. She could barely survive after numerous operations and being provided best of health care facilities in ICU. One fails to understands that what could be a worse scenario in which alone the death sentence can be awarded. It was considered by us as to whether such extreme punishment should have been awarded when the prosecutrix is left in vegetative state which was not the case here ?. However, this question also cannot be

answered in affirmative because Section 376(A) of IPC provides that death sentence can be awarded when the victim is left in vegetative state. No such mention is there in Section 376(DB) of IPC. The offence of gang rape in itself is a very heinous offence and to impose further condition of the victim being left in vegetative state for awarding death penalty would be asking for too much, which was not the intention of the legislature in any case.

133. In the case of ***Ravi S/o. Ashok Ghumare vs. State of Maharashtra***, *2019 (9) SCC 622*, a three Judge Bench of the Apex Court has observed the following :-

> "***58.*** *It is equally apt at this stage to refer the recent amendments carried out by Parliament in the Protection of Children from Sexual Offences Act, 2012 by way of The Protection of Children from Sexual Offences (Amendment) Act, 2019 as notified on 6th August, 2019. The unamended Act defines "Aggravated Penetrative Sexual Assault" in Section 5 which included, "whoever commits aggravated penetrative sexual assault on a child below the age of 12 years." Originally, the punishment for an aggravated sexual assault was rigorous imprisonment for a term not less than 10-years but which may extend for imprisonment for life with fine.*
>
> ***59.*** *The recent amendment in Section 6 of 2012 Act has substituted the punishment as follows:-*
>
> *"Post the Amendment, Section 6 has been substituted as follows:-*
>
> > *"6.* ***Punishment for aggravated penetrative sexual assault.*** *(-1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.*

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."

[Emphasis applied]

60. *The minimum sentence for an aggravated penetrative sexual assault has been thus increased from 10 years to 20 years and imprisonment for life has now been expressly stated to be imprisonment for natural life of the person. Significantly, `death sentence' has also been introduced as a penalty for the offence of aggravated penetrative sexualt assault on a child below 12 years.*

61*. The Legislature has impliedly distanced itself from the propounders of "No-Death Setence" in "No Circumstances" theory and has re-stated the will of the people that in the cases of brutal rape of minor children below the age of 12 years without murder of the victim, `death penalty' can also be imposed. In the Statement of Objects and Reasons of amendment, Parliament has shown its concern of the fact that "in recent past incidents of child sexual abuse cases administering the inhuman mindset of the accused, who have been barbaric in their approach to young victim, is rising in the country." If the Parliament, armed with adequate facts and figures, has decided to introduce capital punishment for the offence of sexual abuse of a child, the Court hitherto will bear in mind the latest Legislative Policy even though it has no applicability in a case where the offence was committed prior thereto. The judicial precedents rendered before the recent amendment came into force, therefore, ought to be viewed with a purposive approach so that the legislative and judicial approaches are well harmonised.*

62*. In the light of above discussion, we are of the considered opinion that sentencing in this case has to be judged keeping in view the parameters originating from Bachan Singh and Machhi Singh cases and which have since been strengthened, explained, distinguished or followed in a catena of subsequent decisions, some of which have been cited above. Having said that, it may be seen that the victim was barely a two-year old baby whom the appellant kidnapped and apparently kept on assaulting over 4-5 hours till she breathed her last. The appellant who had no control over his carnal desires surpassed all natural, social and legal limits just to satiate his sexual hunger. He ruthlessly finished a life which was yet to bloom. The appellant instead of showing fatherly love, affection and protection to the child against the evils of the society, rather made her the victim of lust. It's a case where trust has been*

> *betrayed and social values are impaired. The unnatural sex with a two-year old toddler exhibits a dirty and perverted mind, showcasing a horrifying tale of brutality. The appellant meticulously executed his nefarious design by locking one door of his house from the outside and bolting the other one from the inside so as to deceive people into believing that nobody was inside. The appellant was thus in his full senses while he indulged in this senseless act. Appellant has not shown any remorse or repentance for the gory crime, rather he opted to remain silent in his 313 Cr.P.C. statement. His deliberate, well-designed silence with a standard defence of `false' accusation reveals his lack of kindness or compassion and leads to believe that he can never be reformed. That being so, this Court cannot write off the capital punishment so long as it is inscribed in the statute book.*
>
> ***63**. All that is needed to be followed by us is what O' Conner J. very aptly observed in California v. Ramos, 463 U.S. 992 that the "qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination" and in order to ensure that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has to be with the procedure by which the death sentence is imposed than with the substantive factors laid before it.*
>
> ***64.** For the reasons aforestated, we dismiss the appeals and affirm the death sentence.*

134. In the present case also the appellants have not shown any remorse, they have acted in a cold blooded manner and have followed their natural routine after committing the ghastly incident, which shows that they were already hardened into such perverts with criminal mindset which was devoid of any emotions or care about small girl child.

135. Learned counsel for the appellants have argued that while awarding the death sentence, adequate hearing to appellants was not granted which was necessary as per Section 235(2) of Cr.P.C. Citation of ***Jagdish Daya Bhai Patel & Anr.*** *vs*. ***State of Maharashtra***, *2012 (8) SCC 43* has been relied upon on this issue.

Learned counsel has submitted that on the date of the verdict of conviction, the sentence has been pronounced, giving detailed opportunity to accused to make submissions on the quantum of sentence. This submission was considered. A three Judge Bench of the Apex Court in the case of ***Shatrughna Baban Meshram*** (supra) has considered this issue. The Apex court has observed that the fact of imposition of sentence on the same day, the order of conviction was pronounced cannot by itself be a ground to commute death sentence to life imprisonment. In such case, though remand of the matter for consideration afresh is not necessary but the appellant must be afforded adequate and sufficient opportunity to place all the relevant materials on record while arguing the case before the appellate Court on the question of sentence. The relevant paras are 36, 38, 40 & 41 :-

> "***36.*** *We now turn to the first submission advanced by Ms Mathur, learned Senior Advocate on the issue of sentence. Section 235(2) of the Code mandates that the accused must be heard on sentence. In the instant case the order of sentence was made on the same day the order of conviction was pronounced. In* ***Santa Singh v. State of Punjab*** *[Santa Singh v. State of Punjab, (1976) 4 SCC 190 : 1976 SCC (Cri) 546] the accused was convicted and sentenced to death by one single judgment and thus a Bench of two Judges of this Court found that there was infraction of Section 235(2) of the Code. The sentence of death was therefore set aside and the matter was remanded to the Sessions Court. Whether, for non-compliance with Section 235(2) of the Code, the matter be remanded in the light of the decision in Santa Singh v. State of Punjab [Santa Singh v. State of Punjab, (1976) 4 SCC 190 : 1976 SCC (Cri) 546] was thereafter considered by a Bench of three Judges of this Court in Dagdu v. State of Maharashtra [Dagdu v. State of Maharashtra, (1977) 3 SCC 68 : 1977 SCC (Cri) 421] . Chandrachud, C.J. who delivered the leading judgment,*

observed: (SCC p. 89, para 79)

> *"79. But we are unable to read the judgment in Santa Singh [Santa Singh v. State of Punjab, (1976) 4 SCC 190 : 1976 SCC (Cri) 546] as laying down that the failure on the part of the court, which convicts an accused, to hear him on the question of sentence must necessarily entail a remand to that court in order to afford to the accused an opportunity to be heard on the question of sentence. 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. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the court or he may, on affidavit or otherwise, place in writing before the court whatever he desires to place before it on the question of sentence. The court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court."*
>
> *Goswami, J., authored a concurring opinion, the relevant part of which was quoted in B.A. Umesh v.High Court of Karnataka [B.A. Umesh v. High Court of Karnataka, (2017) 4 SCC 124 : (2017) 2 SCC (Cri) 304] .*

38. *In* ***B.A. Umesh v. High Court of Karnataka*** *[B.A. Umesh v. High Court of Karnataka, (2017) 4 SCC 124 : (2017) 2 SCC (Cri) 304] , a Bench of three Judges of this Court considered the decisions on the point including the question whether the matter was required to be remanded to hear the accused on sentence. Paras 11 to 13 of the decision were as under: (SCC p. 131)*

> "*11.* **In *Dagdu* v. *State of Maharashtra*** [*Dagdu* v. *State of Maharashtra*, (1977) 3 SCC 68 : 1977 SCC (Cri) 421] Goswami, J. observes as under: (SCC p. 92, para 90)
>
> > *'90. I would particularly emphasise that there is no mandatory direction for remanding any*

case in Santa Singh v.State of Punjab [Santa Singh v. State of Punjab, (1976) 4 SCC 190 : 1976 SCC (Cri) 546] nor is remand the inevitable recipe of Section 235(2), Code of Criminal Procedure, 1973. Whenever an appeal court finds that the mandate of Section 235(2) CrPC for a hearing on sentence had not been complied with, it, at once, becomes the duty of the appeal court to offer to the accused an adequate opportunity to produce before it whatever materials he chooses in whatever reasonable way possible. Courts should avoid laws' delay and necessarily inconsequential remands when the accused can secure full benefit of Section 235(2) CrPC even in the appeal court, in the High Court or even in this Court. We have unanimously adopted this very course in these appeals.'

*12. In another two-Judge Bench case in **Tarlok Singh v. State of Punjab** [Tarlok Singh v. State of Punjab, (1977) 3 SCC 218 : 1977 SCC (Cri) 490] , at para 4, Krishna Iyer, J. writes: (SCC pp. 219-20)*

'4. In Santa Singh v. State of Punjab [Santa Singh v. State of Punjab, (1976) 4 SCC 190 : 1976 SCC (Cri) 546] this Court considering Section 235(2) CrPC held that the hearing contemplated by that sub-section is not confined merely to hearing oral submissions but extends to giving an opportunity to the prosecution and the accused to place before the Court facts and materials relating to the various factors bearing on the question of sentence and, if they are contested by either side, then to produce evidence for the purpose of establishing the same. Of course, in that particular case this Court sent the case back to the Sessions Court for complying with Section 235(2) CrPC. It may well be that in many cases sending the case back to the Sessions Court may lead to more expense, delay and prejudice to the cause of justice. In such cases, it may be more appropriate for the appellate court to give an opportunity to the parties in terms of Section 235(2) to produce the materials they wish to adduce instead of going through the exercise of sending the case back to the trial court. This may, in many cases, save time and help produce prompt justice.'

13. *In **Deepak Rai v. State of Bihar** [Deepak Rai v. State of Bihar, (2013) 10 SCC 421 : (2014) 1 SCC (Cri) 52] , yet another three-Judge Bench case, Dattu, J. observes in para 54 as under: (SCC p. 449)*

'54. Herein, it is not the case of the appellants that the opportunity to be heard on the question of sentence separately as provisioned for under Section

> *235(2) of the Code was not provided by the courts below. Further, the trial court has recorded and discussed the submissions made by the appellants and the prosecution on the said question and thereafter, rejected the possibility of awarding a punishment less harsh than the death penalty. However, the High Court while confirming the sentence has recorded [State of Bihar v. Deepak Rai, 2010 SCC OnLine Pat 949] reasons though encapsulated. The High Court has noticed the motive of the appellants being non-withdrawal of the case by the informant and the ghastly manner of commission of crime whereby six innocent persons as young as 3 year old were charred to death and concluded that the incident shocks the conscience of the entire society and thus deserves nothing lesser but death penalty.' "*
>
> ***40.*** *Recently, in Manoj Suryavanshi v. State of Chhattisgarh [Manoj Suryavanshi v. State of Chhattisgarh, (2020) 4 SCC 451 : (2020) 2 SCC (Cri) 601] , a Bench of three Judges of this Court, after considering the relevant decisions on the point, concluded: (SCC p. 476, para 27.2)*
>
> > *"27.2. Thus, there is no absolute proposition of law that in no case there can be conviction and sentence on the same day. There is no absolute proposition of law laid down by this Court in any of the decisions that if the sentence is awarded on the very same day on which the conviction was recorded, the sentencing would be vitiated."*
>
> ***41.*** *Thus, merely on account of infraction of Section 235(2) of the Code, the death sentence ought not to be commuted to life imprisonment. In any case we have afforded adequate and sufficient opportunity to the appellant to place all the relevant materials on record in the light of principle laid down in Dagdu v. State of Maharashtra [Dagdu v. State of Maharashtra, (1977) 3 SCC 68 : 1977 SCC (Cri) 421].*

136. In the present case, adequate hearing on sentencing has been given to the appellants at appellate stage as well.

137. The other citations in which both sentence was commuted into life imprisonment are ***Sachin Kumar Singhraha vs. State of M.P.***, *2019 Cr.L.R. (S.C.) 317*, ***Chhannu Lal Verma vs. State of***

Chattisgarh, *AIR 2019 SC 243*, ***State of M.P. vs. Naveen @ Ajay S/o. Dattaji Rao Gadke***, *2018 SCC Online M.P. 952*, ***CRRFC No.8 of 2019 & CRA.No.4554/2019*** decided on 28.7.2021 ***Appellant : In Ref (Suo Moto) & Ors. vs. Manoj & Ors.*** (Gwalior Bench), ***Rameshbhai Chandubhai Rathod vs. State of Gujarat***, *AIR 2011 SC 803*, ***Criminal Ref. No.07/2018 In Reference vs. Raj Kumar Kol***, CRA. No.5786/2018 ***(Raj Kumar Kol vs. State of M.P.)*** decided on 26.10.2018 at Principal seat, Jabalpur, ***Sachin Kumar Singhraha vs. State of M.P.***, *2019 Cr.L.R (SC) 317*. These citations have been relied upon by the appellants.

138. Broadly speaking, in the aforesaid citations, the commutation of death sentence to life imprisonment has been allowed when the probability of reform of the accused / appellant has been not ruled out and there is absence of prior offending history. However, all these cases pertain to dates of incident prior to the date when Section 376(DB) of IPC came into force. Earlier also in the case of ***Purushottam Dashrat Borate*** (supra), a three Judge Bench of Apex Court has laid down that age, family background and lack of criminal antecedents cannot be a paramount consideration as a mitigating circumstance in such heinous offences relating to gang rape and subsequent murder of a woman. Regarding the chances of rehabilitation and reformation, the Apex Court in the aforesaid case has held that the manner in which offence was committed shows meticulous and careful planning coupled with sheer brutality and

apathy for humanity in the execution of the offence, in every probability the accused would have the potency to commit the similar offence in future and therefore, the probability that the accused can be reformed or rehabilitated is strongly negated.

139. The learned Additional Advocate General has made strenuous efforts to meet the submissions made by learned Senior counsel and other counsel for the appellants and has bolstered his view point by citing numerous Apex Court judgments which though considered, are not being mentioned separately for the sake of avoiding repetition of the philosophy already culled out by the Apex Court in citations referred to by us.

140. After due consideration and having taken into account all the circumstances prevailing in the case, we are constraint to hold that the rights of the victim cannot take a back seat while considering the rights of the accused persons. Although in the aforesaid case of ***Ravi S/o. Ashok Ghumare vs. State of Maharashtra*** (supra), the appellants have committed gang rape and murder of victim. However, the present case not less serious. The appellants in the present case had done all they could to ebb out the life of prosecutrix and had left her thinking her to be dead, but prosecutrix regained consciousness the next day and was saved due to quirk of fate.

141. The Division Bench of this High Court in ***Criminal Appeal No.653/2006*** (***Aftab Khan vs.State of M.P.***) (supra) has considered

the aspect relating to sentencing of an accused in such cases by resorting to various Apex Court judgments. It would be appropriate to reproduce portions of the same which are as under :-

> *"**(29)** The Supreme Court in the case of **Shyam Narain Vs. State (NCT of Delhi) reported in (2013) 7 SCC 77, has held as under : -***
>
> > ***"14.** Primarily, it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions,opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.*
>
> *(30) The Supreme Court in the case of **Raj Bala Vs. State of Haryana** reported in **(2016) 1 SCC 463** has held as under :-*
>
> *"**4.** We have commenced the judgment with the aforesaid pronouncements, and our anguished observations, for the present case, in essentiality, depicts an exercise of judicial discretion to be completely moving away from the objective parameters of law which clearly postulate that the prime objective of criminal law is the imposition of adequate, just and proportionate punishment which is commensurate with the gravity, nature of the crime and manner in which the offence is committed keeping in mind the social interest and the conscience of the society, as has been laid down in State of M.P. v. Bablu, State of M.P. v. Surendra Singh and State of Punjab v. Bawa Singh.*
>
> ***16.** A court, while imposing sentence, has a duty to respond to the collective cry of the society. The*

> *legislature in its wisdom has conferred discretion on the court but the duty of the court in such a situation becomes more difficult and complex. It has to exercise the discretion on reasonable and rational parameters. The discretion cannot be allowed to yield to fancy or notion. A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked. It is the duty of the court not to exercise the discretion in such a manner as a consequence of which the expectation inherent in patience, which is the "finest part of fortitude" is destroyed. A Judge should never feel that the individuals who constitute the society as a whole is imperceptible to the exercise of discretion. He should always bear in mind that erroneous and fallacious exercise of discretion is perceived by a visible collective."*

142. Consequently, we confirm the death sentence awarded to the appellants under Section 376(DB) of IPC. It is directed that the appellants shall be hanged by neck till their death. The sentence of life imprisonment on both the appellants under Section 307, 307/34 of IPC is also affirmed and the sentence of life imprisonment and Rs.10,000/- fine each with the default stipulation of six months RI also stands affirmed. The conviction of the appellant Irfan under Section 366A and 363 of IPC also stands affirmed. However, the sentence would be imposed only under the more serious of these offences under Section 366A of IPC and the sentence of appellant

Irfan imposed by the trial Court of 10 years of RI and Rs.10,000/- fine with default stipulation of six months of R.I also stands affirmed.

143. Appellant Asif stands acquitted from the offence under Sections 363 and 366A of IPC. Any fine amount deposited by Irfan in lieu of Section 363 of IPC and deposited by Asif under Sections 363 and under Section 366A of IPC be returned to these appellants. The fine amount of Rs.30,000/- so deposited shall be handed over to the prosecutrix as compensation. We also affirm the observation of trial Court that the copy of this judgment be sent to a Secretary District Legal Service Authority, Mandsaur, for giving adequate compensation to prosecutrix under M.P. Apradh Pidit Pratikar Yojna, 2015. The disposal of properties shall be as per para 104 of the impugned judgment. The jail sentences under various sections awarded to the Irfan shall run concurrently. A copy of this judgment be provided to both the appellants. The copy of this judgment be sent along with the original record for compliance. The reference thereby stands answered wherein, the death sentence imposed upon the appellants has been affirmed. The appeals of appellant Irfan stands rejected while the appeal of Asif stands partly allowed with regard to his conviction under Section 363 and 366A of IPC.

(VIVEK RUSIA)
JUDGE

(SHAILENDRA SHUKLA)
JUDGE

SS/-