RAHUL

v.

STATE OF DELHI MINISTRY OF HOME AFFAIRS & ANR.

(Criminal Appeal No. 611 of 2022)

NOVEMBER 07, 2022

[UDAY UMESH LALIT, CJI, S. RAVINDRA BHAT AND BELA M. TRIVEDI, JJ.]

Penal Code, 1860 – ss. 365, 367, 376(2)(g), 302, 201 & 34 – A girl was kidnapped when she was returning from her job along with her friends – She was raped and killed later on and her body was thrown in open field – FIR was registered against the accused-appellant u/s 365, 367, 376(2)(g), 302, 201 read with 34 of IPC – Trial Court after appreciating the evidence on record and material recovered during investigation, convicted and sentenced them with death penalty – The same was confirmed by the High Court in Death Sentence Reference referred by the Session Court – On appeal, held: Neither any T.I. Parade was conducted by the investigating officer during the course of investigation for the identification of the accused, nor any of the witnesses had identified the accused during their respective depositions before the Court – The circumstances under which the accused were arrested and the car was seized have also raised serious doubts in the story put-forth by the prosecution – None of the witnesses had seen the registration number of the car in which the victim was kidnapped – The trial Court had allowed the entire disclosure statements of the three accused to be admitted in evidence, the said statements being in nature of the confessions before the police were hit by s.25 of the Evidence Act – Trial Court had committed gross error in exhibiting the entire disclosure statements of the accused recorded – The incriminating articles were sent to the CFSL for examination however, no conclusive opinion was given by the CFSL to establish their link with the accused – The call details record of the phone being electronic record, was also not proved in terms of s.65B of the Evidence Act – It has been noticed from the record that out of the 49 witnesses examined by the prosecution, 10 material witnesses were not cross-examined and many other important witnesses were not adequately cross-examined by the defence counsel – The

Appellants-accused were deprived of their rights to have a fair trial, apart from the fact that the truth also could not be elicited by the trial Court – Judgments and orders of conviction and sentence passed by the trial Court and the High Court set aside.

Evidence Act, 1872 – 27, 45 & 65B – Circumstantial Evidence – The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused only and none else – The evidence with regard to the arrest of the appellants-accused, their identification, discoveries and recoveries of the incriminating articles, identity of the Indica Car, the seizures and sealing of the articles and collection of samples, the medical and scientific evidence, the report of DNA profiling, the evidence with regard to the CDRs etc. were not proved by the prosecution by leading, cogent, clinching and clear evidence much less unerringly pointing the guilt of the accused.

Evidence Act, 1872 – s.165 – Section 165 of the Indian Evidence Act confers unbridled powers upon the trial courts to put any question at any stage to the witnesses to elicit the truth – The Judge is not expected to be a passive umpire but is supposed to actively participate in the trial, and to question the witnesses to reach to a correct conclusion.

Allowing the appeal, the Court

HELD: 1.1 Neither any T.I. Parade was conducted by the investigating officer during the course of investigation for the identification of the accused, nor any of the witnesses had identified the accused during their respective depositions before the Court. Therefore, the very identity of the Appellants -accused having not been duly established, the entire case of the prosecution falls flat on the very first circumstance having not been duly proved by any evidence much less clinching evidence, against the Appellants-accused. [Para 20][1147-D-E]

1.2 As regards the arrest of the accused-R, PW-12 ASI had stated before the Court that the accused-R was seen driving the red Indica Car, and he looked perplexed; when he asked for the documents of the said vehicle, the accused-R could not produce

them and therefore he (PW-12) apprehended 'R' and handed over his custody to the SHO at P.S. Chhawla. The PW-12 ASI had tried to explain that there was a message from the Control Room that a girl was abducted in a red coloured Indica Car and the police had to apprehend the said vehicle and to report to the concerned SHO, and therefore he apprehended R. Thus, the accused R was apprehended because he was driving one red Indica Car. Pertinently, none of the witnesses examined by the prosecution had identified the Indica Car which was allegedly being driven by 'R' on 13.02.2012. P.W-29, the complainant S had admitted in her cross-examination that she could not say with certainty that it was the same car in which the victim was kidnapped. None of the witnesses had seen even the registration number of the car in which the victim was kidnapped. [Para 22][1148-B-D]

1.3 It may be noted that the trial court had allowed the entire disclosure statements of the three accused to be admitted in evidence by exhibiting the same as Ex. PW-39/B, PW-41/B and PW-41/C. The said statements were recorded by the PW-48, SG, when they were in police custody. The said statements being in nature of the confessions before the police were hit by Section 25 of the Evidence Act. The law in this regard is very clear that the confession before the police officer by the accused when he is in police custody, cannot be called an extra-judicial confession. If a confession is made by the accused before the police, and a portion of such confession leads to the recovery of any incriminating material, such portion alone would be admissible under Section 27 of the Evidence Act, and not the entire confessional statements. In the instant case, therefore the trial court had committed gross error in exhibiting the entire disclosure statements of the accused recorded by the PW-48 P1, for being read in evidence. Though, the information furnished to the Investigating Officer leading to the discovery of the place of the offence would be admissible to the extent indicated in Section 27 read with Section 8 of the Evidence Act, but not the entire disclosure statement in the nature of confession recorded by the police officer. [Para 25][1149-F-H; 1150-A-B]

1.4 The recovery of a strand of hair found from the body of the deceased by ASI BS as per the Seizure Memo (Exhibit 34/A) is also highly doubtful, inasmuch as the same was allegedly found from the body of the deceased which was lying in the open field for about three days and three nights. The PW-8 father of the deceased and PW-3 and PW-7 neighbours of the deceased who had identified the dead body of the victim had not stated anything about the articles lying near the dead body. The learned advocates for the appellants had also drawn the attention of the Court with regard to number of inconsistencies and contradictions appearing in the evidence of the Haryana Police, Delhi Police and also in the testimonies of the formal witnesses, which render the entire evidence with regard to the discovery and recovery as also seizure of the incriminating articles, very unreliable. The seizure of the articles like burnt ash, underwear of the deceased etc. on 14.02.2012 at the instance of the accused were also not duly proved by the prosecution. The said articles were sent to the CFSL for examination however, no conclusive opinion was given by the CFSL to establish their link with the accused. [Para 27][1150-G-H; 1151-A-B]

1.5 In the instant case, the alleged incident of kidnapping had taken place on 09.02.2012 and the dead body of the victim was found on 13.02.2012. Hence, the time of death was also very much significant, however in view of the state in which the dead body was found, the Post-Mortem Report Ex.26/A is also not clear about the timing as to when the death had occurred. The Post-Mortem report stated the time of death to be 72 to 96 hours i.e. between 10.02.2012 to 11.02.2012, as the post-mortem had taken on 14.02.2012. However, as per the case of the prosecution, death would have taken place on the intervening night of 09.02.2012 to 10.02.2012. The body of the deceased also did not show any signs of putrefaction. It is highly unlikely that the dead body would have remained in the field for three days without being noticed by anybody. [Para 29][1151-E-G]

1.6 The *Amicus Curiae* has also assailed the forensic evidence i.e., the report regarding the DNA Profiling dated 18.04.2012 (Exhibit P-23/1) giving incriminating findings. She

vehemently submitted that apart from the fact that the collection of the samples sent for examination itself was very doubtful, the said forensic evidence was neither scientifically nor legally proved and could not have been used as a circumstance against the Appellants-accused. The Court finds substance in the said submissions made by the Amicus Curiae. The DNA evidence is in the nature of opinion evidence as envisaged under Section 45 and like any other opinion evidence, its probative value varies from case to case. It is true that PW-23, Senior Scientific Officer (Biology) of CFSL, New Delhi had stepped into the witness box and his report regarding DNA profiling was exhibited as Ex. PW-23/A, however mere exhibiting a document, would not prove its contents. The record shows that all the samples relating to the accused and relating to the deceased were seized by the Investigating Officer on 14.02.2012 and 16.02.2012; and they were sent to CFSL for examination on 27.02.2012. During this period, they remained in the Malkhana of the Police Station. Under the circumstances, the possibility of tampering with the samples collected also could not be ruled out. Neither the Trial Court nor the High Court has examined the underlying basis of the findings in the DNA reports nor have they examined the fact whether the techniques were reliably applied by the expert. In absence of such evidence on record, all the reports with regard to the DNA profiling become highly vulnerable, more particularly when the collection and sealing of the samples sent for examination were also not free from suspicion. [Paras 31 & 32][1152-C-E; 1157-F-H; 1158-A-B]

2. Thus, having regard to the totality of circumstances and the evidence on record, it is difficult to hold that the prosecution had proved the guilt of the accused by adducing cogent and clinching evidence. As per the settled legal position, in order to sustain conviction, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused only and none else. The circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused

but should be inconsistent with his innocence. As demonstrated earlier, the evidence with regard to the arrest of the Appellants-accused, their identification, discoveries and recoveries of the incriminating articles, identity of the Indica Car, the seizures and sealing of the articles and collection of samples, the medical and scientific evidence, the report of DNA profiling, the evidence with regard to the CDRs etc. were not proved by the prosecution by leading, cogent, clinching and clear evidence much less unerringly pointing the guilt of the accused. The prosecution has to bring home the charges levelled against them beyond reasonable doubt, which the prosecution has failed to do in the instant case, resultantly, the Court is left with no alternative but to acquit the accused, though involved in a very heinous crime. It may be true that if the accused involved in the heinous crime go unpunished or are acquitted, a kind of agony and frustration may be caused to the society in general and to the family of the victim in particular, however the law does not permit the Courts to punish the accused on the basis of moral conviction or on suspicion alone. No conviction should be based merely on the apprehension of indictment or condemnation over the decision rendered. Every case has to be decided by the Courts strictly on merits and in accordance with law without being influenced by any kind of outside moral pressures or otherwise. The Court is constrained to make these observations as the Court has noticed many glaring lapses having occurred during the course of the trial. It has been noticed from the record that out of the 49 witnesses examined by the prosecution, 10 material witnesses were not cross-examined and many other important witnesses were not adequately cross-examined by the defence counsel. It may be reminded that Section 165 of the Indian Evidence Act confers unbridled powers upon the trial courts to put any question at any stage to the witnesses to elicit the truth. As observed in several decisions, the Judge is not expected to be a passive umpire but is supposed to actively participate in the trial, and to question the witnesses to reach to a correct conclusion. In the instant case, material witnesses examined by the prosecution having not been either cross-examined or adequately examined, and the trial court also having acted as a passive umpire, it is

found that the Appellants-accused were deprived of their rights to have a fair trial, apart from the fact that the truth also could not be elicited by the trial court. It is left to the wisdom and discretion of the trial courts to exercise their powers under Section 165 of the Indian Evidence Act for eliciting the truth in the cases before them, howsoever heinous or otherwise they may be. [Paras 33-35][1158-B-H; 1159-A-B; 1160-F-G]

Sharad Birdhichand Sarda vs. State of Maharashtra **(1984) 4 SCC 116 : [1985] 1 SCR 88;** *Padala Veera Reddy vs. State of Andhra Pradesh & Ors*. **(1989) Suppl. 2 SCC 706;** *Navaneethakrishnan vs.State by Inspector of Police* **(2018) 16 SCC 161 – relied on.**

Manoj and Ors. Vs. State of Madhya Pradesh **(2022) SCC Online SC 677;** *State of Rajasthan vs. Ani alias Hanif and Others* **(1997) 6 SCC 162 : [1997] 1 SCR 199 – referred to.**

Case Law Reference

[1985] 1 SCR 88	**relied on**	**Para 16**
[1997] 1 SCR 199	**referred to**	**Para 34**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.611 of 2022.

From the Judgment and Order dated 26.08.2014 of the High Court of Delhi at New Delhi in Crl. A No.563/2014.

With

Criminal Appeal Nos.612-613 And 614-615 of 2022.

Ms. Aishwarya Bhati, ASG, Ms. Sonia Mathur, Sr. Adv.,/Amicus Curiae, A. Sirajudeen, Ms. Kiran Suri, Sr. Advs., Ms. Shivani Misra, Ms. Khushboo Aggarwal, Ms. Prerna Dhall, Simarjeet Singh Saluja, Harinder Mohan Singh, Parnam Prabhakar, Karthik Vasan, Ms. Nidhi, S.S. Ray, Prashant Singh, Ms. Ruchi Kohli, Abhay Kumar, Sughosh Subramanyam, Gurmeet Singh Makker, Dr. (Ms.) Charuwali Khanna, Dharmendra Pal, Krishna Kumar, Ms. Nandani Gupta, Dr. (Ms.) Vipin Gupta, Advs. for the appearing parties.

A The Judgment of the Court was delivered by

BELA M. TRIVEDI, J.

1. All the appeals arise out of the common judgment and order dated 26.08.2014 passed by the High Court of Delhi at New Delhi, in the Death Sentence Reference No. 01/2014 with Criminal Appeal Nos. 563/2014, 726/2014 and 1036/2014, whereby the High Court while affirming the sentence of death and other sentences imposed on the Appellants-accused by the Additional Sessions Judge, Special Fast Track Court, Dwarka Courts, New Delhi (hereinafter referred to as the 'Trial Court') in Sessions Case No. 91/2013 had dismissed the criminal appeals filed by the Appellants-accused. The Trial Court vide the Order dated 19.02.2014 had convicted all the three Appellants-accused i.e., A1 Ravi Kumar, A2 Vinod @ Chhotu and A3 Rahul for the offences punishable under Sections 365/34, 367/34, 376(2)(g), 302/34 and 201/34 IPC, however had acquitted all the three from the charge under Section 377/34 IPC. The order of sentences imposed on the accused read as under:-

"1. To imprisonment for a period of five years alongwith a fine of Rs.25,000/- each for the offence punishable under Section 365/34 IPC. The convicts shall undergo further imprisonment for a period of six months each in case of default in payment of fine; and

2. To imprisonment for a period of five years alongwith a fine of Rs.25,000/- each for the offence punishable u/s. 367/34 IPC. The convicts shall undergo further imprisonment for a period of six months each in case of default in payment of fine; and

3. To imprisonment with a fine of Rs.50,000/- each for the offence punishable u/s 376(2) (g) IPC. The convicts shall undergo further imprisonment for a period of one year each in cases of non-payment of fine; and

4. To death for the offence punishable u/s 302/34 IPC with a fine of Rs.50,000/- each; and

5. To imprisonment for a period of three years with a fine of Rs.10,000/- each for the offence punishable u/s201/34 IPC. The convicts shall undergo further imprisonment for a period of six months each in case of non-payment of fine."

2. The case of prosecution as emerging from the record and proceedings of the Trial Court is that an information was received in the Police Station Chhawla on 09.02.2012 at 09:18 PM from the police control room that a girl was kidnapped in the red-coloured Tata Indica Car near Hanuman Chowk, Qutub Vihar, Chhawla and the car had proceeded towards Shyam Vihar. The information was recorded as DD No. 27 A, and the investigation was entrusted to SI Prakash Chand. Accordingly, SI Prakash Chand along with the constable Rakesh reached at the spot near Hanuman Chowk, Qutub Vihar, where they met a girl named Saraswati. On her statement being recorded to the effect that on 09.02.2012 at about 08:45 PM, when she was returning from her job at DLF Gurgaon along with her friends Pooja, Sangeeta and the victim Anamika (name is changed), and when they were walking near the Hanuman Chowk, a red coloured Indica Car came from behind;the driver suddenly applied breaks on reaching near to them; that a boy opened the door of the car and pulled Anamika forcibly inside the car; that there were other three or four boys sitting in the Indica Car. On the basis of the said statement of the complainant Saraswati, an FIR was registered under Section 363 of IPC. The investigation was commenced by the SI Prakash Chand.

3. On 12.02.2012, the investigation of the case was transferred to the special staff south-west New Delhi and was entrusted to SI Ashok Kumar. On 13.02.2012, further investigation of the case was entrusted to Inspector Sandeep Gupta. On thesame day ASI Rajender Singh produced the accused Rahul and a red coloured Indica Car bearing registration no. DL-3 CAF-4348 before the Inspector Sandeep Gupta, stating that accused Rahul who was found perplexed and roaming in the said car near Metro station, sector-9 Dwarka, New Delhi.

4. During the course of interrogation of the accused Rahul by the Inspector Sandeep Gupta, Rahul confessed that he along with his brother Ravi and one Vinod @ Chhotu had kidnapped a girl from Qutub Vihar; hadcommitted rape on her, had killed her and hadthrown her dead body in the fields ahead of Jhajjar. The said accused Rahul therefore was arrested, and subsequently the accused Ravi and accused Vinod were also arrested.The disclosure statements of the other two accused were also recorded wherein they had admitted to have kidnapped, gang raped and killed the victim.

A 5. As per the further case of the prosecution, when the aforesaid Tata Indica car was seized, mobile phones were recovered from the personal search of the accused Rahul and the accused Ravi, and they were also seized. Thereafter, inspector Sandeep Gupta alongwith his staff and the two accused Ravi and Vinod left for the search of the dead body of the victim, and found the same lying in the mustard fields, near B Karawara Morel, village Rodai, at the instance of the two accused. Information about the same was conveyed to P.S. Rodai. Thereafter ASI Balwan alongwith his Crime Team from P.S. Rodai also reached at the spot. The Crime Team lifted some hair strands from the body of the deceased as well as two plastic glasses, one empty pouch of snacks, C piece of earthenware pot, a broken piece of a red-coloured plastic bumper and one wallet near the dead body. Thereafter ASI Balwan Singh sent the dead body to Civil Hospital, Rewari for postmortem examination. The two accused were brought to Delhi and were got medically examined. During the course of further interrogation, the accused Rahul got D recovered the mobile phone of the deceased. The accused also got recovered the panty of the deceased which she was wearing at the time of incident and the steel Parat, in which they had burnt the articles belonging to the deceased.

6. On 15.02.2012 further investigation of the case was entrusted E to Inspector Ranjeet Singh. He got the aforesaid Tata Indica Car inspected by CFSL team. Hair strands found inside the car as well as in its seat covers were seized. He obtained the opinion from the autopsy doctor regarding the Jack and Pana, which were found in the Tata Indica Car and it was opined by the doctor that the external injuries found on the body of the deceased were possible by the said Jack and Pana. The hair F strands of the deceased which had been preserved by the autopsy doctor were sent to Safdarjung Hospital for examination. All the articles lifted from and near the dead body were sent to CFSL for examination. The Tata Indica Car was also sent to CFSL for examination. The IO also obtained the call details record of mobile no. 9540594640 of the deceased, mobile no. 9968988533 of the accused Rahul and mobile no. 8802090923 G of the accused Ravi. The DNA reports were also obtained on the articles seized and sent to the CFSL, New Delhi.

7. After completion of the investigation, Charge Sheet was laid before the concerned court. Upon the committal of the case to the court of Sessions, Charges u/s 365/34 IPC, u/s 367/34, u/s 376(2)(g) IPC, u/s H

377/34 IPC, u/s 302 IPC and u/s 201/34 IPC were framed against all the three accused on 26.05.2012. Since the accused pleaded not guilty to the said charges, trial was held.

8. The prosecution had examined 49 witnesses to bring home the guilt of the accused. The accused were examined u/s. 313 Cr.PC on 27.11.2013 wherein all of them denied the incriminating facts and circumstances put to them and claimed false implication. One witness was examined on behalf of the accused Rahul and Ravi in their defence. He was the Legal Assistant of 'Nav Bharat Times' and had brought the issue dated 15.02.2012 of daily newspaper 'Nav Bharat Times' Ex.DW1/A.

9. The Trial Court after appreciating the evidence on record adduced by the prosecution and by the accused, convicted and sentenced them as stated hereinabove, which has been confirmed by the High Court vide the impugned order.

10. The present appeals were filed by the accused through the Supreme Court Legal Services Committee. Considering the facts on record, the Court vide order dated 05.12.2019 had requested learned Senior Counsel Ms. Sonia Mathur to appear as an Amicus Curiae. Accordingly learned Amicus Curiae Ms. Mathur and learned Senior Advocate Mr. A. Sirajudeen, appearing for the Appellants-accused and learned ASG Ms. Aishwarya Bhati appearing for the Respondent-state were heard at length.

11. The learned Amicus Curiae Ms. Sonia Mathur and learned Senior Advocate Mr. Sirajudeenfor the appellants broadly made the following submissions:

(i) The identity of any of the Appellants-accused in the alleged abduction of the victim was not established.

(ii) The circumstances under which the possession of red coloured Tata Indica Car was recovered from the appellant Rahul, and the circumstances under which all the three accused were arrested, were not proved.

(iii) The recoveries made from the scene of offence allegedly at the instance of the appellants on 13.02.2021, were also not proved.

(iv) The recoveries of articles like broken piece of bumper, wallet and hair strands allegedly recovered from the place where

A the body of the deceased victim was found, were highly doubtful, as the same were not mentioned by the key witnesses during the course of their respective depositions.

(v) There were discrepancies with regard to the photography and the videography done by the Delhi Police and Haryana Police and with regard to the position of the arm, visibility of the jeans lining and mud on the jeans of the deceased and the presence of a wallet seen in the photographs, which created a dent in the credibility of the investigation carried by the prosecution.

C (vi) Recoveries of articles made on 14.02.2012 from the open places which were easily accessible to the public was not supported by any independent witnesses.

(vii) The post-mortem report did not prove the time of the death of the victim, in view of the state in which the body was discovered.

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(viii) The forensic evidence collected against the accused during the course of investigation was not scientifically and legally proved and therefore could not be used as a circumstance against the appellants.

E (ix) The call details record of the accused Rahul and Ravi were not proved to be incriminatory.

(x) There was violation of fair trial rights of the accused, as ten material witnesses were not cross-examined, and many other crucial witnesses were not adequately examined by the defence counsel during the course of the trial.

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12. The learned ASG Ms. Aishwarya Bhati has made the following submissions:

(i) There being concurrent findings of the facts and convictions recorded by the Trial Court and the High Court after fully appreciating the evidence on record,this Court may not disturb the same considering the gravity of the offences for which the appellants were charged.

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(ii) The case against Rahul was proved by the prosecutionby examining all material witnesses including the ASI Rajender

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Singh who had apprehended him, while he was driving red coloured Tata Indica Car in question.A jack and spanner and a strand of hair were found in the said Tata Indica Car and the jack was found to be stained with blood.

(iii) DNA profile generated from jack and hair found in the car and female fraction DNA obtained from the vaginal swab of Anamika were consistent with each other.

(iv) The injuries found on the victim Anamika were possible to have been caused by the jack and spanner found in the car

(v) A broken piece of bumper found near the dead body of Anamika was opined to be the piece of bumper of red coloured Indica Car being driven by Rahul.

(vi) From the testimony of PW-10 Hari Om, it was established that the car was with Rahul from 07:45 AM on January 9, 2012 till around 10:00AM of February 10, 2012, during the period when the crime was allegedly committed.

(vii) The semen of Rahul was detected on the seat cover of the Indica Car.

(viii) A wallet containing two ATM cards, a driving licence, photocopies of school leavingcertificates and PAN card, was found near place where Anamika's dead body was recovered and it was proved that it was the wallet of the accused Rahul.

(ix) The hair strand recovered from the dead body of Anamika matched with the DNA extracted from the blood sample of the accused Ravi.

(x) The accused Ravi was carrying a mobile phone having telephone no. 8802090923 when he was arrested, and the call details records showed that during the period Anamika was removed from Delhi and her body dumped in village Rodai, the said phone was foundaround the area of village Rodai.

(xi) So far as the accused Vinod was concerned, the DNA profile of the semen extracted from the vaginal swab of Anamika matched with his DNA profile, and his semen

A was also detected from the seat cover of Tata India Car driven by Rahul.

13. After the arguments on the issue of conviction were concluded, certain directions were given by this Court to the Respondent-State to place the report of the Probation Officer relating to the appellants, the B report of the Jail Administration about the nature of the work done by the appellants in jail. Directions were also issued to the Director VIMHANS to constitute a suitable team for the psychiatric evaluation of the appellants and to place the report on record. Accordingly, all the reports have been placed on record by the concerned authorities. The father of the victim Kunwar Singh Negi had filed an application being C Crl.M.P. No. 5559 of 2015 seeking his impleadment as a party respondent to enable him to participate in the proceedings. Another application was also filed by one Yogita Bhayana to implead her as a party respondent on the ground that she was a support person of the family of the deceased-victim and activist working in the field of providing counselling and succour D to sexually abused children in Delhi as well as other states.

14. Having heard the learned counsel for the parties, in the light of the evidence on record, it cannot be denied that the entire case of prosecution rested on the circumstantial evidence, and that the victim was raped and brutally murdered. The Trial Court relying upon the E following circumstances as"proved" convicted and sentenced the Appellants-accused for the charged offences:

"(1) The deceased has been kidnapped in a red colour Tata Indica car.

F (2) The red colour Tata Indica car bearing registration No. DL 3C AF 4348 belonging to PW-10 was in the custody of accused Rahul from 07.45 am on 9.2.2012 till 9 a.m. on 10.2.2012 and from 11.2.2012 to 13.2.2012.

(3) The female hair strand was found on the rear seat of the aforesaid Tata Indica car and DNA generated from it was found G similar to the DNA of the deceased implying that it was the hair of the deceased.

(4) The DNA generated from the semen spots found on the seat covers of the aforesaid Tata Indica car was similar to that of accused Rahul.

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(5) The dead body of the deceased was recovered from the fields of village Rodai at the instance of accused Ravi and Vinod on 13.2.2012.

(6) A red colour purse containing some cash, ATM cards as well as PAN card and driving license in the name of Rahul were found near the dead body of the deceased.

(7) The three accused had pointed out the spot, on which they had smashed the head of the deceased with a 'Matka' in order to kill her.

(8) A Jack and pana were recovered from the boot of the aforesaid Tata Indica car bearing registration No. DL 3C AF 4348, which was having blood spots and DNA generated from the blood spots was found similar to that of the deceased implying that deceased was hit by said Jack and Pana.

(9) The autopsy doctor (PW26) opined that the injuries found on the dead body of 'Anamica' could be possible by aforesaid Jack and Pana.

(10) A broken piece of bumper of the aforesaid Tata Indica car bearing registration No. DL 3C AF 4348 was also recovered from near the dead body of the deceased in the fields of village Rodai.

(11) The panty of the deceased was got recovered by accused Vinod from a vacant plot adjacent to house No. RZ-54, Palam Vihar, Sector-6, Dwarka, belonging to PW-11 where the three accused were residing as a tenant.

(12) Accused Rahul had got recovered the broken mobile phone of the deceased from amongst the bushes on the central verge in front of the road near Karnal Cinema Hall, near Rajinder Dhaba, Delhi.

(13) The vaginal swab of the deceased was found to have mixed male DNA profile, which was similar to that of accused Vinod as well as accused Ravi.

(14) The location of mobile phones of the accused Rahul, accused Ravi and the deceased was around Jhajhar, Haryana in the night intervening between 09.2.2012 and 10.2.2012 when the deceased was kidnapped, raped and murdered."

15. The High Court also believing the same set of circumstances as"proved" further noted that the two incriminating circumstances of the DNA of a strand of hair recovered from Anamica's dead body matching DNA of Ravi and DNA generated from semen spots found on seat cover of the Indica car matching DNA profile of Vinod were overlooked by the Trial Court.

16. The law pertaining to the appreciation of circumstantial evidence is quite well settled by this Court in catena of decisions. In ***Sharad Birdhichand Sarda vs. State of Maharashtra***[1]**,** this Court after taking note of earlier decisions had carved out five principles: -

> **"152.** Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant* v. *State of Madhya Pradesh* [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail (Alias) Simmi* v. *State of Uttar Pradesh* [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and *Ramgopal* v. *State of Maharashtra* [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in *Hanumant case* [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :
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> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."
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> **153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

[1] (1984) 4 SCC 116

(*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [(1973) 2 SCC 793 :

"Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(*3*) the circumstances should be of a conclusive nature and tendency,

(*4*) they should exclude every possible hypothesis except the one to be proved, and

(*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

17. In ***Padala Veera Reddy vs. State of Andhra Pradesh & Ors***[2] , it was observed as under:

"10……. (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

[2] (1989) Suppl. 2 SCC 706

A (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must
B be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See *Gambhir* v. *State of Maharashtra* ."

C 18. The said principles have also been followed in ***Navaneethakrishnan vs. State by Inspector of Police (2018) 16 SCC 161.*** Keeping in view the afore-stated principles, let us examine whether the circumstances relied upon by the Trial Court and the High Court cogently and firmly established the guilt of the Appellants-accused.

D 19. The first and foremost circumstance relied upon by the prosecution was with regard to the victim having been kidnapped in a red coloured Tata Indica Caron 09.02.2012 at about 8:45 p.m. In this regard the prosecution has relied upon evidence of PW-1 Pooja Rawat, PW-2 Vikas Singh Rawat, PW-4 Vikas, PW-29 Saraswati and PW-42 Sangeeta. As per the case of the prosecution, the victim along with PW-
E 1 Pooja Rawat, PW-29 Saraswati and PW-42 Sangeeta was returning home and when she and her friends were walking through Hanuman Chowk, a red-coloured Tata Indica car came from behind and suddenly stopped near them. One boy thereafter came out of the car and pulled the victim into the car. There were other three-four persons sitting in the
F said car. At that time PW-4 Vikas tried to intervene, but the said boys in the car started quarrelling with him and thereafter drove out the car along with victim. Though the said story put forth by the prosecution to an extent,is supported by the concerned witnesses viz. PW-1 Pooja Rawat, PW-4 Vikas, PW-29 Saraswati, and PW-42 Sangeeta, none of the said witnesses had identified the accused sitting in the Court during
G the course of their respective depositions. Even the PW-4 Vikas, who had some altercations with the boys attempting to kidnap the victimalso could not identify any of the accused sitting in the Court during the course of his deposition and say that the accused were the boys with whom he hadthe altercations as they were kidnapping the victim. Further, the PW-
H 1 Pooja Rawat stated that the Appellants-accused had covered their

faces, whereas PW-29 Saraswati and PW-4 Vikas stated that the faces of the accused could not be recognized because of darkness. PW-2 Vikas Singh Rawat who happened to be the brother of PW-1 Pooja Rawat and whose house was situated near Hanuman Chowk had immediately come out of the house and had stated to have seen the red coloured Indica car going towards Tajpur. The said witness also therefore could not identify the persons who had kidnapped the victim. The PW-8 Kunwar Singh Negi, father of the deceased had stated that his daughter was kidnapped on 09.02.2012 by some unknown persons when she was returning from Gurgaon along with her friends, however, he having not witnessed the incident, also could not identify the accused. There was no T.I. parade conducted by any of the Investigating Officers during the course of their respective investigations.

20. From the said evidence of the concerned witnesses, it clearly transpires that neither any T.I. Parade was conducted by the investigating officer during the course of investigation for the identification of the accused, nor any of the witnesses had identified the accused during their respective depositions before the Court. Therefore, the very identity of the Appellants -accused having not been duly established, the entire case of the prosecution falls flat on the very first circumstance having not been duly proved by any evidence much less clinching evidence, against the Appellants-accused.

21. The next important circumstance relied upon by the prosecution was the arrest of the accused Rahul with red coloured Indica car on 13.02.2012. Again, turning to the case of prosecution, it appears that after the alleged incident of kidnapping, an information was received by the Police Station Chhawla, New Delhi through call at 21:18 hours on 09.02.2012 to the effect that a girl was kidnapped in a red-coloured Tata Indica Car near Hanuman Chowk, Qutub Vihar, Chhawla. The said information was recorded as DD No.27A at the said police station. On receving the said information S.I. Prakash Chand (PW-45) who was posted at P.S. Chhawla, along with constable Rakesh had gone to the spot at Hanuman Chowk, where they met the complainant- Saraswati. She gave her statement with regard to the alleged incident and on the basis of her statement, the FIR was got registered under Section 363 IPC by SI Prakash Chand. Thereafter on 13.02.2012 when the investigation was entrusted to the SHO, P.S. Chhawla, Inspector Sandeep Gupta (PW-48), the ASI Rajinder Singh from P.S. Sector-23, Dwarka

A (PW-12) produced the accused-Rahul and one red coloured Indica Car bearing Registration No. DL 3C AF 4348 stating that the accused Rahul was found roaming in the said car near Metro station, Sector 9, Dwarka, New Delhi.

22. As regards the arrest of the accused-Rahul, PW-12 ASI B Rajinder Singh had stated before the Court that the accused-Rahul was seen driving the red Indica Car, and he looked perplexed; when he asked for the documents of the said vehicle, the accused-Rahul could not produce them and therefore he (PW-12) apprehended Rahul and handed over his custody to the SHO at P.S. Chhawla. The PW-12 ASI Rajinder had tried to explain that there was a message from the Control Room C that a girl was abducted in a red coloured Indica Car and the police had to apprehend the said vehicle and to report to the concerned SHO, and therefore he apprehended Rahul. Thus, the accused Rahul was apprehended because he was driving one red Indica Car. Pertinently, none of the witnesses examined by the prosecution had identified the D Indica Car which was allegedly being driven by Rahul on 13.02.2012. P.W-29, the complainant Saraswati had admitted in her cross-examination that she could not say with certainty that it was the same car in which the victim was kidnapped. None of the witnesses had seen even the registration number of the car in which the victim was kidnapped.

E 23. Now, as per the further case of the prosecution, the accused-Rahul gave a disclosure statement (Ex. PW-39/B) before Inspector Sandeep Guptaon the basis of which the other accused Vinod and Ravi were brought to the police station by the beat constables, and they were also arrested at 14:45 and 15:00 hours respectively. They also gave their disclosure statements (Ex. P.W-39/A and Ex.PW-39/C) before P-1 F Sandeep Gupta. The said beat constables were not examined by the prosecution before the Trial Court. The non-examination of the said beat constables has created a cloud of doubt in the story of the arrests of the accused, as in the further statements, recorded under Section 313 of Cr.P.C., the accused-Rahul had stated that Ravi was lifted from his G house, and when he (i.e., Rahul) reached to the police station in the evening to enquire about Ravi, he was arrested and the car was seized. The accused-Vinod and Ravi have also stated that they were picked up from their home. Thus, the circumstances under which the accused were arrested and the car was seized have also raised serious doubts in the story put-forth by the prosecution.

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24. Curiously, the evidence with regard to the time as who reached to the place of incident first where the body of the victim was lying,is also not clear. PW-46 ASI Balwan Singh P.S. Rodai, Haryana, stated that on 13.02.2012 on the receipt of DD No. 24, he along with head constable Vinod and head constable Aman Kumar had reached to the fields near Karawara Railway Phatak, Rewari, where he found that SHO P.S. Chhawla, Sandeep Gupta (PW-48) and other staff members were already there. In his cross-examination PW-46 stated that he received the DD No. 24 at about 11.30 a.m or 12.00 noon, and he had reached to the spot at around 4.30 p.m. P.W. 48 P1 Sandeep Gupta stated that on 13.02.2012, after arrest of all the three accused and visiting the spot from where the alleged kidnapping had taken place, he alongwith his team and the two accused Ravi and Vinod, leaving Rahul at the police station, had gone to P.S. Rodai, Distt. Rewari, Haryana he further stated that thereafter, on the accused Ravi and Vinod having indicated, they all reached to the spot i.e., the field where the dead body of the victim was lying. Since a PCR van of P.S. Rodai was parked there, an information was sent to P.S Rodai through PCR officials and thereafter ASI Balwant Singh along with his staff reached the spot. Thus, there are contradictions in the respective depositions of P.W.-46 and P.W.-48 as to how and when they reached to the spot where the dead body of the victim was found lying. Though the said DD No. 24 was an extremely crucial piece of evidence, the said document was not got exhibited as an evidence by the prosecution.

25. At this juncture, it may be noted that the trial court had allowed the entire disclosure statements of the three accused to be admitted in evidence by exhibiting the same as Ex.PW-39/B, PW-41/B and PW-41/C. The said statements were recorded by the PW-48, Sandeep Gupta, when they were in police custody. The said statements being in nature of the confessions before the police were hit by Section 25 of the Evidence Act. The law in this regard is very clear that the confession before the police officer by the accused when he is in police custody, cannot be called an extra-judicial confession. If a confession is made by the accused before the police, and a portion of such confession leads to the recovery of any incriminating material, such portion alone would be admissible under Section 27 of the Evidence Act, and not the entire confessional statements. In the instant case, therefore the trial court had committed gross error in exhibiting the entire disclosure statements of the accused recorded by the PW-48 P1 Sandeep Kumar Gupta, for being read in

A evidence. Though, the information furnished to the Investigating Officer leading to the discovery of the place of the offence would be admissible to the extent indicated in Section 27 read with Section 8 of the Evidence Act, but not the entire disclosure statement in the nature of confession recorded by the police officer.

B 26. This takes us to the next circumstance with regard to the alleged discovery of incriminating articles on 13.02.2021 namely, the broken piece of bumper, wallet containing the documents connecting the accused-Rahul etc. In this regard, the evidence of the Delhi Police and the Haryana Police Officers would be relevant. Though PW-32 Head Constable Omkar Singh of P.S. Chhawla and PW-36 ASI Atar Singh, in C charge of Crime Team South-West District, New Delhi, stated about the recovery of the said incriminating articles, PW-37, PW-38, PW-39 and PW-41 who were also there at the spotdid not make any mention about the said articles. Again PW-31 photographer called at the instance of P.S. Rodai also did not state about the said articles. The other non-D official witnesses i.e. PW-3, PW-7, PW-8 and PW-14 also did not state anything about such discoveries or recoveries. The prosecution had also not proved by cogent evidence that the broken piece of bumper lying near the dead body of the victim was of the red coloured indica car seized from the accused-Rahul. Further, the seizure memo of the wallet (Exhibit 34/A) mentioned only that one red coloured wallet containing E Rs.365 and a list of things was seized. There was no mention about any document in the seizure memo which could connect the accused Rahul. If the ATM cards, driving licence, photocopies of school leaving certificates and PAN card connecting the accused Rahul, were found from the said wallet, no Investigating Officer would commit such a blunder F of not mentioning them in the seizure memo. The accused-Rahul in his further statement under Section 313 had stated that the said articles were taken away from him at the police station.

27. The recovery of a strand of hair found from the body of the deceased by ASI Balwan Singh as per the Seizure Memo (Exhibit 34/A) G is also highly doubtful, inasmuch as the same was allegedly found from the body of the deceased which was lying in the open field for about three days and three nights. The PW-8 father of the deceased and PW-3 and PW-7 neighbours of the deceased who had identified the dead body of the victim had not stated anything about the articles lying near the dead body. The learned advocates for the appellants had also drawn H

the attention of the Court with regard to number of inconsistencies and contradictions appearing in the evidence of the Haryana Police, Delhi Police and also in the testimonies of the formal witnesses, which render the entire evidence with regard to the discovery and recovery as also seizure of the incriminating articles, very unreliable. The seizure of the articles like burnt ash, underwear of the deceased etc. on 14.02.2012 at the instance of the accused were also not duly proved by the prosecution. The said articles were sent to the CFSL for examination however, no conclusive opinion was given by the CFSL to establish their link with the accused.

28. The next circumstance relied upon by the prosecution was the alleged recovery of the phone of the deceased at the instance of the accused Rahul from the bushes on the road divider opposite to Rajinder Dhaba near Kamal Cinema. Though PW-8 Kunwar Singh Negi, father of the deceased had stated that mobile phone no.9540594640 was in his name and was used by his daughter, he was not shown the phone instrument for the purpose of identity. The call details record of the said phone being electronic record, was also not proved in terms of Section 65B of the Evidence Act. Hence, this part of the evidence also does not take the case of the prosecution any further.

29. In the instant case, the alleged incident of kidnapping had taken place on 09.02.2012 and the dead body of the victim was found on 13.02.2012. Hence, the time of death was also very much significant, however in view of the state in which the dead body was found, the Post-Mortem Report Ex.26/A is also not clear about the timing as to when the death had occurred.The Post-Mortem report stated the time of death to be 72 to 96 hours i.e. between 10.02.2012 to 11.02.2012, as the post-mortem had taken on 14.02.2012. However, as per the case of the prosecution, death would have taken place on the intervening night of 09.02.2012 to 10.02.2012. The body of the deceased also did not show any signs of putrefaction. It is highly unlikely that the dead body would have remained in the field for three days without being noticed by anybody.

30. The learned Senior Advocates appearing for the appellants have also rightly drawn the attention of the Court to the timings and the manner in which the samples were collected during the course of post-mortem of the deceased, to submit that the PW-48 P1 Sandeep Kumar was present at the hospital when the post-mortem was conducted on

14.02.2012, and therefore there was no reason to collect the samples from the body of the deceased on 16.02.2012. The collection and sealing of the samples during the MLC of the accused which had taken place on 14.02.2012 at the RTMR Hospital, Jaffarpur also does not inspire confidence. The story of blood stains and semens found on the seat covers of the Indica Car seized on 13.02.2012 and sent to the CFSL for examination also appears to be highly improbable and unreliable. There is no clear evidence as to who was in custody of the said car after its seizure till it was sent to CFSL for examination and as to whether the car was sealed during the said period.

31. The learned Amicus Curiae has also assailed the forensic evidence i.e., the report regarding the DNA Profiling dated 18.04.2012 (Exhibit P-23/1) giving incriminating findings. She vehemently submitted that apart from the fact that the collection of the samples sent for examination itself was very doubtful, the said forensic evidence was neither scientifically nor legally proved and could not have been used as a circumstance against the Appellants-accused. The Court finds substance in the said submissions made by the Amicus Curiae. The DNA evidence is in the nature of opinion evidence as envisaged under Section 45 and like any other opinion evidence, its probative value varies from case to case. In this regard a very pertinent observations made by this Court in case of ***Manoj and Ors. Vs. State of Madhya Pradesh***[3] deserve to be made**.** This Court has in detail dealt with the issue of DNA profiling methodology and statistical analysis, as also the collection and preservation of DNA evidence. The relevant paragraphs read as under:-

> "**138.** During the hearing, an article published by the Central Forensic Science Laboratory, Kolkatawas relied upon. The relevant extracts of the article are reproduced below:
>
> "Deoxyribonucleic acid (DNA) is genetic material present in the nuclei of cells of living organisms. An average human body is composed of about 100 trillion of cells. DNA is present in the nucleus of cell as double helix, supercoiled to form chromosomes along with Intercalated proteins. Twenty-three pairs of chromosomes present In each nucleated cells and an individual Inherits 23 chromosomes from mother and 23 from father transmitted through the ova and sperm respectively. At the time of each cell division, chromosomes replicate and one set goes to

[3] (2022) SCC Online SC 677

each daughter cell. All Information about Internal organisation, physical characteristics, and physiological functions of the body is encoded in DNA molecules in a language (sequence) of alphabets of four nucleotides or bases: Adenine (A), Guanine (G), Thymine (T) and Cytosine (C) along with sugar-phosphate backbone. A human haploid cell contains 3 billion bases approx. All cells of the body have exactly same DNA but it varies from individual to Individual in the sequence of nucleotides. Mitochondrial DNA (mtDNA) found in large number of copies in the mitochondria is circular, double stranded, 16,569 base pair in length and shows maternal inheritance. It is particularly useful in the study of people related through the maternal line. Also being in large number of copies than nuclear DNA, it can be used in the analysis of degraded samples. Similarly, the Y chromosome shows paternal inheritance and is employed to trace the male lineage and resolve DNA from males in sexual assault mixtures.

Only 0.1 % of DNA (about 3 million bases) differs from one person to another. Forensic DNA Scientists analyse only few variable regions to generate a DNA profile of an individual to compare with biological clue materials or control samples.

.....

DNA Profiling Methodology

DNA profile is generated from the body fluids, stains, and other biological specimen recovered from evidence and the results are compared with the results obtained from reference samples. Thus, a link among victim(s) and/or suspect(s) with one another or with crime scene can be established. DNA Profiling Is a complex process of analyses of some highly variable regions of DNA. The variable areas of DNA are termed Genetic Markers. The current genetic markers of choice for forensic purposes are Short Tandem Repeats (STRs). Analysis of a set of 15 STRs employing Automated DNA Sequencer gives a DNA Profile unique to an Individual (except monozygotic twin). Similarly, STRs present on Y chromosome (Y-STR) can also be used in sexual assault cases or determining paternal lineage. In cases of sexual assaults, Y-STRs are helpful in detection of male profile even in the presence of high level of female portion or in case of azoo11permic or

A vasectomized" male. Cases In which DNA had undergone environmental stress and biochemical degradation, min lSTRs can be used for over routine STR because of shorter amplicon size.

DNA Profiling is a complicated process and each sequential step involved in generating a profile can vary depending on the facilities
B available In the laboratory. The analysis principles, however, remain similar, which include:

1. isolation, purification & quantitation of DNA

2. amplification of selected genetic markers

C 3. visualising the fragments and genotyping

4. statistical analysis & interpretation.

In mtDNA analysis, variations in Hypervariable Region I & II (HVR I & II) are detected by sequencing and comparing results with control samples:….

D

Statistical Analysis

Atypical DNA case involves comparison of evidence samples, such as semen from a rape, and known or reference samples, such as a blood sample from a suspect. Generally, there are three possible outcomes of profile comparison:

E

1) Match: If the DNA profiles obtained from the two samples are indistinguishable, they are said to have matched.

2) Exclusion: If the comparison of profiles shows differences, it can only be explained by the two samples originating from different
F sources.

3) Inconclusive: The data does not support a conclusion Of the three possible outcomes, only the "match" between samples needs to be supported by statistical calculation. Statistics attempt to provide meaning to the match. The match statistics are usually
G provided as an estimate of the Random Match Probability (RMP) or in other words, the frequency of the particular DNA profile in a population.

In case of paternity/maternity testing, exclusion at more than two loci is considered exclusion. An allowance of 1 or 2 loci possible
H mutations should be taken Into consideration while reporting a

match. Paternity of Maternity Indices and Likelihood Ratios are calculated further to support the match.

Collection and Preservation of Evidence

If DNA evidence is not properly documented, collected, packaged, and preserved, It will not meet the legal and scientific requirements for admissibility in. a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be Identified, preserved, packed and sent for DNA Profiling."

139. In an earlier judgment, R v. Dohoney & Adams the UK Court of Appeal laid down the following guidelines concerning the procedure for introducing DNA evidence in trials: (1) the scientist should adduce the evidence of the DNA comparisons together with his calculations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the Crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the basis of the calculations; (3) the Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.

140. The Law Commission of India in its report, observed as follows:

"DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not 'match', then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number

A reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for example, that the relevant profile is found in 1 person in every 100,000: This is described as the 'random occurrence ratio' (Phipson 1999).

Thus, DNA may be more useful for purposes of investigation but
B not for raising any presumption of identity in a court of law."

141. In Dharam Deo Yadav v. State of UP this court discussed the reliability of DNA evidence in a criminal trial, and held as follows:

"The DNA stands for deoxyribonucleic acid, which is the biological
C blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines…..DNA usually can be obtained from any biological
D material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a
E century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and
F quality assurance procedures in the laboratory."

142. The US Supreme Court, in District Attorney's Office for the Third Judicial District v. Osborne, dealt with a post-conviction claim to access evidence, at the behest of the convict, who wished to prove his innocence, through new DNA techniques. It was
G observed, in the context of the facts, that

"Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible
H to determine whether a biological tissue matches a suspect with

near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue. DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others."

143. Several decisions of this court - Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh, Santosh Kumar Singh v. State Through CBI, Inspector of Police, Tamil Nadu v. John David, Krishan Kumar Malik v. State of Haryana, Surendra Koli v. State of Uttar Pradesh, and Sandeep v. State of Uttar Pradesh, Rajkumar v. Stateof Madhya Pradesh and Mukesh v. State for NCT of Delhi have dealt with the increasing importance of DNA evidence. This court has also emphasized the need for assuring quality control, about the samples, as well as the technique for testing-in Anil v. State of Maharashtra

"7. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory."

32. It is true that PW-23 Dr. B.K. Mohapatra, Senior Scientific Officer (Biology) of CFSL, New Delhi had stepped into the witness box and his report regarding DNA profiling was exhibited as Ex. PW-23/A, however mere exhibiting a document, would not prove its contents. The record shows that all the samples relating to the accused and relating to the deceased were seized by the Investigating Officer on 14.02.2012 and 16.02.2012; and they were sent to CFSL for examination on 27.02.2012. During this period, they remained in the Malkhana of the Police Station. Under the circumstances, the possibility of tampering with the samples collected also could not be ruled out.Neither the Trial Court nor the High Court has examined the underlying basis of the findings

A in the DNA reports nor have they examined the fact whether the techniques were reliably applied by the expert. In absence of such evidence on record, all the reports with regard to the DNA profiling become highly vulnerable, more particularly when the collection and sealing of the samples sent for examination were also not free from suspicion.

B

33. Thus, having regard to the totality of circumstances and the evidence on record, it is difficult to hold that the prosecution had proved the guilt of the accused by adducingcogent and clinching evidence. As per the settled legal position, in order to sustain conviction, the circumstances taken cumulatively should form a chain so complete that

C there is no escape from the conclusion that within all human probability, the crime was committed by the accused only and none else. The circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but

D should be inconsistent with his innocence. As demonstrated earlier, the evidence with regard to the arrest of the Appellants-accused, their identification, discoveries and recoveries of the incriminating articles, identity of the Indica Car, the seizures and sealing of the articles and collection of samples, the medical and scientific evidence, the report of DNA profiling, the evidence with regard to the CDRs etc. were not

E proved by the prosecution by leading, cogent, clinching and clear evidence much less unerringly pointing the guilt of the accused. The prosecution has to bring home the charges levelled against them beyond reasonable doubt, which the prosecution has failed to do in the instant case, resultantly, the Court is left with no alternative but to acquit the accused,

F though involved in a very heinous crime.It may be true that if the accused involved in the heinous crime go unpunished or are acquitted, a kind of agony and frustration may be caused to the society in general and to the family of the victim in particular, however the law does not permit the Courts to punish the accused on the basis of moral conviction or on suspicion alone. No conviction should be based merely on the

G apprehension of indictment or condemnation over the decision rendered. Every case has to be decided by the Courts strictly on merits and in accordance with law without being influenced by any kind of outside moral pressures or otherwise.

34. The Court is constrained to make these observations as the

H Court has noticed many glaring lapses having occurred during the course

of the trial. It has been noticed from the record that out of the 49 witnesses examined by the prosecution, 10 material witnesses were not cross-examined and many other important witnesses were not adequately cross-examined by the defence counsel. It may be reminded that Section 165 of the Indian Evidence Act confers unbridled powers upon the trial courts to put any question at any stage to the witnesses to elicit the truth. As observed in several decisions, the Judge is not expected to be a passive umpire but is supposed to actively participate in the trial, and to question thewitnesses to reach to a correct conclusion. This Courtwhile not accepting the submission that it was improper for the Court to have interjected during the course of cross-examination of the witness, had observed in the case of ***State of Rajasthan vs. Anialias Hanif and Others***[4] thus: -

> **"11.** We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial court to put "*any* question *he pleases*, in *any* form, at *any* time, of *any* witness, or of the parties, about *any* fact *relevant or irrelevant*" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the power whenever he deems it *necessary to elicit truth*. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question.
>
> **12.** Reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a bout or combat between two rival sides with the Judge performing the role only of a *spectator or even an umpire* to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses in the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing

[4] (1997) 6 SCC 162

which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit *truth*. The corollary of it is that if a Judge felt that a witness has committed an error or a slip it is the duty of the Judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence-collecting process. It is a useful exercise for trial Judge to remain active and alert so that errors can be minimised.

13. In this context it is apposite to quote the observations of Chinnappa Reddy, J. in *Ram Chander* v. *State of Haryana* [(1981) 3 SCC 191 : 1981 SCC (Cri) 683 : AIR 1981 SC 1036] : (SCC p. 193, para 2)

"The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth."

35. In the instant case, material witnesses examined by the prosecution having not been eithercross-examined or adequately examined, and the trial court also having acted as a passive umpire, we find that the Appellants-accused were deprived of their rights to have a fair trial, apart from the fact that the truth also could not be elicited by the trial court. We leave it to the wisdom and discretion of the trial courts to exercise their powers under Section 165 of the Indian Evidence Act for eliciting the truth in the cases before them, howsoever heinous or otherwise they may be.

36. Having said that and for the reasons stated above, the judgments and orders of conviction and sentence passed by the trial court and the High Court are set aside. The Appellants-accused are acquitted from

the charges levelled against them by giving them a benefit of doubt, and they are directed to be set free forthwith if not required in any other case. The appeals deserve to be allowed accordingly. A

37. It is needless to say that in view of Section 357(A) Cr.PC, the family members of the deceased- victim would be entitled to the compensation even though the accused have been acquitted. Hence, while allowing these appeals and acquitting the Appellants- accused, we direct that the parents of the victim would be entitled to the compensation, if not awarded so far by the Delhi State Legal Services Authority, as may be permissible in accordance with law. B

38. In view of the above, the appeals stand allowed. All pending applications also stand disposed of. C

39. Before parting, we place on record the valuable assistance rendered by the Amicus Curiae Ms. Sonia Mathur and the learned Senior Advocates and their associates appearing for the parties.

Ankit Gyan
(Assisted by : Rahul Rathi, LCRA)

Appeal allowed.