A.F.R.
Reserved

Court No. - 40

Case :- CRIMINAL APPEAL No. - 293 of 2014

Appellant :- Dr. (Smt.) Nupur Talwar
Respondent :- State Of U.P. And Anr.
Counsel for Appellant :- Vikram D. Chauhan,Dileep Kumar,Kuldeep Saxena,Ms. Rebecca M. John,Nikhil Kumar,Rajrshi Gupta,Tanveer Ahmad Mir,Vijit Saxena
Counsel for Respondent :- Govt. Advocate,Anurag Khanna,Gyan Prakash,S.N. Tripathi

WITH

Case :- CRIMINAL APPEAL No. - 294 of 2014

Appellant :- Dr. Rajesh Talwar
Respondent :- State Of U.P. And Anr.
Counsel for Appellant :- Vikram D. Chauhan,Dileep Kumar,Kuldeep Saxena,Ms. Rebecca M. John,Tanveer Ahmad Mir
Counsel for Respondent :- Govt. Advocate,Anurag Khanna,R.K. Saini,Rajeev Sharma,Raunak Chaturvedi

Hon'ble Bala Krishna Narayana,J.
Hon'ble Arvind Kumar Mishra-I,J.

(Delivered by Hon'ble Bala Krishna Narayana, J.)

1. Heard Sri Dileep Kumar, Sri Tanvir Ahmad Mir, Sri Rajrshi Gupta, Sri Aditya Wadhwa and Sri Dhruv Gupta, learned counsel for the appellants, Sri Anurag Khanna, Senior Advocate assisted by Sri Ronak Chaturvedi, Sri R.K. Saini, Sri Raghav Dev Garg and Sri Hridesh Batra learned counsel for the CBI, Sri Awadhesh Narayan Mulla, Sri Saghir Ahmad, Sri J.K. Upadhyay and Kumari Meena, learned

A.G.As., Smt. Manju Thakur and Syed Hasan Shaukat Abidi, State Law Officers for the State and perused the entire lower Court record.

2. These two criminal appeals have been preferred by the appellants Dr. Nupul Talwar and Dr. Rajesh Talwar under Section 374(2) of the Cr.P.C., against the judgement dated 25.11.2013 and order dated 26.11.2013 passed by Shri Shyam Lal, Learned Additional Sessions Judge & Designated Judge under the P.C. Act, Ghaziabad in Sessions Trial No. 477 of 2012 (State of U.P. through CBI Versus Rajesh Talwar and another) arising out of RC No. 1(2)/2008/SCR-III/CB/New Delhi, by which both the appellants have been convicted and sentenced to rigorous imprisonment for life and a fine of Rs. 10,000/- each under Section 302/34 IPC, five years rigorous imprisonment and a fine of Rs. 5000/- each under Section 201/34 IPC. In addition Dr. Rajesh Talwar appellant in Criminal Appeal No. 294 of 2014 has been convicted and sentenced to one year simple imprisonment and a fine of Rs. 2000/- under Section 203 IPC. All the sentences were directed to run concurrently.

3. The prosecution case as emerging out from the perusal of the facts stated in the FIR of this case which was

lodged by appellant Dr. Rajesh Talwar himself and as later testified by the prosecution witnesses who were examined during the trial for proving the guilt of the accused, defence witnesses and the statements of the accused-appellants recorded under Section 313 Cr.P.C., are that the appellant Dr. Rajesh Talwar successfully completed his master's course in Prosthetic Dentistry while appellant Nupur Talwar successfully completed her post graduation in Orthodontics and both started practicing in their clinic situated in C-42 Hauz Khas and several other hospitals. The marriage of the appellants was solemnized in the year 1989 and the appellants started residing at A-1/143, Azad Apartments, Aurobindo Marg, New Delhi. Appellant Nupur Talwar gave birth to a female child Aarushi at Sir Ganga Ram Hospital. Thereafter, on account of the fact that mother of Dr. Rajesh Talwar had already expired, in order to give great love and affection to the newly born Aarushi, they decided to buy a flat bearing Flat No. L-32 in Jalvayu Vihar, Noida, the primary consideration being its close vicinity to the flat in which Aarushi's grandparents and Dr. Nupur Talwar's parents Group Captain B.G. Chitnis (Retd.) and Smt. Lata Chitnis were residing which would facilitate a better upbringing of

Aarushi.

4. In his Noida clinic appellant Dr. Rajesh Talwar was assisted on day to day basis by one Krishna Thadarai who was of Nepali origin. Krishna Thadarai was residing in servant quarter of L-14, Jalvayu Vihar which was at a distance of about 50 meters from the appellants' flat.

5. In the year 2008 Aarushi was studying in Class 9th in Delhi Public School, Noida. After her school was over she was taken from her school to her grandparents' apartment from where she was picked up usually by Dr. Nupur Talwar and brought up to her home. Dr. Nupur Talwar's usual home return time was between 6pm-7pm. Sometimes in the year 2007, the appellants had employed Hemraj who was originally from Nepal, as a permanent domestic help. Hemraj had two daughters, one of whom was physically handicapped and in terms of the statements recorded by the Investigating Officer themselves during the course of investigation, it was found that Hemraj was a very affable domestic help and there had never been any complaint against him regarding misbehaviour or any other reason.

6. Hemraj's duties as a domestic help of the Talwars included cooking, buying groceries, milk etc., opening the

doors of the house in case of any visitor and guest. Sometimes in March, 2008 the work of painting of the flats of Jalvayu Vihar was in progress and the labourers employed for that purpose had been whitewashing the wall by taking water from the overhead water tank of the appellants situated on their terrace and thereafter Hemraj had put a lock on the terrace doors and its key was also in his possession.

7. On the date of the occurrence Dr. Rajesh Talwar and his wife Dr. Nupur Talwar were residing in Flat No. L-32 Jalvayu Vihar, Sector 25, Noida, Gautam Buddha Nagar with their teenage daughter Aarushi Talwar and a servant Hemraj, who occupied a room of the same flat. Upon their regular maid Kalpana going on leave about a week before the incident, on her recommendation, Talwars had employed Bharti Mandal who was resident of Malda, West Bengal and had come to Delhi in search of livelihood only a few days before, as their maid. She visited their flat twice a day, once in the morning and again in the evening, swept and dusted their home and washed the utensils. Hemraj usually opened the door for Bharti.

8. On the fateful day i.e. 15.5.2008 Dr. Nupur Talwar had

returned to her home along with Aarushi between 6pm-7pm while Dr. Rajesh Talwar after completing his work had come back to his home at about 9:00pm in his Optra Car which was driven by PW15 Umesh Sharma who after parking the car in the garage of Aaruhi's grandparents' apartment had gone to the flat of the appellants for giving the keys of the car to Dr. Talwar. The family had dined at 9:30pm. Although Aarushi's birthday fell on 24.5.2008 and the appellants had planned to present her a Sony Digital camera on her birthday as a surprise gift which incidentally had been delivered through courier on the same day and instead of waiting for her birthday, her parents decided to present her the gift on the same day and accordingly at about 10pm on the same day they gifted her Sony Digital Camera and on receiving the same she was very excited and clicked several pictures from the said camera. She clicked number of pictures with the object of testing the camera and at the same time she was also deleting the same.

9. After sometime Aarushi went to sleep. However appellant Dr. Rajesh Talwar had to send an e-mail to an American Dentistry Association for which purpose he asked appellant Dr. Nupur Talwar to switch on the internet router

installed in Aarushi's bedroom whereupon appellant Dr. Nupur Talwar went to Aaruhi's room to switch on the router leaving the key of door of Aarushi's bedroom in the lock. The appellants after finishing their work slept by 11:30pm. By that time Aarushi was also asleep. The air conditioners were switched on which were a bit noisy.

10. On the morning of the 16th May, 2008, Bharti Mandal rang the doorbell switch whereof was fixed next to the outer grill gate of the flat but when no one responded from inside, she after pressing the doorbell for the second time, went up the stair case landing leading to the terrace of the flat to fetch the bucket and mop kept there. When on coming down she found that no one had opened the door, she put her hand on the outer grill door but it did not open, then she again pressed the doorbell on which Dr. Nupur Talwar opened the innermost wooden door and appeared behind the inner iron mesh door and started talking to her. She asked Bharti Mandal where Hemraj had gone, to which she expressed her ignorance. Dr. Nupur Talwar then told her that Hemraj must have gone to fetch milk from mother dairy after locking the inner iron mesh door from outside and she told her to wait till Hemraj returned. Thereupon Bharti

Mandal asked Dr. Nupur Talwar to give her key so that she may enter into the house after unlocking the inner iron mesh door on which Dr. Nupur Talwar told her to go to the ground level and she would throw the key to her from the balcony while Bharati Mandal was going down Dr. Nupur Talwar picked up a cordless phone (Landline No. 0120-4316388) and dialled Hemraj's mobile no. 9213515485 (Tata Indicom). The call got connected but got disconnected after a couple of seconds. When Bharti Mandal came down Dr. Nupur Talwar told her that the door was not locked but only latched from outside, a fact which has been denied by appellant Dr. Nupur Talwar, on which Bharti Mandal asked Dr. Nupur Talwar to give her the key so that in case on climbing up the stairs again she found that the door was locked then she would have to go down again on which Dr. Nupur Talwar threw the long key to her from the balcony. Thereafter she climbed up the staircase to L-32 Jalvayu Vihar and when she put her hand on the outermost iron grill door it opened and thereafter she unlatched the middle iron mesh door and stood there. She heard Dr. Rajesh Talwar and Dr. Nupur Talwar weeping on which she suspected that some thief had broken into the house. Thereafter Dr. Nupur Talwar

embraced her and started weeping. When Bharti Mandal inquired from her why she was weeping, Dr. Nupur Talwar asked her to come inside and see what had happened. Then Bharti Mandal came with Dr. Nupur Talwar inside the flat and stood outside Aarushi's room Dr. Nupur Talwar pulled the bed sheet with which her daughter was covered on which she saw that her throat was slit. She became frightened. Dr. Nupur Talwar told her to see what Hemraj had done. With the permission of Dr. Nupur Talwar she went down the staircase and informed the inmates of the flat situated on the first floor about the incident. Thereafter she returned back to the house of Talwars and informed them that the aunt living in the flat on the first floor would be soon coming. When she asked Dr. Nupur Talwar whether she should wash the utensils she stopped her and after that she left the house to do her job in other houses. Nupur Talwar's parents, Group Captain (Retired) Balchand Chitnis and his wife Lata, Rajesh's brother Dr. Dinesh Talwar and his wife Vandana Talwar and their friends Durranis, also dentists, were one of the first few persons to reach the Talwars' flat.

11. Within hours of the discovery of Aarushi's body, the flat was swarming with people, the policemen, the press, family

friends, curious strangers, everyone seemed to have descended on the Talwar's home. One Mr. Puneesh Rai Tandon resident of L-28, Jalvayu Vihar, Sector 25, Noida who had also visited Flat No. L-32 at about 6:15 am, after returning back to his house had telephoned one Virendra Singh, Security Guard of the Jalvayu Vihar and told him to inform the police about the occurrence. Virendra Singh reached the flat of Dr. Rajesh Talwar and he was informed by Dr. Rajesh Talwar that after committing the murder of Aarushi, his servant Hemraj had fled. Thereafter Virendra Singh, came back to gate no. 1 where he met Constable Pawan Kumar who was returning from his night duty and he informed him about the occurrence. Thereupon Constable Pawan Kumar informed Sub-Inspector, In-charge Police Outpost Jalvayu Vihar, S.I. Bachchoo Singh about the occurrence and then climbed up to the Talwar's flat at about 7:00 am. By that time Dr. Dinesh Talwar brother of Rajesh Talwar had also given information at 6:54am to police through the landline phone installed at Dr. Rajesh Talwar's house on 100 number about the murder after he had arrived at the appellants' flat. In the meantime Mahesh Kumar Sharma S.P. (City), C.O. (City), Officer-in-charge P.S. Sector

20, Noida, Inspector Data Ram Naunaria, Lady Constable Suneeta Rana and S.I. Bachchoo Singh had also arrived at the Talwar's flat. On the instructions of the S.P. City Mahesh Kumar Sharma, Dr. Rajesh Talwar scribed the report of the occurrence stating therein that he lives in L-32 Jalvayu Vihar, Sector 25, Noida along with his wife and daughter Aarushi. The servant Hemraj who hails from Nepal used to live in one room of the said flat. His daughter Aarushi aged about 14 years was sleeping in her bedroom in the preceding night but in the morning she was found dead in her bed with signs of sharp edged weapons on her neck. The servant Hemraj after committing the murder of his daughter is missing from night and therefore the report be lodged and action taken. The contents of the written report Ext. Ka95 are being reproduced herein below :

> *''मैं डा0 राजेश तलवार अपने मकान में (एल0–32/25) नोएडा सेकेण्ड स्टोरी जलवायू विहार में अपनी पत्नी बेटी आरूशी के साथ रहता हूँ, एक कमरे में मेरा* ***Servant*** *हेमराज जो नेपाल का रहने वाला था, रहता था। बिती रात मेरी बेटी आरूशी 14 लमंते अपने रूम में सोई थी सूबे जब देखा तो मेरी बेटी बिस्तर पर मृत अवस्था में मिली उसके गले पर किसी* ***DHAR DAR*** *हथियार के निशान है, नौकर भी रात से ही गायब हो गया है, नौकर ने मेरी बेटी की हत्या की है।* ***Report*** *लिखकर कानूनी कार्यवाई करने का का कष्ट करें।''*

12. On the basis of the written report Ext. Ka95, Case Crime No. 695 of 2008 under Section 302 IPC was registered against Hemraj and the substance of the information was recorded in Chek No. 12 at 07:10 am on 16.5.2008.

13. The investigation of the case was entrusted to S.I. Data Ram Naunaria, SHO, P.S. Sector 20, Noida who during the course of investigation visited the place of occurrence, inspected the bedroom of the deceased Aarushi and recorded the statements of Dr. Rajesh Talwar and Dr. Nupur Talwar. He instructed S.I. Bachchoo Singh Officer-in-charge of Police Outpost, Jalvayu Vihar, P.S. Sector 20, Noida to reach the crime scene. On the inspection of the bedroom of deceased Aarushi, walls of the room were found splattered with blood. Aarushi was lying on her bed covered with a white flannel blanket with pattern of a multi coloured rings on it. Her throat was slit by a sharp edged weapon, her head was on pillow, bed sheet and mattress were soaked with blood, her T-Shirt (upper garment) was above the waist, trouser was just below her waist and twine of trouser was untied. The articles of the room were properly arranged and placed in order. The other articles lying on the bed were

undisturbed. Constable Chunni Lal Gautam reached the place of occurrence on 16.5.2008 at about 8:00 am and took photographs of Aarushi's room and the lobby of L-32 Jalvayu Vihar. He also picked finger prints from the bottle of Ballentine scotch whisky found on the dining table in the drawing room of the Talwar's flat, plates, glasses, two bottles of liquor and one bottle of sprite found in Hemraj's room and also from the main door. After nominating Mujib-Ur-Rahman, Shivram, Vakil Ahmad, Akhilesh Gupta and himself as panch witnesses, S.I. Bachchoo Singh conducted the inquest on the dead body of the deceased-Aarushi in the presence of Lady Sub-Inspector Suneeta Rana between 8am-10am and prepared the inquest report. The inquest report contains a vivid and meticulous description of the crime scene (Aarushi's bed room) and records a specific request of Sri Bachchoo Singh asking doctor to whom the task of conducting post mortem on the Aarushi's dead body was entrusted to check whether she had been subjected to any kind of sexual assault or not. After completing the inquest the dead body of the deceased-Aarushi was sealed and dispatched to the mortuary for conducting post mortem through Constables Raj Pal Singh and Pawan Kumar along

with necessary papers. Dr. Sunil Kumar Dohre, Medical Officer, In-charge of Primary Health Centre, Sector 22, Noida conducted autopsy on the cadaver of Aarushi between 12noon to 1:30pm on the same day. The post mortem report of deceased-Aarushi prepared by Dr. Sunil Kumar Dohre indicates that the deceased-Aarushi was aged about 14 years, rigor mortis was present in both upper limb and lower limb. She was of average built, both eyes were congested. Whitish discharge was noticed in the vagina. The following ante-mortem injuries were found on the cadaver of the deceased-Aarushi :

> *(i) Lacerated wound 4 cm x 3 cm, 1 cm. above left eye brow on frontal region. Injury was entering into skull cavity.*
> *(ii) Incised wound 2 cm x 1 cm on left eye brow.*
> *(iii) Lacerated wound 8 cm x 2 cm on left parietal region.*
> *(iv) Incised wound 14 cm x 6 cm on neck, above thyroid cartilage. Trachea partially incised. 6 wound 3 cm away from left ear and 6 cm away from right ear and 4 cm below chin. Left carotid artery was slit.*

14. On internal examination, fracture was found in the left parietal bone. Haematoma 8 cm x 5 cm was present below parietal wound. Similar haematoma was found on right side of skull, trachea was partially cut, both the chambers of

heart were empty, lungs were normal. No abnormality was detected in the genitals. The deceased was having teeth 15 x 15. Oesophagus and peritoneum were normal. Semi-digested food was found. It was opined that the deceased had died about 12-18 hours before due to hypovolemia. Viscera of stomach contents, piece of small intestine, piece of liver with gall bladder, piece of one kidney were preserved and sent for examination. Vaginal slides were prepared. Vaginal spots of Aarushi were broken and sent to the pathology to rule out sexual assault or rape. The report of the pathology suggested that she was neither sexually assaulted nor raped. After the post mortem, the dead body of the deceased-Aarushi was handed over to her parents in the evening on 16.5.2008. The Talwars left their house for the crematorium for cremating the dead body of their beloved daughter. In their absence their flat was swept and cleaned in the presence of the police men present there. The next morning, the Talwars left for Haridwar to immerse Aarushi's ashes which they had kept in a container and deposited it in a locker.

15. During investigation, S.I. Data Ram Naunaria seized the blood stained pillow, bed sheet and pieces of mattress

from the room of Aarushi in the presence of witnesses Mohd. Aamir and Digambar Singh and prepared recovery memo of the aforesaid articles. The bottle containing Sula wine, one empty bottle of Kingfisher beer and a plastic bottle of green colour were recovered from the Hemraj's room and taken into possession. One Ballentine Scoth bottle with residue of liquor was recovered from the dining table in the drawing room. All the aforesaid articles were also seized and recovery memo was prepared on the spot and signatures of the witnesses Mohd. Aamir and Digambar Singh were obtained thereon. Investigating Officer Data Ram Naunaria prepared the site plan of the L-32 Jalvaryu Vihar Ext. Ka2. He also recorded the statements of Bharti Mandal, Jeevan, Mohd. Aamir, Digambar Singh, Shivram, Vakil Ahmad, Muzaib-Ur-Rahman and Akhilesh Gupta.

16. Two doctor friends of Rajesh Talwar, Dr. Rajeev Kumar Varshney PW13 and Dr. Rohit Kochar PW14 who had also arrived at the Talwar's flat, chanced upon what they thought were bloodstains on the staircase leading up to the terrace and on the lock of the terrace door. They disclosed the aforesaid fact to S.I. Data Ram Naunaria who claims that he tried to go to the terrace but found the door leading to the

terrace locked and noticed bloodstains on the lock and asked Dr. Rajesh Talwar to give the key of lock of the door of the terrace but he told him that he was not having the key and he should not waste his time in breaking open the lock and to go after Hemraj before he fled. The Senior most police officer on the crime scene Mahesh Kumar Mishra S.P. (City) asked the constable to break the lock but the lock could not be broken as they could not find aloxite.

17. Lock put on the door leading up to terrace to the Talwars flat was broken on the next day i.e. 17.05.2008 under the supervision of Investigating Officer Data Ram Nauneria and he went on the terrace of the flat with K.K. Gautam, retired police officer, Dr Sushil Chaudhary and Dr. Dinesh Talwar where they found a dead body lying in a pool of blood covered with a panel of cooler and dragging marks were visible on the terrace. Dr. Dinesh Talwar was told to identity the dead body but he stated that he did not recognize the dead body. However, Ram Prasad, Rudra Lal and other persons who had gathered there identified the dead body as that of Hemraj, **however the fact that the dead body of Hemraj was identified by Rudra Pal, Ram Prasad and other witnesses on the terrace of the**

Talwars' flat has been very seriously disputed by the defence. Soon after the discovery of the dead body on the terrace of their flat, Talwars who were on their way to Haridwar to immerse the ashes of their daughter in the holy Ganga received a telephone call from Dinesh Talwar who was in-charge of the Talwars' falt in their absence that a dead body was found on their terrace. On coming to know the aforesaid fact they immediately returned. As Nupur waited outside the building with Aarushi's ashes in consonance with the Hindu custom which forbids the re-entry of the ashes into the house, Dr. Rajesh Talwar climbed upto the terrace of his house. He was asked to identify the body which was heavily swollen. Shocked he called Nupur Talwar to ask about Hemraj's T-shirt and confirmed to the police that the dead body was that of Hemraj after looking at his hair.

18. The inquest of the dead body of Hemraj was conducted by S.I. Bachchoo Singh between 12:30pm to 4:30pm on 17.5.2008 and thereafter the dead body was sealed and sent for post mortem to the mortuary with Constable Raj Pal Singh and Pawan Kumar along with necessary papers. Dr. Naresh Raj conducted post mortem examination on the dead

body of Hemraj on 17.5.2008. The post mortem started on 17.5.2008 at about 9 pm. After completing the post mortem Dr. Naresh Raj prepared the post mortem report of the deceased-Hemraj. According to the post mortem report of the deceased-Hemraj, he was aged about 45 years and of average built. Rigor mortis was present in the upper limb and lower limb and had passed from head and neck. His eyes were protruding bilaterally. Bleeding from nostrils and mouth was seen. Penis was swollen. The following ante-mortem injuries were found on his body :

> i) Abrasion 3 cm. x 2 cm. behind the right elbow.
> ii) Abraded contusion 3 cm. x 4 cm. behind the left elbow
> iii) Incised wound on the front and sides of neck above the level of thyroid cartilage. The wound is 30 cms. long and is situated 5 cm. below right ear, 6 cm below left ear and 6 cm below the chin. The wound is involving the trachea.
> iv) Abraded contusion 3 cm. x 2 cm. on the left frontal region 2 cm above the left eye brow
> v) Abraded contusion 2 cm. x 2 cm. on the left frontal region
> vi) Lacerated wound 3 cm. x 2 cm. x bone deep on the occipital region
> vii) Lacerated wound 8 cm. x 2 cm. x bone deep on the occipital region, 1 cm. below Injury No. 05.

19. On internal examination, fracture of occipital bone was seen. Trachea was severed above the thyroid cartilage. Both

chambers of heart were empty. Abdomen was distended. The deceased was having 16/16 teeth. 25 ml. liquid contents were seen in the stomach. The deceased had died about 1 ½ – 2 days before as a result of shock due to hypovolemia, caused by ante-mortem injuries. Viscera of stomach contents, piece of small intestine, piece of liver with gall bladder, piece of one spleen and kidney were preserved.

20. During the course of investigation, red coloured water from the tank of the cooler was collected in a bottle and its recovery memo was prepared. Bloodstained and plain floor scrappings of the terrace were taken and memos thereof were also prepared. Site plan of the terrace was prepared on the same day and statements of some other witnesses including Dr. Rajesh Talwar and Dr. Dinesh Talwar were recorded. Since from the investigation conducted, till then it transpired that the evidence of the offence had been concealed, therefore, Section 201 IPC was also added. Thereafter, the investigation of the case was transferred to Mr. Anil Samania, SHO of P.S. Sector 39, Noida. On 18.5.2008 Constable Chunni Lal Gautam took photographs of dead body of Hemraj in the mortuary. On 23.5.2008, Dr.

Rajesh Talwar was arrested by the local police on being the prime suspect in the double murder.

21. By notification No. 1937-VI-P-3-2008-15(48) P/2008 dated 29.05.2008 the Government of Uttar Pradesh gave consent to transfer of the investigation of Case Crime No. 695 of 2008 from the U.P. Police to CBI. The issuing of the aforesaid notification was followed by issuing of another notification by the Department of Personnel and Training, Government of India being notification no. 228/47/2008-ABD (II) dated 31.5.2008 where under the investigation of the case was handed over to the CBI. Consequently CBI registered RC No. 1(S)/2008/SCR-(III)/CBI/New Delhi dated 31.5.2008. The investigation was taken up by one Mr. Vijay Kumar, the then S.P. CBI/SCR(III)/New Delhi who was assisted by Additional S.P. Mr. T. Rajabalaji, Dy. S.Ps. Mr. K.S. Thakur, R.S. Kureel and Hari Singh, Inspectors M.S. Phartyal, Naresh Indora, R.K. Jha and Mukesh Sharma. He visited the place of occurrence along with his team on 1.6.2008 and on his direction Inspector Mukesh Sharma prepared memo of 14 articles which were seized from the place of occurrence and sealed, Copy of the recovery memo of the aforesaid seized articles was given to Nupur Talwar.

On 2.6.2008 on his direction Mr. T. Rajabalaji, Naresh Indora, team of CBI experts, independent witnesses Manoj Kumar and Sanjeev Kumar took possession of the bloodstained palm print embossed on the wall of the terrace and prepared its memo on 13.6.2008. Krishna Thadaria, the Talwars' clinic employee, living just a few apartments away in the same block in L-14, Jalvayu Vihar was arrested on 13.6.2008. On 14.6.2008, the CBI team led by Dy. S.P. Mr. Kureel, Anuj Arya, Inspector R.K. Jha, S.K. Singla and B.K. Mohapatra, the Scientists and photographer Gautam of C.F.S.L inspected the servant's quarter of Flat No. L-14, Sector 25, Noida in which Krishna Thadarai was residing and seized three articles from there including a khukhri with specks of blood and bloodstained purple pillow cover. On 18.6.2008, Hari Singh who was part of investigating team, on the direction of the Chief Investigator, Vijay Kumar seized the half pant and T-shirt of Dr. Rajesh Talwar, gown and bathroom slippers of Dr. Nupur Talwar and four sets of shoes of Dr. Rajesh Talwar.

22. Rajkumar and Vijay Mandal were also apprehended on 27.6.2008 and 11.7.2008 respectively. The results of the lie detector, brain-mapping, Narco-analysis and Polygraph tests

to which Krishna was subjected in AIIMS, New Delhi and Forensic Laboratory, Bangalore hinted at the presence of Rajkumar and Vijay Mandal along with Krishna in the house of Talwars on the night of the incident. CBI filed a report under Section 169 Cr.P.C on 11.7.2008 in the Court of learned Special Judicial Magistrate (CBI), Ghaziabad Thereupon Dr. Rajesh Talwar was released from custody. This followed the transfer of investigation of the case from Vijay Kumar to Inspector M.S. Phartyal on 25.8.2008 who investigated the case till 15.3.2009. During the course of the investigation in which he was assisted by Inspector Richh Pal Singh, Inspector Pankaj Bansal, Inspector NR Meena and S.I. Yatish Sharma he recorded the statements of witnesses Sanjay Chauhan, Ravindra Tyagi, Dr. Richa Saxena, Sankalp Arora, Rudra Lal, Navneet Kaushik, Afzal Khan, S.I. B.R. Kakran, Constable Raj Pal, S.I. Data Ram Naunaria, S.I. Bachchoo Singh, Dr. S.C. Singhal, and Kripa Shankar Tripathi. Following his transfer to CBI, ACB, Dehradun the investigation of the case was entrusted to Inspector Richh Pal Singh who investigated the case independently between the first week of March, 2009 and September, 2009. Thereafter, the investigation was made over to AGL Kaul, Dy.

SP CBI, SC-III. During the course of the investigation of this case by AGL Kaul he inspected the scene of crime, re-recorded the statements of the material witnesses. He also directed Dr. Rajesh Talwar to produce the set of golf sticks. He noted prior to that Dr. Rajesh Talwar was quizzed about one missing golf stick about which he had failed to give any satisfactory explanation. The golf sticks were sent to CFSL for chemical examination. Query was made by SP, CBI Dehradun from Dr. Rajesh Talwar that when one golf stick was missing then how he produced the complete set on which one Ajay Chaddha had sent an e-mail allegedly on behalf of Dr. Rajesh Talwar from his e-mail ID ajay@mediconz.com to Mr. Kaul stating therein that the missing golf stick was found lying in the attic of the Talwars flat opposite the room of Aarushi during the cleaning of the house. On examination of golf sticks it was found that two golf sticks were cleaner than others. These golf sticks were got identified by Umesh Sharma, the driver of Rajesh Talwar who stated before Mr. Kaul that the aforesaid two golf sticks were kept by him in the room of Hemraj. The identification proceeding qua the golf sticks was conducted in the presence of witness Laxman Singh PW16. The Investigating

Officer of the case PW39 AGL Kaul surreptitiously got the statement of PW13 Dr. Rajeev Kumar Varshney and PW14 Dr. Rohit Kochar recorded under Section 164 Cr.P.C., before M.M. Karkardooma, New Delhi and strangely not before the CJM, Ghaziabad who alone had jurisdiction in the matter. After completing the investigation Mr. Kaul submitted closure report before the Learned Special Judicial Magistrate (CBI), Ghaziabad on 19.12.2010/1.1.2011. Notice was issued by Learned Special Judicial Magistrate (CBI), Ghaziabad to the informant Rajesh Talwar who being aggrieved by the submission of closure report filed protest petition seeking further investigation in the matter by the CBI. Closure report was rejected by Special Judicial Magistrate CBI, Ghaziabad by his order dated 9.2.2011. By the same order, he took cognizance under Section 190 Cr.P.C., of the offences under Section 302/34 and 201/34 IPC and summoned Dr. Rajesh Talwar as well as his wife Dr. Nupur Talwar to stand trial for the aforesaid offences. The aforesaid order was challenged by the accused Dr. Rajesh Talwar and Dr. Nupur Talwar by filing Criminal Revision No. 1127 of 2011 before this Court which was dismissed by this Court by order dated 18.3.2011. The matter went up to the Hon'ble Supreme

Court vide Special Leave Petition filed by the Talwars before the Supreme Court challenging the validity of the orders passed by the Special Judicial Magistrate (CBI), Ghaziabad, taking cognizance on the closure report and summoning the appellants to face trial and the order passed by this Court in Criminal Revision No. 1127 of 2011 which was also dismissed by the Apex Court.

23. Since the case was triable exclusively by the Court of Sessions, Learned Special Judicial Magistrate (CBI), Ghaziabad by his order dated 9.5.2012 committed the accused for trial to the Court of Sessions Judge, Ghaziabad where it was registered as Sessions Trial No. 477 of 2012, from where it was made over to the Court of Additional Sessions Judge/Special Judge Anti-Corruption (CBI), Ghaziabad.

24. On the basis of the material collected during the investigation and after hearing the prosecution as well the accused on the point of charge, both the accused were charged for having committed offences punishable under Sections 302/34 and 201/34 IPC. Additional charge under Section 203 IPC was framed against accused Dr. Rajesh Talwar. Both the accused abjured the charges and claimed

trial.

25. The prosecution in order to prove its case against the accused examined PW1 Constable Chunni Lal Gautam, PW2 Rajesh Kumar, PW3 Amar Dev Sah, PW4 Sanjay Chauhan, PW5 Dr. Sunil Kumar Dohre, PW6 Dr. B.K. Mohapatra, PW7 K.K. Gautam, PW8 Shohrat, PW9 Virendra Singh, PW10 Mrs. Bharti Mandal, PW11 Kripa Shankar Tripathi, PW12 Punish Rai Tondon, PW13 Dr. Rajeev Kumar Varshney, PW14 Dr. Rohit Kochar, PW15 Umesh Sharma, P.W. 16-Laxman Singh, P.W. 17- Deepak Kanda, PW18 Bhupendra Singh Avasya, PW19 Deepak, PW20 Vinod Bhagwan Ram Teke, PW21 R.K. Singh, PW22 M.N. Vijayan, PW23 Mrs. Kusum, PW24 Suresh Kumar Singla, PW25 S.P.R. Prasad, PW26 Deepak Kumar Tanwar, PW27 Dr. Rajendra Singh, PW28 Constable Pawan Kumar, PW29 Mahesh Kumar Mishra, PW30 Dr. Dinesh Kumar, PW31 Hari Singh, PW32 Inspector Richh Pal Singh, PW33 S.I. Bachchu Singh, PW34 S.I. Data Ram Naunaria, PW35 Inspector M.S. Phartyal, PW36 Dr. Naresh Raj, PW37 Vijay Kumar, PW38 Dr. Mohinder Singh Dahiya and PW39 A.G.L. Kaul.

26. Apart from the oral evidence, the prosecution had also adduced documentary evidence, Ext. Ka1 letter issued by

PW2 Rajesh Kumar, Executive Engineer, Electricity Urban Distribution, Division-VI, Ghaziabad certifying that there was no disruption in electricity supply during the night on 15/16th May, 2008, Ext. Ka3 Post mortem examination report of deceased-Hemraj, Ext. Ka4 entry of post mortem no. 356/8 dated 16.5.2008 in the Post Portem Register, Ext. Ka5 entry at serial no. 53 of Viscera Register, Ext. Ka6 report dated 19.6.2008 prepared by Dr. B.K. Mohapatra, Senior Scientific Officer Grade-I, CFSL, New Delhi containing the results of chemical examination of the various articles seized during investigation, Ext. Ka7 letter dated 19.6.2008 written by Smt. Vibha Rani, Director CFSL, CBI, New Delhi to the Superintendent of Police, New Delhi requesting him to collect the biological report and DNA profiling, finger-print and chemistry report, Ext. Ka8 biological examination and DNA profiling report dated 1.7.2008, Ext. Ka9 letter dated 2.7.2008 of Smt. Vibha Rani, Director CFSL, CBI, New Delhi addressed to Superintendent of Police, CBI requesting him to collect the Exts., biological examination and DNA profiling, serology and physics report prepared by Dr. B.K. Mohapatra, Ext. Ka10 biological examination of DNA profiling report dated 30.6.2008 prepared by Dr. B.K. Mohapatra,

Ext. Ka11 letter of Smt. Vibha Rani, Director CFSL, CBI, New Delhi addressed to Superintendent of Police, CBI special crime to collect DNA biological and physical report and the Exts. of the case, Ext. Ka12 DNA profiling report dated 1.7.2008 signed by Dr. B.K. Mohapatra, Ext. Ka13 biological examination report dated 15.10.2009, Ext. Ka14 biological and DNA profiling report dated 15.7.2010 issued under the signature of Dr. B.K. Mohapatra, Ext. Ka15 photo copy of the cremation register pertaining to 6.5.2008 page 18, Ext. Ka16 statement of PW13 Dr. Rajeev Kumar Varshney recorded under Section 164 Cr.P.C., Ext. Ka17 statement of PW14 Dr. Rohit Kochar recorded under Section 164 Cr.P.C., Ext. Ka18 identification memo of golf stick, Ext. Ka19 printout of email sent to Mr. Neelabh Kishore, Ext. Ka20 printout of email sent by Mr. Neelabh Kishore, Ext. Ka21 printout of bills and call details, Ext. Ka22 printout of internet lock, Ext. Ka23 letter dated 21.9.2010 of PW18 Bhupendra Singh Avasya, Scientist-C, computer emergency response team of C.E.R.T. in Department of Information Technology, Govt. of India, Ext. Ka24 certificate issued by PW19 Deepak, Nodel Officer, Vodafone Mobile Services Limited, C-45, Okhla Industrial area, phase-2, New Delhi, in

Sector 65D, New Delhi, Ext. Ka25 printout of call details record pertaining to mobile no. 9999101094, Ext. Ka26 certificate issued under Section 65b of the Evidence Act, Ext. Ka27 printout of call details record pertaining to mobile no. 9899555999, Ext. Ka28 chemical examination report of the three glass bottles and one plastic bottle issued under the signature of PW20 Sri Vinod Bhagwan Ram Teke, Senior Scientific Officer, Grade-I (chemical) CFSL, New Delhi, Ext. Ka30 photo copy of the consumer application for call details of Dr. Rajesh Talwar relating to mobile no. 9910520630, Ext. Ka29 letter dated 8.8.2008 issued by PW21 R.K. Singh, Nodal Officer, Bhartiya Airtel Limited, Okhla Phase, New Delhi, Ext. Ka30 photocopy of consumer application form of Dr. Rajesh Talwar relating to mobile no. 9910520630, Ext. Ka31 copy of the consumer application form of Dr. Rajesh Talwar relating to mobile no. 9871557235, Ext. Ka32 photo copy of the consumer application form of Rakesh Arora pertaining to mobile no. 9810509911, Ext. Ka33 photo copy of the consumer application form of Dr. Rajesh Talwar relating to mobile no. 9871625746, Ext. Ka34 photo copy of the consumer application form of Dr. Prafull Durrani, Ext. Ka35 photocopy of consumer application form of Dr. Rajesh

Talwar relating to mobile no. 9810037926, Ext. Ka36 to Ext. Ka45 printout of call detail records of mobile nos. 9910520630, 9871625746, 9810037926, 9871557235, 9810302298, 9810165092, 9810178071, 9810096246, 9910669540, 9810509911, Ext. Ka46 letter of PW21 R.K. Singh, Ext. Ka47 printout of call details records of mobile no. 9213515485, Ext. Ka48 photocopy of consumer application form of Dr. Rajesh Talwar relating to his mobile no. 9213515485, Ext. Ka49 serological examination report dated 23.06.2008 prepared by PW24 Suresh Kumar Singla pertaining to material Exts. 26 and 27, Ext. Ka50 letter dated 06.11.2008 of Director C.D.F.D.,Hyderabad, Ext. Ka51 report dated 06.11.2008 of C.D.F.D., Hyderabad, Ext. Ka52 clarificatory letter dated 24.03.2011 of Dr. N. Madhusudan Reddy of C.D.F.D., Hyderabad, Ext. Ka53 golf sticks examination report dated 13.07.2010, Ext. Ka54 diagram of golf sticks, Ext. Ka54 memo of experiments relating to carriage of dead body, Ext. Ka56 crime scene reconstruction report dated 16.12.2012 prepared by PW27 Dr. Rajendra Singh, Ext. Ka57 observation memo relating to crime scene reconstruction, Ext. Ka58 crime scene inspection report, Ext. Ka59 letter of Mr. Kandpal of Maulana Azad Institute of

Dental Sciences, New Delhi, Ext. Ka 60 seizure memo dated 18.06.2008, Ext. Ka61 to Ext. Ka 63 seizure memo dated 30.10.2009 pertaining to 12 golf clubs, receipt memo dated 02.07.2008 and seizure memo dated 13.09.2009, Ext. Ka64 inquest report of the dead body of the deceased Ms. Aarushi, Ext. Ka65 police Form No. 13, Ext. Ka66 report of CMO, Ext. Ka67 diagram/sketch of dead body of Aarushi, Ext. Ka68 specimen seal impression, Ext. Ka69 endorsement made on back of police Form No. 13, Ext. Ka70 original chik F.I.R. of Police Station, Sector 20, N.O.I.D.A., Ext. Ka71 inquest report of the deceased Hemraj, Ext. Ka72 letter address to CMO, Ext. Ka73, diagram/ sketch of dead body of Hemraj, Ext. Ka74 police Form No. 13, Ext. Ka75 endorsement on back of police Form No. 13, Ext. Ka76 order of the District Magistrate, Gautambudh Nagar for conducting postmortem examination in the night, Ext. Ka77 G.D. No. 12 dated 16.5.2008 recorded on 7:10 am, Ext. Ka78 seizure memo dated 16.05.2008, Ext. Ka79 another seizure memo dated 16.05.2008, Ext. Ka80 site-plan of the place of murder of Hemraj, Ext. Ka81 carbon copy of letter sent to C.M.O., Gautam Budh Nagar, Ext. Ka82 memo regarding breaking open of lock of the door of terrace and its seizure,

Ext. Ka83 memo of collecting reddish water from the cooler, Ext. Ka84 memo regarding taking of blood stained and plain floor, Ext. Ka85 site plan of terrace, Ext. Ka86 seizure memo dated 1.6.2008, Ext. Ka87 memo dated 05.11.2008 regarding receipt of photocopy of ashes-register of crematorium of N.O.I.D.A., Ext. Ka88 postmortem examination report of Hemraj, Ext. Ka89 chik F.I.R. of RC No.1(S)/2008, Ext. Ka90 inspection memo dated 01.06.2008 of the scene of crime, Ext. Ka91 memo of examination of crime scene (terrace of Flat No. L-32, Jalvayu Vihar), Ext. Ka92 inspection of servant quarter of House No. L-14, Sector 25 and inspection cum seizure memo dated 14.06.2008, Ext. Ka93 to Ext. Ka 94 crime scene analysis report prepared by PW38 Dr. Mahendra Singh Dahiya as well as his letter dated 26.10.2009, Ext. Ka95 letter of Dr. Rajesh Talwar addressed to SHO, P.S. Sector 20, Noida admitting the genuineness of crime scene and analysis report, Ext. Ka96 printout of email sent by Ajay Chaddha to accused Dr. Rajesh Talwar, Ext. Ka97 production-cum-seizure memo dated 26.9.2009, Ext. Ka98 closure report, Ext. Ka99 to Ext. Ka100 e-mail of Dr. Andrei Semikhodskii, Director, Medical Genomics, London sent to the Court of Additional Sessions

Judge (CBI) and his e-mail sent on 10.6.2010 to S.P., C.B.I., ACB, Dehradun.

27. Fingerprint reports dated 29.05.2008, 30.07.2008,24.07.2008, 17.06.2008 and 13.06.2008 were proved by PW3 and marked as Ext. Ka1, kha-2, kha-3, kha-4 and kha-5, fingerprints paper no.-45-kha/1 to 45-kha/5 were proved by PW1 and marked as Ext. Ka6, kha-7, kha-8, kha-9 and kha-10, letter dated 22.12.2009 (paper no. 189-Aa/1) of Dr. Bibha Rani Ray, Director, C.F.S.L., New Delhi, genoplots paper nos. 189-Aa/2, 189-Aa/3 and photocopy of report dated 28.12.2010 paper no. 86- ka/1 to 86-ka/3 were proved by PW6 Dr. B.K. Mohapatra and marked as Ext. Ka11, kha-12, kha-13 and kha-14 respectively. Report dated 20.06.2008, paper nos. 171-Aa/6, 171-Aa/7 and report dated 18.06.2008 paper no. 163-Aa/6 were proved by PW26 Deepak Tanwar and marked as Ext. Ka15 and kha-16. Report dated 06.09.2008 paper nos. 154- Aa/2 to 154-Aa/19 was proved by PW27 Dr. Rajendra Singh and marked as Exhibit-kha-17. Seizure memo dated 11.06.2008 paper no. 125-Aa, seizure memo dated 12.06.2008 paper nos. 112-Aa/1 to 112-Aa/2, observation-cum-seizure memo paper no. 114-Aa were proved by PW32 Inspector Richh Pal

Singh and marked as Ext. Ka18, kha-19 and kha-20 respectively, application dated 11.06.2008 seeking permission for brain mapping, lie detection and narco analysis examinations of the suspect Krishna at F.S.L., Bangalore was proved by PW35 Inspector M.S. Phartyal and marked as Exhibit kha-21.Production cum seizure memo dated 06.07.2008 paper no. 119-Aa/1 was proved by PW37 Vijay Kumar and marked as Exhibit-kha-22. The genuineness of reports paper no. 187-Aa/2 to 187-Aa/4 and 190-Aa/1 has been admitted by the learned counsel for the appellants and hence paper nos. 187-Aa/2 to 187-Aa/4 were marked as Exhibit-kha-23 but paper no. 190-Aa/1 was marked inadvertently as Exhibit-kha-25 and therefore, it's marking was amended and paper no. 190-Aa/1 marked as Exhibit-kha-25 was marked as Exhibit-kha-24. D.W.-4 Dr. P.K. Sharma proved his report paper nos. 431-kha/2 to 431-kha/17 but at the time of examination of this witness, this paper was marked as Exhibit-Kha-26 and therefore, the aforesaid report was marked as Exhibit-kha-25. D.W.-6 proved printout of Cell ID Chart paper nos. 468-kha/1 to 468-kha/82 of Bharti Airtel Ltd. which was marked as Exhibit-kha-27 and later marked as Exhibit-kha-26. D.W.-7

Dr. Andrei Semikhodskii proved his examination report paper no. 503-kha/1 to 503-kha/13, paper no. 503-kha/14 to 503-kha/19, paper no. 503-kha/20 to 503-kha/26, e-mail correspondence paper nos. 506-kha/1, 506-kha/2, 506-kha/3, 506-kha/4, 506-kha/5, 506-kha/6. At the time of examination of D.W.-7 the aforesaid papers were respectively marked as Ext. Ka28 to ka-36 and therefore, the aforesaid documents were marked as Exts.-kha-27 to kha-35 respectively. The learned counsel for the appellants admitted the genuineness of serological examination report dated 17.06.2008 paper no. 165-Aa/7 to 165-Aa/9, biological examination report dated 07.01.2010 paper no. 181-Aa, photocopy of pathological report dated 16.05.2008 paper no. 107-Aa/34, letter dated 09.09.2008 written by T.D. Dogra of A.I.I.M.S to Mr. Vijay Kumar, S.P., C.B.I. paper no. 154-Aa/1, examination report dated 15.06.2008 of C.F.S.L., Hyderabad paper nos. 191-Aa/1 to 191-Aa/4, enclosure No. 1 paper no. 151-Aa/9 to 151-Aa/26, email paper nos. 461-kha/1, 461-kha/2 with printout of call details record, paper nos. 461-kha/3 to 461-kha/19, photocopy of memorandum of proceedings paper no. 460-kha/1 to 460-kha/4, letter dated 25.07.2013 of Dr. B.K. Mohapatra written

to Mr. A.G.L. Kaul, paper no. 464-kha/1, genotype plots paper no. 464-kha/2 to 464-kha/8, letter dated 04.06.2008 of S.P., C.B.I.-SCR-III, New Delhi to the Director, C.F.S.L., New Delhi paper no. 66-ka/1 to 66-ka/13 and letter dated 19.06.2008 of Mr. Vijay Kumar to the Director, C.F.S.L., New Delhi paper no. 67-ka/1 to 67-ka/3 were erroneously marked by the learned counsel for the appellants as Ext. Ka37 to kha-47 by mistake. Therefore, serial number of Exts. Ka-37 to Kha-47 were corrected and marked as Ext. Ka36 to kha-46.

28. Apart from the documentary evidence, the prosecution had produced as many as 246 material exhibits particulars whereof in our opinion need not be mentioned here as we will refer to the relevant material exhibits as and when context so requires.

29. Dr. Nupur Talwar, appellant in Criminal Appeal No. 293 of 2014, also admitted in her examination under section 313 Cr.P.C. that on 15.05.2008 at about 09.30 P.M. she, Dr. Rajesh Talwar, baby Aarushi and servant Hemraj were present in L-32, Jalvayu Vihar, Sector 25, Noida. The three gates of Jalvayu Vihar remain open round the clock but in the night one of the gates is closed. She has also admitted

that Smt. Bharti Mandal was working in her house as housemaid and on 16.05.2008 at about 6.00 A.M. Smt. Bharti Mandal had rung call-bell but she did not go to open the door assuming that Hemraj would open the door. Smt. Bharti Mandal has falsely deposed that she had pushed the grill door but it could not be opened in view of the fact that no such statement was given by her to the investigating officer. It is that she had told Smt. Bharti Mandal that Hemraj may have gone to bring milk. It is also correct that wooden door and mesh door are in the same frame. It is also correct that she had told Smt. Bharti Mandal that door will be opened when Hemraj came back and until then she should wait. She has also admitted that Smt. Bharti Mandal had enquired of her as to whether she is having the key of the door and she had replied in the affirmative. She has also admitted that thereupon Smt. Bharti Mandal asked her to give the key so that she may come inside the house after unlocking the door and then she had told Smt. Bharti Mandal to go to the ground level and she would be giving key to her. But it is incorrect to say that when Smt. Bharti Mandal reached at the ground level, she told her from the balcony that she should come up and see that door was not

locked but only latched. She has also admitted that she had thrown duplicate key on the ground level. She has stated that when Smt. Bharti Mandal came inside the house, she and her husband were weeping. She has admitted that school bag and toys were on the bed of Aarushi but she has no knowledge as to whether these were having blood stains or not. She has also admitted that there were blood splatters on the wall of Aarushi's bed room behind her bed but not on the outer side of the door. When Aarushi was seen by her just in the morning her body was covered with a flannel blanket but the condition of the clothes worn by her was not such as deposed to by PW29 Mahesh Kumar Mishra, who had not talked to Dr. Rajesh Talwar. She also admitted that lock of the door of Aarushi’s room was like that of hotel which if locked from outside could be opened from inside but could not be opened from outside without key. She had not told Mahesh Kumar Mishra that outer door of the house was of grill and it was latched from outside and after opening the same Smt. Bharti Mandal came inside the house. She has also admitted that the servant room has two doors, one opened inside the flat while other opened into the outer grilled gallery/passage between the iron grill door and the

double door which remained closed and was never used. She also admitted that Ballentine Scotch bottle alone without any glass was found on the dining table. She stated that except in the room of Aarushi blood stains were not found in the remaining part of the house. She also stated that no blood stains were found on the stairs. Mahesh Kumar Mishra had not asked Dr. Rajesh Talwar to provide the key of the lock put on door of the terrace. S.I. Bachchu Singh had never tried to talk to her and her husband. Dr. Rajesh Talwar had never gone to the police station to lodge the report and rather complaint was dictated to Dr. Rajesh Talwar by police personnel present in their house. She and her husband were fully mournful. She had not noticed as to whether the bed-sheet had any wrinkles/folds on it. Punish Rai Tandon had come to her house on coming to know about the occurrence. Dr. Rajesh Talwar had not shrugged off Punish Rai Tandon. She and her husband were badly weeping. She also stated that Dr. Rajesh Talwar was wearing a T-shirt and a half pant and she was wearing maxi since night and it was incorrect to say that there were no blood stains on their clothes. It was also incorrect to say that Aarushi had died 12-18 hours before postmortem

examination. She has admitted that in the postmortem examination report white discharge was shown in the vaginal cavity of Aarushi. It was incorrect to say that deceased Aarushi may have died three hours after taking the dinner. Dr. Sunil Kumar Dohre had falsely deposed that vaginal cavity was open and vaginal canal was visible and that opening of cavity was prominent in as much as neither this fact has been mentioned in the post-mortem examination report nor in his first four statements given to the investigating officer. The evidence that hymen was old, healed and torn is false. It is also incorrect to say that injuries no. 1 and 3 of Aarushi were caused by golf stick and injuries no. 2 and 4 were caused by sharp-edged surgical weapon as this fact was not stated before the investigating officer in his four-five statements given earlier to the investigating officer. She has no knowledge as to whether the room of Aarushi was cleaned and mattress was kept on the terrace of House No. L-28 as at that time she was at the place of cremation to perform last rites of Aarushi. She has also admitted that 3-4 months before the occurrence Dr. Rajesh Talwar had sent his Santro Car for servicing but she has no knowledge as to where the golf sticks and other

items lying in the car were kept by the driver Umesh Sharma. About 8-10 days before the incident, at the time of painting of flats, the labourers used to take water from the water tank of her house and then Hemraj had started locking the door of the terrace and the key of that lock remained with him. The ashes of Aarushi were kept in locker of crematorium for about 2-3 hours. The site-plan of the terrace is not on scale. On 15.05.2008 at about 11.30 P.M. she and her husband had gone to sleep after switching off laptop. The start and stop activity of internet could be due to umpteen reasons. She had made a telephone call from land line number 0120-4316388 to mobile number 9213515485, which was used by Hemraj. Pillow with cover was recovered from the room of Hemraj. She challenged the veracity of the evidence ofPW6 that in pillow cover and khukri no D.N.A. was generated. As per report Exhibit-Ka-51, the Exhibit-Z-20 code Y-0204CL-14 is a pillow cover of purple colour in which DNA of Hemraj was generated. The clarificatory letter Exhibit-Ka-52 is illegal and the report which was replaced conclusively established the involvement of Krishna. The C.B.I. has tampered with the case property. Since the house was to be given on lease and therefore, it

was got painted/washed and there was no instruction for abstaining from painting/washing. It is incorrect to say that partition wall was of wood. It was made of bricks over which wooden panelling was done and the same was got painted on the suggestion of painter as its polish had withered away. Iron grill of main gate and balcony were unauthorized and therefore, these were got removed and C.B.I. had not restrained the Talwars from making any alteration. Mr. M.S. Dahiya has given his report on imaginary grounds. She has also admitted that area of her house is 1300 sq. feet and it has only one entry gate. She had also admitted that the door of Aarushi's room was having click shut automatic lock of Godrej company which could be opened from inside without key but could not be opened from outside without key. Mr. Ajay Chaddha had never sent an e-mail to Mr. Neelabh Kishore, S.P., C.B.I., Dehradun on their behalf. Mr. Kaul had collected sufficient evidence against Krishna, Raj Kumar and Vijay Mandal but it was concealed by him to mislead the court. In respect of the other evidence, she has stated that either it is a matter of record or is false or she is not having any knowledge about the same. She had also filed written statement under section 313 Cr.P.C. which is

paper no. 400- kha/1 to 400-kha/12.

30. After closure of the prosecution evidence the accused were examined under section 313 Cr.P.C. The accused Dr. Rajesh Talwar, appellant in Criminal Appeal No. 294 of 2014, admitted in his statement under section 313 Cr.P.C. that on 15.05.2008 at about 9.30 P.M. his driver Umesh Sharma had driven him to his residence and at that time he, Dr. Nupur Talwar, Baby Aarushi and servant Hemraj were present. Gate No. 2 of Jalvayu Vihar is closed in the night but Gate No. 1 and 3 remain open. He and his wife had gone to sleep at about 11.30 P.M. and the air conditioner of their room was on. He has no idea as to whether the supply of electricity was disrupted or not in that fateful night. He has admitted that Smt. Bharti Mandal used to work in his house as a housemaid and when at about 6.00 am on 16.05.2008 Smt. Bharti Mandal had rung the call-bell, he was asleep. His wife Dr. Nupur Talwar had not told Smt. Bharti Mandal that the grill door is latched from outside but Nupur Talwar had thrown the keys from the balcony. The witness Sanjay Chauhan had never visited his residence. When he and his wife had seen the dead body of Aarushi it was covered with a flannel blanket but her upper garment was not above the

waist and lower garment not below the waist. They were not in position to talk to anyone as they were lugubrious. He has admitted that the lock of the room of Aarushi was akin to that of a hotel room which if locked from the outside, could be opened from inside without key but could not be opened from outside without key. The door of the room of Hemraj opening into the gallery/passage remained closed. He has also admitted that in the dining table one bottle of Ballentine Scotch Whisky without any glass was found. Except in the room of Aarushi, no blood stains were found in the remaining part of the house and even upstairs there were no blood stains. Nobody had asked him to give the key of door of the terrace. School bag and whim-whams were on the bed of Aarushi but he has no knowledge as to whether these were blood stained or not. He had not gone to the police station to lodge his report. The report was dictated to him by police personnel in his house. The site-plan is not on scale and in the site-plan bathroom of the room of Hemraj has been wrongly shown and shaft has been erroneously shown to be part of that room. He had not noticed as to whether the bed-sheet of Aarushi’s bed had any wrinkles or not. On hearing ululation of Mr. Punish Rai Tandon who had

come to his house he had not pushed him aside when he tried to console him. Dr. Rajeev Kumar Varshney and Dr. Rohit Kochar had also come to his house. He was wearing T-shirt and half pant and Dr. Nupur was wearing a maxi since night and it is incorrect to say that their clothes were not stained with blood. He stated that presence of white discharge in the vaginal cavity of Aarushi was matter of record but the statement of Dr. Sunil Kumar Dohre that opening of vaginal cavity was prominent is incorrect in as much as this fact has not been mentioned in the postmortem examination report and in the first three statements given by him to the investigating officer. The evidence that hymen was old, healed and torn is nothing but an act of calumny and character assassination of his daughter. It is also incorrect to say that injuries no. 1 and 3 of Aarushi were caused by golf stick and injuries no. 2 and 4 were caused by sharp-edged surgical weapon. He has no knowledge as to whether the room of Aarushi was cleaned and mattress was kept on the terrace of House No. L-28 as at that time he was away at the crematorium to perform obsequies of his daughter. He also admitted that 3-4 months prior to the occurrence he had sent his Santro Car for

servicing and he has no knowledge as to where the golf sticks and other items lying in the car were kept by the driver Umesh Sharma. About 8-10 days before the occurrence painting of cluster had started and the navvies used to take water from water tank placed on the terrace of his house and then Hemraj had started locking the door of the terrace and the key of that lock remained with him. He also admitted that there is an iron grill wall between the terraces of House No. L-30 and L-32 but he has no knowledge as to whether any bed-sheet was placed on this partition wall. He has also admitted that on 17.05.2008 ashes of Aarushi were collected and locker no. 09 was allotted for keeping the ashes. The ashes were not taken out after half an hour but after 02.00-02.30 hours. It is incorrect to say that S.I. Data Ram Naunaria had enquired from him about the identity of the dead body lying in the terrace rather he had identified the dead body of Hemraj by his hair in the presence of other police officers. He has also admitted that Hemraj was of average built but he had no knowledge as to whether his willy was turgid. He has admitted that on 15.05.2008 at about 11.00 P.M. his wife had gone to Aarushi's room to switch off the internet router and he and

his wife went to sleep around 11.30-11.35 P.M. and the same activity was seen from 6.00 A.M. to 1.00 P.M. on 16.05.2008, although computers were shut down. He has also admitted that mobile number 9213515485 was in his name but the same was used by Hemraj and whether any call was made from land line number 120-4316387 to mobile number 9213515485 at 06:00:10 hours on 16.05.2008 is a matter of record. It is on the record that the pillow with cover was recovered from the room of Hemraj. It is incorrect to say that no DNA was generated from pillow cover and khukri. He has stated that Exhibit Z-20 code Y-204CL-14 was a pillow cover of purple colour in which DNA was generated. He has also stated that case property was tampered with, hence a complaint was sent by him to Department of Bio- Technology which has been changed. Since the house was in a slightly dilapidated condition and was to be let out and therefore, it was got washed/painted. It is incorrect to say that partition wall was of wood. It was made of bricks over which wooden panelling was done and same was got painted on the suggestion of painter as its polish had faded away. Iron grill of main gate and balcony were unauthorized and therefore, these were got removed

and nobody objected to it. Mr. M.S. Dahiya has given his report on imaginary grounds. Mobile number 9899555999 is in the name of Invertis Institute and not in the name of K.K. Gautam. He has also admitted that area of his house is 1300 sq. feet and it has only one entry gate. He has also admitted that the door of Aarushi's room was having click shut automatic lock which could be opened from inside without key but could not be opened from outside without key. Mr. Ajay Chaddha had never sent an e-mail to Mr. Neelabh Kishore, S.P., C.B.I., Dehradun on his behalf. He has no knowledge as to whether main door was bolted from outside or not at the time of incident. It is incorrect to say that murders were not committed by an outsider or by Krishna, Raj Kumar and Vijay Mandal and rather by him and the co-accused. Regarding the remaining evidence, he stated that either it is a matter of record or is false or he is not having any knowledge about the same. He has also filed written statement paper no. 399-kha/1 to 399- kha/11 under section 313 Cr.P.C.

31. The accused examined D.W.-1 Rajendra Kaul, D.W.-2 Dr. Amulya Chaddha, D.W.-3 Dr. Urmil Sharma, D.W.-4 Dr. R.K. Sharma, D.W.-5 Vikas Sethi, D.W.-6 Vishal Gaurav and

D.W.-7 Dr. Andrei Semikhodksii in defence.

32. The learned Additional Sessions Judge/Special Judge, Anti Corruption, CBI, New Delhi after considering the submissions made before him by the learned counsel for the parties, scrutinizing the entire evidence on record, both oral as well as documentary and examining the law reports cited by the learned counsel for the parties before him in support of their respective contentions, convicted both the appellants and awarded aforesaid sentences to them.

33. Learned counsel for the appellants submitted that in the present case there is no direct evidence on record proving that the accused appellants had committed the murder of their only daughter Aarushi and their male servant Hemraj in their flat in the intervening night of 15/16.5.2008. The trial court has convicted the accused-appellants on the basis of circumstantial evidence although the circumstances relied upon by the trial court do not bring home the case of the prosecution. The prosecution has totally failed to establish the chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with innocence of the accused showing that in all probability act must have been done by the accused.

34. He next submitted that having regard to the evidence adduced by the prosecution during trial, the trial court committed a patent error of law in convicting the accused-appellants for the double murder of Aarushi and Hemraj by invoking Section 106 of the Indian Evidence Act although the said section is not at all attracted to the facts and circumstances of the present case in view of the overwhelming evidence on record fully establishing the presence of outsiders inside the appellants' flat on the night of occurrence and that the appellants had slept through out the night and discovered the gruesome crime when they woke up in the morning of 16.05.2008 on hearing the sound of call bell, hence there was no fact especially within the exclusive knowledge of the appellants and they could not be held liable for the horrendous crime, merely on the ground of their failure to furnish any explanation regarding the circumstances under which the double murder had been committed. Moreover, the prosecution totally failed to prove by any cogent evidence that the appellants who were sleeping in the adjoining room could have necessarily heard the sounds emanating from and the commotion caused in the adjoining room of Aarushi which would have woken

them up or they were awake throughout the night, a fact which prosecution endeavored to prove by relying upon the circumstances of internet router/internet activity throughout the fateful night. In any view of the matter the presumption under Section 106 of the Indian Evidence Act could not be raised against the accused-appellants with regard to the murder of Hemraj, whose dead body was found on the terrace of the flat which was accessible to the public at large.

35. Learned counsel for the appellants further submitted that the present case is based upon circumstantial evidence. The law is settled that it is imperative for the prosecution to prove motive in such case. However, the motive suggested by the prosecution for the appellants to commit the murder of their only daughter Aarushi and domestic help Hemraj is grave and sudden provocation, caused on their finding their domestic help Hemraj in a compromising position with their daughter Aarushi in her bedroom.However, there is not even an iota of evidence on record even remotely suggesting either Hemraj was assaulted in Aarushi's bedroom or of any sexual activity between the deceased. The motive suggested by the prosecution which led the appellants to commit the double

murder emerges from the crime scene analysis and crime reconstruction report dated 26.10.2009 (Ext.Ka-93) prepared by Dr. M.S. Dahiya which is based entirely upon his personal analysis and the incorrect information supplied to him by the Investigating Officer of the Central Bureau of Investigation (C.B.I.) to the effect that blood of Hemraj was found on the pillow recovered from Aarushi's bedroom. Although from the testimony of PW6 Dr. B.K. Mahapatra it is fully proved beyond any doubt that pillow along with cover seized by the C.B.I. on 01.06.2008 and sent to CFSL New Delhi which was marked as Ext.Ka-90 was actually seized from Hemraj's room and was his pillow and pillow cover but Sri R.S. Dhankar had in his forwarding letter Ext.Ka-45 erroneously stated that the aforesaid pillow and pillow cover were recovered from Aarushi's bedroom. The aforesaid fact is further evident from the perusal of seizure memo dated 01.06.2008 (Ext.Ka-90) and the report of Biology Division, C.F.S.L., New Delhi dated 19.06.2008 (Ext.Ka-6) pertaining to the aforesaid pillow and pillow cover. Blood and Deoxyribonucleic Acid (D.N.A.) of Aarushi alone was found on the Aarushi's pillow, part of mattress and bed sheet seized from her room. The aforesaid fact stood further

corroborated from the evidence of PW6 Dr. B.K. Mahapatra (at pages 130 to 134) of the paper book and the report of D.N.A. Expert, CDFD Hyderabad who affirmed the aforesaid scientific finding in his testimony and also vide his report dated 06.11.2008 (Ext.Ka-51), in which also he reported that D.N.A. of Aarushi alone was found on the articles recovered from Aarushi's bedroom.

36. Learned counsel for the appellants also submitted that reliance placed by the trial court upon the post incident conduct of the accused-appellants which under no circumstance could be termed as abnormal or unusual for the purpose of connecting the accused-appellants with the crime was wholly unwarranted and legally unsustainable. He next submitted that the prosecution failed to prove by any cogent evidence that the injuries found on the dead body of the deceased were caused by golf club belonging to the appellant Rajesh Talwar especially in the face of uncertainty with regard to the weapon used in the commission of double murder which kept changing. The prosecution during investigation introduced as many as five different kinds of murder weapons at different stages namely, hammer and knife propounded by the NOIDA police, Kukri and then Golf

Club bearing no. 5 and surgical scalp propounded by the C.B.I.

37. Learned counsel for the appellants further submitted that in a case of circumstantial evidence it is well settled parameter of law that the chain of circumstance existing in a particular case should be unbreakable and should point out only at the hypothesis of the guilt of the accused and there should be no alternative hypothesis available or probable in the case at all. Advancing his submissions in this regard further learned counsel for the appellants submitted that in view of the recital contained in the closure report dated 26.12.2010 (Ext.Ka-98) submitted by the C.B.I., an alternative hypothesis as against the alleged guilt of accused exists in the prosecution case itself and the alternate hypothesis so established stood proved from the evidence collected by the NOIDA police and the C.B.I. during the investigation which was tampered with by the Investigating Authority and the evidence adduced during trial suggesting outsiders' entry inside the appellants' flat on the fateful night which pointed out towards the innocence of the appellants but the trial court illegally failed to examine the aforesaid aspect of the matter in it's right perspective which

resulted in a miscarriage of justice. He lastly submitted that the tenor of the impugned judgement clearly indicates that the trial judge had prejudged the whole issue and was predetermined to convict the accused-appellants. The impugned judgement which suffers from illegalities, perversities and infirmities which are apparent on the face of the record can not be sustained and is liable to be set aside.

38. Per contra, Sri Anurag Khanna, Senior Advocate assisted by Sri R.K. Saini, learned counsel appearing for the C.B.I. submitted that it was fully established from the testimony of PW15 Umesh Sharma, driver of appellant Rajesh Talwar that the four inmates namely, appellants Rajesh Talwar, Nupur Talwar their daughter Aarushi and their male servant Hemraj were present in L-32 Jalvayu Vihar, Ghaziabad in the night of 15/16.5.2008. PW10 Bharti Mandal who was the first person to reach the place of occurrence in the morning of 15/16.5.2008 at about 6:00 A.M. deposed that the main door of the appellants' flat was latched from inside and there was no possibility of any outsiders having forced their entry into their flat and escape after committing the double murder. What had happened inside the premises in the night of 15/16.5.2008 and how

and under what circumstances their daughter Aarushi and their male help Hemraj were brutally done to death was within the special knowledge of the accused-appellants and they having failed to come up with any satisfactory explanation with regard to the circumstances under which the brutal double murder was committed and the accused-appellants having virtually admitted the facts deposed by PW10 Bharti Mandal in her testimony during the trial to be true in their statements recorded under Section 313 Cr.P.C. during trial, the trial court did not commit any error in convicting both the accused-appellants for having committed the murders of their daughter and male servant Hemraj by relying upon the testimony of PW10 and PW15 and other evidence on record by invoking Section 106 of the Evidence Act. Sri Anurag Khanna next submitted that there was oral evidence of Dr. Rajiv Kumar Varshney PW13 and Dr. Rohit PW14 on record who were one of the earliest persons who had arrived at the Talwar's flat proving that there were blood stains on the stair case leading upto the terrace and the lock of the terrace door which fully established that the accused-appellants after killing Hemraj in the bedroom of Aarushi had dragged his dead body from there upto the terrace

where they had left it after concealing it with the panel of cooler and then locked the terrace door from inside.

39. He further submitted that the post occurrence conduct of the appellants noticed by the witnesses who had arrived there upon getting the news of Aarushi's murder and as testified by them during trial was wholly incompatible with normal human conduct of a couple who had just found their only child murdered in a diabolic manner. He also submitted that blood stains were visible on the outer frame of the door of Aarushi's bedroom which proved that the door was open when she was murdered. He further submitted that efforts made by the appellants for influencing the doctor who had conducted the postmortem on the cadaver of Aarushi by approaching Dr. K.K. Gautam and Dr. Sushil Chandana to ensure that the factum of rape did not find mention in the postmortem report, lack of any urgency on their part to report the matter to the police, their failure to make available the key of the lock put on the door of the terrace on which blood stains were noticed and to come up with any satisfactory explanation for the key of the door of the Aarushi's room being found in its lock although they claimed that they used to keep the key of door of Aarushi's bedroom

in their bedroom after locking the same from outside; their attempt to discourage anyone who tried to console them; reluctance on the part of Rajesh Talwar to identify the dead body of Hemraj; the dramatic starting of weeping of Talwars as soon as PW10 Bharti Mandal entered into their flat; covering Aarushi's dead body with a bed sheet on noticing that she had died, lack of any effort on their part to ensure whether she was alive or dead and their failure to hug their daughter's dead body even once on finding her murdered as the witnesses did not notice any blood on their clothes are some of the factors which clinchingly point towards the guilt of the appellants. Covering of partition grill of two terrace with a bed sheet to ensure that the dead body of Hemraj was not visible from the adjoining terrace, getting the partition wall between their bedroom and that of Aarushi's room painted in the same colour as the walls of the room which was earlier polished; getting the first iron grill door and the grill enclosing the balcony removed during the trial are some other instances which indicate their attempts to make material evidence disappear. He also submitted that it was fully proved from the evidence of PW5 and PW36 who had conducted the postmortem on the dead bodies of

Aarushi and Hemraj respectively that the double murder had taken place between 00 hours and 1:00 hours on 16.05.2008. He next submitted that medical evidence on record fully corroborates the prosecution case that the blunt injuries found on the dead bodies of both the deceased were caused by the same person, at the same time and by using the same weapon, a golf club of the same dimension as those of the injuries and the incised cuts found on the necks of the victims which were clean cuts were caused by a very sharp edged small weapon like surgical scalp by a surgically trained person. He also submitted that there is evidence on record showing that Aarushi's dead body was tampered by cleaning her vagina with a view to erase marks of sexual act and the same was done during the process of setting in of rigor mortis due to which vagina remained in dilated condition. The position of clothes worn by the deceased clearly suggested that her clothes were put on the dead body after her death. The absence of blood on the toys, school bag and books etc. which were neatly placed on Aarushi's bed while there was blood on the bed sheet, pillow and wall behind the bed clearly suggested that the crime scene had been dressed.

40. Sri Anurag Khanna next submitted that the evidence on record proves that the attack on the victim was made while the door of Aarushi's bedroom was open and considering the injuries found on the dead bodies of both the deceased, their heart rendering screams must have at the time of assault echoed in the entire flat and it is unbelievable that any outsider would commit such an offence within the flat when the parents of the deceased Aarushi were present in the adjoining room and walk away without their waking up, unnoticed. Moreover the wall between the room of Aarushi and the appellants was of wooden plywood on both the sides with a hollow space in between and it is not possible for the screams of the victims having not been heard by them, if an outsider was the perpetrator of the crime. It has also been emphasized by Sri Anurag Khanna, learned counsel for the Central Bureau of Investigation, by inviting our attention to the site plan of appellants' flat (Ext.Kha-18), in which the distance between the bed of Aarushi and her parents' bed is shown to be barely 8 feet and any sound originating from Aarushi's bedroom would have been easily audible in the adjacent room. He also submitted that the report of sound simulation

test (Ext.Kha-44) which was conducted by recreating crime scene totally falsified the appellants claim that they could not have heard any sound coming from outside while sleeping in their room, with the air conditioners which were noisy, on. He further submitted that in view of the admission made by the appellant Nupur Talwar in her statement recorded under Section 313 Cr.P.C. that she heard all the three bells rung by PW10 Bharti Mandal in the morning of 16.05.2008 while she was sleeping in her room, it is impossible to believe that the appellants could not have heard the victim's screams which must have echoed in the flat when the victims were attacked.

41. Sri Anurag Khanna further submitted that there was evidence in the form of logs provided by the service provider Airtel (Ext.Kha-22) which proved that internet was used in the flat of appellants from 23:00:50 up to 02:04:30 and thereafter again from 02:04:30 to 2:04:30 on 15.5.2008 which continued up to 16.5.2008 and then again from 23:00:50 on 16.5.2008 up to 3:34:07 which indicated that the appellants were awake throughout the night and their defence that they were sleeping in the night of 15/16.05.2008 is palpably false. He also submitted that the

presence of Hemraj's blood on the bottle of Ballentine's whiskey found on the dining table in the lobby of appellants' flat, inter-alia proves, that the murderer had killed Hemraj and Aarushi both in Aarushi's bedroom and then dragged the dead body of Hemraj up to the terrace and then he had returned to the flat, touched the bottle of Ballentine's whiskey and in the process transferred the blood of Hemraj on the bottle, as a part of dressing up of crime scene. The crime was committed by the inmates of the house as no outsider after committing the crime would have dared to return to the crime scene after committing the double murder and move freely inside the flat. This act of such audacity can be attributed only to the two inmates of the flat and not to an outsider especially in view of the presence of appellants inside the flat.

42. Sri Anurag Khanna also submitted that there is nothing on record which may suggest an alternative hypothesis as against the claimed guilt of the accused or outsiders' entry inside the appellants' flat which could have pointed out towards the innocence of the appellants.

43. Advancing his submission in this regard he further submitted that the reliance placed by the learned counsel for

the appellants on the report of C.D.F.D. Hyderabad for proving Krishna's presence inside the house in the night of occurrence, which indicated that D.N.A. of Hemraj was found on the pillow cover of the pillow seized from Krishna's room is wholly misconceived in view of clarificatory letter (Ext.Ka-52) issued by C.D.F.D. Hyderabad and from the evidence of PW25 S.P.R. Prasad, C.D.F.D. Hyderabad that the earlier report given by C.D.F.D. Hyderabad in respect of purple colour pillow cover was a result of mistake committed by C.D.F.D. Hyderabad, whereby the description of exhibits was inadvertently interchanged in the report. Sri Anurag Khanna has also invited our attention to the fact that this Court had rejected the aforesaid contention of learned counsel for the appellants raised before this Court in Criminal Revision no. 1127 of 2011 after hearing both the parties at length vide it's judgement dated 18.03.2011 and held that it was clear that D.N.A. of Hemraj was not found on Krishna's pillow cover. Similar plea was again raised by the appellants before this Court in Misc. Petition no. 35303 of 2012 by contending that clarificatory letter issued by the C.D.F.D. Hyderabad did not mention any basis for the ensuing to have crept in the report of C.D.F.D. Hyderabad.

This Court after hearing the parties at length had passed a detailed judgement holding that the clarificatory letter issued by the C.F.F.D. Hyderabad does mention as to how the error had crept in. Since it was conclusively established by the Clarificatory letter (Ext.Ka-52) that no D.N.A. of Hemraj was found on the pillow cover of Krishna by both the labs, C.F.S.L. New Delhi and C.D.F.D. Hyderabad and hence there is no force in the theory of alternative hypothesis as against the alleged guilt of accused. Sri Anurag Khanna further submitted that the accused-appellants made a false claim by attempting to shift the blame on Krishna, Vijay Mandal and Raj Kumar by introducing 'Khukri' as a crime weapon of offence. The appeals lack merit and are liable to be dismissed.

44. This is one of those unusual cases in which the appellants, Dr. Rajesh Talwar and Dr. Nupur Talwar have been charged and convicted for having committed the murder of their only daughter Aarushi and their domestic help Hemraj in an extremely gruesome and diabolic manner within the premises of their residential flat, L-32 Jalvayu Vihar, Ghaziabad in the intervening night of 15/16-08-2008. If after examining the marathon arguments advanced by the

learned counsel for the parties in support of their respective contentions and scrutinizing and evaluating the evidence on record, we come to the conclusion that there is truth in the prosecution version and the learned Trial Judge has neither erred in law nor in fact in convicting the appellants, in that case the punishment of imprisonment for life awarded by the trial court to the appellants may appear to be thoroughly disproportionate to the horrendous offence. There cannot be a safer haven for a child than his/her home. A child cannot feel more secure in the custody of anyone else other than his or her parents. Even in his or her wildest imagination a child cannot suspect that he or she is unsafe even within the four corners of his or her home with his or her parents. In case the the offence allegedly committed by the appellants stands proved in the manner dispelled by the prosecution, there could not be a more glaring instance of shocking betrayal or the protectors turning into predators.

45. Admittedly, in the present case there is no direct evidence on record proving the complicity of the appellants in the commission of the double murder of their only daughter Aarushi and their domestic help Hemraj. It is a case of circumstantial evidence.

46. In these two appeals preferred by the appellants challenging the correctness of judgment and order of conviction, we have gone through the entire record and considered the rival submissions and the question which arises in this matter for our consideration is that whether the circumstances on record satisfy the principle laid down by the Apex Court in its various judgments as regards appreciation of cases based on circumstantial evidence.

47. The circumstances which have weighed with the learned trial court are reproduced herein below :-

(i) That irrefragably in the fateful night of 15/16.05.2008 both the accused were last seen with both the deceased in Flat No. L-32, Jalvayu Vihar at about 9.30 P.M. by Umesh Sharma, the driver of Dr. Rajesh Talwar;

(ii) That in the morning of 16.05.2008 at about 6.00 A.M. Ms. Aarushi was found murdered in her bed-room which was adjacent to the bedroom of the accused and there was only partition wall between two bed-rooms;

(iii) That the dead body of the servant Hemraj was found lying in a pool of blood on the terrace of flat no. L-32, Jalvayu Vihar on 17.05.2008 and the door of terrace was found locked from inside;

(iv) That there is a close proximity between the point of time when both the accused and the deceased persons were last seen together alive and the deceased were murdered in the intervening period of 15/16.05.2008 and as such the time is so small that possibility of any other person(s) other than the accused being the authors of the crime becomes impossible;

(v) That the door of Ms. Aarushi's bed-room was fitted with automatic click-shut lock.PW29 Mahesh Kumar Mishra the then S.P. (City), N.O.I.D.A. has deposed that when he talked to Dr. Rajesh Talwar on 16.05.2008 in the morning, he had told him that in the preceding night at about 11.30 P.M. he had gone to sleep with the key after locking the door of Ms. Aarushi's bed-room from outside.

(vi) Both the accused have admitted that door of Ms. Aarushi's bed-room was having automatic-click shut lock like that of a hotel, which could not be opened from outside without key but could be opened from inside without key. No explanation has been offered by the accused as to how the lock of Ms. Aarushi’s room was opened and by whom;

(vii) That the internet remained active in the night of the gory incident suggesting that at least one of the accused

remained awake;

(viii) That there is nothing to show that an outsider(s) came inside the house in the said night after 9.30 P.M.;

(ix) That there was no disruption in the supply of electricity in that night;

(x) That no person was seen loitering near the flats in suspicious circumstances in that night;

(xi) That there is no evidence of forcible entry of any outsider(s) in the flat in the night of occurrence;

(xii) That there is no evidence of any larcenous act in the flat;

(xiii) That in the morning of 16th may 2008 when the maid came to flat for the purpose of cleaning and moping a false pretext was made by Dr. Nupur Talwar that door might have been locked from outside by the servant Hemraj although it was not locked or latched from outside;

(xiv) That the house maid Bharti Mandal has no where stated that when she came inside the flat both the accused were found weeping;

(xv) That from the testimony of Bharti Mandal it is manifestly clear that when she reached the flat and talked to Dr. Nupur Talwar then at that time she had not complained

about the murder of her daughter and rather she told the maid deliberately that Hemraj might have gone to fetch milk from Mother dairy after locking the wooden door from outside. This lack of spontaneity is relevant under section 8 of the Evidence Act;

(xvi) That the clothes of both the accused were not found soaked with the blood. It is highly unnatural that parents of deceased Ms. Aarushi will not cling to and hug her on seeing her murdered;

(xvii)That no outsider(s) will dare to take Hemraj to the terrace in severely injured condition and thereafter search out a lock to be placed in the door of the terrace;

(xviii) That it is not possible that an outsider(s) after committing the murders will muster courage to take Scotch whisky knowing that the parents of the deceased Ms. Aarushi are in the nearby room and his top priority will be to run away from the crime scene immediately;

(xix) That no outsider(s) will bother to take the body of Hemraj to the terrace. Moreover, a single person cannot take the body to the terrace;

(xx) That the door of the terrace was never locked prior to the occurrence but it was found locked in the morning of

16.05.2008 and the accused did not give the key of the lock to the police despite being asked to give the same;

(xxi) That the accused have taken plea in the statements under section 313 Cr.P.C. that about 8-10 days before the occurrence painting of cluster had started and the navvies used to take water from water tank placed on the terrace of the flat and then Hemraj had started locking the door of the terrace and the key of that lock remained with him. If it was so then it was not easily possible for an outsider to find out the key of the lock of terrace door;

(xxii)That if an outsider(s) had committed the crime in question after locking the door of terrace and had gone out of the flat then the outer most mesh door or middle mesh door must have been found latched from outside;

(xxiii) That the motive of commission of the crime has been established;

(xxiv) That it is not possible that after commission of the crime an outsider(s) will dress-up the crime scene;

(xxv) That golf-club no. 5 was thrown in the loft after commission of the crime and the same was produced after many months by the accused Dr. Rajesh Talwar;

(xxvi) That pattern of head and neck injuries of both the

accused persons are almost similar in nature and can be caused by golf-club and scalpel respectively;

(xxvii) That the accused Dr. Rajesh Talwar was a member of the Golf-Club, N.O.I.D.A. and golfclubs were produced by him before the C.B.I. and scalpel is used by the dentists and both the accused are dentists by profession;

48. In the face of the aforesaid circumstances, according to the trial court the only possible conclusion or hypothesis could be the guilt of the appellants and nothing else.

49. Before proceeding to examine whether the circumstances relied upon by the learned Trial Judge stood proved beyond all reasonable doubts on the basis of the evidence adduced by the CBI and that in the aforesaid circumstances, the only hypothesis could be the guilt of the appellants and nothing else, are conclusive in nature and have tendency which could be considered against the appellants.

We consider it appropriate to first examine the law on the issue.

50. The principles how the circumstances be considered and weighed are well settled and summed up by the Apex Court in **Sharad Birdhi Chand Sarda Vs. State of**

Maharashtra 1984 (4) SCC 116. as under :

> "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) 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 and another Vs. State of Maharashtra 1973 2 SCC 793** where the observations were made :
> (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."

51. In **Sujit Biswas Vs. State of Assam (2013) 12 SCC 406** the Apex Court ruled that in judging the culpability of

an accused the circumstance adduced when collectively considered must lead to the only irresistible conclusion that the accused alone is the perpetrator of a crime in question and the circumstances established must be of a conclusive nature consistent only with the hypothesis of the guilt of the accused and observed as here under :

> 59. A reference in the passing however to the of quoted decision in Sharad Birdhichand Sarda (supra) construed to be locus classicus on the relevance and decisiveness of circumstantial evidence as a proof of the charge of a criminal offence would not be out of place. The relevant excerpts from paragraph 153 of the decision is extracted herein below.
> "153.(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused...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.
> * * * (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."

52. In Dhan Raj @ Dhand vs. State of Haryana (2014) 6 SCC 745, (Hon. Ghose,J.) while dwelling on the imperatives of circumstantial evidence ruled that the same has to be of highest order to satisfy the test of proof in a criminal prosecution. It was underlined that such circumstantial

evidence should establish a complete unbroken chain of events so that only one inference of guilt of the accused would ensue by excluding all possible hypothesis of his innocence. It was held further that in case of circumstantial evidence, each circumstance must be proved beyond reasonable doubt by independent evidence excluding any chance of surmise or conjecture.

53. The Apex Court in paragraph 58 of its judgment in Jose@Pappachan Vs. Sub-Inspector of Police, Koyilandy and another (2016) 10 SCC 519 referred to the following extracts from the treatise on the law of evidence "fifth edition by Ian Dennis at page 483" :

> 58. Addressing this aspect, however, is the following extract also from the same treatise "The Law of Evidence" fifth edition by Ian Dennis at page 483:
>
> "Where the case against the accused depends wholly or partly on inferences from circumstantial evidence, factfinders cannot logically convict unless they are sure that inferences of guilt are the only ones that can reasonably be drawn. If they think that there are possible innocent explanations for circumstantial evidence that are not "merely fanciful", it must follow that there is a reasonable doubt about guilt. There is no rule, however, that judges must direct juries in terms not to convict unless they are sure that the evidence bears no other explanation than guilt. It is sufficient to direct simply that the burden on the prosecution is to satisfy the jury beyond

> reasonable doubt, or so that they are sure.

54. The legal proposition which emerges out from the reading of the aforesaid authorities is where a case is based upon circumstantial evidence the same has to be of highest order to satisfy the test of proof in a criminal prosecution and as such circumstantial evidence should establish a complete unbroken chain of events so that only one inference of guilt of the accused would ensue by excluding all possible hypothesis of his innocence, each circumstance must be proved beyond reasonable doubt by independent evidence excluding any chance of surmise or conjecture.

55. We now proceed to scrutinize whether the circumstances which weighed with the trial court are conclusive in nature and have tendency which could be considered against the appellants in the background of the evidence adduced by the prosecution and the defence and to see if those circumstances bring home the case of the prosecution.

56. The site map of L-32, Jalvayu Vihar Ext. Ka2 indicates that in order to enter the Talwars' flat one has to pass through three doors. The first is the iron grill gate shown by red colour which opens into a short gallery or a passage

leading to the main door of the Talwars' flat which consists of a pair of doors affixed in the same frame denoted by letter G. One of these, one on the outside is an iron mesh door (shown by dark green colour) which has a two way lock and can also be bolted from outside. Behind iron mesh door is a wooden door (shown by light green colour) that leads to the drawing room of the flat which has a click shut lock i.e. a lock when the door is locked it can only be opened from inside without a key. The passage leading from the first iron grill door to the main door of the Talwars' flat was enclosed by Talwars by fixing iron grills.

57. As one enters L-32 Jalvayu Vihar through the double doors one notices a kitchen (shown by numerical 9) on the left, Hemraj's room on the right, (indicated by numerical 10) having two doors one of which (shown by black colour) opens in the gallery between the kitchen and his room and which leads into the drawing room and the other which opens in the grilled outer gallery (shown by letter 'F'), is between the iron grill door and the double doors, with an attached bathroom (shown by numerical 11), As one walks into the drawing room (shown by numerical 8) through the inner passage one notices that on the left of the gallery is

the guest room with an attached toilet (shown by numericals 6 & 7 respectively) followed by the bedroom of Rajesh and Nupur Talwars (shown by numerical 4) with an attached toilet in the left (shown by numerical 5) and a grilled balcony in the right (shown by numerical 3) and on the right side of the gallery is Aarushi's bed room (shown by numerical 1) with two doors, one of which opens in the grilled balcony and the other in the inner gallery (orange colour) leading to her parents' bedroom with an attached toilet (shown by numerical '2') with two doors one of which opens in the Aarushi's bedroom and the other (maroon colour) in the inner gallery. The beds of Aarushi, appellants and the guests have been denoted by letters A, B and C respectively. The dining table has been shown by letter 'D'. The middle iron mesh door has been denoted by letter 'G'. The dining table in the lobby and the table kept in the bedroom of Hemraj have been shown by letters D and E in the site-plan

58. The present case being a case of circumstantial evidence, hence motive assumes considerable significance and it is settled law that in a case based upon circumstantial evidence the prosecution has to prove the motive.

59. The motive suggested by the prosecution in the present case for committing the double murder of their only daughter Aarushi and their domestic help Hemraj by the appellants is grave and sudden provocation caused on Hemraj being caught in an act of sexual intercourse with 13 years old Aarushi in her bedroom by her father Dr. Rajesh Talwar in the mid of the night on account of which he murdered both by assaulting them by golf club bearing no. 5 and thereafter slitting their throats with a surgical scalpel.

60. It has been argued by the learned counsel for the appellants that the prosecution has miserably failed to prove by leading even an iota of legally admissible or cogent evidence the motive in this case. He has also argued that there is no evidence on record indicating that on the fateful night the deceased had been involved in any kind of sexual activity except the evidence of PW38 Dr. Mohinder Singh Dahiya which is tainted with conjectures and surmises and the crime scene analysis and reconstruction report dated 26.10.2009 Ext. Ka93 prepared by PW38 Dr. Dahiya on the basis of an erroneous information supplied to him by the CBI Investigating Officer that blood of Hemraj was found on the pillow in Aaruhis's bedroom/ Aaaruhis's bed.

61. From the perusal of Ext. Ka93 (page 189-Aa/2, 189-Aa/3), it transpires that the entire theory of appellant Dr. Rajesh Talwar having discovered his daughter Aarushi and domestic help Hemraj engaged in an sexual act which provoked him to such an extent that he picked up a golf club and killed both Aarushi and Hemraj and thereafter he dragged the dead body of Hemraj upto the terrace and then slit his throat with surgical scalpel and then came down to his flat, repeated same act with deceased-Aarushi, is based upon an information supplied by the Investigating Officer of this case to PW37 Dr. M.S. Dahiya which has been noted by him in paragraph 8 and 9 of his report on pages 189 ka5 and 189 ka7 that blood of Hemraj was found on the pillow in Aarushi's bedroom. That the aforesaid fact is factually incorrect is proved from the report of the CFSL, New Delhi dated 19.6.2008 Ext. Ka6 which indicates that on the bed sheet, pillow along with cover and part of mattresses of Aaruhis's bed seized from her bedroom on 16.5.2008 which were examined by the Biology Division of CFSL, New Delhi, blood and DNA of Aarushi alone was found and no blood or DNA of Hemraj was detected on the aforesaid articles. The aforesaid finding was affirmed by PW6 Dr. B.K. Mohapatra,

DNA expert of CFSL, New Delhi, as is evident from the facts deposed by him in his evidence recorded during the trial on page 101 of the paper book and those stated in the report of CDFD Hyderabad dated 6.11.2008 Ext. Ka51 according to which, on the aforesaid seized articles DNA of Aarushi alone was found. The aforesaid fact finds further corroboration from the evidence of Suresh Kumar Singla, serologist CFSL, New Delhi who was examined as PW24 during the trial and who testified before the trial court that no blood of Aarushi was found on Hemraj's clothes and vice versa. PW39 AGL Kaul, the last Investigating Officer of this case of CBI who after completing the investigation submitted closure report on 29.12.2010 Ext. Ka98 has in paragrapgh 25 of closure report clearly stated that no blood of Hemraj was found on the bed sheet and pillow of Aarushi and there was no evidence on record to prove that Hemraj was killed in the room of Aarushi. It would be interesting to note that PW39 AGL Kaul has in his testimony in the first line of page 274 of the paper book admitted ***"even as on date I stand by my final report" .***

62. Although the post mortem report of the deceased Aarushi Ext. Ka93 which was prepared by PW5 Dr. Sunil

Kumar Dohre who had conducted post mortem on the dead body of the deceased does not contain even a faint indication that she was subjected to any kind of sexual assault but PW5 Dr. Sunil Kumar Dohre for the first time deposed before the trial court on page 94 of the paper book in his examination-in-chief that Aarushi's vaginal cavity contained white colour discharge. The opening of vaginal cavity was so prominent that the internal vaginal cavity was visible. On page 95 of the paper book Dr. Sunil Kumar Dohre further deposed in his examination-in-chief that the mouth of the vaginal cavity was open and vaginal canal was visible which was on account of manipulation/fiddling with the vaginal cavity either prior to the stage of rigor mortis or during the stage of rigor mortis. The aforesaid description of the deceased's vagina given by PW5 Dr. Sunil Kumar Dohre in his evidence recorded before the trial court was conspicuous by its absence not only in the post mortem report of the deceased Ext. Ka93 which was prepared by him but also in his three statements recorded under Section 161 Cr.P.C., on 18.5.2008, 18.07.2008 and 3.10.2008 by Inspector Anil Kumar Samani, C.B.I. Inspector, Vijay Kumar, First Investigating Officer of CBI and M.S. Phartyal another

I.O. of C.B.I respectively. In all his aforesaid statements he had remained consistent with the finding recorded by him in his postmortem report especially with regard to the genetelia of Aarushi.

63. Moreover, Dr. Sunil Kumar Dohre was a Member of Expert Committee of Forensic Science which was constituted with the object of examining the postmortem report of the deceased Aarushi and Hemraj and for ascertaining whether the deceased Aarushi was subjected to any kind of sexual assault before her death and the crime weapons used in committing the double murder. The report of the Expert Committee of Forensic which is on record as Ext. Kha17 and findings whereof were consistent with his postmortem report and which bears his signature.

64. However, PW5 Sunil Kumar Dohre in his fourth statement recorded during investigation by PW38 Sri AGL Kaul, Investigating Officer of the CBI on 30.9.2009 made a statement dramatically opposite to his observation recorded in his postmortem report, that on external examination the vaginal cavity of deceased Aarushi was prominently wide open and the cervix and entire vaginal canal was visible. He also stated that the whitish discharge was present in the

vaginal cavity whereas in the postmortem report he had mentioned whitish discharge in the column of "genitalia"

65. PW5 Dr. Sunil Kumar Dohre in his fifth statement recorded by PW39 I.O. AGL Kaul on 28.5.2010 again stated that vaginal cavity of Aarushi was wide and prominent and vaginal canal and cervix were visible and the reason for the aforesaid phenomena was manipulation with private parts of Aarushi after her death. However when he was contradicted with his previous statements dated 18.5.2008, 18.7.2008 and 3.10.2008 recorded by different Investigating Officers during the investigation with the facts stated by him for the first time in his evidence recorded before the trial court, PW5 Sunil Kumar Dohre in his cross-examination admitted that on 18.7.2008 he had not stated before the I.O. that the mouth of the vaginal cavity was open and vaginal canal was visible, reason for this being that either prior to the stage of rigor mortis or during the stage of rigor mortis vaginal cavity was filtered with or manipulated. He had further deposed in his cross-examination that he did not write in his post mortem report that the opening of vaginal cavity was prominently wide or that the vaginal canal was visible or inner cavity of vagina was visible as these were his

subjective findings.

66. Thus upon a critical evaluation of the testimony of PW5 Dr. Sunil Kumar Dohre it transpires that he has in his testimony made material improvements which effect the core of the prosecution case that the deceased were caught by Dr. Rajesh Talwar in the midst of a sexual intercourse and he then stated that the material improvements were a matter of subjective findings which have no place in forensic science. In this regard it would be useful to reproduce the dictionary meaning of "subjective" and "objective" herein below :-

> ***Black's Law Dictionary, Eighth Edition:***
>
> ***Subjective:*** *Based on an individual's perceptions, feelings, or intentions, as opposed to externally verifiable phenomena.*
>
> ***Objective:*** *1. Of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feeling, or intentions <the objective facts>. 2. Without bias or prejudice; disinterested. <because her son was involved, she felt she could not be objective>. Cf. Subjective*
>
> "Subjective" and "Objective" as used in English language

67. Thus in view of the dictionary meaning of the word "subjective" it is apparent that Dr. Sunil Kumar Dohre

deposed regarding condition of deceased-Aarushi's vaginal at the time he had conducted the postmortem which he failed to mention either in his postmortem report or in her numerous statements recorded under Section 161 Cr.P.C. It is crystal clear, his evidence for the purpose of believing that she was subjected to any sexual intercourse or any fiddling or manipulating with her vaginal cavity was done after her murder does not inspire confidence and no credibility can be attached to the same.

68. The prosecution in order to further corroborate the theory of sexual intercourse and the case of grave and sudden provocation had examined Dr. Naresh Raj who had conducted the postmortem on the corpse of Hemraj on 17.5.2008 and prepared his postmortem report Ext. Ka88. It has been argued by the learned counsel for the appellants that if the credulity of investigation, the postmortem report of deceased Hemraj and the testimony of PW36 Naresh Raj are taken into consideration, it is proved beyond all reasonable doubts that Dr. Naresh Raj like Dr. Sunil Kumar Dohre too committed medical blasphemy in supporting the prosecution case of sexual intercourse and consequent grave and sudden provocation theory; In this regard he has

referred to the following reasons :

69. Dr. Naresh Raj in the column of internal examination (Ext. Ka88 postmortem report of deceased-Hemraj) had described the word "swelling" in the private part of Hemraj. However, he had given no reason whatsoever despite there being a column in the postmortem report providing for "any additional information"

70. Three statements of PW36 Dr. Naresh Raj were recorded under Section 161 Cr.P.C., during the investigation on 19.5.2008, 25.7.2008 and 12.10.2009 by Inspector Anil Samania, CBI, Sri H.S. Sachan of CBI and PW39 I.O. AGL Kaul of CBI respectively. In none of the aforesaid statements he had furnished any reason regarding the swelling in the private part of Hemraj Even as a Member of Expert Committee of Forensic which was constituted for the purpose of discussing the postmortem reports of deceased Aarushi and deceased Hemraj, he did not state anything about the aforesaid aspect of the matter. However in his statement recorded before the trial court on 22.3.2013 PW36 Naresh Raj on page 258 of the paper book deposed as hereunder in his examination-in-chief :-

लिंग में इसलिए सूजन थी क्योंकि या तो वो सम्भोग कर रहा था अथवा करने वाला था। उसके तुरन्त बाद मृतक की मृत्यु हुई थी।

(The reason for swelling in the penis of Hemraj was because either he was in the midst of sexual intercourse or was about to indulge in the same immediately before being murdered.

71. On being cross-examined by the defence counsel, PW36 Dr. Naresh Raj deposed that he considered Dr. Modi in his treatises of medical jurisprudence and toxicology (third line from top at page 259 of the paper book). On page 259 of the paper book he further deposed in his cross-examination :

> "I agree with the following suggestion of Mr. Modi :-
>
> From 18 to 36 or 48 hours after the death, eyes are forced out of their sockets, a frothy seddish fluid of mucus is forced out of the mouth and nostrils, abdomen becomes greatly distended. The penis and scrotum become enormously swollen.
>
> I am married and on the basis of marital experience I have stated that the reason for the swelling in Hemraj penis was because either he was in the midst of sexual intercourse or was based about to indulge in the same."

72. According to the postmortem report of the deceased Hemraj Ext. Ka88 which was prepared by PW36 Dr. Naresh Raj the deceased had died in the night of 15/16.05.2008.

73. Record further shows that Hemraj's dead body was discovered at about 10:00 AM on the terrace of Dr. Rajesh Talwar where it had been lying for more than 24 hours exposed to the heat of scorching May sun and the postmortem on the dead body of the deceased was performed at about 9:30 PM on 17.5.2008.

74. Thus almost more than 36 hours had elapsed since the death of Hemraj by the time postmortem on his dead body was conducted and the swelling of his private part was in consonance with the opinion of Mr. Modi expounded by him in his treatises of medical jurisprudence and toxicology and had nothing to do with his being murdered either during the sexual intercourse or just before that as deposed by PW36 Dr. Naresh Raj.

75. Learned counsel for the CBI has made a feeble attempt to justify the non mention of the factum of rape by PW5 Dr. Sunil Dohre in his postmortem report by submitting that he was influenced by his acquaintances who were close to Dr. Rajesh Talwar. In this regard our attention has been invited by the learned counsel for the CBI to the extracts of testimonies of PW5 Dr. Sunil Kumar Dohre and PW7 Dr. K.K. Gautam who were examined by the prosecution for proving

the aforesaid fact and after giving a thoughtful consideration to the aforesaid extracts of their testimonies we have noticed that PW5 Dr. Sunil Kumar Dohre has nowhere stated in his testimony that he was approached by Talwars. He stated in his examination-in-chief that Dinesh Talwar had asked him to speak to Dr. Dogre who had told him to take blood samples. Learned Trial Judge however conjunctured and speculated on the basis of the aforesaid statement that Dr. Sunil Kumar Dohre was influenced and as such he did not mention the findings which he had narrated in his evidence recorded before the trial court in his postmortem report. The trial court had failed to notice that Dr. Sunil Kumar Dohre neither in his four statements recorded under Section 161 Cr.P.C., nor in his examination-in-chief had deposed that he was approached not to mention anything in his report about sexual activity.

76. PW7 K.K. Gautam deposed that he was called by his friend Dr. Sushil Chaudhary who was not produced as a witness during the trial and told that Dr. Dinesh Talwar does not want any mention of rape in the postmortem report. In our opinion the evidence of PW7 Dr. K.K. Gautam on the point of Dr. Dinesh Talwar having approached him through

Dr. Sushil Chaudhary for manipulating the postmortem report is wholly inadmissible being hearsay for proving the fact that acting upon the telephone call of his friend Dr. Sushil Chaudhary he had contacted Dr. Sunil Kumar Dohre who had conducted the postmortem on the dead body of the deceased. In fact during his cross-examination he frankly admitted that he told Sushil Chaudhary that he would not be able to help him in managing the postmortem report. Even otherwise the allegation that Dr. Sushil Chaudhary had called him at the behest of Dr. Dinesh Talwar for managing the postmortem report of Aarushi is conspicuous by its absence in his first statement recorded under Section 161 Cr.P.C., on 1.7.2008. The aforesaid fact was introduced by him for the first time in his statement which was recorded on 6.4.2010, almost nine months after the recording of his first statement.

77. On the other hand the defence examined Dr. Urmila Sharma renowned gynecologist and Dr. R.K. Sharma former Head of the Department, AIIMS, Forensic Medicine as DW3 and DW4 who by their evidence tendered during the trial effectively rebutted the testimonies of PW38 Dr. M.S. Dahiya, PW5 Dr. Sunil Kumar Dohre and PW36 Dr. Naresh

Raj on the point of the deceased being subjected to sexual intercourse before the occurrence or there was any attempt to clean her private parts after incident when the rigor mortis had set in.

78. DW3 Dr. Urmil Sharma categorically deposed on page 556 of the paper book that the presence of white colour discharge noticed in the vaginal cavity of Aarushi was normal, psychological and biological discharge which starts in every girl between the age of 13-14 years when harmonical changes start taking place in the ovary after the beginning of the menstruation cycle. She further deposed by referring the photograph of vaginal anatomy in Shaw's Textbook of Gynecology on page 9 that during a vaginal examination unless both the labia are separated by using a speculum instrument inserted between the two labia, vaginal canal cannot be seen. She further deposed that in the case of vagina of a 13-14 years old girl who has died, neither orifice would be found open nor the vaginal canal will be visible. Vaginal orifice is found open only in those women who have given birth to several children, which in medical terminology is described as prolapse. Vaginal cavity will not be visible after the death of girl unless an instrument is

forcefully inserted.

79. The aforesaid witness was cross-examined at a great length by the CBI counsel but he could not extract anything from her which may in any manner either support the theories propounded by PW5 Dr. Sunil Kumar Dohre or suggest that DW3 Dr. Urmila Sharma had stated wrong or incorrect facts in her evidence.

80. Thus in view of the foregoing discussion, we have no hesitation in holding that the prosecution has failed to prove by any reliable or cogent evidence, the motive suggested by the prosecution for the appellants to commit the double murder i.e. the deceased being caught in the midst of a sexual act on the fateful night by Dr. Rajesh Talwar who suddenly got so gravely provoked that he committed their murder.

81. The Central Bureau of Investigation in order to prove that the appellants Nupur Talwar, Rajesh Talwar, deceased Aarushi and Hemraj were seen alive for the last time in the night of 15.05.2008 in the Talwar's flat L-32 Jalvayu Vihar Sector 25, NOIDA had examined Umesh Sharma, the driver of Dr. Rajesh Talwar as PW15. PW15 Umesh Sharma deposed that on 15.05.2008 at about 8:45 P.M. when he

went to the flat of Talwar's to hand over the key of the car, he saw Dr. Rajesh Talwar, Dr. Nupur Talwar, Aarushi and Hemraj in the flat and handed over the key to Dr. Rajesh Talwar. Thus from the evidence of PW15 Umesh Sharma, it is proved that the deceased Aarushi and Hemraj were alive in the night of 15.05.2008 and apart from the deceased, appellants Rajesh Talwar and Dr. Nupur Talwar were also present in the Talwars' flat. But from his evidence we cannot presume that after PW15 Mahesh Sharma had left, no one else had visited the appellants' flat during the night.

82. CBI had examined PW10 Bharti Mandal to prove that the Talwars' flat was locked from inside when Bharti Mandal arrived at their flat in the morning of 16.5.2008 and hence there was no possibility of any outsider having accessed the Talwar's flat.

83. Learned counsel for the appellants has argued that the reliance placed by the trial court on the testimony of PW10 Bharti Mandal, the solitary witness examined by the CBI for the purpose of proving the most material allegation made by the CBI in this case that the flat of Talwars was latched from inside in the morning of 16.05.2008 when PW10 Bharti Mandal had pressed the call bell is per se illegal as she has

nowhere stated the aforesaid fact in her examination-in-chief, moreover, her statement is full of contradictions, embellishments and material improvements which are result of tutoring.

84. Per contra, Sri Anurag Khanna, learned senior counsel argued for the C.B.I. that it is fully proved from the evidence of PW10 Bharti Mandal who had reached the Talwar's flat in the morning of 16.5.2008 at 6:00 A.M. that when she rung the bell, nobody opened the outer door, even after she had rung the call bell second time she found the outer-grill door bolted from inside and it did not open when she put her hand on it, she went up stairs and Nupur Talwar after sending her down stairs on the pretext of throwing the key of the lock of middle iron-mesh door, bolted the inner iron grill door from outside, opened the outer iron grill door from inside and went inside the flat from the door of Hemraj's room which opens in the gallery between the two iron-grill doors and then she asked PW10 Bharti Mandal to come up without throwing the key by stating her that the inner-grill door was not locked but only latched from outside.

85. He further argued that appellant Nupur Talwar had deliberately sent PW10 Bharti Mandal down stairs to get the

key to open the lock of the inner-mesh door which she could have herself opened from inside as inbuilt lock can be opened with the same key from inside as well as from outside. The act of sending Bharti Mandal down stairs clearly indicated malicious intent on the part of Nupur Talwar who by sending Bharti Mandal down stairs achieved her goal and opened the outer most grill door from inside, latched the inner most mesh door from outside and entered into the flat from the door of Hemraj's room opening in the grilled gallery.

86. Sri Anurag Khanna, learned counsel for the C.B.I. has further argued that evidence of PW10 Bharti Mandal is liable to be believed as the defence failed to impeach the creditworthiness of Bharti Mandal in accordance with Section 155 read with section 145 of the Indian Evidence Act. Sri Khanna also submitted that attention of PW10 Bharti Mandal having not been drawn to her previous statements in writing, in which she had not stated that the outer mesh iron-grill door of Talwar's flat did not open when she put her hand on it on reaching there in the morning of 16.5.2008 at 6:00 A.M by learned counsel for the defence for the purpose of contradicting her with her previous statement reduced

into writing as required by Section 145 of Evidence Act, the contradictions cannot be said to be legally proved and it cannot be said that PW10 Bharti Mandal had made any material improvement in her statement recorded before the trial court when she for the first time deposed that outer most-iron grill door of Talwar's flat did not open when she put her hand on it. In support of his aforesaid contention Sri Anurag Khanna, learned Senior Advocate has placed reliance on **Tahsildar Singh v. State of U.P.** reported in **AIR 59 SC 1092, V.K. Mishra Vs. State of Uttarakhand (2015) 9 SCC 588** and **R.K. Soni Vs. State of Maharashtra (2001) 5 Bombay CR 681**.

87. In order to ascertain the veracity of the prosecution's allegation that Talwar's house was latched from inside, we have the evidence of PW10 Bharti Mandal alone on the record. It would be useful to evaluate and scrutinize her evidence to unearth the mystery in the light of the arguments advanced by the learned counsel for the parties.

88. Learned counsel for the appellants has invited our attention to the following salient features of the testimony of PW10 Bharti Mandal (at pages 141-144) of the paper book [English translation] :-

" On 16.5.2008 I reached the residence of the accused at 6:00 a.m. in the morning.

Besides the iron-mesh door there was a call bell which I pressed, but the door was not opened.

I pressed the door bell again for the second time and went up the stairs to collect the bucket and mopping cloth and came down.

I touched the door (*iron-mesh door)* but it did not open.

Then I pressed the bell again, whereupon aunty (Nupur Talwar) opened the wooden door and stood in front of the iron mesh door (the inner most mesh door) and started talking to me.

She asked me where Hemraj had gone and I replied that I do not know.

Thereafter, aunty told me that Hemraj must have gone to fetch milk from Mother Dairy.

She also told me that Hemraj must have locked the wooden door and gone to fetch the milk.

The wooden door and iron-mesh door are in the same frame (inner ones).

Aunty also told me that you sit down, when Hemraj will

come he will open the lock and then only you come inside.

At that juncture I stated to aunty whether she did not have the key, aunty replied that she had keys.

I then told aunty that you give me the keys I will open the door and come inside.

At that time aunty stated that alright you go down I will give the keys.

I went downstairs and aunty from the balcony told me that you see the door is not locked but it is only bolted.

But I told aunty that she better give me the keys, because if it is locked then I will have to come down again.

At that juncture aunty threw long key from the balcony.

Thereafter, when I came up and put my hand on the outer iron-mesh door, it opened.

Thereafter, I opened the latch (kundi) in the inner iron-mesh door and stood there.

I felt that some thief has entered the house and that is why uncle and aunty were crying.

Then aunty threw her arms around me and started

crying, when I asked her why are you crying so much, she said go inside and see what has happened.

I went with aunty and stood outside Aarushi's room.

Aunty removed the sheet from Aarushi and I saw that the neck of Aarushi had been cut, I got scared.

Then aunty told me, see what Hemraj has done.

I told aunty whether I should go downstairs and call other people, she said yes do that.

I went downstairs and pushed the door bell of the people living downstairs, one lady asked me from inside the door what has happened and I told her that someone has cut the neck of the daughter of the people living upstainrs.

That aunty told me Ok, you go upstairs I am coming.

Thereafter I told aunty whether I should wash the dishes, she said let it be.

I thereafter asked aunty whether I should leave to work at other houses, she said Ok.

When I had opened the latch and entered into the house, uncle was wearing red T-shirt and half pant and aunty was wearing a maxi.

I have not received any summon.

I have been called for the first time to give statement here.

Whatever was taught/explained to me, the same statement I have stated here.

It is correct that yesterday in the court I have stated for the first time that, "the door bell which is near the outer iron-mesh door had been pressed by me.

Before giving my statement in the court I had not stated to anybody else, "aunty also told me that when Hemraj will return with the milk, then lock will open till then you sit down.

When I used to go to the house of the accused for doing my work, Hemraj used to open the door.

In the court I have stated for the first time, "then I put my hand on the door but it did not open.

In the court I have stated for the first time that, "thereafter I returned to the door and put my hand on the outer iron-mesh door and it opened."

Before making the aforesaid statement before the court, I had not stated these facts to the IO or to anybody else.

I had not stated to the IO that, 'I first pushed the

outer iron-mesh door and saw that the inner iron-mesh door is closed and latched".

I used to reach the house of uncle and aunty daily at around 6:00 A.M. in the morning.

When I used to reach at 6:00 a.m. in the morning, at that time usually uncle and aunty used to be sleeping.

It is incorrect to suggest that I have given false statement in the court under pressure from CBI.

89. In the case of Tahsildar Singh (supra) the constitutional Bench of the Apex Court examined the scope of Section 162 and its proviso which was concaved to enable the accused to rely upon the statement made by witness before a police officer for a limited purpose of contradicting a witness in the manner provided by Section 145 of the Evidence Act by drawing his attention to the parts of the statement intended for contradictions. Per Majoriy view as expressed in paragraph 26 of the aforesaid judgment, the Apex Court held as here under :

> From the foregoing discussion the following propositions emerge: (1) A. statement in writing made by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness-box and for no other purpose; (2) statements not reduced to writing by the police officer cannot be used for

> contradiction; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases: (i) when a recital is necessarily implied from the recital or recitals found in the statement ; illustration: in the recorded statement before the police the witness states that he saw A stabbing B at a particular point of time, but in the witness-box he says that he saw A and C stabbing B at the same point of time; in the statement before the police the word " only " can be implied, i.e., the witness saw A only stabbing B; (ii) a negative aspect of a positive recital in a statement; illustration: in the recorded statement before the police the witness says that a dark man stabbed B, but in the witness-box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that be was not of fair complexion; and (iii) when the statement before the police and that before the Court cannot stand together; illustration: the witness says in the recorded 904 statement before the police that A after stabbing B ran away by a northern lane, but in the Court he says that immediately after stabbing he ran away towards the southern lane; as he could not have run away immediately after the stabbing, i.e., at the same point of time, towards the northern lane.

90. While dealing with the same issue the Apex Court in paragraph 19 of its judgment rendered in the case of V.K.

Mishra (supra) has laid down as here under :

> 19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo moto make use of statements to police

> not proved in compliance with Section 145 of Evidence Act that is, by drawing attention to the parts intended for contradiction.

91. The Bombay High Court in its judgment in Ibrahimkhan Pirkhan Pathan Vs. State of Maharashtra (2003) CriLJ 1802 has held as here under :-

> It is pertinent to note that Section 145 of the Evidence Act deals with contradiction of a witness during his cross-examination by the, previous inconsistent statement. Section 145 of the Evidence Act in clear terms provides that the witness can be cross-examined without the statement being shown to the witness but if the previous statement is to be used for the purpose of omissions or contradictions then his attention much be drawn to that part of the statement which deals with contradictions/ omissions amounting to contradictions. The witness must, therefore, be given opportunity of explaining or reconciling his statement and if this opportunity is not given to him, the contradictory writing cannot be placed on record as evidence.

92. The Bombay High Court in R.K. Soni Vs. State of Maharashtra (2001) 5 Bombay CR 681 has also held as here under :

> In order to appreciate the contention of Mr. Rizvi the learned Counsel appearing for the applicant this Court with the Assistance of the learned Counsel for the applicant as well as the learned Counsel for the non applicant verified the statement of the witness recorded under section 161 of the Criminal Procedure

> Code and finds that the aforesaid omission is erroneously brought on record by cross-examining the witness and cannot be relied upon by the applicant. The accused cannot take advantage of the fact that the witness in his cross-examination admitted of not having made certain statement to the police unless the attention of the witness is drawn to such statement. To put it in other words before an omission is put to the witness in relation to his statement under section 161 of the Criminal Procedure Code his attention must be drawn to his previous statement recorded by the police so that the witness is given a fair opportunity to examine his previous statement and ascertain whether such omission in fact exists or not; it is then only that such omission can be authoritatively taken on record to prove that the prosecution improved its case before the Court through the witness.

93. Thus what follows from the reading of the above judgments is that when it is intended to contradict a witness by his previous statement reduced into writing, the attention of such witness must be first drawn to those parts of his earlier statement reduced into writing which are to be used for the purpose of contradicting him, if the witness is not confronted with that part of the statement with which the defence intended to contradict him, then the Court cannot suo moto make use of statements made to police not proved in accordance with Section 145 of Evidence Act.

94. We now proceed to examine whether PW10 Bharti

Mandal has been contradicted by the defence in accordance with the provisions of Section 145 of the Indian Evidence Act or not.

95. Record shows that PW10 Bharti Mandal in her first statement under Section 161 Cr.P.C. which was recorded by PW34 Dataram Nanoriya on 16.5.2008 had categorically stated that when she came inside the house the outer and inner iron mesh doors were open and this fact has been proved by PW34 Dataram Nanoriya in his testimony (at pages 241-251) of the paper book wherein PW34 Dataram Nanoriya had deposed that it was correct that on 16.05.2008, he had recorded the statement of maid servant Bharti Mandal, she did not state to him that when she came to the house of the accused at 6:00 O'clock in the morning and put her hand on the outer iron mesh door it did not open.

96. Similarly when PW10 Bharti Mandal in her another statement under Section 161 Cr.P.C. which was recorded by Sri Naresh Indora, Inspector C.B.I. On 04.06.2008, had not stated that when she reached the residence of the accused and put her hand on the door it did not open but later when she came back with the keys after having collected it and

put her hand on the door again, it opened.

97. In the present case there is no doubt about the fact that the defence had not confronted PW10 Bharti Mandal during her cross-examination with her previous statements reduced into writing which did not contain any recital that when she reached the house of the accused on 16.5.2008 at 6:00 am in the morning and touched the door (outer iron mesh door) it did not open" although she herself admitted on page 143 of the paper book in her cross-examination that she for the first time had stated before the Court that *when she put her hand on the door but it did not open.* Since there was no compliance with Section 145 of the Evidence Act in this case, the statements cannot be said to be duly proved for the purpose of contradiction by eliciting admission from PW10 Bharti Mandal during her cross-examination. In the case at hand, PW10 Bharti Mandal was not confronted with her statement recorded under Section 161 Cr.P.C. to prove the contradiction, hence her statement recorded under Section 161 Cr.P.C. cannot be looked into for any purpose. But that is not the end of the matter.

98. The moot question which still remains to be addressed by us is that whether on the basis of the facts deposed by

PW10 Bharti Mandal in her statement recorded before the trial court it is conclusively proved that when PW10 Bharti Mandal arrived at the flat of the Talwars at 6 AM on 16.05.2008, the outer most grill door of the Talwar's flat was latched from inside.

99. However after scanning the entire statement of PW10 Bharti Mandal recorded before the trial court we are constrained to observe that she in her entire statement has nowhere stated that the outer-grill door was locked from inside or the same did not open, despite her trying to open it by pushing it. The only fact which has come in her evidence qua the outer iron mesh grill door is that the same did not open when she had put her hand on it and that to in her cross-examination. The failure of PW10 Bharti Mandal to depose that the outer mesh grill door was actually locked or bolted from inside gives rise to a very strong inference that the outer mesh iron-grill door was not latched from inside.

In our opinion the testimony of PW10 Bharti Mandal was thoroughly insufficient for establishing the prosecution case that Talwar's household was locked from inside in the morning hours of 16.5.2008 at around 6:00 A.M. when the first person PW10 Bharti Mandal arrived there, suggesting that there was no possibility of any outsider accessing the apartment in the fateful night and that the double murder therefore, were committed by the inmates of the house and no one else.

100. Thus in view of the above, the failure of the defence to impeach the creditworthiness of PW10 Bharti Mandal under Section 155 of the Indian Evidence Act would not ipso facto either augment the proposition set up by the prosecution that the outer mesh iron door was latched from inside or give any advantage to the prosecution.

101. Although Sri Anurag Khanna, learned counsel for the C.B.I. very strenuously tried to persuade us to accept that the extract of testimony of PW10 Bharti Mandal, in which she had stated that when she put her hand on the outer mesh-iron grill door, it did not open as conclusive proof of fact that outer mesh iron-grill door was bolted from inside as she was a rustic illiterate lady and not very well versed with

Hindi language being a resident of West Bengal, we however find ourselves unable to agree with the aforesaid interpretation of the testimony of PW10 Bharti Mandal forwarded by learned counsel for the appellants for the reasons already discussed herein above.

102. There is another very significant aspect of her testimony. On page 143 of the paper book, PW10 Bharti Mandal in her evidence has deposed "whatever was taught/explained to me, the same statement I have stated there". The aforesaid piece of testimony of PW10 Bharti Mandal clearly indicates that Bharti Mandal is a tutored witness and whatever incriminating facts were stated by her in the Court for the first time were taught/explained to her. Her testimony therefore is fraught with serious suspicion to sustain the proposition that Talwars' household, when Bharti Mandal had arrived there in the morning of 16.5.2008 at about 6 A.M. was locked/latched from inside. There is yet another very interesting aspect of the prosecution case and the evidence of PW10 Bharti Mandal, which has neither been addressed nor dealt with by the trial court and of which we had taken note during the hearing of this appeal and which conclusively proves that the outer most iron grill door of

Talwars' flat was not latched from inside when PW10 Bharti Mandal had arrived there the morning of 16.5.2008 is that in case outer most iron grill door was latched from inside PW10 Bharti Mandal would not have asked for the key of the middle iron mesh door from appellant Nupur Talwar.

103. A perusal of the testimony of PW10 Bharti Mandal shows that the CBI counsel neither put any question to Bharti Mandal nor sought any clarification from her as to whether the outer mesh iron-grill door was actually locked or bolted from outside. Her evidence further shows that Nupur had opened the wooden door and said that she could not open the middle iron-mesh door as Hemraj had locked the wooden door and gone to fetch milk from Mother Dairy. Bharti Mandal told Nupur Talwar to give her the key of the middle iron-mesh door. Now the question which arises for our consideration is that in case the outer iron-grill/mesh door was locked from inside then how Bharti Mandal would have entered into the flat by opening the middle iron-grill door and why she had asked for key of the lock of the aforesaid door. If the outer grill door was actually locked or bolted from inside as claimed by the prosecution, there was no point for PW10 Bharti Mandal to ask for the key of the

middle iron mesh door.

104. The prosecution has also propounded a theory on the basis of the testimony of PW39 AGL Kaul that while on the fateful morning PW10 Bharti Mandal had gone down the stairs to collect the keys, it was Dr. Nupur Talwar who went into Hemraj's room and opened the other door (F) of his room which opened in the passage between the outer iron grill door and the main double door of the house and opened the latch of the outer most iron grill door and latched the inner mesh door from outside and then entered into the apartment from the same door of Hemraj's room and latched it from inside. PW39 AGL Kaul admittedly is not an eye-witness of the occurrence. Upon going through his testimony, we find the same to be totally conjectural and speculative. However from the evidence of PW15 Umesh Sharma who was produced by the prosecution during the trial, it is fully proved that the second door (F) of Hemraj's room which was near the main door of the appellants' flat remained closed because in front of that door of Hemraj's room a refrigerator had been put and the door of Hemraj's room which opened in the drawing room of the flat alone was used by him for ingress and egress into the flat. It is

noteworthy that PW15 Umesh Sharma had also deposed in his evidence on page 158 of the paper book in the 9th line that outer most grill/mesh door used to open by application of some force with a noise while opening *"yah darwaza jhatke ke saath aur aawaz ke saath khulta tha"*.

105. The evidence of PW15 Umesh Sharma inter alia on the points that the second door of Hemraj's room which opened in the passage between the main door of the flat and the outer most iron grill door used to remain closed was not challenged by the CBI counsel either by cross-examining him on the aforesaid point or suggesting that he was not speaking the truth after he was declared hostile.

106. In this regard it would be useful to take note of the fact that CBI investigator had recorded the statement of one Shashi Devi who ironed the clothes of residents of locality and she used to iron the clothes of the appellants on regular basis. She in her statement under Section 161 Cr.P.C., recorded on 19.6.2008 by CBI Officer, Hari Singh stated that the outer most iron mesh door usually remained open but it remained jammed with the frame (baad mein darwaza chipka rahta tha). The CBI Officer Hari Singh who was examined as PW31 by the CBI during the trial admitted in

his evidence on page 231-232 of the paper book that Shashi Devi had stated before him that Hemraj used to take clothes whenever she used to finish iron, however when the work was more she herself used to go to their flat to deliver the ironed clothes, the outer most door of the flat used to remain open all the time, if nobody came up after pressing the bell she used to push the door open which used to remain jammed in the frame *(bahri darwaza chipka rahta tha)* and I used to keep the clothes there.

107. In view of the evidence of PW15 Umesh Sharma and PW31 Hari Singh, we find that the outer iron grill door of the appellants' flat was never locked or latched from inside and it is proved from the testimony of PW10 Bharti Mandal that on 16.5.2008 the middle iron mesh door fixed in the same frame in which the wooden door was fixed was latched from outside and it was unlatched by PW10 Bharti Mandal and hence the crime could have been committed by the outsiders. It is also proved from the evidence of PW15 Umesh Sharma that the second door of Hemraj's room(F) which opened into the outer passage or gallery between the main door of the house and the outer most iron grill/mesh door was never used by anyone and it was latched from

inside and it was the other door of his room which opened in the lobby or the inner gallery of the flat was used by him for entering into the flat. No other evidence was lead by prosecution to prove the aforesaid fact.

108. Thus we hold that it is not proved from the testimony of PW10 Bharti Mandal either that when she arrived at the appellants' flat in the morning of 16.5.2008 the outer iron grill door and the iron inner mesh door of their flat were latched or locked from inside or appellant Nupur Talwar after PW10 Bharti Mandal had gone to down stairs came out into the grilled gallery from the door (F) of Hemraj's room unlocked the outer grill door and latched the inner iron mesh door from outside and then entered into the flat from the same door of Hemraj's room.

109. It is the case of the prosecution that defence set up by the accused-appellants that they had slept in their bedroom throughout the night of 15/16.05.2008 while their daughter and their domestic help Hemraj were brutally murdered in their adjoining bedroom of Aarushi is absolutely false and baseless and for proving the fact that the accused were awoke through the night, the CBI has relied upon the circumstance of internet activity in the flat which according

to the CBI had continued throughout the night of 15/16.05.2008.

110. The prosecution in order to establish the aforesaid circumstance has inter-alia relied on internet consumption log and internet service provider log Ext. Ka21 and Ext. Ka 22 which were proved by PW17 Deepak Kanda, Nodal Officer of Airtel Company; and communication dated 21.9.2010 written by one Mr. Anil Sagar, Director, CERT-In (Scientist-F) (computer emergency response team), Anti-hacking team, Government of India, Ministry of Communication and Information Technology which was proved by PW18 Bhupendra Singh Avasya as Ext. Ka23.

111. Learned counsel for the appellants has assailed the admissibility of the documents brought on record by the CBI as Ext. Ka21 and Ext. Ka22 primarily on the ground that the same are not supported by any certificate required under Section 65B of the Evidence Act and hence the same cannot be looked into or relied upon for the purpose of holding that the internet activity in the accused's flat had continued through the night of 15/16.05.2008 at the behest of the appellants.

112. The testimony of PW17 Deepak Kanda shows that an

application dated 8.10.2012 was filed by the prosecution for placing a certificate issued under Section 65B in support of Ext. Ka21 and Ext. Ka 22 on record which was dismissed by the learned trial court on 11.10.2012. The said order attained finality in law and was never challenged by the prosecution.

113. Even on merits, learned counsel for the appellants has submitted that it is not conclusively proved from Ext. Ka21 and Ext. Ka22 that the internet was manually operated by the accused and the appellants had remained awake through out the night in as much as the internet consumption log i.e. Ext. Ka21 does not match with the start and stop activity log Ext. Ka22 to the following extent :

KA-21	KA-22
01/05/2008 22:46:57 (showing a consumption of 4033kb of data, at internal page 145 KA/11)	No mention in KA-22
02/05/2008 06:43:09 (showing a consumption of 351kb of data, at internal page 145 KA/11)	No mention in KA-22
04/05/2008 22:46:20 (showing a consumption of 35kb of data, at internal page 145 KA/11)	No mention in KA-22
11/05/2008 06:45:55 (showing a consumption of 40kb of data, at internal page 145 KA/11)	No mention in KA-22

13/05/2008 22:52:34 (showing a consumption of 17724kb of data, at internal page 145 KA/12)	No mention in KA-22
14/05/2008 22:52:26 (showing a consumption of 231kb of data, at internal page 145 KA/12)	No mention in KA-22
16/05/2008 06:46:14 (showing a consumption of 46kb of data, at internal page 145 KA/12)	No mention in KA-22

PW17 at page 165 (at the top line) clearly admitted that his company bills a consumer for the consumption of internet at the start of a session which reflects the start time of that session.

114. However on the other hand Sri Anurag Khanna, learned counsel for the appellants submitted that the appellants were not asleep after 11:30 pm and they were using internet and had switched off their computer at 02:04:30 hrs in the night intervening 15/16.05.2008 and in support thereof he placed reliance on the entries recorded in ISP log KA-22 at page 145 KA/15 depicting IP address as 122.162.238.230 from 23:00:50 hrs (start) to 2:04:30 hrs (stop) and new IP address i.e. 122.162.52.96 had been assigned at 2:04:35 hrs (start). On the basis of the aforesaid entries Sri Anurag Khanna tried to convince us

that appellants were manually operating the computer throughout the fateful night ***in as much as two different IP addresses according to prosecution were assigned to the computer***. PW18 Bhupendra Singh Avasya has deposed that if there is a gap of 5 seconds between the internet sessions it means that modem on its own tried to reconnect with the ISP and if the gaps are longer such as 26.20 mins, 6.54 minutes and 2hr 58 minutes then it indicates that the modem had been switched off and thereafter again switched on.

115. Sri Anurag Khanna has submitted that from the evidence of PW18 it is fully proved that internet router in the accused's flat which was admittedly installed in the room of Aarushi had been switched on and off during the intervening night of 15/16.05.2008 when the murders took place and although the accused had come up with the defence that they had switched off the computer on 15.5.2008 at 23:00 hours and since the modem could be switched on and off only by going into Aarushi's room, the internet activity established the prosecution case that during the aforementioned period the modem was physically switched on and off by the appellants. It has also been submitted that

the internet activity in the night of 15/16.05.2008 was quite anomalous with the activities in the previous nights as was evident from the log. Sri Anurag Khanna invited our attention to Ext. Ka21 and Ext. Ka22 and submitted that the absence of internet activity between 03:43:32 hrs in 06:01:51 hrs only points out to one conclusion that there was no network failure which could have caused such inordinate long gap in case internet was being switched on and off.

116. After having very carefully examined the submissions made by learned counsel for the parties on the aforesaid aspect of the matter and examined the relevant evidence on record, we do not find any force in the submission of the learned counsel for the CBI because the internet activity during the intervening night of 15/16.05.2008 upon which much emphasis has been laid by Sri Anurag Khanna, learned counsel for the CBI for proving that the accused had remained awake throughout the night of 15/16/05.2008 and had manually switched on and off the modem of the computer which was installed in the room of Aarushi as on each new start and stop after 23:00:50 hrs on 15.5.2008 till 02:03:30hrs on 16.5.2008 new IP address was created and

hence there was no question of modem on its own trying to reconnect the ISP as the aforesaid activity of its own had continued throughout the 16th morning upto 1:16pm which was virtually of the same pattern.

117. Even otherwise merely on the basis of evidence of PW17 and PW18 and Ext. Ka21 and Ext. Ka22 it is not conclusively established that the internet activity noticed in the flat of the Talwars in the intervening night of 15/16.05.2008 was as a result of manual operation as prosecution had failed to provide to the expert PW18 Bhupendra Singh Avasya detailed computer log, detailed router log and detailed ISP log despite his demand, after comprehensive examination whereof alone it could be ascertained when the computer, desktop/laptop was physically switched on and physically switched off. In this regard it would be relevant to refer to english translation of the evidence of PW18 Bhupendra Singh Avasya who on page 168 and 169 of the paper book has deposed as here under :

> ● Upon a perusal of event logs of computer desktop/laptop it can be stated and found out as to when the computer desktop/laptop was physically switched on and physically switched off/shut down. (4th line from the top at page 168)

- Upon examination of router log, it can be found out and then stated as to when the router was physically switched on and when the router was physically switched off. (7th line from the top at page 168)
- I had written to the investigating officer of this case vide Ka-23 to supply me the computer internet activity log, the modem/router log and detailed ISP log. If the investigating officer had supplied me these documents then much better examination could have been undertaken. (10th line from the top at page 168)
- For comprehensive investigation the aforesaid documents i.e. computer internet activity log, the modem/router log and detailed ISP log, were necessary. (13th line from the top at page 168)
- The reasons for start and stop activity in the ISP log can be on account of :-

- router/modem power recycling;
- inactivity of router/modem which is switched on (which is also called as idle time out);
- lease time expiry of IP address assigned by ISP;
- network issues: amongst network issues the reasons for start/stop activity can be on account of:
  - . admin reset;
  - . idle time out;
  - . login time out;
  - . lost carrier;

(line 1 to 5 at page 169 from the top)

- Had the investigating authorities provided me with detailed computer log, router/modem log and ISP log, then I could have examined the aforesaid 8 reasons with which I have agreed and then I could have given a reason for the start/stop activity in the internet log. (8th line from bottom at page 169)

118. Thus from the evidence of PW18 Bhupendra Singh Avasya itself it is established that the circumstance of internet activity through the intervening night of 15/16.5.2008 was not in itself conclusive proof of the fact that the appellants had remained awaken on the fateful night and had manually operated the computer.

119. The admissibility of the Ext. Ka21 and Ext. Ka22 in evidence has been challenged by the learned counsel for the appellants on the ground that the same are not accompanied by the certificate under Section 65-B of the Indian evidence Act. In order to appreciate the challenge of the learned counsel for the appellants to the admissibility of the aforesaid documents Ext. Ka21 and Ext. Ka22 in evidence it would be useful to first reproduce Section 65B of the Indian evidence Act which was inserted by Section 92 of Act 21 of 2000 and schedule 11–9 with effect from 17.10.2000 and then to examine the law on the aforesaid aspect of the matter :

> [65B. Admissibility of electronic records.—
> (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a

paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the

period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record

containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,—

(a) infomation shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that

> computer, shall be taken to be supplied to it in the course of those activities;
> (c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. Explanation.—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.]

120. The Hon'ble Supreme Court in ***State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600*** while examining the effect of non compliance of the provision of Section 65B of the Indian Evidence Act in paragraph 150 of its judgment held as here under :

> Irrespective of the compliance with the requirements of Section 65B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65B is not

> filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely Sections 63 and 65.

121. However the aforesaid judgment was overruled by the Apex Court by its judgment render in ***Anvar P.V. Vs. P.K. Basheer (2014) 10 SCC 473***. Paragraph 13, 14, 16, 19, 20, 22, 23 and 24 of the aforesaid judgment which are relevant for our purpose are being reproduced herein below :

> 13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or

magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from

the information fed into the computer in the ordinary course of the said activity.

14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.

19. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special

provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

20. In ***State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru,*** a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerized records of the calls pertaining to the cellphones, it was held at Paragraph-150 as follows:

> "150. According to Section 63, secondary evidence means and includes, among other things, "copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies". Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which

> is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub- section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65."

22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in **Navjot Sandhu case (supra)**, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23. The appellant admittedly has not produced any certificate in terms of Section 65B in respect of the CDs, Exhibits-P4, P8, P9, P10, P12, P13, P15, P20 and P22. Therefore, the same cannot be admitted in evidence. Thus,

> the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.
> The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.

122. In ***Sonu Vs. State of Haryana (2017) 8 SCC 45***, the Apex Court in paragraphs 31 and 32 of the aforesaid judgment held as here under :

> 31. Electronic records play a crucial role in criminal investigations and prosecutions. The contents of electronic records may be proved in accordance with the provisions contained in Section 65B of the Indian Evidence Act. Interpreting Section 65B (4), this Court in Anvar's case held that an electronic record is inadmissible in evidence without the certification as provided therein. Navjot Sandhu's case which took the opposite view was overruled.
> 32. The interpretation of Section 65B (4) by this Court by a judgment dated 04.08.2005 in Navjot

> Sandhu held the field till it was overruled on 18.09.2014 in Anvar's case. All the criminal courts in this country are bound to follow the law as interpreted by this Court. Because of the interpretation of Section 65B in Navjot Sandhu, there was no necessity of a certificate for proving electronic records. A large number of trials have been held during the period between 04.08.2005 and 18.09.2014. Electronic records without a certificate might have been adduced in evidence. There is no doubt that the judgment of this Court in Anvar's case has to be retrospective in operation unless the judicial tool of 'prospective overruling' is applied. However, retrospective application of the judgment is not in the interests of administration of justice as it would necessitate the reopening of a large number of criminal cases. Criminal cases decided on the basis of electronic records adduced in evidence without certification have to be revisited as and when objections are taken by the accused at the appellate stage. Attempts will be made to reopen cases which have become final.

123. The Apex Court in paragraph 35 of the same judgment observed as here under :

> This Court did not apply the principle of prospective overruling in Anvar's case. The dilemma is whether we should. This Court in K. madhav Reddy v. State of Andhra Pradesh, MANU/SC/03934/2014 : (2014) 6 SCC 537 held that an earlier judgment would be prospective taking note of the ramifications of its retrospective operation. If the judgment in the case of Anvar is applied retrospectively, it would result in unscrambling past transactions and adversely affecting the administration of justice. As Anvar's case was decided by a Three Judge Bench, propriety demands that we refrain from declaring that the judgment would be prospective in operation. We lave it open to be decided in an appropriate case by a Three Judge Bench. In any event, this question is not germane for adjudication of the present dispute in view of the adjudication of the other issues against the accused.

124. Thus what follows from the reading of Section 65B of the Evidence Act and the aforesaid law reports is that electronic record is inadmissible in evidence without the certification as provided under Section 65B of the Indian Evidence Act and the judgment of the Apex Court in P.V. Anvar case is retrospective in operation. The evidence relating to the electronic record being a special provision, the general law on secondary evidence under Section 63 read with Section 65B of the Evidence Act shall yield to the same. The certificate issued under Section 65B must conform to the requirements prescribed under Section 65B of the Evidence Act. Thus in view of the law declared by the Apex Court in the case of P.V. Anvar (supra), the CDRs Ext. Ka21 and Ext. Ka22 were not admissible in evidence as the same were not accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to the aforesaid electronic records was inadmissible.

125. Sri Anurag Khanna has invited our attention to another aspect of the matter by arguing that the appellants having failed to raise any objection regarding the admissibility of Ext. Ka21 and Ext. Ka22 at the time when they were marked

and it being nobody's case that Ext. Ka21 and Ext. Ka22 were inherently inadmissible in evidence, the appellants cannot be permitted to raise an objection with regard to the admissibility of the aforesaid documents in evidence for want of certification under Section 65B of the Evidence Act at the appellate stage as it was nobody's case that CDRs which are form of electronic record are not inherently admissible in evidence. In support of his aforesaid contention Sri Anurag Khanna has relied upon paragraph 27 of the judgment rendered by the Apex Court in the case of Sonu (supra) which reads as here under :

> 27. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the Trial Court without a certificate as required by Section 65B (4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and

> objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 of the Cr.P.C. 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65 B (4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof.

126. Upon perusing the record of this appeal it transpires that an application 151kha was moved by CBI before learned Trial Judge with a prayer that the certificate under Section 65B paper no. 152kha which was produced by PW17 Deepak Kanda be admitted in evidence. The aforesaid application was opposed by the appellants inter alia on the grounds that application was highly belated; that certificate did not bear any date and the same was not in accordance with Section 65B of the Evidence Act; PW17 in his examination-in-chief had admitted that internet data is preserved upto three years in the server; and the certificate sought to be brought on record was never provided by him to the Investigating Officer.

127. Learned Trial Judge by his order dated 11.10.2012

rejected the application of 151kha holding that certificate was prepared while the evidence in the case was being recorded and the same neither bears any date nor it conformed to the requirements of Section 65B of the Evidence Act. The learned Trial Judge, however, observed that the legal effect of the electronic evidence not being accompanied with a certificate in terms of Section 65B of the Evidence Act would be examined at the time of final hearing of the case. Although it transpires from the record that admissibility of Ext. Ka21 and Ext. Ka22 was not objected to by the appellants at the time of their being marked as exhibits but the CBI being fully conscious of the fact that Ext. ka21 and Ext. Ka22 could not be read in evidence unless they were accompanied by a certificate under Section 65B of the Evidence Act, rightly sought to bring on record the certificate under Section 65B of the Evidence Act which was rejected by the trial court by order dated 11.10.2012 on merits. It is interesting to note that the order dated 11.10.2012 was not challenged by the CBI before any higher court and the same attained finality.

128. The question which arises for our consideration in this appeal is that whether in the face of the law declared by the

Apex Court in the case of P.V. Anvar (supra) Ext. Ka21 and Ext. Ka22 could still be read in evidence despite being not accompanied with a certificate in terms of Section 65B and the application of the CBI for bringing on record the certificate under Section 65B of the Evidence Act was rejected by the trial court on merits and the said order had attained finality, merely on the ground that no objection was taken by the appellants at the time of their being marked as exhibits as it was nobody's case that copies of electronic records Ext. ka21 and Ext. Ka22 were not inherently inadmissible in evidence.

129. In our considered opinion, since the CBI had not produced any certificate in terms of Section 65B of the Evidence Act in respect of CDRs Ext. ka21 and Ext. Ka22, the same were not admissible in evidence. The legal principle expounded by the Apex Court in the case of Sonu (supra) will not apply to the facts and circumstances of this case in as much as in the case of Sonu (supra) neither any application was moved on behalf of the prosecution for bringing on record the certificate under Section 65B of the Evidence Act nor the same was rejected rather the prosecution was taken by surprise when an objection

regarding admissibility of CDR's in evidence on account of their not being accompanied by a certificate under Section 65B of the Evidence Act was raised by the accused's side for the first time before the Apex Court. The underlying principle behind the requirement of a party to object to the admissibility of a document at the time of the same being marked, is to give an opportunity to the other side to cure the defect at the stage of marking of the document. The facts of the present case show that the CBI was fully conscious of the requirement of bringing on record the certificate under Section 65B of the Evidence Act which would have made the call detail records admissible in evidence and accordingly an application was moved in this regard but the same was rejected on merits but still the CBI did not care to rectify the deficiency pointed out by the learned Trial Judge in the certificate under Section 65B of the Evidence Act which was sought to be brought on record by the CBI while rejecting the application 151kha.

130. Moreover we have already held that on the basis of the evidence of PW17 and PW18 and Ext. Ka21 and Ext. Ka22, it is not conclusively established that internet activity noticed in the flat of the Talwars in the intervening night of 15th/16th

May, 2008 was as a result of manual operation.

131. In the present case the appellants had pleaded that they had slept throughout the night and had heard nothing. The murder of their only daughter Aarushi was discovered by them when PW10 Bharti Mandal had rang the door bell of the appellants' flat. We have already discussed in detail, the evidence on record which proved that outer most iron grill door was not latched/locked from inside and the middle iron mesh door was latched/locked from outside when PW10 Bharti Mandal had arrived at the appellants flat in the morning of 16.05.2008 which suggested that the outsiders may have accessed into their flat on the fateful night and left after committing the double murder. The explanation that the appellants knew nothing as they were sleeping cannot be termed as no explanation and/or false explanation as from the evidence adduced by the CBI itself it was proved that if someone was sleeping in the Talwars' bedroom with the air-conditioners on which were a bit noisy it was not possible for them to have heard the sounds of moving foot steps, closing and opening of doors inside the Talwars' flat.

132. Thus the trial court in our opinion committed a patent error of law in holding that the appellants were awake

throughout the fateful night.

133. For the purpose of drawing an inference of guilt against the appellants the prosecution has also relied upon the post crime conduct of the appellants which according to the prosecution suggested that after committing the double murder they had wrapped the dead body of Hemraj in a bed sheet and then dragged it through the stairs upto the terrace and wiped out the whole stairs and whole marks of bloodstains. In order to prove the aforesaid facts the prosecution had examined Sanjay Chauhan, Rohit Kochar and Dr. Rajeev Kumar Varshney as PW4, PW13 and PW14.

134. The relevant portion of the testimony of PW4 Sanjay Chauhan (english translation) on the aforesaid aspect of the matter as deposed by him on page 91-93 of the paper book is as here under :

> ***Examination-in-Chief***
>
> - *On 16.5.2008, I was posted as the Staff Officer of the District Magistrate, Gautam Budh Nagar, (1st line fro the top on page 91)*
> - *During my morning walk, I spotted some police vans and I went inside Sector-25, where I got knowledge that in Flat No. 32, Jalvayu Vihar, Noida, some murder had taken place and hence went inside. (3rd line from the top at page 91)*
> - *He further asserts that he saw blood on the stairs and on the*

railing. (19th line from the top at page 91)

Cross-examination

- *Stadium in Sector-25, Noida, where I used to take morning walk is at a distance of 28 kilo meters from my house. (12th line from the top at page 92)*
- *That prior to 12.11.2008, my statement was not recorded by any I.O. (30th line fro the top at page 92)*
- *It is correct that prior to 12.11.2008 in regard of the incident, I did not give any statement to any police officer or to any government official. (21st line fro the bottom at page 92)*
- *When I had seen blood on the stairs and the railing, I had not sought the attention of the police officers towards the same, because they were doing their own work and I did not want to cause any inference in their investigation. (13th line from the top at page 93).*

135. Thus what follows from his testimony is that he had neither disclosed to any police officer about his having visited L-32 Jalvayu Vihar on 16.5.2008 nor anybody had recorded his statement before 12.11.2008.

136. PW35 M.S. Phartyal on being questioned during the cross-examination as to how he had come to know about the visit of PW4 Sanjay Chauhan to L-32 Jalvayu Vihar on 16.5.2008, PW35 M.S. Phartyal on page 252-256 of the paper book deposed as here under :

> *During the course of the investigation, I had gained knowledge from some witness that Sanjay Chauhan was also present at the crime scene, therefore, I recorded his statement. (12th line from top at page no. 253)*
>
> *I do not remember which witness had told me that Sanjay Chauhan was also present on the crime scene. (13th line from top at page no. 253)*
>
> *On this aspect, I do not want to peruse the case diary to refresh my memory. (14th line from the top at page 253)*
>
> *It is incorrect to suggest that no witness ever told me that Sanjay Chauhan was also present on the crime scene. (15the line from top at page 253)*
>
> *It is incorrect to suggest that Sanjay Chauhan was planted as false witness in the present case. (16th line from the top at page 253)* (english translation)

137. Thus from the evidence of PW35 M.S. Phartyal it is fully established that PW4 Sanjay Chauhan was a planted witness as the CBI has not been able to come up with any cogent answer to the query of the defence as to how the CBI had came to know about the visit of PW4 Sanjay Chauhan to L-32 Jalvayu Vihar.

138. The second witness examined to substantiate the aforesaid post crime conduct of the appellants PW13 Dr. Rajeev Kumar Varshney deposed as here under during the course of his testimony on page 150-152 of the paper book

(english translation) :

Examination-in-Chief

- *On 16.5.2008 at around 8.00 to 8.30am in the morning, I got a message that Dr. Talwar's daughter, Aarushi had been murdered. (1st line from the top at page 150)*
- *I climbed the stairs and reached the roof door which was locked. I thought, I have climbed more, therefore, I went one floor down. (4th line from the top at page 150)*
- *The door of the roof and its lock was bearing blood marks. (6th line from the top at page 150)*
- *I went into the drawing room of the flat where I met Dr. Kochar and his wife and I told them that I had seen blood on the door of the roof and its lock. (8th line from the top at page 150)*
- *Thereafter, I and Dr. Rohit Kochar went towards the roof and I showed blood to him. (9th line from the top ate page 150)*
- *After looking carefully near the roof door, on the stairs there, blood stains were visible. (10th line from the top at page 150)*
- *Meanwhile, one police official also came there and we also showed the blood to him. (11th line from the top at page 150)*

Cross-examination

- *I had told the magistrate in my statement under Section 164 Cr.P.C., that bloodstains were faint, which meant that the bloodstains were visible only when one would carefully look at them. (8th line from the top at page 151)*
- *When I had taken Dr. Kochar there, at that time, the stains were*

very nuclear. (10th line from the top at page 151)

- *Upon seeking physical Ex. P-11 (photograph), the colour of the strip of the parapet is the same as of dried blood. (11th line from the top at page 151)*
- *I have seen physical Ex. P-9 (photograph), however, upon seeing it, I cannot say whether this is the photograph of the roof of the door, where for the first time, on 16.5.2008, I had reached by a mistake. (12th line from the top at page 151)*
- *I cannot say whether the bloodstains that I had seen, were actually blood or not. (13th line from the top ate page 151)*
- *I thought that it was blood, so I stated so. (14th line from the top at page 151)*
- *On 16.5.2008, I had only shown one police official blood on the lock of the terrace door and on that day, the police did not record my statement. (9th line fro the bottom at page 151)*
- *The police did not make any attempt to break the roof door in my presence. (4th line from the top ate page 152).*

139. Thus PW13 Dr. Rohit Kochar had noticed blood on the terrace lock alone. English translation of the relevant extract of the testimony of PW12 Dr. Rohit Kochar the third witness produced by the prosecution to establish the aforesaid post crime conduct of the appellants is being reproduced on page 153-155 of the paper book is as here under :

Examination-in-Chief

- *After I had reached, around 45 minutes to 1 hour later, Dr. Rajeev Kumar Varshney arrived and he stated that by a mistake, he had gone upto the roof and he had found that the roof was locked and on the floor near the door and on the handle of the roof door, there was blood. (8th line from the top at page 153).*
- *I went up with him and saw red colour foot prints, which seemed to me, as if they had been cleaned. (10th line from the top at page 153)*
- *I saw mark of blood on the handle of the roof door. (11th line from the top at page 153)*
- *Some other people also came there. (12th line from the top at page 153)*
- *Out of those people, someone called the police (12th line from the top ate page 153)*
- *One police official came there and we showed him the mark of the blood. (13th line from the top at page 153)*
- *We told him that the lock of the roof door be broken to see what is there. (14th line from the top at page 153)*

Cross-examination

- *When the police officials had arrived, at that time, we were near the roof door. (14th line from the bottom at page 153)*
- *The name of the police official was Akhilesh Kumar as was written on his name plate. (13th line from the bottom at page 153)*
- *Between the two door on the terrace there were the footprints of shoes. (1st line from the top at page 154)*
- *I cannot say whether this was*

the colour of the blood or not. The blood was faint red. (2nd line from the top at page 154)

- *I know that if the blood falls on the ground, it gets clotted and turns black in colour. (4th line from the top at page 154)*
- *I had told Akhilesh to open the door of the lock on the door, but, he told that it seems very old, there is dirt on the lock and it is of no use at all. (7th line from the top at page 154)*
- *I had not given the statement to the CBI I.O. On 10.10.2008 in the manner, "after I had reached, around 45 minutes to 1 hour later, Dr. Rajeev Kumar Varshney arrived and he stated that by a mistake, he had gone upto the roof and he had found that the roof was locked and on the floor near the door and on the handle of the roof door, there was blood". (1st line from the top at page 155)*
- *I do not remember whether on 10.10.2008, I had made the statement to the CBI, I.O. "I went up with him and saw red colour footprint, which appeared as if it had been cleaned". (5th line from the top at page 155)*
- *After the Magistrate had taken down my statement, I had gone through it, but I did not sign the same, (4th line from the bottom at page 155).*

140. PW7 Dr. K.K. Gautam who was examined by the prosecution to prove that the dead body of Hemraj was wrapped in a bed sheet after committing his murder and taken upto the terrace by dragging the same from the stairs

made following statement (english translation) before the trial court on page 135 to 135 of the paper book :

Examination-in-Chief

- *I asked Dr. Dinesh Talwar that we should see the scene of the crime, upon which Dr. Talwar took me to Aarushi's room, Hemraj's room and on the stairs, which were going towards the roof. (9th line from the bottom at page 135)*
- *On the stairs and on the railing, Dr. Dinesh Talwar showed me bloodstains, On the roof door, on its lock as well as on the bolt, there were bloodstains. (7th line from the bottom at page 135)*

Cross-examination

- *I had not given the statement to the I.O. of the CBI to the extent, "it came to my mind that I should find out as to where could be the exit in addition to the entry route to the house. I came outside the house and saw towards the stairs which lead to the roof. I found some bloodstains on the railing on the staircase and I climbed the stairs to reach the roof top. I had noticed bloodstains on the door, which was locked. Dr. Sushil Chaudhary and Dr. Dinesh Talwar also followed me. Dr. Dinesh Talwar was complaining that the police had not examined these bloodstains despite this having been brought to their notice". (20th line from the bottom at page 136)*
- *The CBI had taken my statement on two occasions, first on 1.7.2008 and the second on 16.4.2010. On 16.4.2010,I had seen my statement dated 1.7.2008. (9th line from the top at page 136)*
- *My statement were the same, but, there was some difference. (11th*

line from the top at page 136)

141. It is proved from the facts stated by him in his cross-examination that he had not disclosed to the Investigating Officer of the CBI PW37 Vijay Kumar in his statement recorded by him under Section 161 Cr.P.C., about his having noted bloodstains on the railing of the staircase as he had climbed up the stairs to the roof top where he found bloodstains on the door which was locked and hence it is apparent that like other witnesses PW7 K.K. Gautam also made material improvements in his evidence on the point of presence of bloodstains, marks of wiped out blood stains on the railing of the staircase of the Talwars' flat leading to the terrace which made the same unreliable.

142. Thus upon a critical evaluation of the testimony of witnesses produced by the CBI during the trial for proving that bloodstains or marks of wiped out blood/or the marks of blood were noticed on the stairs leading upto the terrace door which was locked and the fact that the dead body of Hemraj was dragged up to the terrace from the Talwars' flat after wrapping the same in a bed sheet, it is clearly discernible that there are material discrepancies in their testimonies with regard to the spots on the staircase, handle

and the lock of the terrace door where bloodstains or marks of wiped out bloodstains were noticed by the witnesses in as much as PW4 Sanjay Chauhan had noticed bloodstains only on the 3rd or the 4th steps of the staircase going towards the terrace as well as the railing which were neither seen by PW13 Dr. Rajeev Kumar Varshney nor PW14 Dr. Rohit Kochar. Similarly PW13 Dr. Rajeev Kumar Varshney saw some blood marks on the door of the terrace and on its lock but he failed to notice any bloodstained footprint on the landing near the terrace door which was noticed by PW14 Dr. Rohit Kochar alone. It is interesting to note that PW14 Dr. Rohit Kochar in his statement recorded on 10.10.2008 by Yatish Chanda Sharma, Investigating Officer of the CBI has no where stated that on 16.5.2008 he had gone upto the terrace door of the Talwars' flat either with PW13 Dr. Rajeev Kumar Varshney or on his own. Although PW4 Sanjay Chauhan, PW13 Dr. Rajeev Kumar Varshney and PW14 Dr. Rohit Kochar deposed that they had spoken to ASP Akhilesh Kumar and told him about the presence of bloodstains/marks of wiped out blood/dragging on the stair of the staircase, its railing and the lock put on the terrace door but ASP Akhilesh Kumar was not produced as witness

during the trial. Record shows that PW39 I.O. AGL Kaul who was entrusted with the investigation of the case in September 2009 had strangely got the statements of PW13 and PW14 recorded under Section 164 Cr.P.C., before M.M. Karkardooma, New Delhi and not before the CJM, Ghaziabad who alone had jurisdiction in the matter which according to the appellants were procured statements. But the prosecution did not produce Yatish Chandra Sharma as a witness although he would have been the best witness to testify/prove whether the aforesaid facts were disclosed to him by PW4, PW13 and PW14 or not.

143. However PW39 I.O. AGL Kaul upon being confronted with the statement of Yatish Chandra Sharma dated 10.10.2008, he on page 278 of the paper book (20th line from the top) stated *"Dr. Rohit Kochar had not given the statement to Yatish Chandra Sharma that on 16.5.2008, he went to the roof through the stairs and on the stairs, he saw any blood or wiped out bloodstains there"*. Although PW39 I.O. AGL Kaul denied the suggestion given to him by the appellants' counsel that he had procured the subsequent statement of PW13 Dr. Rajeev Kumar Varshney and PW14 Dr. Rohit Kochar under Section 161 Cr.P.C., in order to

fabricate a false case against the appellants but he in his testimony made following pertinent admissions which totally shattered the prosecution theory that blood marks or marks of wiped out bloodstains or marks of dragging were noticed by any of the witnesses on the stairs leading to the terrace door of the Talwars' house :

- *No expert during the course of investigation has given any report to the extent that bloodstains on the stairs had been wiped. (10th line from the top bottom at page 274)*
- *I had not recorded the statement of witness, Sanjay Chauhan, PW4 and ASP Akhilesh Kumar, because their statements had already been recorded by the previous Investigating Officers. (6th line from the bottom at page 274)*
- *During the course of the investigation, I did not confront the PW4, Sanjay Chauhan with ASP Akhilesh Kumar, Mahesh Kumar Mishra, Bachchoo Singh and Data Ram Nanoriya. (4th line from the bottom at page 274)*

144. Another very interesting aspect of this matter is that although apart from PW4 Sanjay Chauhan, PW13 Dr. Rajeev Kumar Varshney, PW14 Dr. Rohit Kochar and PW7 K.K. Gautam, large number of other persons had visited the appellants' flat including PW10 Bharti Mandal, PW34 Data Ram Naunaria the first Investigating Officer of the case,

PW29 Mahesh Kumar Mishra, S.P. (City), PW1 Chuuni Lal Gautam who had reached the appellants' flat on 16.5.2008 at about 8am and had taken photographs of the fingerprints from the crime scene, PW12 Puneesh Rai Tandon who had opened the lock of the terrace door of his flat on 16.5.2008 around 4pm on the request of Umesh Sharma, Dr. Rajesh Talwar's driver for keeping the ice blocks on which Aarushi's dead body was kept, her mattresses and bed sheets of her room but none of them had noticed any bloodstains or marks of wiped out blood either on the stairs or the railing or on the landing of terrace door.

145. DW4 R.K. Sharma categorically denied having noticed any bloodstains or marks of wiped out blood or dragging on the staircase of the Talwars' flat leading to the terrace, its railing or the landing or having noticed any bloodstains or blood marks or sign of marks of dragging.

146. DW5 Vikas Sethi was examined by the defence. On page 568 of the paper book deposed that when he had gone from the stairs up towards the roof, he saw no bloodstains at any place. Record further shows that on 16.5.2008 as well as 17.5.2008, PW1 Chunni Lal Gautam was the only official photographer and forensic expert available at the

crime scene who admitted in his evidence that he had gone upto the stairs leading to the terrace of the Talwars' flat on 17.5.2008 and on 16.5.2008 and had taken photographs under the instructions of the Investigating Officer Data Ram Naunaria and there was no reason why Chunni Lal Gautam would not have noticed any bloodstains on the stairs or on the railing or on the floor of the flat or the terrace door or any marks of wiped out blood or blood spattered footprint as the same could not have escaped his sight as well as that of the other police officers who were swarming the crime scene. As far the dripping bloodstains found on the vertical side of the lower flights of the stairs are concerned PW39 has himself in his testimony categorically admitted that the same were embossed on 17.5.2008 when the dead body of Hemraj was being taken down from the roof of the terrace through the stairs.

147. The CBI has also placed reliance upon the report Ext. Ka93 prepared by PW38 Mohinder Singh Dahiya in which he has recorded the finding that *"the presence of chance bloodstains on the vertical face of one of the steps in the staircase goes to prove that a cleansing operation must have been undertaken after the incident".* The aforesaid

finding in our opinion is based upon a wrong information supplied to PW38 Mohinder Singh Dahiya by the Investigating Authority and consequently Ext. Ka93 has been rendered wholly inadmissible in evidence for proving the aforesaid aspect of the matter in view of the testimony of PW39 AGL Kaul on the source of the bloodstains found on the vertical face of one of the steps in the staircase of which we have already taken note herein above.

148. The prosecution sought to prove that the dead body of Hemraj was wrapped in a bed sheet and dragged through the stairs to the terrace, although there is no eye-witness account on the aforesaid fact, by examining PW26 Deepak Kumar Tanwar, PW27 Dr. Rajendra Singh Dangi, PW38 Mohinder Singh Dahiya and PW39 AGL Kaul.

149. Record of the trial court shows that a dummy test in this regard was also conducted by PW38 Mohinder Singh Dahiya, CFSL Expert, New Delhi and his report dated 16.12.2010 was brought on record as Ext. Ka56.

150. However the aforesaid dummy test in our opinion is neither cogent nor convincing to establish the aforesaid circumstance in favour of the prosecution, interalia for the reasons, firstly the test is not admissible under Section 45 of

the Evidence Act : secondly the persons who lifted the CBI constable from the corridor outside L-32 Jalvaryu Vihar to the roof, did not consist of a male and a female of the height, built and weight of the appellants Dr. Nupur Talwar and Dr. Rajesh Talwar as is evident from the evidence of PW26 and PW27, thirdly although PW34 Data Ram Naunaria in the site plan of the terrace Ext. Ka85 prepared by him as well as in his testimony has stated that the dragging pattern noticed by him on the terrace of the appellants' house was from the cooler in the east to the air conditioner in the west while Mohinder Singh Dahiya deposed that the *drag pattern was caused because of the pulling out of the bed cover below the body of Hemraj whose head was towards the AC and feet on the opposite side towards the cooler. Therefore, the direction of the drag pattern according to him was caused from west to east.* If the evidence of PW38 Mohinder Singh Dahiya is accepted then the same will materially contradict the evidence of three prosecution witnesses PW1 Chunni Lal Gautam, PW29 Mahendra Kumar Mishra and PW34 Data Ram Naunaria who had deposed that the drag pattern was from east to west, fourthly the demo experiment conducted by PW27 Dr. Rajendra Singh

Dangi and his conclusion that dragging was done on the terrace from north to south while photograph of the spot taken on in the morning of 17.5.2008 indicates the drag pattern from east to west does not inspire confidence.

151. In order to prove the aforesaid fact the CBI has also placed reliance upon Ext. Ka88 postmortem report of Hemraj to establish that a person could be carried out from the corridor outside L-32 Jalvayu Vihar through the stairs onto the roof dragged from cooler in the east of the terrace upto the AC in the western part of the terrace as is evident from the drag pattern of the dead body as shown by PW34 Data Ram Naunaria in the site plan of the terrace Ext. Ka85 which was prepared by him.

152. However the theory propounded by the prosecution that Hemraj after being murdered in Aarushi's bed room upon being found in a compromising position with Aarushi on her bed in the intervening night of 15/16.5.2008 was taken up the stairs after being wrapped in a bed sheet and concealed near the air conditioners on the terrace of the appellants' flat stands disproved for the following reasons :

153. PW36 Dr. Naresh Raj who had conducted postmortem on the dead body of the deceased-Hemraj had

unambiguously deposed during the trial that along with dead body of the deceased 1 pant, 1 underwear, 1 pair of slipper, 1 watch, 1 shirt and 1 baniyan were also sent to him which were sealed and returned back to the police officers which indicates that at the time of being murdered he was wearing slippers. Photograph of the dead body of the deceased Hemaraj taken on the terrace of the appellants which would have certainly depicted whether at the time his dead body was discovered he was wearing his slippers or not were deliberately not filed by the prosecution before the trial Court.

154. Moreover the aforesaid fact lends credence to the alternate theory that the murder of Hemraj was committed on the terrace of the appellants near the cooler.

155. As per the prosecution case the deceased Hemraj had suffered massive injuries on his head and therefore would have without any doubt bleed profusely and in case his dead body was dragged from Aarushi's bed room after wrapping it in a bed sheet upto the terrace then there would have been bloodstains all over. But no blood of Hemraj was found either in the Aarushi's bed room or anywhere in the appellants' flat or in the outer gallery of the staircase.

156. Infact the CBI has miserably failed to lead any evidence which may even remotely suggest that Hemraj was murdered in the bedroom of Aarushi and then his dead body was wrapped in a bed sheet and dragged from Aarushi's bedroom upto the terrace. It has been argued by Sri Anurag Khanna that since the maximum blood loss from the bodies of both the victims was due to the slitting of their throats and since Hemraj's throat was slit on the terrace, there would have been hardly any blood of Hemraj in Aarushi's room where he was attacked by a blunt weapon. In support of his aforesaid submission he has invited our attention to an extract of an article published in Forensic Science Internation, Volume 91 Issue 1, 9th January, 1988 based on the study of analysis and interpretation of mixed forensic stains using DNA STR profiling and submitted that according to the aforesaid study it is almost impossible to determine different types of blood groups when the ratio of one is to another is equal to or more than 3:1. However, we find it difficult to accept the aforesaid arugment of Sri Anurag Khanna in as much as there is no evidence on record indicating that the injuries caused to Hemraj by the blunt weapon would not have led to any bleeding or the maximum

blood loss suffered by Hemraj was due to the slitting of his throat.

157. The prosecution has relied on another circumstance for establishing the appellants' complicity in the double murder that the key of Aarushi's bed room was with appellant Dr. Rajesh Talwar on the night of the occurrence and for proving the aforesaid circumstance the prosecution examined PW29 who deposed in his statement recorded before the trial court that the key of the room of Aaarushi was with appellant Dr. Rajesh Talwar. Even the aforesaid circumstance, for the sake of arguments, is accepted to be true, the same is not conclusive proof of the fact that in the intervening night of 15/16.5.2008 no one else apart from Talwars could have accessed Aarushi's bed room for the following reasons :

(i) PW39 has admitted in his cross-examination that Aarushi's room could be accessed through the toilet which had another door which opened in the lobby

(ii) The door could have been opened by Aarushi herself from inside, possibility whereof cannot be totally ignored

158. The prosecution has come up with the case that after blood was noticed by PW13 Dr. Rajeev Kumar Varshney on the door and the lock of the terrace on 16.5.2008 he had

brought the aforesaid fact to the notice of Dr. Rajesh Talwar who had come out from the flat and climbed up the stairs and immediately returned back and entered inside his flat and when he was asked to provide the key of the lock put on the door of the terrace lock he failed to produce the same. The aforesaid conduct of Dr. Rajesh Talwar according to the prosecution indicated that he had motive to divert the attention of the police so that the dead body of Hemraj be not recovered otherwise Dr. Rajesh Talwar being father of Aarushi whose daughter had been murdered in a gruesome manner, upon being informed about the presence of bloodstains on the door and lock of the terrace would have in normal course of human nature immediately provided key of the lock and got the terrace door opened for finding out the reason for the presence of blood on the terrace door and the lock. The aforesaid conduct of Rajesh Talwar, according to CBI strongly pointed at his complicity in the crime.

159. It has come in the statement of the accused recorded under Section 313 Cr.P.C., that the key of the terrace door lock was in the same bunch of the keys by which the main doors of the apartment were open and which always used to be in possession of Hemraj. Even if the key of the lock put

on the terrace door was not available there was nothing which prevented police officials' present at L-32 Jalvayu Vihar in the morning of 16.5.2008 to have broken open the lock of the terrace door. As a matter of fact it has come in the testimony of PW29 Mahesh Kumar Mishra, S.P. (City) that he had categorically instructed I.O. Data Ram Naunaria to break open the lock of the roof door on 16.5.2008 itself however he forgot to do so. It would also be relevant to note that PW29 Mahesh Kumar Mishra admitted in his testimony on page 226 of the paper book that the accused never stopped anybody from breaking open lock of the roof of the door. Even PW34 Data Ram Naunaria in his evidence on page 249 of the paper book deposed that on 16.5.2008 neither Rajesh Talwar nor any other person stopped him from breaking open the lock of the door of the terrace.

160. Therefore, the non breaking of the terrace lock door was not on account of non availability of the key of the terrace door but due to the negligent and callous approach of the Investigating Officer of the case Data Ram Naunaria. Moreover the prosecution has failed to prove by any cogent evidence that the appellants despite being in possession of the key of the terrace door lock had refused to make the

same available to the Investigating Officer. The prosecution's allegation in this regard therefore, is baseless and wholly irrelevant for fastening the appellants with the guilt.

161. It has been submitted by the learned counsel for the CBI that Dr. Rajesh Talwar was reluctant to identify the dead body of Hemraj on 17.5.2008 when the same was discovered on the terrace of his flat and the dead body of Hemraj was purposely got discovered on 17.5.2008. In this regard the prosecution had examined PW29 Mahesh Kumar Mishra, PW34 Data Ram Naunaria and PW33 Bachchoo Singh. English translation of the relevant extracts of evidence of PW29 Mahesh Kumar Mishra, PW33 Bachchoo Singh and PW34 Data Ram Naunaria are being reproduced herein below :

> ***Examination-in-Chief- PW29 Mahesh Kumar Mishra :***
>
> ● *On 17.5.2008, when I reached the crime scene and saw the dead body of Hemraj, Dr. Rajesh Talwar and Dr. Nupur Talwar were not at home. Only Dr. Dinesh Talwar, Dr. Durani and one or two more persons were present. Dr. Dinesh Talwar, Dr. Durani stated that this dead body is of Hemraj. After sometime, Dr. Rajesh Talwar also arrived, however, he was reluctant in identifying the body of Hemraj. When the people who were there stated that this body is of Hemraj, then, he also stated the same after sometime. (7th line from the top at page 221)*

Cross-examination PW29 Mahesh Kumar Mishra :

- *In this case, my statement had been recorded by CBI, I.O., Vijay Kumar. After he had recorded my statement, I had gone through the same and affirmed the same to be true and correct. (8th line from the bottom at page 221)*
- *I had stated to the CBI, I.O., Sri Vijay Kumar that, "On 17.5.2008, when I reached the crime scene and saw the dead body of Hemraj, Dr. Rajesh Talwar and Dr. Nupur Talwar were not at home. Only Dr. Dinesh Talwar, Dr. Durani and one or two more persons were present. Dr. Dinesh Talwar, Dr. Durani stated that this dead body is of Hemraj. After sometime, Dr. Rajesh Talwar also arrived, however, he was reluctant in identifying the body of Hemraj. When the people who were there stated that this body is of Hemraj, then, he also stated the same after sometime". I do not know why the CBI, I.O. has not recorded the above in my statement. (8th line from the top at page 226)*
- *I had given the statement to the CBI, I.O., "near the dead body, Sri K.K. Gautam, Sri Dinesh Talwar, Dr. Durani and Mrs. Durani were standing and in the meantime, Dr. Rajesh Talwar also came there and when I asked him, whose dead body is this, he stated that the dead body is of Hemraj on the basis of his hair". (15th line from the top at page 226)*

Cross-examination – PW37 Vijay Kumar

- *I had recorded the statement of Mahesh Kumar Mishra, who had read his statement and affirmed it to be true and correct (21st line from the bottom at page 267)*
- *This witness had not stated to me, "On 17.5.2008, when I reached the crime scene and saw the dead body of Hemraj, Dr. Rajesh Talwar and Dr. Nupur Talwar*

were not at home. Only Dr. Dinesh Talwar, Dr. Durani and one or two more persons were present. Dr. Dinesh Talwar, Dr. Durani stated that this dead body is of Hemraj. After sometime, Dr. Rajesh Talwar also arrived, however, he was reluctant in identifying the body of Hemraj. When the people who were there stated that this body is of Hemraj, then, he also stated the same after sometime". (10th line from the bottom at page 267)

Examination-in-Chief PW33 Bachchoo Singh

- *The dead body (Hemraj) was not identified by Dr. Dinesh Talwar, who refused to identify the same. Thereafter, Dr. Rajesh Talwar came, who also did not identify the same. At that time, three Nepalis came, who identified the dead body as that of Hemraj. Thereafter Dr. Rajesh Talwar identified dead body of Hemraj. (6th line from the top at page 238)*

Cross-examination PW33 Bachchoo Singh

- *In the Panchayatnama, I have not stated anywhere that Dr. Dinesh Talwar refused to identify the dead body of Hemraj and that Dr. Rajesh Talwar also did not identify the dead body of Hemraj. (11th line from the bottom at page 239)*

Examination-in-Chief PW34 Data Ram Naunaria

- *On 17.5.2008, I asked Dr. Dinesh Talwar whose dead body it was, he replied, he does not know. Meanwhile, Dr. Rajesh Talwar came, I asked him, whose dead body it was, he also said that he cannot recognize the dead body. (17th line from the top at page 242)*

Cross-examination PW34 Data Ram Naunaria

- *On 6.6.2008, I had stated to the CBI, I.O., R.S. Kuril that on 17.5.2008, when Dr. Rajesh Talwar had*

reached, he had expressed his inability to recognize the dead body of Hemraj. However, I cannot say how R.S. Kuril has mentioned in my statement that on that day, I had not met Dr. Rajesh Talwar at all. (19th line from the top at page 25)

Cross-examination PW39 I.O. AGL Kaul

- *I had perused the statement of Data Ram Naunaria, which was recorded by C.O.-I.O., Sri R.S. Kuril, in which he had stated, "that on 17.5.2008, he had not met with Dr. Rajesh Talwar at all". (6th line from the top at page 227)*
- *Witness, Ram Prasad Sharma had given statement to Sri Naresh Indora on 4.6.2008 stating, "Noida police had informed that the body of Hemraj has been found on the rooftop of L-32and for postmortem has been sent to Sector-94, Civil Hospital. Police Officials took me and Krishna, who used to work in Dr. Talwars' hospital to Civil Hospital, there, I met Rudralal, who was from the village of Hemraj and he was already present there. I, Rudralal and Krishna identified the dead body of Hemraj on the basis of his face, moustache, hair of head, mole on his ear, kada (bracelet on his wrist) and Janeyu (religious thread around the neck). (11th line from the top at page 227)*

162. Thus upon a careful evaluation of the evidence of PW29 Mahesh Kumar Mishra, PW33 Bachchoo Singh, PW34 Data Ram Naunaria on the aforesaid circumstance it transpires that the prosecution witnesses made material improvements in their evidence tendered during the trial by deposing facts in their testimonies which are conspicuous by

their absence in their previous statements recorded under Section 161 Cr.P.C. PW29 Mahesh Kumar Mishra, although in his statement made before the trial court deposed that Rajesh Talwar was reluctant to identify the dead body of Hemraj, however, upon being confronted with his previous statement recorded by CBI Officer he deposed that it was correct that the dead body of Hemraj had been readily identified by the Dr. Dhurrani, Dr. Dinesh Talwar and after Dr. Rajesh Talwar had arrived he had also identified the dead body of Hemraj. The evidence of reluctance on the part of appellant Dr. Rajesh Talwar to identify the dead body of Hemraj was apparently a clear afterthought and an improvement made by PW29 Mahesh Kumar Mishra and also by other witnesses PW33 Bachchoo Singh and PW34 Data Ram Naunaria. The prosecution allegation that Dr. Rajesh Talwar or Dr. Dinesh Talwar had refused to identify the dead discovered on the terrace of the appellants' flat as that of Hemraj is false and untrustworthy. PW33 S.I. Bachchoo Singh who had conducted the inquest on the dead body of Hemraj and had prepared his inquest report Ext. Ka71 failed to mention the aforesaid fact in the inquest report. Much emphasis has been laid by the learned counsel for the CBI

on the so called reluctance of Dr. Dinesh Talwar and appellant Dr. Rajesh Talwar to identify the dead body of the domestic help Hemraj when it was discovered on the terrace of his flat on 16.5.2008 while Rudralal and Krishna had identified the same on the terrace. However the aforesaid allegation is without any basis and it is clearly proved from the testimony of PW29 Mahesh Kumar Mishra that Rudralal and Krishna had identified Hemraj's dead body in the mortuary of Civil Hospital and not on the terrace of the flat of Talwars. Thus the evidence adduced by the prosecution to establish that upon the discovery of the dead body of Hemraj on his flat Dr. Rajesh Talwar was reluctant to recognize the same neither inspires any confidence nor the same is trustworthy.

163. As far as the prosecution allegation that appellants purposely got the dead body of Hemraj discovered on 17.5.2008 is concerned the same is not warranted by any circumstance or evidence on record. The not breaking of the lock put on the terrace door on 16.5.2008 which would have led to the discovery of the dead body of Hemraj on the same day by no means can be attributed to the appellants. It has come in the evidence of PW29 Mahesh Sharma that upon

noticing bloodstains on the terrace door and the terrace lock he had instructed PW34 Data Ram Naunaria to get the terrace door lock broken but Data Ram Naunaria failed to get the lock broken, a fact which has been admitted by him in his statement. The discovery of the dead body of Hemraj on 17.5.2008 was not on account of any act of omission on the appellants but was a result of negligence and shoddy investigation by Noida police. There is no evidence that either Rajesh Talwar or Nupur Talwar or any of their relatives tried to prevent or obstruct the police officers from breaking open lock of the terrace door on 16.5.2008. Infact when the lock of the terrace door was broken, the appellants were not present in their flat as they were on way to Haridwar to immerse the ashes of Aarushi in the river Ganges and upon receiving telephonic information about a dead body being found on the terrace of their flat they had immediately returned back to their flat in Ghaziabad. The prosecution theory that the appellants had hidden the dead body of Hemraj on the terrace of their flat is patently absurd and improbable as it contemplates an assumption that the appellants had hidden the dead body on their terrace with the intention of disposing of the same upon getting a

suitable opportunity which is based upon an impossible hypothesis that Noida police would not find the dead body on the terrace on 16.5.2008 itself.

164. Another allegation made by the prosecution against the appellant Dr. Rajesh Talwar was that he deliberately lodged a false FIR and misdirected Noida police on account of which a separate charge under Section 203 IPC was framed against him. Record shows that the aforesaid fact was sought to be proved by the CBI from the evidence of PW34 Data Ram Naunaria who deposed on page 241 of the paper book that *"On 16.5.2008 at 7:10am Rajesh Talwar came down to Police Station Sector-20, Noida to present a complaint (Tehrir) to the effect that his daughter, Aarushi was killed by servant Hemraj who is absconding". "Accordingly, the Duty Officer (Moharrir), Constable Rajpal Singh had recorded information at GD No. 12 on 16.5.2008 at 7:10am and G.D. Entry is exhibited as Ext. Ka77".* However when he was confronted with his statement recorded under Section 161 Cr.P.C., in which the aforesaid fact was conspicuous by its absence, he deposed that he had stated to the CBI (I.O.) that on 16.5.2008 at around 7:10am Rajesh Talwar had lodged the complaint at the

police station itself. If CBI had not recorded the aforesaid fact in his statement then he had no explanation for the same (page 245 of the paper book). He then went to depose on page 246 of the paper book that he had not seen Dr. Rajesh Talwar in police station on 16.5.2008; that on 24.10.2008 he had given the statement to the CBI, Inspector M.S. Phartyal that on 16.5.2008 at around 7am he had received a telephone call probably from the control room or from the residence of SSP and immediately thereafter he had received a call from S.P. (City), Sri M.K. Mishra who had told him that in L-32, Sector-25, a lady had been murdered and he was asked to reach L-32 Jalvayu Vihar forthwith. He further deposed on page 246 of the paper book that he had no knowledge about Dr. Dinesh Talwar having made a telephone call to police control room regarding the murder of Aarushi at 6:55am and infact it was incorrect to suggest that on 16.5.2008 Dr. Rajesh Talwar had not gone to Sector 20 Police Station and had remained in his house. However, when PW35 M.S. Phartyal was confronted with the statement of PW34 Data Ram Naunaria in his cross-examination he deposed that *"Sri Data Ram Naunaria had not made the statement to me on 16.5.2008*

at around 7am, Dr. Rajesh Talwar had lodged the complaint at police station itself" (page 255 of the paper book). The allegation that the FIR of the incident was lodged by appellant Dr. Rajesh Talwar himself at the Police Station Sector 20 Noida itself stands further falsified from the following extract of the testimony of PW29 Mahesh Kumar Mishra (english translation) (page 219-227 of the paper book)

> ***Examination-in-Chief***
>
> - *I had reached L-32, Jalvayu Vihar at 7:30am (4th line from the top at page 219)*
>
> ***Cross-examination***
>
> - *Till the time, I remained on the crime scene, FIR had not been lodged and I had asked the accused persons to get the FIR lodged. (2nd line from the bottom at page 222)*
> - *I had instructed Data Ram Naunaria that whatever the accused write, on that basis you lodge the FIR, (1st line from the bottom at page 222 and 1st line from the top at page 223)*
> - *When I reached L-32, Dr. Rajesh Talwar was writing the complaint (Tehrir) and I had told SHO Datam Ram Naunaria that on the basis of this Tehrir, FIR be lodged (2nd line from the top at page 22)*

165. Thus from the evidence of the prosecution witnesses PW35 M.S. Phartyal and PW29 Mahesh Kumar Mishra itself it

is established that the prosecution allegation that the appellant Dr. Rajesh Talwar had lodged a false FIR at Police Station Sector-20 Noida is absolutely false and it is established that the FIR of the incident was scribed by Dr. Rajesh Talwar at his flat L-32 Jalvayu Vihar which was subsequently lodged at Police Station by SHO Data Ram Naunaria after 7:30 am. The prosecution had also alleged that the appellants after committing the double murder had dressed up the crime scene which is evident from the fact that the toys on bed of the Aarushi were found in the same position when the body was discovered in the morning hours of 16.5.2008. It has also been alleged that the toys did not have bloodstains and hence it is obvious that the toys were put on the bed subsequently. It has also been alleged that there were no discernible creases on the bed sheets, although Aarushi had been violently murdered. It has further been alleged that dead body of Hemraj was concealed by covering it with a cooler panel which had been removed from the cooler kept on the roof top and the appellants had changed the clothes which they were wearing in the night of 15/16.5.2008 and had worn fresh clothes before the dawn.

166. In order to prove the aforesaid allegations the prosecution had placed reliance on the testimony of PW15 Umesh Sharma who deposed that after the dead body of the deceased Aarushi was taken to the crematorium he had got the Aarushi's room cleaned on the order of the police personnel who were present there whose names he did not know as large number of police men were present in the flat and after getting the room cleaned he had left for the cremation ground. Learned counsel for the CBI has invited our attention to testimony of PW29 Mahesh Kumar Mishra, PW33 Bachchoo Singh, PW34 Data Ram Naunaria and PW1 Chunni Lal Gautam and submitted that all the aforesaid witnesses had uniformly deposed that there was no blood on the toys, school bag, book titled “three mistakes of my life” kept on the bed whereas blood found on the bed and blood splatter on the wall behind the bed. Although there was blood on the bed sheet, pillow and the wall behind the bed, the absence of blood on the toys, school bag, book etc. which could not have remained without being stained with blood if the aforesaid articles were actually lying there at the time of occurrence. Even if the aforesaid articles were present at the place where they were found kept in the

morning of 16.5.2008 by the witnesses, they must have been dis-lodged from their respective positions at the time when the gruesome assault was made and thereafter restored to their respective positions, something which an outsider, if involved in the incident would never have done. Learned counsel for the appellants has countered the aforesaid submission of the learned counsel for the CBI by referring to the observations made by PW38 Dr. M.S. Dahiya in his report Ext. Ka93 and the photograph Ext. Kha40.

167. In paragraph 4 of Ext. Ka93 PW38 Dr. M.S. Dahiya stated that photographs also proved that there was no resistance or scuffle before the victim was immobilized or killed by her injuries. The head injuries as can be judged by their severity, could not have left any scope for resistance once the injuries were inflicted. Thus, another inference is that inflicting such severe head injuries would have led to the certain death of Ms. Aarushi even if no other injury was caused.

168. Thus what follows from the observations made by PW38 Dr. M.S. Dahiya in paragraph 4 of his report Ext. Ka93 is that the impact of first blow which was inflicted on her head was so immense that she must have been immediately

immobilized leading to a situation where obviously there could be no resistance on the part of victim which clearly explains why the seat of the toys kept on the headrest of the bed remain unchanged. Moreover the toys were never seized either by the Noida police or by the CBI for being examined by a serologist or any forensic expert for ascertaining whether any blood marks were present on the toys or not. In our opinion the toys having neither been seized nor subjected to forensic examination, the allegation that the toys did not bear any blood marks does not have any substance and cannot be accepted. Even otherwise the non presence of blood on the toys on the bed stand cannot be construed as a circumstance conclusively pointing out at the dressing up of the crime scene by the appellants.

169. As regards the prosecution allegation that there were no discernible creases on the bed sheet despite Aarushi being murdered violently is concerned the appellants have come up with an explanation for the same in their statement under Section 313 Cr.P.C., by stating that the minimal creases on the bed sheet were not on account of crime scene being dressed up or removing of the creases but on account of the fact that the attack took place in one go as

opined by PW38 Dr. M.S. Dahiya and immobilized the victim forthwith leaving no room for any scuffle or resistance by her. Moreover from the photograph of the crime scene Ext. Kha40 which has been brought on record, it is proved that the Aarushi's bed was a heavy wrought iron bed on which a heavy double mattress had been placed and the bed sheet was tightly and snugly pressed on all sides beneath the heavy mattress. The aforesaid fact can also be a reason for minimal creases on the bed sheet.

170. As regards the prosecution allegation that the appellants had changed their clothes in the morning of 16.5.2008 after committing the double murder the same stands disproved from the testimonies of the prosecution witnesses themselves. It is proved from the evidence of PW31 Hari Singh who had deposed that he had seized the same clothes of the appellants which they were wearing in the intervening of 15/16.5.2008. Moreover there is forensic evidence on record indicated the presence of blood on their clothes.

171. The prosecution also alleged that the appellants with the intention of concealing the dead body of Hemraj had dragged it from their flat upto a corner on the terrace and

covered it with the cooler panel and in order to prevent the dead body from being seen from the adjoining terrace a big bed sheet was spread over the iron grill dividing the two terraces. Record shows that PW34 Data Ram Naunaria in the course of his cross-examination on page 243 of the paper book in the 5th line admitted that *"the cooler panel which was found on the body of Hemraj was not seized by me, because it was big, hence I did not seize it"*. He further deposed that he did not recollect whether there were handles on the cooler panel. He further deposed on page 244 of the paper book that *"I do not recollect whether there were handles on the cooler panel". Photographs, Physical Exts. 15 and 16 are the photographs of the same cooler panel which was found on 17.5.2008 on the roof. I cannot see handles on the cooler panel in photographs 13 and 16. It is incorrect to suggest that in these photographs, the handles on the cooler panel are clearly visible at point 'A' and on this point, I am deliberately lying before the Court. I did not lift the cooler panel to see how heavy it was. I do not recollect whether on this cooler panel blood was embossed or not. Finger prints of the persons who had put the cooler panel on the dead body of Hemraj could have got*

embossed on the cooler panel or may be the same could not have embossed at all. I do not recollect, whether I asked Chunni Lal Gautam to take photographs and fingerprints of the said cooler panel".

172. Thus the prosecution having failed to pick up the fingerprints of the persons who had put the cooler panel on the dead body of the Hemraj embossed on the cooler panel and get it compared with the fingerprints of the appellants, we do not consider it proper to presume that the cooler panel was put over the dead body of Hemraj by the appellants in the absence of any cogent evidence in this regard.

173. Circumstances which lead to the framing of charge against the accused-appellants under Section 201 IPC were the alleged destruction of evidence by him. Sri Anurag Khanna, learned counsel for the CBI submitted that the appellant destroyed material evidence by getting the outer most iron grill door of the apartment removed and getting the apartment painted after 1-1/2 years of the occurrence specially the wooden panel by which the door existing between the bed room of the appellants and deceased Aarushi was painted in the same colour as of the three walls

with the oblique motive of giving an impression that there was no wooden partition at all and to rule out any suggestion of possibility of noise made in Aarushi's bed room at the time of assault being heard in their bed room and getting Aarushi's bed room cleaned on 16.05.2008. In this regard prosecution has examined PW8 Shohrat, who has deposed that appellant Rajesh Talwar got the partitioned wall painted in the colour of the walls of the rooms, which earlier had polish and he also got removed the main gate, the first iron grill door and the grill of the balcony though there was no defect in the same.

174. Record shows that there is no evidence on record indicating that either the Noida police or the CBI after taking over the investigation either instructed or issued any notice in writing to the accused-appellants prohibiting any physical or structural alteration in the apartment. On the other hand from the evidence of PW1 Chhunni Lal, it is proved that Noida police had collected all the evidence needed on 16.05.2008 as was deemed necessary and neither Aarushi's room was sealed nor any instruction in this regard was ever issued by the police.

175. There is no iota of evidence showing that the removed

outer most iron grill door or the grill affixed in the gallery had in any manner hampered the investigation of the Noida police or CBI. It is also admitted case of the prosecution that by the time PW39 AGL Kaul joined the investigation all the material evidence had already been collected. Even on the date on which PW39 AGL Kaul had inspected the place of occurrence, he had found that L-32 Jalwayu Bihar structurally and physically in the same form on which it existed on the date of occurrence. Record further shows that Aarushi's room was cleaned in the absence of the appellants after they had left for the crematorium for performing the last rites of their daughter by PW15 Umesh Sharma in the presence of large number of policemen. The aforesaid fact finds mention in his examination-in-chief on page 156 of the paper book and also in his cross examination on page 157 of the paper book conducted by public prosecutor with the permission of the Trial Judge after PW15 Umesh Sharma was declared hostile. It is not the case of the prosecution that at the time when Aarushi's bed room was cleaned by PW15 Umesh Sharma no policemen were present in the flat or Aarushi's bed room was sealed. There is also no evidence showing that the cleaning of Aarushi's bed room was done

by PW15 Umesh Sharma at the behest of the appellants. We find that the prosecution has miserably failed to prove that the accused-appellants had destroyed material evidence and finding recorded to the contrary by the trial court cannot be maintained and is liable to be set aside.

175A. Sri Anurag Khanna has also submitted that the conduct of the appellants on finding their only daughter murdered, as noticed by the witnesses, was not compatible to the normal human behaviour, was another circumstance which indicated at their complicity. We are unable to agree with the submission made by Sri Anurag Khanna as different persons react differently in a given situation.

176. The prosecution has further alleged that the circumstance of recovery of the golf club no.5 from the attic in Hemraj's room, which according to learned counsel for the CBI was proved to be the crime weapon along with surgical scalpels, pointed at the guilt of the appellants.

177. In this regard, it has been submitted by the learned counsel for the appellant that there is no cogent or reliable evidence proving that the deceased were either assaulted by golf club no. 5 belonging to appellant Dr. Nupur Talwar and later their throats were slit by surgical scalpels.

178. Record of this case reflects that during the course of investigation of the case from 16.05.2008 to 29.12.2010, when the closure report was submitted, five different crime weapons were suggested to be the crime weapons, namely, (i) hammer (propounded by Noida Police), (ii) Knife (propounded by Noida police), (iii) Khukri (propounded by CBI), (iv) Golf Club no. 5 (again propounded by CBI) and (v)

surgical scalpels (again propounded by CBI). As far as hammer propounded as crime weapon by Noida police is concerned the same was never recovered. Khukri propounded as crime weapon surfaced during the course of investigation between 01.06.2008 and 26.10.2009 was recovered on the pointing out of suspect Krishna and sent to forensic expert by the Investigating Officer upon noticing the blood stains on it, but the blood stains found on the khukri were not found to be human blood by the forensic expert. On 26.10.2009 PW38 Dr. M.S.Dahiya for the first time propounded golf club and surgical scalpel as murder weapons and thereafter during the entire investigation from 08.08.2009 when PW39 AGL Kaul took over the investigation, till the filing of the final report, commencement of trial, framing of charges and during the course of the trial, the crime weapon indisputably was golf club bearing no. 5 and surgical scalpel. Although PW39 AGL Kaul has made a vague reference in his examination-in-chief on page 272 of the paper book that during investigation appellant Dr. Rajesh Talwar was asked to produce the golf sticks and he was quizzed about the missing golf stick but he had not given any satisfactory reply, a fact which is not

substantiated from any evidence on record and he had sent the golf sticks for their chemical examination to CFSL, New Delhi, which constituted the complete set including the missing golf stick and when APCBI SRI Neelam Kishore had inquired from Dr. Rajesh Talwar that if one golf stick was missing then how he had produced the complete set of golf sticks to which a reply was given on his behalf by one Ajay Chaddha by e-mail stating therein that the missing golf stick was found lying in the attic in front of Aarushi's bed room by appellant Nupur Talwar, while cleaning the house. Record however indicates that Dr. Rajesh Talwar was asked to produce the golf set for the first time on 30.10.2009 by the investigating authority after PW39 AGL Kaul had taken over the investigation and he had produced the complete set of 12 golf clubs and golf bag before Inspector Arvind Jetly and Inspector Richpal Singh in his clinic, which were seized vide seizure memo Ext.Ka-61, prepared and signed by Inspector Arvind Jetly in his own hand writing.

179. The so called e-mail sent by Ajai Chaddha, allegedly sent by Dr. Rajesh Talwar to SP, CBI Dehradun Sri Neelam Kishore, which was proved by PW39 AGL Kaul as Ext. Ka-96 could not be read in evidence against the appellants for

proving that appellant Dr. Rajesh Talwar had admitted in the e-mail purporting to have been sent by him to SP, CBI Dehradun Sri Neelam Kishore that any golf club of the appellant Dr. Rajesh Talwar's golf set was either missing or the same was found lying in the attic in front of Aarushi's bed room by appellant Nupur Talwar while cleaning the house as admittedly neither ASP CBI Dehradun Sri Neelam Kishore nor Ajay Chaddha were produced as witnesses during the trial, who would have been the best witness to depose on the aforesaid aspect of the matter. Thus we do find that the prosecution succeeded in proving that appellant Dr. Rajesh Talwar was quizzed about golf sticks earlier during investigation or he had failed to give any satisfactory reply.

180. The prosecution in order to prove its theory regarding golf stick no.5 and surgical scalpel being crime weapon has relied upon the evidence of PW38 of MS Dahiya, PW5 Dr. Sunil Dohre and PW36 Dr. Naresh Raj.

181. PW38 M.S.Dahiya while testifying that golf club being the murder weapon has made very following candid admissions in his evidence which put a big question mark to the correctness of the theory propounded by him in his

report Ext.Ka-93 regarding golf cloth being a possible crime weapon:-

- I do not have any degree in forensic medicine (12th line from the top, page 270)
- The Investigating Officer never send any golf club to me. (19th line from the bottom, page 270)
- I do not know what are the different kind of fractures (13th line from the bottom, page 271)
- The Investigating Officer never supplied any surgical scalpel to me. (8th line from the bottom, page 271)
- The Investigating Officer had supplied me a questionaire in which he stated that the injuries on the head of Aarushi and Hemraj were of "triangular shape". (9th line from the top, page 271)
- I have based my theory of golf club being a murder weapon on the basis of the information supplied to me by the Investigating Officer to the extent that injury on the head of Aarushi was of triangular shape (10th line from the top, page 271)
- It is correct that in the postmortem report no injury has been referred to as that of triangular shape. (7th line from the top, page 271)
- If the golf stick is not the weapon, then Hockey stick is a possible murder weapon (11th line from the bottom, page 271) (English translation)

182. Thus it is obvious from the perusal of the aforesaid extract of testimony of PW38 Dr. M.S.Dahiya that theory of golf club and surgical scalpel being the crime weapon is based wholly upon the information made available to him in the questionnaire supplied to him by AGL Kaul, Investigating

Officer, which has hardly any legal sanctity. Moreover, neither the post mortem of Aarushi nor that of Hemraj mentions any injury of triangular shape.

183. There is nothing in the evidence of PW5 Dr. Sunil Dohare and PW36 Dr. Naresh Raj showing that they had examined any golf club or a surgical scalpel before testifying that golf club and surgical scalpel were possible crime weapons. In fact PW36 Dr. Naresh Raj has categorically admitted in his cross-examination on page 260 of the paper book that neither any surgical scalpel nor nay golf stick was sent to him by the Investigator of the CBI for his opinion.

184. It is apparent that the entire theory of crime weapons being golf club and surgical scalpel has been propounded by PW38 Dr. M.S.Dahiya on the basis of absolutely wrong information supplied to him by PW39 AGL Kaul, Investigating Officer of the case, which was not warranted by any material on record is liable to be rejected out rightly. Moreover there is evidence on record showing that the golf club, which was handed over by appellant Dr. Rajesh Talwar was neither properly sealed nor kept in Maalkhana and the same had been tampered with.

185. Record shows that entire set of 12 golf club including

golf club no. 5 and golf bag were seized on 03.10.2009 in the clinic of appellant Dr. Rajesh Talwar at Hauz Khas, New Delhi after being voluntarily produced by him vide Ext. Ka61. The golf bag was separately sealed with cloth by PW32 Inspector Richh Pal Singh and Inspector Arvind Jetly who was not examined. The 12 golf clubs were not sealed with separate pieces of clothes individually but were tied together with a piece of cloth wound around the same in the middle and sealed as a result the handles and head portions remained uncovered. The aforesaid fact was admitted by PW32 Richpal Singh and PW39 I.O. AGL Kaul in their statements recorded before the trial court. PW32 Richpal Singh deposed on page 235 of the paper book that he had tied 12 golf sticks in the middle together in a bundle with a piece of cloth and on that cloth he had put the seal. PW39 AGL Kaul on page 283 of the paper book deposed that when golf clubs were seized, their heads were not sealed separately. Record further shows that partially sealed set of 12 golf sticks and fully sealed golf bag/cover were sent by PW39 AGL Kaul, Investigating Officer to the CFSL Biology Division, New Delhi for blood and DNA analysis on 30.10.2009. PW6 Dr. B.K.Mahapatra after examining the set

of golf sticks and the golf bag returned the entire set of 12 golf clubs including golf club no.5 and golf bag separately along with his report Ext.Ka-37. No DNA or blood was found on either of the articles. He also deposed before the trial court (9th line from the bottom, page 130) that after examining the 12 golf clubs for blood and DNA, he had sealed head portion of the 12 golf clubs with the seal and returned both the parcels i.e. golf clubs and golf bag with the seals of BKM SSO II BIO CFSL, CBI New Delhi.

186. Record further shows that although the entire set of 12 golf clubs was dispatched by PW6 Dr. B.K.Mahapatra to the Investigating Officer on 07.01.2010 and in the normal course the same should have been deposited in the Maalkhana, the same golf clubs were again received by PW26 D.K.Tanwar of the Physics Division CFSL and the parcel containing the golf clubs was opened by him for their examination by him on 15.04.2010, who submitted his report in this regard and proved the same as Ext.Ka-53.

187. The conclusion recorded by Dr. D. K. Tanwar PW6 is being reproduced below:-

> "That the laboratory examination (i.e. microscopic examination) of the 12 golf sticks revealed that Ex. 3 (wooden golf club) and Ex.5(Golf Club bearing No.4) had negligible

> amount of soil sticking in the cavity of the numbers engraved on the bottom portion of the head of the golf clubs in comparison to others. As a result, **Ex. 6 (Golf Club bearing No. 5) as per the report was dirty and not cleaned**. The admitted CBI case is that it is the Golf Club bearing No. 5 which is the murder weapon. Hence, on this count alone golf club as a murder weapon deserves to be rejected."

188. Our attention was also invited by learned counsel for the appellant to the testimony of PW15 Umesh Sharma, who had identified the golf clubs in the test identification parade, which had been conducted by PW39, Investigating Officer AGL Kaul and PW16 Laxman Singh in whose presence PW15 allegedly identified the golf clubs as those belonging to appellant Dr. Rajesh Talwar.

PW15 Umesh Shamra testified that "**before I had reached the golf sticks had been spread around on a table (page 159, 6th line from the bottom)**

PW16 Laxman Singh stated in his testimony, "Koul Sahab called for a bag. On seeing material physical Exhibit 207, the witness has stated that the same bag had been called for by Kaul Sahab. **From the inside of the bag Umesh Sharma pulled out two golf sticks and stated that these were the ones that he had put in servant's room of Dr. Rajesh Talwar's apartment**." **(page 160,**

7th line from the top)

PW16 Laxman Singh also stated in his testimony, "this bag was opened by Umesh Sharma by opening the chain". **"At that time the bag was not bearing any seal at all". (page 160, 4th line from the bottom)**

PW16 Laxman Singh also stated that, **"in my presence the bag was not sealed at all." (page 161, 9th line from the top)**

189. It is pertinent to note that Maalkhana Moharrir was never produced by the prosecution during the trial who would have been the best witness to prove that the golf clubs had remained in safe custody after the same had been returned back by PW6 Dr. B.K.Mahapatra to PW39 Investigating Officer AGL Kaul. Thus from the evidence of PW15, PW16, PW39 and PW6, it is fully established that the golf clubs were not properly sealed and the seals which were put on the golf bag and golf sticks on 07.01.2010 by PW6 by Dr. B.K. Mahapatra were tampered with by the investigating authority. At the time when the test identification parade of the golf sticks was conducted the golf sticks were not taken out from any sealed bag or cover but were found lying on the table by PW15. Even if, we ignore the aforesaid glaring

irregularities and illegalities committed by the investigating authorities during the investigation, there is absolutely no cogent or reliable evidence on record to persuade us to believe that golf club no. 5 was the crime weapon. No blood or DNA was found on any of the golf clubs. Thus we do not find that the prosecution has been able to prove that golf club and surgical scalpel were the crime weapons which were used by the accused-appellants for committing the double murder.

190. Moreover the evidence of identification of two golf sticks allegedly pulled out by PW15 Umesh Sharma from the inside the golf bag, material Ext. Ka207 as the ones which he had put in servant's room of Dr. Rajesh Talwar apartment at the instance of and under active supervision of the CBI officer was hit by Section 161 of the Cr.P.C. and wholly inadmissible in evidence as the identification of a person amounts to an statement within Section 162 of the Cr.P.C. and that therefore, fact of such identification is not admissible in evidence. We stand fortified in our view by the observations made by Hon'ble Apex Court in Ramkishan Mithanlal Sharma Vs. State of Bombay AIR 1955 SC 104 in

paragraphs 8.13 to 15 and 21 of it's aforesaid judgment :

> *8. The admission of inadmissible evidence was attacked on two counts: ----*
> *(1)That the evidence in regard to the test identification parades held at the instance of the police and under their active supervision was hit by section 162 of the Criminal Procedure Code; and*
> *(2)That the statement of the police officer that it was 'tat the instance of" or "in consequence of certain -statement by" the accused that certain discoveries were made was hit by section 27 of the Indian Evidence Act.*
> *13. It may be noted that the test identification parades in regard to the accused I and 2 were all held prior to the 1st August, 1951, and no question could therefore arise as to the provisions of section 162 of the Criminal Procedure Code being applicable to the evidence in I regard to those parades. The test identification parades in regard to accused 4 however were held after the 1st August, 1951, between the 16th January and the 22nd January, 1952, and it remains to be considered how far the evidence in regard to those parades was admissible in evidence having regard to the provisions of section 162 of the Criminal Procedure Code.*
> *14. There has been a conflict of opinion between various High Courts in regard to the admissibility of evidence in regard to these test identification parades. The Calcutta High Court and the Allahabad High Court have taken the view that identification of a person amounts to a statement within ection 162 and that therefore the fact of such identification is not admissible in evidence. *The High Court of Madras and the Judicial Commissioner's Court at Nagpur have taken the contrary view.*
> *15. In Khabiruddin v. Emperor(1) the question arose as to the admissibility of*

identification of stolen property during investigation in the presence of police officers and it was held that section 162 embraced all kinds of statements made to a police officer in the course of an investigation, that the evidence of the fact of identification is nothing but evidence of the statements which constitute the identification in a compendious and concise form and that therefore any identification of stolen property in the presence of a police officer during investigation was a statement made to a police officer during investigation and was therefore within the scope of section 162. Pointing out by finger or nod of assent in answer to a question was held as much a verbal statement as a statement by word of mouth and no distinction was made between the mental act of the identifier on the one hand and the communication of that identification by -him to another on the other. Even the fact of identification by the identifier himself apart from the communication thereof to another was considered to be within the ban of section 162.

In order to resolve this conflict of opinion one has to examine the purpose of test identification parades. These parades are held by the police in the course of their investigation for the purpose of enabling witnesses to identify the properties which are the subject-matter of the offence or to identify the persons who are concerned in the offence. They are not held merely for the purpose of identifying property or persons irrespective of their connection with the offence. Whether the police officers interrogate the identifying witnesses or the Panch witnesses who are procured by the police do so, the identifying witnesses are explained the purpose of holding these parades and are asked to identify the properties which are the

subject-matter of the offence or the persons who are concerned in the offence. If this background is kept in view it is clear that the process of identification by the identifying witnesses involves the statement by the identifying witnesses that the particular properties identified were the subject-matter of the offence or the persons identified -were concerned in the offence. This statement may be express or implied. The identifier may point out by his finger or -touch the property or the person. identified, may either nod his head or give his assent in answer to a question addressed to him in that behalf or may make signs or gestures which are tantamount to saying that the particular property identified was the subject-matter of the offence or the person identified was concerned in the offence. All these statements express or implied including the signs and gestures would amount to a communication of the fact of identification by the identifier to another person. The distinction therefore which has been made by the Calcutta and the Allahabad High Courts between the mental act of identification and the communication thereof by the identifier to another person is quite logical and such communications are tantamount to statements made by the identifiers to a police officer in the course of investigation and come within the ban of section 162. The physical fact of identification has thus no separate existence apart from the statement involved in the very process of identification and in so far as a police officer seeks to prove the fact of such identification such evidence of his would attract the operation of section 162 and would be inadmissible in evidence, the only exception being the evidence sought to be given by the identifier him- self in regard to his mental act of identification which he would be entitled

> *to give by way of corroboration of his identification of the accused at the trial. We therefore approve of the view taken by the Calcutta and Allahabad High Courts in preference to the view taken by the Madras High Court and the Judicial Commissioner's Court at Nagpur.*

191. It has also been submitted by the learned counsel for the appellants that in a case of circumstantial evidence, it is a well settled parameter of law that the chain of circumstances existing in a particular case should be unbreakable and should point out to only hypothesis and that is the hypothesis of the guilt of the accused and that there should be no alternative hypothesis available or probable in the case at all. Learned counsel for the appellants has further submitted that alternative hypothesis of the double murder is convenanted in the prosecution's case itself and in this regard he has invited out attention to the following circumstances:

(i) The result of scientific examinations like serology, DNA analysis and fingerprint examination of the evidence collected by the CBI from the crime scene in the form of blood scrapings, fingerprints, exhibits, photographs of the flat, staircase and roof, bloodstained, palm print found on the outer terrace wall did not yield any results which could

point out to the hypothesis of guilt against the appellants.

(ii) The result of polygraph test conducted on the appellant Dr. Rajesh Talwar on 4/5.6.2008 and 20.6.2008 and Psychological Assessment test done on 13.6.2008 on him also did not point out anything inculpatory or incriminating against the appellant Dr. Rajesh Tavlar.

(iii) Report of the sound simulation test conducted by CBI, I.O. Vijay Kumar on 10.6.2008 in the bedroom of Dr. Rajesh and Nupur Talwar Ext. Ka43 for the purpose of ascertaining whether the veracity of the appellants' claim that they had slept off throughout the night switching on the air-conditioner and had woken up upon hearing the ring of call bell of PW10 Bharti Mandal and had come to know about the murder of deceased Aarushi in the morning hours and they could not have heard the sounds emanating either from their drawing-cum-dining room or Aarushi's bedroom which was deliberately concealed from the cognizance of the trial court by the CBI at the time of the filing of the closure report proved that if outsiders/intruders had accessed the apartment in the intervening of 15/16.5.2008 through the three doors of the apartment it was not possible for the accused who were fast asleep in their bedroom with the

door of their bedroom closed and air-conditioners switched on, to hear the sounds of opening, closing and bolting of the doors. Similarly it was also not possible for the appellants to have heard the sound of moving footsteps in the apartment, opening and closing of door of Aarushi's door. The aforesaid test vindicates the claim of the appellant and lends credibility to their innocence and to the probability of the outsiders/intruders involved in the commission of the heinous crime who had friendly access to the Talwars' apartment as they were acquaintances of Hemraj being themselves Nepali and their ingress and egress out of the apartment could not have been heard by the appellants.

192. PW27 Rajendra Singh Dangi, PW35 M.S. Phartyal and PW31 Hari Singh despite being members of the part of sounds stimulation test in their testimonies recorded before the trial court deliberately did not disclose about the aforesaid sound stimulation test, although as per the CBI case itself from 1.6.2008 to 01.10.2008, Krishna, Rajkumar and Vijay Mandal were prime accused in the case on the strength of the evidence which had been gathered against them during the course of investigation which the prosecution had, with oblique motive tried to withhold.

(i) The deceased Hemraj (as it emerges from the testimony of PW10 Bharti Mandal and the facts stated by the appellants in their statement recorded under Section 313 Cr.P.C.,) had full control over the three doors through which the Talwars' flat could be accessed, main wooden door which had an automatic click shut lock (as admitted by PW39 A.G.L. Kaul in his testimony on page 281, iron and mesh door fixed in the same frame as the main wooden door and the iron mesh door at the end of the passage and the probability and possibility of deceased Hemraj entertaining his friends Krishna, Vijay Mandal or even Rajkumar in his room after the masters of the house had retired for the night by allowing their access through the aforesaid doors could not be ruled out.

193. The pieces of evidence on record to which our attention has been invited by the learned counsel for the appellants which indicate at the possibility of strangers/intruders presence in the Talwars' flat on the fateful night are as here under :

(i) Seizure of one Sula wine bottle which contained 1/4th contents of liquor material Ext. Ka76, one empty kingfisher beer bottle material Ext. Ka69, one green colour plastic

bottle containing some water material Ext. Ka72 by I.O. Data Ram Naunaria on 16.5.2008, recovery memo whereof is on record as Ext. Ka79. PW6 Dr. B.K. Mahapatra who had scientifically examined the aforesaid articles seized from the bedroom of deceased Hemraj in his evidence recorded before the trial court stated that bloodstains were detected on Sula wine bottle, kingfisher beer bottle and green colour plastic sprite bottle as per his report which was brought on record proved by him as Ext. Ka6)

(ii) Kingfisher beer bottle material Ext. Ka69 generated partial male DNA profile which matched with material Ext. Ka11, cotton thread seized from the right side of the door of the terrace and Ext. Ka24 bloodstained palm print extracted from the outer wall of the terrace. He further deposed that the partial male DNA profile generated from the material Ext. Ka6, the pillow with pillow cover of Hemraj which although actually seized from Hemraj's room and marked as material Ext. Ka177, was erroneously shown to have been seized from Aarushi's room by PW6 Dr. B.K. Mohapatra on page 108 of the paper book in his statement recorded before the trial court matched with the cotton thread recovered from the right side of the door of the terrace and

bloodstained palm print.

(iii) PW24 Suresh Kumar Singla, Serologist in his testimony and in his report dated 17.6.2008 Ext. Kha36 (at page no. 165/AA/1 to 3) observed that human blood on Ext. Ka20 Hemraj's bed sheet, Ext. Ka21 Hemraj's pillow and pillow cover and Ext. Ka24 bloodstained palm print was found to be having blood group "AB". None of the aforesaid articles, fingerprints or DNA of appellants were found.

In this regard PW7 K.K. Gautam (Retired DSP, Noida Police) who had examined Hemraj's room minutely had in his statement under Section 161 Cr.P.C. recorded by the First CBI Investigating Officer, Vijay Kumar, he had stated following facts :-

- *I have done formal inspection of Hemraj's room and to my mind, it appeared that three persons might have sat on the bed because of some depression on the mattress.*
- *I also observed that there were three glasses, ordinary type, lying towards the door side of the bed. In two glasses some quantity of liquor appeared to be there while the third glass was empty.*
- *Besides there was one bottle of whisky having 1/4th quality of liquor in it. The other bottle was empty.*
- *I had also seen the toilet and according to me, it appeared that it was very dirty and was not flushed and more than one person had used the toilet for urinating.*

However in his evidence tendered before the trial court (at pages 135 to 137 of the paper book) he on being confronted and contradicted with his statement under Section 161 Cr.P.C. deposed as here under :

- *On 1.7.2008, I had stated to the CBI, I.O., that I had seen room of Hemraj and in this room, there was a bed on which a mattress was placed and one refrigerator was also in the room. (17th line from the top at page no. 136)*
- *I had not stated to the CBI, I.O., that I conducted a formal inspection and examination of Hemraj's room and to my mind, it appeared that three persons might have sat on the bed because there was depression on the same. (19th line from the top at page no. 136)*
- *I had stated to the I.O. that I had seen three ordinary glasses in the room of Hemraj. I had also stated to the I.O. that these three glasses were below the bed. (22nd line from the top at page no. 136)*
- *I had stated to the I.O. that the third glass was empty. (24th line from the top at page no. 136)*
- *I do not recollect whether I had stated to the I.O. that in that room, there was a bottle of whisky which contained 1/4th quantity of liquor. (25th line from the top at page no. 136)*
- *I had not stated to the I.O. that the other bottle was empty. (26th line from the top at page no. 136)*
- *I had stated to the I.O. that I had seen the toilet and it was dirty. (27th line from the top at page no. 136)*

- *I had not stated to the I.O. that as per my opinion, the toilet had not been flushed and more than 1 person had urinated in the same. (28th line from the top at page no. 136).*

PW37 Vijay Kumar, Investigating Officer of the CBI who had recorded the statement of PW7 KK Gautam under Section 161 Cr.P.C., upon being confronted with the contradictions in the testimony of PW7 KK Gautam qua the facts stated by him in his statement under Section 161 Cr.P.C., PW37 Vijay Kumar deposed as here under :

- *I had recorded the statement of witness, KK Gautam and he had also perused the statement and accepted and admitted that the same was true and correct. (1st line from the top at page no. 267)*
- *KK Gautam had stated to me, "I conducted a formal examination and inspection of Hemraj's room and to my mind, it appeared that three persons might have sat on the bed, because there was depression in the mattress". (13th line from the top at page no. 267)*
- *KK Gautam also stated to me, "In two glasses it appeared to me that there was liquor like substance". (15th line from the top at page no. 267)*
- *KK Gautam also stated to me, "in that room there was a whisky bottle, which contained 1/4th quantity of the liquor". (17th line from the top at page no. 267)*
- *KK Gautam also stated to me, "according to my opinion, the toilet had not been flushed and more than 1*

person had urinated in the same". (18th line from the top at page no. 267)

194. Thus in view of the testimony of PW6 Dr. BK Mohapatra, PW24 Suresh Kumar Singla and duly proved contradictions in the evidence of PW7 KK Gautam, the possibility of presence of other persons and the outsiders besides Hemraj having accessed to the apartment in the fateful night cannot be ruled out and the clear and credible evidence of alternative hypothesis available on record substantially demolishes the prosecutions theory that the crime was committed by the appellants alone as there was no proof of any outsiders having accessed into the apartment.

195. Record shows that during the course of investigation the Investigating Authority found blood splattered footprints near the dead body of deceased Hemraj on the roof corner and photographs whereof were taken for the purpose of comparison with the blood splattered shoe prints, the Investigating Authorities had seized shoes, slippers belonging to both Dr. Rajesh and Nupur Talwar vide the seizure memo dated 18.6.2008 Ext. Ka60 at page No. 115/AA/1 and sent for forensic examination.

Report of the comparison of blood splattered,

shoe prints, shoe prints belonging to the appellants dated 20.6.2008 Ext. Kha15 of CFSL, New Delhi (Physics Division) of Sri D.K. Tawar indicates that after physical and microscopic examination, he did not find presence of any fiber and paint on the shoes and slippers belonging to Rajesh and Nupur Talwar which were marked by him and described in his report Ext. Ka4, Ext. Ka5a, Ka5b, Ext. Ka5c and Ext. Ka5d.

With regard to the same articles PW6 Dr. BK Mahapatra in his report Ext. Ka8 dated 1.7.2008 found that "blood, hair and no other foreign material or body fluid could be detected from Ext. Ka4, Ext. Ka5a, Ext. Ka5b, Ext. Ka5c and Ext. Ka5d".

Similarly PW3 Sri Amardev Saha on page 80 and 90 of the paper book in his testimony recorded before the trial court that "It is correct to say that the photographs of the shoe prints that had been taken were of the complete shoe size and on comparison, it did not match with the specimens". (5th line from the bottom at page no. 90)

196. Admitted case of the prosecution that a call was made from landline phone of the appellants installed in their flat L-32 on Hemraj's number 9213515485 at about 6am on 16.5.2008 and the Investigating Authority in their final report although had claimed that Hemraj's phone was active in Punjab but it did not place any evidence in support of the aforesaid assertion. The fact that Hemraj phone was active on 16.5.2008 and was in possession of someone else is another very strong circumstance which strongly indicates that someone had entered into the house of the appellants in the night of the incident and after committing the double

murder had taken away the cell phone of Hemraj otherwise there is no explanation for the Hemraj's cell phone responding and being picked up by someone upon a landline call being from the landline of L-32 although at that time Hemraj was lying dead on the terrace of the appellants' flat.

197. Another clinching piece of evidence which according to the appellants' counsel unequivocally establishes the presence of Krishna in the house of the appellants on the night of the occurrence is the presence of blood on Krishna's pillow which was seized from his house and send for DNA examination along with number of other exhibits to CDFD Hyderabad. The report of CDFD Hyderabad dated 6.11.2008 which was brought on record by the CBI as Ext. Ka51 was proved by PW25 Sri SPR Prasad. Before evaluating the testimony of PW25 Sri SPR Prasad, we consider it proper to have a glance at Ext. Ka51 which indicates that :

> ● *One pillow cover (purple colour) duly exhibited in CDFD as Ext. Y204 Cl-14 and Alias Ext. Z-20 (This purple coloured pillow cover as per the letter of the forwarding authority dated 15.7.2008 duly exhibited as Ext. Kha41 is the Parcel No. 26, MR No. 121/08 of CFSL, New Delhi which in turn is Ext. Ka26 of CFSL, New Delhi as per Ext. Ka10 which again in turn, as per the seizure memo dated 14.6.2008 (Ext. Ka92) is the pillow cover of*

the erstwhile accused, Krishna and duly seized from his room and MR-121/08.

- *Result:"(2) The DNA profile from the source of exhibit W(DNA sample said to be extracted from the bloodstained palm print found on the wall of the roof/terrace, marked as 24), exhibit X (DNA sample said to be extracted from the exhibit: 6d bottle), exhibit U (broken hair comb, article said to be of Mr. Hemraj), exhibit R (two razors, articles said to be of Mr. Hemraj), Z20 (one pillow cover, purple coloured cloth) and exhibit Z30 (one bed cover (multi coloured) with suspected spots of blood) are from the same male individual, district from and unrelated to the sources of exhibit H (Mr Krishna Thadarai), exhibit I (Mr. Rajkumar), exhibit J (Dr. Rajesh Talwar) and exhibit Z26 (Mr. Vijay Mandal)."*

198. The aforesaid report thus clearly indicated that DNA of Hemraj was generated from the purple colour pillow recovered from the house of Krishna which establishes and lends credibility to an alternative hypothesis convenanted in the prosecutions' case itself as against the claimed hypothesis of the double murder having been committed by Dr. Rajesh Talwar and Dr. Nupur Talwar. The aforesaid circumstance is sought to be rebutted by the learned counsel for the CBI by submitting that no blood or DNA of Hemraj was found on Krishna's pillow cover and the

appellants want to take benefit of a typographical error committed by CDFD, Hyderabad in its report Ext. Ka51 whereby the description of exhibits was inadvertently interchanged. He further submitted that CDFD Hyderabad issued a clarification letter which is on record as Ext. Ka52 proved by PW25 SPR Prasad and the defence despite having cross-examined PW25 SPR Prasad at great length on the aforesaid aspect could not elicit anything out of him which may create a doubt about the prosecution's claim that the mention of presence of blood of Hemraj on the purple pillow cover seized from the house of Krishna was nothing but a clerical mistake and that upon letter sent by CBI seeking clarification CDFD Hyderabad received the inputs provided and after examining the electro-phorograms, draft reports and entire records issued clarification letter Ext. Ka52.

199. Sri Anurag Khanna, learned counsel for the CBI has further submitted that the appellants are estopped from re-agitating the aforesaid issue as the same was canvassed by appellants before this Court in Criminal Revision No. 1127 of 2011 and this Court after hearing both the parties at great length had rejected the aforesaid contention of the appellants being without any basis and held that it was clear

that DNA of Hemraj was not found on Krishna's pillow cover. Advancing his submission in this regard further Sri Anurag Khanna has submitted that the aforesaid issue was re-agitated by the appellants before this Court in Crl. Misc. Application No. 35303 of 2012. This Court had heard both the parties at great length and passed a detailed judgment holding that clarification letter issued by CDFD is in essence only a communication issued by the CDFD Hyderabad on the basis of record and whether an error has taken place or not can be clarified from the witnesses during the cross-examination.

200. Before we proceed to examine the aforesaid issue, we consider it proper to first deal with the preliminary objection raised by Sri Anurag Khanna, learned counsel for the CBI that in view of the orders passed by this Court on 18.3.2011 in Criminal Revision 1127 of 2011 and in Crl. Misc. Application No. 35303 of 2012, the appellants are debarred from re-agitating the aforesaid issue before this Court. We do not find any force in the preliminary objection raised by the learned counsel for the CBI. The findings recorded by this Court while deciding the Criminal Revision No. 1127 of 2011 and Crl. Misc. Application No. 35303 of 2012 were

mere tentative findings recorded while deciding proceeding challenging the cognizance order and another interlocutary order. There is no bar which precludes the Court from examining the aforesaid issue afresh in the light of the evidence led during the trial which was not available at the time of the hearing of Criminal Revision No. 1127 of 2011 and Crl. Misc. Application No. 35303 of 2012.

201. We accordingly proceed to examine the issue whether the prosecution succeeded in proving that mention of DNA of Hemraj being generated from the purple colour pillow recovered from the house of Krishna which was described as Ext. Y204 Cl-14 in the report of the CDFD Hyderabad Ext. Ka51 was a typographical error emanating from inadvertent interchange of the exhibits as clarified by the CDFD Hyderabad by issuing a clarification letter which has been brought on record and proved as Ext. Ka52.

202. Record of this case shows that CFSL forensic experts and CBI officials had visited the crime scene on 1.6.2008 and seized a large number of physical objects including a pillow with pillow cover containing bloodstains from the room of Hemraj admittedly belonging to Hemraj and a seizure-cum-inspection memo was prepared on the same

date which was marked as Ext. Ka91. When the aforesaid article was opened before the Court during the course of testimony of PW6 Dr. B.K. Mahapatra and exhibited as material Ext. Ka176 it was found bearing the seal and seizure marks on the tag of Sri Pankaj Bansal, CBI, SCR-3 and Dr. Rajendra Singh Dangi. The tag contained a clear recital that the pillow along with pillow cover was seized from the servant's room (Hemraj's room). It is the admitted case of the prosecution that the said pillow and pillow cover were subsequently sent to the CFSL, New Delhi for biological examination as well as to CDFD Hyderbad for DNA/biological examination.

203. Record further shows that during the course of investigation a team of CBI officials including I.O. Vijay Kumar and DSP R.S. Kurul raided the premises of Krishna on 14.6.2008 pursuant to the disclosure and confession made by him before them that he had committed the double murder with his accomplices Raj Kumar and Vijay Mandal and seized several articles from his premises including one Khukri with Sheath and one purple colour pillow cover belonging to Krishna which was sent by the Investigating Authorities to the CFSL, New Delhi and to CDFD Hyderabad

as the same bore suspicious looking spots. CDFD Hyderbad after due analysis vide report dated 6.11.2008 Ext. Ka51 returned a finding that DNA of deceased-Hemraj was found on purple colour pillow cover belonging to Krishna.

204. Thus according to the report of the CDFD Hyderabad dated 6.11.2008 Ext. Ka51 blood of Hemraj alone was found on the pillow and pillow cover seized from his room on 1.6.2008 while DNA of Hemraj was generated from the purple colour pillow cover belonging to Krishna which was seized from his premises on 14.6.2008. The report of the CDFD Hyderabad dated 6.11.2008 was filed along with final report by PW39 AGL Kaul, Investigating Officer on 29.12.2010 and no discrepancy or error was noticed by the Investigating Officer in the aforesaid report till 24.3.2011 when a clarificatory letter was issued by the CDFD Hyderabad on the request of the CBI officials stating that a mistake had crept into the report of CDFD Hyderabad dated 6.11.2008 Ext.Ka51 in as much as the entire description of purple colour pillow cover which was seized from the premises of Krishna had got interchanged with the description of pillow and pillow cover belonging to Hemraj seized from his room, after a lapse of almost 3 years from the date of

submitting the report Ext. Ka51 by the CDFD Hyderabad dated 6.11.2008.

205. In the inspection-cum-seizure memo dated 1.6.2008 Ext. Ka90, the item at entry no. 12, on page 109/AA/3 has been described as one sealed envelop marked as "12" containing bed sheet with dried bloodstains (recovered from the servant's room). MR number given to this entry is 108/08. The item at entry no. 13 has been mentioned as "one pillow with pillow cover containing bloodstains" sealed in one envelop and marked as 13. MR number given is 109/08.

206. In inspection-cum-seizure memo dated 14.6.2008 Ext. Ka92 pertaining to the articles seized from the servants quarter L-14 Jalvayu Vihar (Krishna's room) at page 113/AA/2 it is mentioned that one pillow cover stated to be used by Krishna was seized and some spots were noticed on the pillow cover and clothes of Krishna which appeared to be suspicious. MR number given to the aforesaid item is 121/08.

207. The forwarding letter of the Investigating Authority dated 4.6.2008 Ext. Kha45 by which the seized articles were sent to the CFSL, New Delhi for forensic examination, the

item mentioned at serial no. 20 in the table was described as bed sheet with bloodstains seized from the room of Hemraj captioned as "12" bearing MR number 108/08 and bloodstained pillow with pillow cover in sealed envelop captioned as "13" bearing MR No. 109/08 actually seized from the room of Hemraj but wrongly stated to have been seized from the room of Aarushi mentioned at serial no. 21.

208. Report of the CFSL, New Delhi dated 19.06.2008 Ext. Ka6 (pages 38 to 47) indicates that 32 sealed parcels were received by the CFSL, New Delhi along with forwarding letter of the investigating authority dated 4.6.2008 including parcel no. 20 containing bloodstained bed sheet bearing MR No. 108/08 and Hemraj's pillow and pillow cover which were marked as Exts. Ka20 and Ka21 by the CFSL, New Delhi. As per the report of the CFSL, New Delhi Ext. Ka6 which was proved by PW6 Dr. B.K. Mahapatra, partial DNA profile was generated from Ext. Ka21 which was consistent with the piece of plaster extracted from the roof top Ext. Ka24.

209. Report dated 30.6.2008 prepared by PW6 Dr. B.K. Mahapatra of CFSL, New Delhi Ext. Ka10 shows that 3 sealed parcels were received along with a forwarding letter dated 16.6.2008 of the CBI authority which included parcel

no. 26 which was marked as Ext. Ka26 at CFSL, New Delhi and which contained purple colour pillow cover having dirty stains with MR No. 121/08 (Krishna's pillow cover). According to the Ext. Ka10 although blood was detected in Ext. Ka26 but no DNA profile could be generated from the Ext. Ka26.

210. PW6 Dr. B.K. Mahapatra testified in his cross-examination on page 121 (19th line from the bottom) "that on 15.07.2008, he returned parcel nos. 1,7, 20 (Hemraj's bed sheet), 21 (Hemraj's pillow with pillow cover) and 22 to the Investigating Officer. He also admitted on page 113 (5th line from the bottom), "that parcel no. 25 and 26 (containing purple colour pillow cover) were also returned by him to the Investigating Officer on 15.07.2008.

211. Record further shows that although PW6 Dr. B.K. Mahapatra admitted having sent back the above mentioned physical exhibits including Ext. Ka21 and Ext. Ka26 back to the Investigating Officer on 15.07.2008 yet strangely the CFSL, New Delhi itself forwarded the aforesaid two exhibits to CDFD Hyderabad vide letter no. CFSL-2008/B-0463/3545 dated 15.07.2008 which is part of Ext. Kha41. The aforesaid exercise gives irresistible rise to only one

inference that when PW6 Dr. B.K. Mahapatra deposed before the trial court that he had returned parcel nos. 21 and 26 to the Investigating Officer on 15.07.2008 he did not speak the truth. It further follows from the above that the aforesaid physical exhibits were not deposited in Malkhana by the Investigating Officer after being returned to him by PW6 Dr. B.K. Mahapatra nor the same were sent to CDFD Hyderabad after being taken out from the Malkhana. Upon reading of the report of CDFD Hyderabad dated 6.11.2008 Ext. Ka51 it transpires that as per the CFSL New Delhi letter bearing no. CFSL-2008/B-0463/3545 dated 15.07.2008 received at CDFD Hyderabad on 16.07.2008 on page no. 151/AA/4 in the chronological order of the exhibits forwarded by the CFSL, New Delhi vide letter dated 15.07.2008 the pillow with pillow cover (blue and white colour) was numbered as CDFD Ext. No. Y204 CL-10 and Alias Ext. No. Z-14 while one pillow cover (purple colour cloth) was marked as CDFD Ext. No. Y-204 CL-14 alias Ext. Z-20 in the same chronological order.

212. PW25 SPR Prasad on page 203 of the paper book (14th line from bottom) in his testimony admitted that in Ext. Ka51 the details of exhibits received in batch III were

exhibited in the same chronological order as mentioned in the forwarding letter dated 15.07.2008.

213. Ext. Ka51 further shows that Z-20 has been referred to as the purple colour pillow cover at four different places. In this regard it would be useful to reproduce herein below the findings returned by the experts with regard to the Ext. Z-20 upon its examination by the experts of CDFD Hyderabad :

- *".....The source of exhibit Z20 (one pllow cover, purple coloured cloth) yielded male DNA profile". (at page no. 151/AA/6)*
- *"4. The DNA profiles of the sources of exhibit W (DNA sample said to be extracted from the bloodstained palm print found on the wall of the roof/terrace, marked as 24), exhibit X (DNA sample said to be extracted from the exhibit: 6d bottle) and exhibit Z20 (one pillow cover, purple coloured cloth) are a male origin and identical.*
  The DNA profiles of the sources of exhibit W, exhibit X and exhibit Z20 are not matching with the DNA profiles of the sources of exhibit H (blood sample said to be of Mr. Krishana Thadara), exhibit I (blood sample said to be of Mr. Rajkumar), and exhibit Z26 (blood sample said to be of Mr. Vijay Mandal) as shown in the enclosed Table 6". (at page no. 151/AA/9)
- *"Conclusion: (2) The DNA profile from the source of exhibit W (DNA sample said to be extracted from the bloodstained palm print found on the wall of roof/terrace, marked as 24), exhibit X (DNA sample said to be extracted from the exhibit: 6d bottle), exhibit U (broken hair comb, article said to be of Mr. Hemraj) exhibit R (two razor, articles said to be of Mr. Hemraj), Z20 (one pillow cover, purple*

coloured cloth) and exhibit Z30 (one bed cover (multi coloured) with suspected spots of blood) are from the same male individual, distinct from are unrelated to the sources of exhibit H (Mr Krishan Thadarai), exhibit I (Mr. Rajkumar, exhibit J (Dr Rajehs Talwar) and exhibit Z26 (Mr. Vijay Mandal).” (at page no. 151/AA/7)

214. Thus it is evident from the evidence of PW25 SPR Prasad and the report of the CDFD Hyderabad Ext. Ka51 that the exhibit numbers were allotted to various exhibits at CDFD Hyderabad in the same chronological order as was mentioned in the forwarding letter dated 15.07.2008 of the Investigating Authority and there was no possibility of any mistake creeping in into the report as exhibits were marked in the CDFD Hyderabad after comparison with the chronological order mentioned in the forwarding letter. The results indicated that from the purple colour pillow cover belonging to Krishna male DNA profile was generated which did not match with the DNA sample of Krishna and rather matched with the DNA profile generated from the articles and exhibits belonging to Hemraj. The report of CDFD Hyderabad Ext. Ka51 pertaining to the purple colour pillow belonging to Krishna corroborated and lent credibility to the confession made by Krishna before CBI officials after his arrest on 13.06.2008, in addition to the details of his

complexity in various scientific tests that he underwent a fact admitted to the CBI. The report of the CDFD Hyderabad Ext. Ka51 pertaining to the purple colour pillow of Krishna was a piece of clinching evidence on record indicating that Krishna was present in the appellants' flat when Hemraj was murdered and it is on account of the aforesaid fact that Hemraj blood got embossed on the hair of Krishna which in turn got embossed on his purple colour pillow cover which was admittedly seized from the Krishna's premises.

215. During the course of hearing of this appeal we repeatedly asked the learned counsel for the CBI as to what led PW39 AGL Kaul to doubt the correctness of the finding returned by CDFD Hyderabad in its report Ext. Ka51 vis-a-vis the purple colour pillow cover seized from the Krishna's premises although before him several other CBI investigators had gone through the aforesaid report which had remained unchallenged till 17.3.2011. But the learned counsel for the CBI failed to come up with any satisfactory reply.

216. Record shows that PW39 AGL Kaul himself went to CDFD Hyderabad and submitted a letter on 17.3.2001 which was in the following term as deposed by PW25 SPR Prasad

on page 202 of the paper book :

- *It appears that due to a typographical error, the description of the exhibits Z-14 and Z-20 in the report dated 06.11.2008 have got interchanged. The record may kindly be perused and we be informed whether the aforesaid is on account of a typographical error or whether the exhibits have been correctly marked. (1st line from the top at page no. 202 of the testimony of PW25 SPR Prasad)*

217. The tenor of the letter given by PW39 AGL Kaul at CDFD Hyderabad personally appears to be clearly suggestive of the prosecution's desire to have an endorsement by the CDFD Hyderabad that out of all the exhibits examined at CDFD Hyderabad there was only one error that too a typographical error with regard to the most controversial article exhibited during the trial which to some extent adversely affected the prosecution case against the appellants. The letter dated 17.3.2011 written after a gap of almost 3 years was clearly suggestive in nature, albeit command to the CDFD Hyderabad to issue clarification as desired by the Investigating Officer rather than requesting CDFD Hyderabad to enquire whether any error had crept in at the end of CDFD Hyderabad while making the report dated 6.11.2008 or in the procedure examining the exhibits at CDFD Hyderabad.

218. Upon receiving the letter of PW39 AGL Kaul on

17.3.2011 the CDFD Hyderabad responded promptly and issued a clarification letter on 24.3.2011 which was addressed to the Superintendent of Police CBI, Camp Office S.P., CBI Dehradun CBI Headquarters, Block No. 4, CGO Complex, Lodhi Road, New Delhi contents whereof are reproduced herein below :

"The Superintendent of Police
Central Bureau of Investigation
Camp Office S.P. CBI, Dehradun
CBI Hdqtrs, Block No. 4
CGO Complex, Lodhi Road,
New Delhi

Sir,

Sub: DNA fingerprinting examination in Hemraj-Aarushi Murder case – Regarding

Ref: - 1) Letter No. 3/1/S/08/SCR-III/dated 17.03.2011 of Superintendent of Police, CBI,
2) CDFD File No. 2079

This has reference to your above referred letter, addressed to the Director, CDFD which was forwarded to the undersigned for necessary action. The undersigned sought clarifications from the concerned DNA Examiners who performed the analysis of the exhibits and reported the above case. The clarification are as below :

1) There are typographical errors in the description of the exhibits Z14 and Z20.

2) a) The description of 'exhibit Z14' shall be read as below :

"One pillow cover (puple coloured cloth)

Y204 Cl10 instead of "pillow with pillow cover (blue and white coloured)"

b) The description of 'exhibit Z20' shall be read as below:

"Pillow with pillow cover (blue and white coloured) Y204 Cl14" instead of "One pillow cover (purple coloured cloth)".

3) The conclusive results of the examination remain unchanged.

The inconvenience caused in this regard is regretted.

Yours faithfully
Sd/-
Scientist In-charge
Laboratory of DNA Fingerprinting Services"

219. Perusal of Ext. Ka52, clarification letter dated 24.3.2011 issued by CDFD Hyderabad shows that the same is a cryptic letter which neither discloses the details as to how the mistake or the typographical error had crept in into the report, nor the stage and in what circumstances.

220. The tenor of letter dated 24.3.2011 on the face of its clearly indicates that the CDFD Hyderabad simply abided by the cryptic suggestion given by the Investigating Officer on 17.3.2011 and virtually satisfied his requirement notwithstanding the fact that all the exhibits that were forwarded to CDFD Hyderabad, vide the forwarding letter dated 15.07.2008 (part of Ext. Ka-41) were admitted by

PW25 to be received, registered and finally recorded by him in the report Ext. Ka51 (06.11.2008) in the same chronological order, in which they had been forwarded. The clarification, therefore, disturbs and disrupts the chronological order of reporting of Exhibits as has been admitted unambiguously by PW25 and therefore puts the clarification introduced on 24.03.2011 under a serious shadow of doubt.

221. Attention of the Court has been invited by the learned counsel for the appellants to the two photographs appended to the counter affidavit filed by CBI before the Hon'ble Supreme Court in Review Petition No. 85 of 2012 although the said two photographs were not part of the trial court record. It is submitted by the learned counsel for the appellants that the aforesaid two photographs were filed before the Supreme Court with the object of giving strength to the argument of CBI advanced before the Supreme Court that an error had taken place at the end of the CDFD Hyderabad with regard to the two exhibits, Z-20 and Z-14 and the two photographs depicted the correct picture as per the case of the CBI. It has further been submitted by the learned counsel for the appellants that the two photographs

which were placed on record before the Hon'ble Supreme Court by CBI were not filed by the CBI before the trial court even along with the application moved by CBI before the trial court on 29.3.2011 for filing additional documentary evidence including clarificatory letter dated 24.3.2011. The aforesaid exercise on the part of investigating authority clearly puts the two photographs of the controversial exhibits, clarification sought from CDFD Hyderabad and ultimately the clarification given as desired by the Investigating Officer under a strong shadow of doubt and gives rise to a very strong suspicion that the entire aforesaid exercise was undertaken by the Investigating Officer in connivance with the CDFD Hyderabad to remove from the record any evidence which was in consonance with innocence of the appellants.

222. Learned counsel for the CBI has failed to come up with any explanation, why the photographs of the two most material exhibits which were filed before the Hon'ble Apex Court were not brought on record by the CBI. The record further shows that for the exhibits examined during the course of investigation including exhibits Z-20 and Z-14, CDFD Hyderabad was the last laboratory in the line and

therefore, the exhibits after having been examined by CDFD sealed in CDFD stationary with its seal ought to have been deposited in the Malkhana against the receipt/signature whereafter it ought to have been produced before the Court from the Malkhana and the case property, therefore, ought to have been in the sealed envelopes or sealed packaging of CDFD Hyderabad. Record however shows that when the case property was opened in the Court it was observed that all the exhibits including the two controversial exhibits Z-20 and Z-14 which were sealed by CDFD were in an open condition strongly suggesting that the CDFD Hyderabad packaging and its seals had been opened subsequently and these exhibits were placed in CFSL, New Delhi envelops with CFSL seals. No evidence for proving that the case properties had remained in safe custody after the same were returned to the Malkhana by the CDFD was led by the CBI nor Malkhana register was placed on record.

223. We now proceed to evaluate the testimony of PW25 SPR Prasad in order to scrutinize whether the description of Z-20 and Z-14 had been actually interchanged in Ext. Ka51 and there was tampering of case property by the CBI by reproducing english translation of the relevant extract of his

testimony :

224.

Examination-in-Chief

- *Because we had received 56 exhibits, therefore, the Director asked myself (SPR Prasad) CHV Gaud and D.S. Negi to examine the said exhibits. (6th line from the bottom at page no. 191)*
- *A combined draft report of all the exhibits received in different batches was prepared and the same was sent to the coordinator for checking. (1st line from the bottom at page nos. 191 and 1st line from the top 192)*
- *The Director had also checked this draft report. (1st line from the top at page no. 192)*
- *Thereafter, on 06.11.2008, we had prepared the final examination report and sent the same to the Director, who dispatched the same with a covering letter to the forwarding authority. (2nd line from the top at page no. 192)*
- *On 17.03.2011, the Director of the CDFD received a leter from CBI, Dehradun, Camp Office, Delhi at Hyderabad in which letter a clarification had been sought regarding Ex. Z14 and Z20. (14th line from the top at page 194)*
- *The Director marked this letter to the Head of our Department, who is also the Scientist In-charge of our laboratory i.e. Dr. Madhusudan Reddy, who asked inputs from us. (16th line from the top at page 194)*
- *On the basis of the inputs given by all three of us, the Scientist In-charge of our laboratory discussed the matter with Coordinator, Dr. Nagaraju, who in turn had a discussion with the Director, CDFD. (24th line from the top at page no. 194)*
- *Coordinator, Dr. Nagaraju asked the Scientist In-charge of our laboratory (Dr. Madhusudan Reddy) to directly issue a clarification to the CBI. I recognize the signatures of Dr. Madhusudan Reddy and the letter is Ex. Ka52. (26th line from top at page no. 194)*

- *Today, in the Court, one carton sealed with seal of the Court, Physical Exhibit 49 has been opened. (9th line from the top at page no. 195)*
- *Inside the carton, one sealed envelop brown colour has been taken out, on which code number Y204C110 and CFSL-2009/E-1025 Job No. 333/09 RC-1(S)/08 SCR 3 CBI ND is written. The seal on this envelop, upon reading, reads CFSL CBI G.R. Remaining cannot be read. (10th line from the top at page no.195)*
- *There are two seals on this envelope which are intact. This envelope has been exhibited as Physical Ex.210 (14th line from the top at page no.195)*
- *From this envelope, a light yellow colour envelope is taken out, which is an open condition and not sealed. On this envelope, Parcel no.26, CFSL 2008 /B-0459 and under that Bio-27/2008 and further below that in English language, to Superintendent of Police, CBI, SCR-III, New Delhi is written. This envelope is exhibited as Physical Exhibit 211(17th line from the top at page no.195)*
- *From this envelope, one white colour sealing cloth, one blank brown colour envelope and one packet wrapped in a brown paper is found. From this packet, a "purple colour pillow cover" which bears two tags of CFSL is taken out. This "purple colour pillow cover" is physical exhibit no.215 and the brown paper in which the said pillow cover is wrapped is exhibited as physical exhibit 214. (21st line from the top at page no.195)*

CROSS-EXAMINATION

- *I cannot say who has opened Physical Exhibit 214 after the same had been sealed by me. (line from the at page no.202)*
- *I had sealed the "pillow and pillow cover" and sent it back to the CBI. I do not know, thereafter, who opened the sealed packet and why the same was opened. (13th line from the bottom at page no.202)*
- *I do not know who and when opened the Exhibits that we examined and sealed. (4th line from the bottom at page nos.202)*

- *The descriptions of all the exhibits are mentioned in the Chain of Custody Form. (13th line from the bottom at page no.196)*
- *When the exhibits were received in the laboratory at that time, the Case Registration Officer opened the exhibits and checked them and the envelopes in which the exhibits had been received, were preserved. (5th line from the top at page no.199)*
- *The exhibits which had been received between June, 2008 and November, 2008 were entered in the stock book in the chronological order. (6th line from the top at page no.199)*
- *The serial number of the Stock Register was written in the Coding Register. (10th line from the top at page no.199)*
- *In my examination report, the code numbers mentioned in column no.3 were given by Mrs. Varsha. (10th line from the top at page no.199)*
- *After examination of exhibits, I had put a sticker on them, but not before, but on the stickers, neither I put my signatures nor date. (11th line from the top at page no.199)*
- *The exhibits received in the third batch were distributed between me, CHV Gaud and Shri Negi. (13th line from the top at page no.199)*
- *In my workbook, I write the description and the code number of the exhibits. (7th line from the bottom at page no.199)*
- *In the workbook, I had written that in what exhibit DNA was obtained. (6th line from the bottom line from the at page no.199)*
- *The draft report was prepared by all three of us together. (4th line from the bottom at page no.199)*
- *The draft report is prepared after the decoding and at that time, all details and descriptions are available. (4th line from the bottom at page no. 199)*
- *In Ext. Ka51, the numbers given in the fourth column were given by me, which were typed on the directions of the Director. These numbers were given in the alphabetical order. (2nd line from the bottom at page no. 199)*
- *I did not give the Chain of Custody Form to*

the CBI. (13th line from the top at page no.200)

- *If two Examiners conduct examination of an exhibit, their report can be the same and can also be different because it depends from where the sample was taken or whether they were taken from different portions. (5th line from the top at page no.201)*
- *It is correct to say that before 17.03.2011, I did not know that there was some kind of a mistake in the report dated 06.11.2008 (3rd line from the bottom at page no.201)*
- *Between 17.03.2011 and 24.03.2011, SP CBI did not meet me. (3rd line from the top at page no.202)*
- *I do not know whether during this time, SP CBI met or not Shri Negi, Shri Gaur, Director of my lab, Scientist Incharge Madhusudan Reddy, Coordinator Dr. Nagaraju, Smt. Varsha, Smt. Selja. (4th line from the top at page no.202)*
- *I do not know whether the CBI recorded the statements of the above officers or any other officers or not. (6th line from the top at page no.202)*
- *I did not hand over my Stock Book Register, Coding Officer Register, the Workbooks and of other Examiners, Directors' Register to the IO of the CBI and neither were they seized. (8th line from the top at page no.202)*
- *After the receipt of the letter dated 17.03.2011, I and other Examiners i.e. Shri Negi and Shri Gaur had checked our Workbooks, Electropherogram, Chain of Custody Form, Draft Report and after that, we had come to a conclusion that there had been a mistake in regard of Z14 and Z20 (10th line from the top at page no.202)*
- *My draft report was checked by Scientist Incharge, Coordinator and Director. I did not hand over the draft Report to the CBI, nor was the same seized by them. (12th line from the top at page no.202)*
- *Regarding the clarification, the Scientist Incharge had asked from all three of us our inputs which we had provided in writing and we*

had also duly signed the input report. (14th line from the top at page no.202)

- *This input report was also not handed over by us to the CBI IO neither did he seize it from us. (16th line from the top at page no.202)*
- *During the course of examination, no photographs of exhibits were taken. (17th line from the top at page no.202)*
- *In my report, Ex.Ka-51, it is opinion that from Ex.Z20, the DNA of Hemraj was found. It is incorrect to suggest that it is because of this reason that after receipt of letter dated 17.03.2011, we interchanged it to Z14 by the mechanism of a clarification. (21st line from the top at page no.202)*
- *The stickers which were used in CDFD were printed ones. (23rd line from the top at page no.202)*
- *After examining all the exhibits, they were sealed with wax. (24th line from the top at page no.202)*
- *SP, CBI through his letter dated 18.12.2009 had sought the Genotype Plots of Ex.V and Ex.Z25. (1st line from the top at page no.203)*
- *In reply to this letter, I had sent a reply on 11.01.2010 and I had informed him that Ex.V is Y204 D1 and Ex.H is Y204B1. (3rd line from the top at page no.203)*
- *Before writing this letter (11.01.2010), I had perused the report dated 06.11.2008, Ex.Ka-51 on this point. (5th line from the top at page no.203)*
- *It is correct that Ex.Z25 is in the batch 3 of Ex.Ka-51, in which batch Z14 and Z20 are also present. (6th line from the top at page no.203)*
- *On 11.01.2010, I did not find any mistake in the report Ex.Ka.-51 because I was only responding to the query raised by the SP and accordingly, I had sent my reply to him. (7th line from the top at page no.203)*
- *In Ex.Ka-51, the first Exhibit of batch no.2 is blood sample, which is also the first item in the forwarding letter dated 07.07.2008 (10th line from the top at page no.203)*
- *Similarly, the last exhibit in batch no.2 is*

DNA sample, which has been taken from bottle 6d, which is also the corresponding last Exhibit in the forwarding letter dated 07.07.2008 (12th line from the top at page no.203)

- *Similarly, in Ex.Ka-51, the list of exhibits in batch no.III are in the same chronological order, as in the forwarding letter dated 15.07.2008. (14th line from the top at page no.203)*
- *It is incorrect to suggest that in the report dated 06.11.2008, Ex.Ka-51, there was no mistake at all. (6th line from the bottom at page no.203)*
- *It is incorrect to suggest that the mistake/ typographical error regarding Z14 and Z20 was introduced by us in connivance with CBI. (5th line from the bottom at page no.203)*
- *It is incorrect to suggest that SP CBI met us and and pressured us to introduced the clarification in the said report. (3rd line from the bottom at page no.203)*
- *It is incorrect to suggest that I am deposing falsely. (1st line from the bottom at page no.203)*

225. Record further shows that in order to prove the material fact that the clarification letter Ext. Ka52 was issued on the basis of alleged typographical error and there was no tampering with the case property, the main Investigating Officer of the case AGL Kaul was examined as PW39 and english translation of the relevant portion of his testimony on the aforesaid aspect of the matter is being reproduced herein below :

- *Ext. Ka51 had been received from CDFD*

Hyderabad, (3rd line from the top at page no. 282)

- *I had seen and perused this report, in this report, it has been stated that the purple colour pillow cover that had been seized from Krishna's room had yielded a DNA of Hemraj. (4th line from the top at page no.282)*

- *Voluntarily stated, this is because of a typographical error. (6th line from the top at page no.282)*

- *I had noticed this mistake during the course of investigation, but, I do not remember at what point of time, I noticed this mistake. (6th line from the top at page no.282)*

- *In the case diary, I had not mentioned anything about this mistake. (7th line from the top at page no.282)*

- *When I discovered this mistake, I did not enter into any correspondence with anybody. (8th line from the top at page no.282)*

- *I did not enter into correspondence because I thought that when the Expert will testify before this Hon'ble Court, he himself will state about this error, because in his examination in chief, he could be briefed about this mistake. (9th line from the top at page no.282)*

- *The purple colour pillow cover which had been seized from Krishna's room had yielded blood, as per the CFSL New Delhi report, however, DNA had not been found. (11th line from the top at page no.282)*

- *It is incorrect to suggest that the purple colour pillow cover seized from Krishna's room and the pillow cum pillow cover seized from Hemraj's room had not*

yielded any material in regard of their descriptions on the basis of which it could be concluded that there had been a typographical error in Ex.Ka-51. (18th line from the top at page no.282)

- *I cannot state specifically one reason on the basis of which I felt that there was typographical error in Ex.Ka-51. (20th line from the top at page no.282)*
- *It is incorrect to suggest that I am deliberately not specifying the causes and the reasons on the basis of which I came to a conclusion that there was a typographical error in Ex.Ka-51. (22nd line from the top at page no.282)*
- *On 17.03.2011, I had written a letter to Director, CDFD to the extent that it seems to me that the purple colour pillow cover seized from the room of Krishna and the pillow cum pillow cover seized from the room of Hemraj have got interchanged as far as their descriptions are concerned. Therefore, the situation may be clarified. (24th line from the top at page no.282)*
- *In regard of the clarification of the mistake, I had gone to CDFD for a discussion, but, there the Receptionst told me that no Scientist will meet you and whatever you have to ask, give it in writing. (27th line from the top at page no.282)*
- *I had written the letter on behalf of SP CBI Dehradun. (30th line from the top at page no.282)*
- *Because the accused persons had raised this issue before the Hon'ble Allahabad High Court, therefore, I had to take a clarification from CDFD Hyderabad. (31st line from the top at page no.282)*
- *Before taking any clarification, orally, the Hon'ble High Court had been given this clarification. (32nd line from the top at page no.282)*
- *I do not know whether the photographs*

of the purple colour pillow cover seized from the room of Krishna and that of the pillow and pillow cover seized from the room of Hemraj had been shown to Allahabad High Court. (33rd line from the top at page no.282)

- *When for the first time, the accused persons raised this issue, before the Hon'ble High Court, then I had informed the CBI Counsel orally about our position in this regard. Thereafter, I went to Hyderabad. (35th line from the top at page no.282)*
- *It is incorrect to suggest that the stickers were changed on the purple colour pillow cover and pillow and pillow cover and thereafter, their photographs were taken and the same were shown to Hon'ble Allahabad High Court. (1st line from the bottom at page no.282 and 1st line from the top at page no.283)*
- *It is incorrect to suggest that as cover up exercise, the clarification was obtained from CDFD Hyderabad in connivance, in order to conceal the tampering that had been done. (2nd line from the top at page no.283)*
- *It is incorrect to suggest that deliberately, in regard of the clarification, I did not seize any document from CDFD Hyderabad, such as, Entry Register, Coding Register, Case Receipt Register, Chain of Custody Form, Draft Report, Work Sheet etc and deliberately further in this regard, I did not record statement of any Scientist there. (4th line from the top at page no.283)*
- *I had filed my Counter Affidavit before the Hon'ble Supreme Court of India in Review Petition No.85 of 2012. Without seeing the original photographs, I cannot say whether their copies had been filed by me along with my Counter Affidavit as Annexure-P and Annexure P-1 (11th line from the top at page no.283)*

- *The witness had seen the certified copy of the Counter Affidavit and the photocopies of the photographs attached with the same and the witness states about these documents, he can say nothing. (13th line from the top at page no.283)*
- *The Counsel for the accused has specifically draw attention of the witness to the copies of the photographs which had been supplied to the accused with the Counter Affidavit and upon seeing the same, witness states that he can say nothing about the coloured photographs at all. (15th line from the top at page no.283)*
- *These photographs are not relied upon documents, therefore, they were not filed along with the additional documents, which had been filed by the CBI. (18th line from the top at page no.283)*
- *It is incorrect to suggest that the photographs that were placed on record before the Supreme Court were not placed on record before this Hon'ble Court, because upon doing so, the tampering done by CBI would have been caught. (19th line from the top at page no.283)*
- *It is also incorrect to suggest that in my Final Report, I did not make any mention about Ex.Ka-51, because that was exonerating/ favoring the accused and was against Krishna, Rajkumar and Vijay Mandal. (21st line from the top at page no.283)*

226. An english translation of the relevant extract of the evidence of PW6 Dr. B.K. Mahapatra showing that when the packets containing pillow and pillow cover seized from the room of Hemraj was opened before the trial court it was found to have been tampered, together with the

observations made by the Court at that time are being reproduced herein below :

> ***Examination in chief- Dr. B.K. Mahapatra, PW6(pages 101-134***
>
> ● *Today in the Court in the presence of everybody, one carton, physical exhibit no.49 has been opened which is sealed with the Court Seal. From this carton, parcel no.21 could not been found, therefore, another carton was opened, which is also sealed with the court seal. (1st line from the top at page no.109)*
>
> ● *This carton bears a typed slip on which detail and description of articles is mentioned. (3rd line from the top at page no.109)*
>
> ● *From this carton, one big envelope which is sealed has been taken out, which is bearing the seal of CFSL. (4th line from the top at page no.109)*
>
> ● ***On this packet, it is written "CFSL-2009/E-1025 Job No.333/09 RC 1 (S)/08/SCR-III CBI DL Y204 CI-14". (5th line from the top at page no.109)***
>
> ● *This packet has been opened in the presence of everybody in the Court and inside this packet, one brown colour big paper of thick size, one pillow with cover, one white sealing cloth has been taken out. (7th line from the top at page no.109)*
>
> ● *The "pillow and pillow cover" has a tag, on which it is written Ex.21 and my signatures are also identified by me on this tag. The "pillow along with pillow cover" is Physical Ex.176 (10th line from the top at page no.109)*
>
> *The brown colour thick paper bears the CDFD chit, the brown paper is entitled as Physical Exhibit as 178 and the main envelope from which the aforesaid articles are taken out is Physical Exhibit 179. (12th line from the top at page no.109)*

227. In order to prove that there was tampering with the pillow and pillow cover seized from the room of Hemraj and the purple colour pillow cover seized from the room of Krishna, learned counsel for the appellants has for the convenience of the Court provided a tabular chart which is part of the written arguments filed by the appellants' counsel after serving a copy of the same to learned counsel for the CBI is being reproduced herein below :

Description of "Pillow and Pillow Cover" seized from the room of Hemraj as noted by this Hon'ble Court, when opened for the first time during testimony of PW6	Description of "purple colour pillow cover" seized from the room of Krishna as noted by this Hon'ble Court, when opened for the first time during testimony of PW25	Description of the "pillow and pillow cover", seized from the room of Hemraj as seen in photograph, page 242 of Ex.Kha-47 (internal pagination)	Description of the "purple colour pillow cover", seized from the room of Krishna as seen in photograph, page 243 of Ex.Kha-47 (internal pagination)
"**CFSL-2009/E-1025** Job No.333/09 RC 1 (S)/08/SCR-III CBI DL Y204 CI-14" is noted by the Court to be written	"**CFSL-2009/E-1025** Job No.333/09 RC-1 (S)/08 SCR 3 CBI ND Y204 CL 10" is noted by the Court on the envelope which	Below the photograph of the "Pillow and Pillow Cover" are two separate white slips, without any signatures or date on	Below the photograph of the "Purple colour Cover" are two separate white slips, without any signatures or date on

on the envelope which contained the "pillow along with pillow cover"	contained the "purple colour pillow cover"	which following is written:- "**CFSL-2010/E-1025** Job No.333/09" (on the left slip below the Exhibit) "**Y204 CI 14**" (on the right slip below the Exhibit)	which following is written:- "**CFSL-2009/E-1025** Job No.333/09 Box-No.3" (on the left slip below the Exhibit) "**SI No.-10 Y204 CI 10**" (on the right slip below the Exhibit)
When "pillow and pillow cover" seized from the room of Hemraj was opened before the Court, **the Coding Officer's sticker was found on the body of the exhibit (at page 12 of the testimony of PW25).**	When the "purple colour pillow cover" seized from the room of Krishna was opened before the Court during the testimony of the PW25 (at page 5), **the description observed does not mention the words "SI No.-10".**	But, if the photograph placed by CBI before the Hon'ble Supreme Court is seen, "**Coding Officer's Sticker is not on the body of the Exhibit, but on the paper below it".**	But, if the photograph placed by CBI before the Hon'ble Supreme Court is seen, then "**the Coding Officer's Sticker mentions words SI No.-10".**

228. If the evidence adduced by the prosecution before the trial court for proving that there was typographical mistake in the report of the CDFD Hyderabad Ext. Ka51 and

accordingly a clarification letter was issued by CDFD Hyderabad Ext. Ka52 on the request of the Investigating Officer, is tested in the background of the aforesaid tabular chart and the evidence on record it unequivocally follows that the investigating authorities had deliberately not filed the photographs of the most controversial exhibits, namely pillow along with pillow cover seized from the room of Hemraj and the purple colour pillow cover seized from the room of Krishna before the trial court although the photographs of the same were shown to this Court at the time of hearing of Criminal Revision No. 1127 of 2011 and were filed as annexures to the counter affidavit filed by the CBI before the Hon'ble Apex Court which have been exhibited and proved as Ext. Kha47. The paper slips as seen in the two photographs of the aforesaid exhibits are different from those affixed on the exhibits when they were opened for the first time before the trial court. When the paper envelop in which the pillow and pillow cover was packed was opened before the Court, CFSL 2009/E 1025 was written on the envelop while on the photograph of the same exhibit filed by the CBI before the Hon'ble Apex Court, the words "CFSL 2010/E–1025" were written similarly the words "Sl

No.10" which are visible on the photograph of purple colour pillow cover, were conspicuous by their absence when the photograph of purple colour pillow cover was exhibited before the Court. The scientific expert Sri SPR Prasad PW25 unequivocally admitted in his testimony that all the 56 exhibits, which were examined at CDFD Hyderabad were properly sealed in CDFD stationary alongwith proper seals. He has also categorically deposed before the trial court "that all his seals have been broken, all his envelopes have been torn open and he cannot say who broke these seals, who tore open the envelopes, when this was done and why this was done".

229. We have very carefully scanned the evidence of PW25 SPR Prasad and PW39 AGL Kaul but there is nothing in their evidence which may show as to how the error had crept in, when and how the error took place. The Case Receiving Register in which exhibits received by CDFD Hyderabad from CFSL were entered after opening and checking each exhibit by Smt. Varsha and Smt. Shelja, the coding register in which coding of exhibits was done by Smt. Varsha, the draft report which was prepared by In-Charge of Lab. Sri Madhusudan Reddy, Director of CDFD Hyderabad were some

of the documents which would have helped the Court to decide whether there was actually any typographical mistake in the description of the two most controversial exhibits Ka51 and Ka52 despite being available were neither seized nor produced before the trial court, for the reasons best known to the CBI.

230. Moreover the discovery of the alleged typographical error in Ext. Ka21 by the last Investigating Officer of the case PW39 AGL Kaul more than three years after its submission and issuance of clarificatory letter of the CDFD Hyderabad, thereafter on 24.3.2011 promptly, pursuant to the letter dated 17.3.2011 given by the investigating agency to CDFD Hyderabad which in itself was clearly "suggestive" in nature as it was virtually suggested by the said letter of the Investigating Officer that there was a typographical error in the description of the most controversial exhibits namely the pillow and pillow cover seized from the room of Hemraj and purple colour pillow cover seized from the room of Krishna appears to be manipulated. It is very strange that although PW39 AGL Kaul has testified that when he took over the investigation of the case he had noticed that error in the most controversial exhibits, however he took no steps

or sought any rectification at that point of time but when the issue was raised by the appellants before the Hon'ble High Court in February, March 2011 in Criminal Revision No. 1127 of 2011 by which they had challenged the cognizance order claiming that clinching, scientific and forensic evidence had been obtained by the Investigating Authorities indicating complicity of the Krishna, Rajkumar and Vijay Mandal in the double murder, photographs of the two exhibits were produced before this Court and later filed in the Hon'ble Apex Court in April 2012 but the same were not filed before the trial court.

231. After going through the evidence of PW25 SPR Prasad and PW39 AGL Kaul, we do not find that the prosecution has been able to prove by any cogent and reliable evidence that there was any typographical error in the description of pillow and pillow cover seized from the room of Hemraj Z-20 and purple colour pillow Z-14 seized from the room of Krishna in the report of CDFD Hyderabad Ext.Ka51 which indicated that blood of Hemraj was found on the purple colour pillow cover seized from the room of Krishna and the clarification letter Ext. Ka52 dated 24.3.2011 which was issued by the CDFD after a lapse of almost three years from the date of

submission of its report dated 6.11.2008 Ext. Ka51 pursuant to the communication issued by the Investigating Authorities on 17.3.2011 to the CDFD Hyderabad appears to be a procured document. It is proved from the evidence of PW25 SPR Prasad that the CDFD Hyderabad before preparing the report dated 6.11.2008 Ext. Ka51 he had got the two exhibits purple colour pillow cover seized from the room of Krishna and pillow along with pillow cover seized from the room of Hemraj examined by experts who had sat down together and prepared the final report and as such there was no possibility of any error as claimed by the prosecution having crept in the description of the two most material exhibits of the case.

232. The prosecution has further failed to come up with any explanation to prove that no tampering with the most material exhibits of the case had taken place pursuant to the positive evidence of PW25 SPR Prasad on record proving tampering with the material exhibit.

233. The last question which arises for our consideration in this appeal is that whether the learned Trial Judge has rightly applied Section 106 of the Indian Evidence Act to the facts and circumstances of the present case while convicting

the appellants of the double murder of their daughter Aarushi and their domestic help Hemraj which had taken place in the intervening night of 15th/16th May, 2008 in their flat L-2 Jalvayu Vihar. Before proceeding to examine the aforesaid aspect of the matter in the light of the evidence on record. We are of the considered opinion that it would be useful to first examine the law on the applicability of Section 106 of the Indian Evidence Act.

234. One of the earliest cases in which Section 106 of Evidence Act was examined and explained are Attygalle versus Emperior reported in (1936) 38 Bombay LR 700. Stephen Seneviratne versus King reported in (1937) 39 Bombay LR 1.

> "In the aforesaid decisions, Their Lordships of the Privy Counsel dealt with Section 106 of Ordinance No. 14 of 1895 (corresponding to Section 106 of the Indian Evidence Act). It was held that Section 106 of the Evidence Act does not affect the onus of proof and throw upon the accused the burden of establishing innocence."

235. Scope of section 106 of the Indian Evidence Act was examined inconsiderable detail by the Apex Court in the case of Shambhu Nath Mehra versus State of Ajmer reported in AIR 1956 SC 404, wherein learned Judges spelt out the legal principle in paragraph 11 which read as

under :

11.“This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that it means facts that are preeminently or exceptionally within his knowledge.”

236. A somewhat similar question was examined by the Apex Court in connection with Section 167 and 178-A of the Sea Customs Act in Collector of Customs, Madras & Ors. v. D. Bhoormull AIR 1974 SC 859 and it will be apt to reproduce paras 30 to 32 of the report which are as under :

> “30. It cannot be disputed that in proceedings for imposing penalties under Clause (8) of Section 167, to which Section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But, in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it - ''all exactness is a fake". El Dorado of absolute proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree

of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered - to use the words of Lord Mansfield in Blatch v. Archer (1774) 1 Cowp. 63 at p.65 "according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and if he falls to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in 'Law of Evidence', (12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, presumptio juris; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property", though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department

altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice."

237. In Ch. Razik Ram versus Ch. J.S. Chouhan reported in AIR 1975 SC 667 it has been held as under:-

"116. In the first place, it may be remembered that the principle underlying Section 106, Evidence Act which is an exception to the general rule governing burden of proof – applies only to such matters of defence which are supposed to be especially within the knowledge of the defendant-respondent. It cannot apply when the fact is such as to be capable of being known also by persons other than the respondent."

238. In State of West Bengal versus Mir Mohammad Umar reported in 2000 SCC(Cr) 1516 it has been reiterated as under:-

"36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows : "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn 35 regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference.

38. Vivian Bose, J. had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

239. The applicability of Section 106 of the Indian Evidence Act, 1872 has been lucidly explained by the Apex Court in paragraph 23 of its judgement rendered in the case of State of Rajasthan versus Kashi Ram reported in JT 2006 (12) SCC 254 which runs as here under:-

> "23. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution."

240. When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer. On the date of occurrence, when accused and his

father Dashrath were in the house and when the father of the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime.

241. The Apex Court in Trimukh Maroti Kirkan versus State of Maharashtra reported in (2007) 10 SCC 445 reiterated as here under :-

> "14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution 1944 AC 315 quoted with approval by Arijit Pasayat, J. in State of Punjab vs. Karnail Singh (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon

him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

"(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

242. P. Mani Vs. State of T.N. 2006 (3) SCC 161 the Apex Court held as here under :

10. We do not agree with the High Court. In a criminal case, it was for the prosecution to prove the involvement of an accused beyond all reasonable doubt. It was not a case where both, husband and wife, were last seen together inside a room. The incident might have taken place in a room but the prosecution itself has brought out evidences to the effect that the children who had been witnessing television were asked to go out by the deceased and then she bolted the room from inside. As they saw smoke coming out from the room, they rushed towards the same and broke open the door. Section 106 of the Evidence Act, to which reference was made by the High Court in the aforementioned situation, cannot be said to have any application whatsoever.

11. The High Court furthermore commented upon the conduct of the Appellant in evading arrest from

4.10.1998 to 21.10.1998. The Investigating Officer did not say so. He did not place any material to show that the Appellant had ben adsconding during the said record. He furthermore did not place any material on records that the Appellant could not be arrested despite attempts having ben made therefore. Why despite the fact, the Appellant who had been shown to be an accused in the First Information Report recorded by himself was not arrested is a matter which was required to be explained by the Investigating Officer. He admittedly visited the place of occurrence and seized certain material objects. The Investigating Officer did not say that he made any attempt to arrest the Appellant or for that matter he had ben evading the same. He also failed and/or neglected to make any statement or bring on record any material to show as to what attempts had been made by him to arrest the Appellant. No evidence furthermore has been brought by the prosecution to show as to since when the Appellant made himself unavailable for arrest and/or absconding.

12. The absence of injury on the person of accused had been found by the High Court to be one of the grounds for believing the prosecution case. All the prosecution witnesses categorically stated that the fire was doused by pouring water. In that situation, no wonder, the Appellant did not suffer any burn injury. It is not the case of the prosecution that in fact any other person had suffered any burn injury in the process of putting out the fire. The incident admittedly took place inside a small room. It had two doors. The prosecution witnesses knocked both the doors. Their call to the deceased to open the door remained unanswered and only then they took recourse to breaking open the door. According to them, not only the Appellant herein was with them at that point of time, but also he took part in dousing the flames. Indisputably, he took the deceased to the hospital. If the version of the deceased in her dying declaration is accepted as correct, the witnesses and in particular the neighbours would have lodged a First Information Report and in any event, would not have permitted the Appellant to take her to the hospital.

243. The Apex court in the case of Vikramjit Singh Vs. State of Punjab 2006 (12) SCC 306 observed as here under :

13. In the instant case, there are two versions. The learned Sessions Judge proceeded to weigh the probability of both of them and opined that the appellant having not been able to prove its case, the prosecution case should be accepted. In our opinion, the approach of the learned Sessions Judge was not correct. The High Court also appeared to have fallen into the same error. It invoked Section 106 of the Indian Evidence Act although opining:

"The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference."

14. Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute.

15. It may be that in a situation of this nature where the court legitimately may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence but applying the well-settled principle of law that suspicion, however, grave may be, cannot be a substitute for proof, the same would lead to the only conclusion herein that the prosecution has not been able to prove its case beyond all reasonable doubt.

244. The Apex Court in the case of State of Rajasthan v. Thakur Singh reported in (2014) 12 SCC 211, while allowing

the appeal preferred before it by the State of Rajasthan against the judgment and order of the Rajasthan High Court, by which the High Court had set aside the conviction of accused Thakur Singh recorded by the trial court under Section 302 I.P.C. on the ground that there was no evidence to link the respondent with the death of the deceased which had taken place inside the room in the respondent's house, in which he had taken the deceased (his wife) and their daughter and bolted it from within and kept the room locked throughout and later in the evening when the door of the room was broken open the deceased was found lying dead in the room occupied by her and the respondent-accused, held:

The High Court did not consider the provisions of Section 106, Evidence Act at all. The law is quite well settled, that burden of proving guilt of the accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused, and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts. In the instant case, since the deceased died an unnatural death in the room occupied by her and the respondent, cause of unnatural death was known to the respondent. There is no evidence that anybody else had entered their room or could have entered their room. The respondent did not set up any case that he was not in their room or not in the vicinity of their room while the incident occurred, nor he did set up any case that some other person entered room and cause to the unnatural death of his wife. The facts relevant to the cause of the death of the deceased being known only to the

respondent, yet he chose not to disclose them or to explain them. The principle laid down in Section 106, Evidence Act, is clearly applicable to the facts of the case and there is, therefore, a very strong presumption that the deceased was murdered by the respondent. It is not that the respondent was obliged to prove his innocence or prove that he had not committed any offence. All that was required of the respondent was to explain the unusal situation, namely, of the unnatural death of his wife in their room, but he made no attempt to do this. The High Court has very cursorily dealt with the evidence on record and has upset a finding of guilt by the trial court in a situation where the respondent to failed to give any explanation whatsoever for the death of his wife by asphyxia in his room. In facts of the case, approach taken by the trial court was the correct approach under the law and the High Court was completely in error in a relying primarily on the fact that since most of the material prosecution witnesses (all of whom were relatives of the respondent) had turned hostile, the prosecution was unable to prove its case. The position in law, particularly Section 106, Evidence Act, was completely overlooked by the High Court, making it a rife at a perverse conclusion in law.

245. A Division Bench of this Court in paragraph 24 of the aforesaid judgement rendered in the case of Pawan Kumar versus State of U.P. and reported in 2016 SCC OnLine All 949 held as under:-

"Section 106 of the Evidence Act can not be utilised to make up for the prosecution's in ability to establish it's case by leading cogent and reliable evidence, especially when prosecution could have known the crime by due diligence and care. Aid of section 106 Evidence Act can be had only in cases where prosecution could not produce evidence regarding commission of crime but brings all other incriminating circumstances and sufficient material on record to prima facie probablise it's case against the accused and no plausible explanation is forthcoming from the accused regarding fact within his special knowledge about the incident. That section lays down only this much that if a

fact is in the "special knowledge of a person" and other side could not have due knowledge of it in spite of due diligence and care then burden of proving that fact lies on that person in whose special knowledge it is. Section 106 Evidence Act has no application if the fact is in the knowledge of the prosecution or it could have gained it's knowledge with due care and diligence."

246. Thus, what follows from the reading of the law reports referred to herein above, is that prosecution has to establish guilt of the accused filtered of all reasonable prognosis favourable to accused to secure conviction and it is never relieved of its initial duty. It is only when the initial burden has been discharged by the prosecution that the defence of the accused has to be looked into. Section 106 of the Indian Evidence Act can not be applied to fasten guilt on the accused, even if the prosecution has failed in its initial burden.

247. Section 101 to Section 114A of Chapter-VII of the Indian Evidence Act, 1872 deal with subject "OF THE BURDEN OF PROOF." Section 106 of the Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proof to prove that fact is upon him. Section 106 is an exception to Section 101 of the Evidence Act which stipulates that whoever desires any Court to give judgment as to any legal right or liability

dependent on the existence of facts which he asserts must prove that those facts exist. Section 106 of the evidence act has to be read in conjunction with and not in derogation of section 101 Evidence Act. Section 106 of the Indian Evidence Act does not relieve prosecution of it's primary and foremost duty to establish the guilt of the accused beyond all reasonable doubts independent of weaknesses of the defence. It is only when prosecution, for well perceptible and acceptable reasons, is unable to lead evidence because of circumstances beyond it's control including the reason that the fact required to be proved was "within the special knowledge of an accused alone" and prosecution could not have known it by due care and diligence, that Section 106 can be resorted to by shifting burden on the accused to divulge that fact which is "in his special knowledge" and if accused fails to offer any reasonable explanation to satiate judicial inquisitive scrutiny, he is liable to be punished. Section 106 is not meant to be utilized to make up for the prosecution's inability to establish its case by leading, cogent and reliable evidence.

248. However once the prosecution establishes entire chain of circumstances together in a conglomerated whole

unerringly pointing out that it was accused alone who was the perpetrator of the crime and the manner of happening of the incident could be known to him alone and within his special knowledge, recourse can be taken to section 106 of the Evidence Act. Aid of Section 106 of the Evidence Act can be invoked only in cases where prosecution could produce evidence regarding commission of crime to bring all other incriminating circumstances and sufficient material on record to prima-facie probablise its case against the accused and no plausible explanation is forthcoming from the accused regarding fact within his special knowledge about the incident.

249. Section 106 of the Evidence Act lays down only this much that if a fact is in the "special knowledge of a person" and other side could not have due knowledge of it in spite of due diligence and care then burden of proving that fact lies on such person in whose special knowledge it is.

250. Thus before Section 106 of the Evidence Act could be applied in the instant case it was incumbent upon the prosecution to establish by cogent and reliable evidence inter alia that the appellants were awake in the night of occurrence; when PW10 Bharti Mandal arrived at the

appellants' flat at about 6 am on 16.05.2008, the outer most iron grill door was latched/locked from inside; thirdly even if the outer most iron and grill door was not latched/locked from inside, the appellants if proved to be awake could have heard noise/sounds in their room at the time of assault in their daughter's bedroom; the deceased Aarushi and Hemraj were assaulted by the appellants in Aarushi's bedroom and thereafter they had dragged the dead body of Hemraj from the bedroom of Aarushi upto the terrace after wrapping it in a bed sheet; and the injuries found on the dead body of Aarushi and Hemraj inflicted on them by golf club number no. 5 and surgical scalp.

251. We have already held after carefully scrutinizing the evidence adduced by the prosecution that the prosecution has failed to prove the aforesaid circumstances which the prosecution was required to prove which could have justified the application of Section 106 of the Indian Evidence Act to the facts and circumstances of the present case for the purpose of convicting the appellants for the double murder of their daughter Aarushi and domestic help Hemraj.

252. Moreover, we while examining the theory of alternative hypothesis of the double murder covenanted in

the prosecution case itself have already held herein above that there is sufficient evidence on record to which we have referred to herein above and dealt with in detail suggesting entry of outsiders into the flat of the appellants. Moreover, during the course of investigation the CBI had arrested and interrogated Krishna Thadarai, Rajkumar and Vijay Mandal who had remained suspects of the double murder for a considerably long time during the investigation of the case by CBI.

253. Thus in view of the foregoing discussion, we do not find any reasonable basis for holding that what had actually happened in the appellants' flat in the intervening night of 15th/16th May, 2008 was a fact within the special knowledge of the appellant and since the same was not a fact within their special knowledge Section 106 of the Indian Evidence Act could not be invoked against appellants for the purpose of convicting them for the double murder of their daughter Aarushi and domestic help Hemraj on account of their failure to come up with any explanation for the circumstances under which the double murder were committed in their flat in the intervening night of 15/16.05.2008.

254. We are also not satisfied that the prosecution could not

have due knowledge of what had happened inside the flat on the fateful night in spite of due diligence as there was clinching evidence on record which pointed at the presence of outsiders in the flat of the Talwars in the intervening night of 15th/16th May, 2008.

255. Sri Anurag Khanna has also submitted before us that since the appellants had offered no explanation how the incident had occurred and as such presumption could be drawn against them under Section 106 of the Evidence Act. In **Sharad Birdichand Sarda's case**, the absence of explanation and/or false explanation or a false plea was considered in the context of appreciation of a case based on circumstantial evidence and it was observed :

> *150. The High Court has referred to some decisions of this Court and tried to apply the ratio of those cases to the present case which, as we shall show, are clearly distinguishable. The High Court was greatly impressed by the view taken by some courts, including this Court, that a false defence or a false plea taken by an accused would be an additional link in the various chain of circumstantial evidence and seems to suggest that since the appellant had taken a false plea that would be conclusive, taken along with other circumstances, to prove the case. We might, however, mention at the outset that this is not what this Court has said. We shall elaborate this aspect of the matter a little later*
>
> *151. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness*

> *of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete than a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.*
> *161. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant's case (supra). Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court. Where the prosecution is unable to prove any of the essential principles laid down in Hanumant's case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General.*

256. What follows from the above is the absence of explanation or false explanation or a false plea would merely be an additional link only when it is proved that all other links in the chain are complete and do not suffer from any infirmity. Here the chain of circumstances is grossly incomplete and broken.

257. Thus having regard to the facts and circumstances of the case, the evidence on record the submissions advanced before us by the learned counsel for the parties and the law

reports cited before us by them in support of their respective contentions, we find that neither the circumstances from which the conclusion of guilt is sought to be drawn have been fully established nor the same are consistent only with the hypothesis of the guilt of the appellants. In our considered opinion, the circumstances are neither conclusive in nature nor they exclude every possible hypothesis except the one of the guilt of the appellant. The chain of circumstances in this case is not complete so as not to leave any reasonable ground for the conclusion consistent with the innocence of the appellant. The chain of circumstances stood snapped the moment, the prosecution failed to prove by any cogent and reliable evidence that the appellants' flat was locked from inside when PW10 Bharti Mandal rang the door bell of their flat in the morning of 16.05.2008 and a strong possibility of outsiders having accessed into the appellants' flat and left after committing the double murder and in the process latched the middle iron mesh door of the appellants' flat from outside and left the outer grill door of their flat open evinced from the evidence adduced by the prosecution itself. We do not find any reason to fasten the appellants with the guilt of double

murder merely on the proof of the deceased being last seen alive with the appellants in their flat in the night of 15.05.2008 specially in view of the alternative hypothesis of the double murder covenanted in the prosecution case itself. The conclusion drawn by the learned trial judge to the contrary are per se illegal and vitiated by non consideration of material evidence on record.

258. Suspicion, however grave it may be, cannot take the place of proof. We stand fortified in our view by the observations made by Hon'ble Apex Court in paragraph 13 of its judgment rendered in the case of Sujit (supra) :

> 13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that `may be' proved, and something that `will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between `may be' and `must be' is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between `may be' true and `must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between `may be' true and `must be' true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the

> quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (Vide: Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, AIR 2011 SC 1017; and Ramesh Harijan v. State of U.P., AIR 2012 SC 1979).

259. In Kali Ram v. State of Himachal Pradesh, AIR 1973 SC 2773, the Apex Court observed as under :

> "Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."

260. In M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200, the Apex Court held, that if the circumstances proved in a case are consistent either with the innocence of the accused, or with his guilt, then the accused is entitled to the benefit of doubt. When it is held that a certain fact has been proved, then the question that arises is whether such a fact

leads to the inference of guilt on the part of the accused person or not, and in dealing with this aspect of the problem, benefit of doubt must be given to the accused, and a final inference of guilt against him must be drawn only if the proved fact is wholly inconsistent with the innocence of the accused, and is entirely consistent with his guilt.

261. Similarly, in Sharad Birdhichand Sarda (Supra), this Court held as under:

> Graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. When on the evidence two possibilities are available or open, one which goes in the favour of the prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. The principle has special relevance where the guilt or the accused is sought to be established by circumstantial evidence."

262. The circumstances of this case upon being collectively considered do not lead to the irresistible conclusion that the appellants alone are the perpetrators of crime in question and on the evidence adduced in this case certainly two views are possible; one pointing to the guilt of the appellants; and the other to their innocence and in view of the principles expounded by the Apex Court in the case of Kali Ram (supra), we propose to adopt the view which is

favourable to the appellants.

263. In view of the foregoing discussion, we hold that the prosecution has failed to prove its case against the accused-appellants beyond all reasonable doubts. The conviction of the appellants recorded by the trial court under Sections 302/34 and 201/34 IPC and that of appellant Dr. Rajesh Talwar under Section 203 IPC and the sentences awarded to them, cannot be sustained.

264. Consequently, both the appeals succeed and are allowed. The impugned judgment dated 25.11.2013 and order dated 26.11.2013 passed by Shri Shyam Lal, Learned Additional Sessions Judge & Designated Judge under the P.C. Act, Ghaziabad are hereby set aside. The appellants are acquitted of all the charges framed against them. Both the appellants are in jail. They shall be released forthwith unless they are wanted in some other case subject to their complying with the provisions of Section 437A Cr.P.C.

Order date :- 12.10.2017
SA

(Per Hon'ble Arvind Kumar Mishra-I, J.)

I am in absolute agreement with the conclusion drawn by my Brother Judge but I would like to say that the conclusion is consensuous in the sense that we had elaborate discussions on each vital aspect of the case and we agree.

However, some reflection need be made upon the style and approach of the trial Judge who recorded conviction and awarded sentence against the appellants.

The learned trial Judge has prejudged things in his own fashion, drawn conclusion by embarking on erroneous analogy conjecturing to the brim on apparent facts telling a different story propelled by vitriolic reasoning. Thus, basing the finding of conviction without caring to see that it being a case based on circumstantial evidence things cannot be presumed and stuffed in a manner like the present one by adhering to self-created postulates then to roam inside the circle with all fanciful whim. The learned trial Judge took evidence and the circumstances of the case for granted and tried to solve it like a mathematical puzzle when one solves a given question and then takes something for granted in order to solve that puzzle and question.

But the point is that the learned trial Judge cannot act like a maths teacher who is solving a mathematical question by analogy after taking certain figure for granted. In all criminal trials, analogies must be drawn and confined within the domain and realm of the evidence, facts and circumstances on record and any analogy which brings facts, circumstances and evidence

so placed in certain domain outside the periphery of that domain then that would be a case of certain aberration deviating from the main path.

That way, the learned trial Judge has aberrated and by dint of fallacious analogy and reasoning has surprisingly assumed fictional animation of the incident as to what actually took place inside and outside the Flat L 32 Jalvayu Vihar, and in what manner he has tried to give live and colourful description of the incident in question and the whole genesis of the offence was grounded on fact that both the deceased Hemraj and Arushi were seen by Dr. Rajesh Talwar in fla-grante and thereafter like a film Director, the trial Judge has tried to thrust coherence amongst facts inalienably scattered here and there but not giving any coherence to the idea as to what in fact happened.

The learned trial Judge forgot as to what is issue in hand. He forgot to travel in and around theme of the charge framed by him against the appellants. It is admitted position to both the sides that no one in fact knew as to what happened. It may be a guess work as to how and in what manner things happened but to base the entire reasoning solely on guess work and give concrete shape to such assumption and then to construe facts and circumstances of the case falling in line with the evidence on record appears to be a futile attempt which attempt altogether acts like a paradox. Certainly such recalcitrant mindset in interpreting facts vis-a-vis circumstances of the case and evaluation of evidence ought to have been shunned. Consideration of merit should be based only on evidence and

circumstances apparent on record, crystallizing the truth in substance and alluding to certainity of decision, backed up by reasonable analogy and scrutiny by the trial Judge as that alone would always be the best approach while deciding a criminal trial.

It is apparent that the trial Judge was unmindful of the basic tenets of law and its applicability to the given facts and circumstances of the case and failed to properly appraise facts and evaluate evidence and analyze various circumstances of this case. It can by no means be denied that the trial Judge, perhaps out of extra zeal and enthusiasm and on the basis of self perception adopted partial and parochial approach in giving vent to his own emotional belief and conviction and thus tried to give concrete shape to his own imagination stripped of just evaluation of evidence and facts of this case.

While appreciating evidence vis-a-vis facts, it was incumbent on the trial Judge to have angled things from a common platform and would not have deviated from that platform as and when the evidence took another turn. May be, that the witnesses of fact testified one way and may be that the Investigating Officer conducted the investigation other way but unnecessarily coherence should not be brought in between the two incongruous objectives as that would be a fallacy which the trial Judge has committed in this case.

Pointer is that the trial Judge should evaluate evidence in its existing form, should not tinge it with his passionate reasoning so as to give a different construction than the one which is naturally reflected and forthcoming. Caution enjoins on

the trial Judge that he should exercise self-restraint from deliberately twisting facts in arbitrary manner and should refrain from recording finding on strength of wrong premise by virulent and meandering reasoning. The entire judgment is on the whole creation of fanciful reasoning with pick and choose presuming facts with indomitable obstinancy and taking things for granted, thus, basing conclusion on unfounded evidence. The trial Judge is supposed to be fair and transparent and should act as a man of ordinary prudence and he should not stretch his imagination to infinity – rendering the whole exercise mockery of law.

Needless to say that in such sensitive cases, the trial Judge should act with utmost circumspection and caution. But certain norms should be kept in mind by the trial Judge while he is deciding any criminal case;

(1) The parochial and narrow approach to the facts and evidence should be avoided and evidence of a particular case has to be read and construed on its face value in line with the statutory requirement.

(2) The passionate and rash reasoning should not be the guiding factor while scrutinizing evidence, facts and circumstances of a criminal case.

(3) The self-perception and realm should not be reflected on analogy of the facts and evidence on record.

(4) The judgment should not be based on self-created postulates.

(5) The imagination should not be given a concrete form and transparency of approach must be reflected in the judgment.

It appears that the trial Judge was unaware of the solemn duty cast by the law as the Judge and has dealt with the entire case in style – a finesse.

Order Date :- 12.10.2017
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