HIGH COURT OF JUDICATURE AT ALLAHABAD

RESERVED

CRIMINAL (CAPITAL) APPEAL NO. 1475 OF 2009

(From Jail)

REFERENCE NO. 3 OF 2009

1. Moninder Singh Pandher

2. Surendra Koli. ..... Appellants

Versus

State of U.P. ..... Respondent

Hon.Imtiyaz Murtaza J.

Hon. K.N.Pandey, J.

(Delivered by Hon. Imtiyaz Murtaza J.)

This composite appeal has been preferred by the appellants from Jail against the judgement and order dated 13.2.2009 passed by Addl. Sessions Judge/Special Judge (Anti Corruption) U.P. Ghaziabad in Special Sessions Trial No. 611 of 2007 whereby the appellant Moninder Singh Pandher has been convicted under section 302 I.P.C read with section 120 B I.P.C. and sentenced to penalties of death and a fine of Rs. 50,000/-. The appellant has also been convicted under section 364 I.P.C read with section 120 B IPC and sentenced to undergo imprisonment for life and a fine of Rs. 20,000/- and in default of payment of fine, he has been directed to undergo further imprisonment for two years. Again, the trial court convicted the appellant under section 376 IPC read with section 120 B IPC and sentenced to undergo imprisonment for seven years and a fine of Rs. 20,000/- and in default of payment of fine, he has been directed to undergo further imprisonment for one and half year. The appellant has also been convicted under section 201 IPC read with section 120 B IPC and sentenced to undergo R.I for seven years and a fine of Rs. 20,000/- and in default of payment of fine, he has been directed to undergo further imprisonment for one and half year.

In so far as appellant Surendra Koli is concerned, the trial court recorded conviction against him under section 302 IPC and sentenced him to penalty of death together with a fine of Rs. 50,000/-. The appellant has also been convicted under section 364 IPC and sentenced to undergo imprisonment for life and a fine of Rs. 20,000/- and in default of payment of fine, he has been directed to undergo further imprisonment for two years. The trial court also recorded conviction against the appellant under section 376 IPC read with section 511 IPC and on this count he has been sentenced to undergo R.I for seven years and a fine of Rs. 20,000/- and in default of payment of fine, he has been directed to undergo further imprisonment for one and half year. The appellant has further been convicted under section 201 IPC and sentenced to undergo R.I for seven years and a fine of Rs. 20,000/- and in default he has been directed to

undergo further imprisonment for one and a half year.

Brief facts shorn of background and frills are set out as under:

Several children had gone missing in and around the area in quick succession and there were reports galore made by respective relations/parents about missing of their children from Sector 31, NOIDA and Nithari village, Gautam Budh Nagar from the year 2005 onwards. On 20.7.2005, a written complaint was made by one Anil Haldar about missing of his daughter Rimpa Haldar at Police Station Sector 20 NOIDA and the said report was entered in the General Diary. Another girl Payal also mysteriously disappeared and on the complaint made by Nand Lal, the father of missing girl, the Chief Judicial Magistrate Gautam Budh Nagar ordered registration of First Information Report. In observance of the order of Chief Judicial Magistrate, a case at case crime No. 838 of 2006 was registered at P.S. Sector 20, NOIDA, under section 363, 366 IPC about missing of Payal. It would appear that upon being approached on judicial side, the High Court issued certain imperative directions in the matter pursuant to which the pace of investigation of the said case was accelerated and the investigation was entrusted to Ramesh Bharti C.O. City Gautam Budh Nagar. However, on 27.11.2006, Ramesh Bharti Investigating officer was supplanted by Dinesh Yadav, Dy. S.P. (Herein arrayed as P.W. 35) ostensibly on the basis of the order passed by Supdt of Police G.B.Nagar. The Investigating officer, it would appear, constituted a special team of officers to assist him. During investigation of case crime no. 838 of 2006, Surendra Koli (hereinafter referred to as A-2) was taken into custody on 29.12.2006. On interrogation, A-2 spilled the beans and confessed to have killed Payal and after her murder, her body was stated to have been chopped into thin pieces in house no. D 5 sector 31, NOIDA (hereafter referred to as "D-5") and her head and slippers were thrown in the enclosed gallery at the back of D-5. He also confessed to have slain various woman and children in the same manner and threw the body parts in the enclosed gallery at the back of the house and in the Nala which flowed in front of D-5. A-2 is also alleged to have volunteered to lead the police team to specific spot where he had kept the aforesaid articles/portions of the bodies hidden. The Police party reached D-5 alongwith A-2 Surendra Koli. On his pointing out, 15 skulls and bones were recovered from D-5 in the presence of witnesses Pappu Lal and Ram Kishan. Recovery memo Ex. Ka 23 was prepared on his dictation by S.I. Chote Singh (herein arrayed as P.W. 39). Recovery Memo of the recovery aforesaid is Ex. Ka 23. On 29.12.2006, on the pointing out of A-2, a knife was recovered in the water tank of a bath room on the first floor of D-5 and its recovery memo Ex. Ka 24 was prepared. On 31.12.2006, during the scooping of drain flowing in front of D-5, bones and Chappals were recovered and recovery memo Ex Ka 25 was prepared. A site plan was also prepared which was marked as Ex Ka 86. On 11.1.2007, on the pointing out of A-2, another knife was recovered and its recovery memo was prepared in the presence of witnesses Jhabbu Lal and Durga Prasad, which is marked as Ex. Ka 58.

On 30.12.2006, as the news about recovery of skulls, bones, cloths etc from the premises namely, D-5, which were reported to be of missing children of Nithari, spread in and around the area, Smt. Doli Haldar mother of Rimpa Haldar, reached police station on 3.1.2007 for identification of cloths and Chappals etc. A sealed parcel containing cloths, Chappals was opened and she identified Chuni and Bra of her daughter, which she was wearing on 8.2.2005. Thereafter, she lodged a First Information Report which was registered as case crime No. 3 of 2007 against A-1 and A-2. The written report substantially contained the allegations that her daughter Km. Rimpa Haldar, aged about 14 years had gone to do menial work in Sector 20 on 8.2.2005 but she did not return and that an application was given at the police station on

20.7.2005; that she came to know that in Sector 31 in house no. D -5, human skeletons and cloths of children were recovered and she came to identify the items at the police station and recognised Chuni and Bra of her daughter which she had put on before getting missing. It is further stated that this showed that owner of the house namely, Moninder Singh son of Sampuran Singh, his servant Surendra Koli son of Shanker Ram resident of Sector 31, House no. D -5 had coaxed her daughter into his house and after committing rape; she had been murdered and buried behind the house. The police prepared recovery memo of Chuni and Bra which is marked as Ex. Ka 47. After the initial investigation by the local police, the case was transferred to C.B.I and after conclusion of investigation, the C.B.I submitted charge sheet only against accused Surendra Koli, -giving clean chit to A-1 that Moninder Singh Pandher had no art or part in the gruesome murder of Rimpa Haldar. During the trial on an application moved by Anil Haldar, the trial court subpoenaed appellant A-1 namely Moninder Singh. After submission of charge sheet the case was committed to the court of Sessions and following charges were framed against accused Surendra Koli. The agreed English translation of the charge framed against Surendra Koli is abstracted below.

"Firstly that on 8.2.2005, when informant's daughter had returned after household work from Sector 29 in the house of Colonel Shailesh Kumar, you called informant 's daughter Rimpa Haldar aged about 14 years on the pretension of arranging some work and you took her inside the house D-5 Sector 31, where you were working as servant whereby you have committed an offence punishable under section 364 IPC which is in the cognizance of this Court.

Secondly, that on the said date and time, you strangulated Rimpa Haldar by her Chunni and she became unconscious and you tried to commit rape whereby you have committed an offence punishable under section 376 IPC read with section 511 IPC which is in the cognizance of this court.

Thirdly, that on the said date and place, at some time, you committed murder of Km. Rimpa Haldar by a knife/axe whereby you have committed an offence punishable under section 302 IPC which is in the cognizance of this Court.

Fourthly that on the said date, place and time you after committing murder of Km. Rimpa Haldar in order to save yourself from punishment and in order to destroy the evidence, cut the dead body into pieces and threw the same in the drainage whereby you have committed an offence punishable under section 201 IPC which is in the cognizance of this Court."

After being summoned under section 319 Cr.P.C., accused Moninder Singh was tried for charges and the agreed translation of the charge is abstracted below.

"Firstly that on 8.2.2005, you had called Rimpa Haldar in house no. D-5 Sector 31 NOIDA fraudulently in order to commit her murder whereby you have committed the offence punishable under section 364 IPC and which is in the cognizance of this Court.

Secondly, that on the said date i.e. 8.2.2005, you have committed rape on Rimpa Haldar in house no. D-5 Sector 31, NOIDA against her wishes whereby you have committed an offence punishable under section 376 IPC and which is in the cognizance of this Court.

Thirdly, that on 8.2.2005 you have caused injuries to Rimpa Haldar with axe /knife alongwith Surendra Koli by hitting in pursuance of criminal conspiracy whereby you have committed an offence punishable under section 302/120 B IPC and which is in the cognizance of the court.

Fourthly, that on the said date and place after committing the murder of Rimpa Haldar and in order to save yourself from punishment and in order to destroy the evidence, cut her dead body into pieces and threw the same in the drainage whereby you have committed an offence punishable under section 201 IPC and which is in the cognizance of this Court."

The prosecution to substantiate its case, examined in all 38 witnesses. S.I Ravi Raj Dixit was examined as Court witness and arrayed as C.W. 1 and defence examined D.W. 1 Devendra Kaur and D.W.2 Pan Singh.

The case of accused Moninder Singh A-1 was one of denial. He also denied incriminating evidence appearing against him. He pleaded that he has been falsely implicated in the case and claimed to be innocent. A-1 namely Moninder Singh Pandher also examined two defence witnesses namely Devendra Kaur D.W.1 and Pan Singh D.W.2.

The appellant Surendra Koli also denied the charges and claimed to have been falsely implicated in the case. However, no witness was adduced to prop up his plea of being innocent.

The trial court, on appraisal of the entire evidence on record held the accused persons guilty of the charges and convicted them accordingly as stated above.

Feeling aggrieved thereby and dissatisfied with the judgement of the court below, the above mentioned jail appeal has been preferred.

Sri R.S.Sodhi, Sri S.B.Kochar Sri OmKar Srivastava and Ms Manisha appeared to represent appellant Moninder Singh Pandher. Appellant Surendra Koli is represented by Sri Gopal S.Chaturvedi, Amicus Curiae assisted by Samit Gopal. Sri Ranjit Saxena, Sri B.P.Singh Dhakray, Senior Advocate, Sri S.S.Dhakray, Sri D.K.Sharma and Sri Khalid Khan on one hand and Sri Nazar Jafri assisted by Sri M.I.Farooqui Advocate argued the case on behalf of the complainant. Sri R.S.Sodhi, Senior Advocate canvassed that there was no legally admissible evidence on record adverse to Moninder Singh Pandher and conviction recorded against him is bad and unsustainable in law attended with the submission that the learned Sessions Judge committed gross illegality in reading confession of co-accused against Moninder Singh Pandher (A-1). He also canvassed that the summoning of Moninder Singh Pandher (A-1) under section 319 Cr.P.C is bad and is not sustainable in law and lastly he argued that the learned Sessions Judge erroneously recorded sentence of death against A-1.

Sri Gopal Chaturvedi Amicus Curiae substantially argued that chain of circumstantial evidence is not complete and the learned Sessions Judge has erroneously held recoveries as admissible under section 27 of the Evidence Act studded with the submission that the confessional statement of Surendra Koli was not recorded in compliance of Section 164 Cr.P.C. and hence, it is argued, the same is inadmissible.

Per contra, Sri D.R.Chaudhary Government Advocate, Sri K.N.Bajpai, A.G.A, Sri Arunendra Singh A.G.A Sri M.S. Yadav A.G.A and Sri V.K.Misra A.G.A appearing for the State were heard. Sri G.S.Hajela Senior Advocate representing the C.B.I canvassed for the correctness of the view taken by the trial judge. We have also perused the written arguments submitted by counsel for the complainant.

In order to appreciate the aforesaid rival contentions of the learned counsel for the parties, we propose to independently scrutinise the oral and documentary evidence appearing on record.

P.W.-1 Manoj Kumar Naunia claimed to be a clerk in Corporation Bank, C.G.O complex Delhi and on the day i.e on 13.1.2007, he claimed that he had been deployed by his Chief Manager to go to the C.B.I office on some special errand and to meet certain officer. At the time when he reached the C.B.I office, one Ashwani Kumar was present alongwith other C.B.I. Officers. In the presence of the persons present in the office, he claimed that Surendra Koli told that he had committed the murder of several children and ladies and also tried to commit rape with them and he volunteered to take the officers to the place where he had committed the crime, and that he could also cause the articles recovered used in the commission of the crime. He further deposed that the statement which was given by Surindra Koli was recorded by C.B.I. The photo copies of the statement were signed by him which were marked as Exhibit Ka-1. After recording of statement, it is deposed, Surendra Koli took all of them to D-5 and he had shown the place where he had committed most of the murders and also pointed out place where he used to throw the pieces of dead bodies. He also got recovered some articles which were seized by the C.B.I. and they were marked as Exhibits. In the cross examination, the quintessence of what he stated is that he had gone to C.B.I. office on the oral direction of Chief Manager. The Office of C.B.I. is situated 600 metre from his office. He reached C.B.I. office at 12.30. When he reached there 3-4 persons were already sitting including Vijay Kumar S.P. and Inspector Kailash Sahu. The names of other persons, he stated, he did not know. He also stated that when he reached the C.B.I office he could not identify Surendra Koli at that time. The Officers of C.B.I. were interrogating Surendra Koli and Vijay Kumar and Kailash Sahu were questioning A-2 and subsequently, statement of Surendra Koli was recorded. When he reached D-5, several persons were present including some doctors. The topography of house No. D-5 was such consisting of three bed rooms and a Kitchen. He had seen only two rooms. He had also entered in the bath room but nothing was recovered from bath room. He denied the suggestion that statement of Surendra Koli was not recorded before him.

P.W.-2 Anil Haldar is the father of deceased Rimpa Haldar. He deposed that he was a native of Nodia district (Calcutta). He migrated to NOIDA in 2001 and started living there. In the year 2005, he was residing in Noida alongwith his wife and three children. He had two sons and a daughter. The name of the daughter was Rimpa Haldar. About two years back she was aged about 14 years. She had passed class VII. Her complexion was fair and height was about five ft. She knew little English and Bengali but she had no knowledge of Hindi. He was living as a tenant of Kehar Prasad. The name of his wife is Doly Haldar. He used to ply cycle rickshaw and his wife used to do menial work in the various houses as a maid servant to eke out their living. He deposed that in the month of January 2005 his wife fell ill for about five and six days. Thereafter, she had started taking Rimpa Haldar alongwith her for assistance. For about 12-13, days she used to go alongwith Rimpa Haldar, and thereafter Rimpa Haldar replaced her mother and began working alone. On 08.2.2005, she had left the house as usual but she did not return after working from Sector 30 and 29. He and his wife made assiduous search at various places and thereafter, he had given a written application to the police but he was told by the police to search for his daughter as she might have eloped alongwith someone. He visited Police out post several times but his report could be registered only after about six months by Sub Inspector Chhotey Singh. The report is marked as Exhibit Ka-2. He deposed that when the news reached his ears that human skeletons and skulls were being recovered from House no. D-5, he and his wife immediately rushed to the site of recoveries. His wife was called by police twice or thrice. He also deposed that his wife recognised the clothes of Rimpa Haldar before the Magistrate. He had given a photograph of his daughter to Officers of C.B.I., which is marked as Exhibit Ka-3 and Ka-4. He further deposed that for D.N.A. test blood sample was

taken of him, his wife and his eldest son. Chunni and Bra of his daughter, are marked as Exhibit Ka-1 and Ka-2. He further deposed that on 29.12.06 when he passed through house No. D-5, Sector -31, a motley crowd had collected there. He went inside the house and saw Moninder Singh taking out a hacksaw (in common parlance known as Aari). He had taken the photo copy of the document which was prepared there and he had heard that Moninder was telling that Payal had taken two and half thousand rupees for one night and she was blackmailing him and therefore he had asked his servant to kill her. In the cross examination, he admitted that Chunni which belonged to Rimpa was easily available in the market. He also deposed that at about 5-6 A.M. in the morning, he used to set out for plying rickshaw and his wife also used to leave the house for menial work prior to him. At the time of occurrence his wife was working in four houses. He did not know the name of the persons where his wife used to work. He did not make any complaint to higher Officers. He also deposed that he came to know of the matter on 29.12.2006. He also deposed that he had lodged the report of missing of his daughter after six months of her missing. For identification of clothes of his daughter, his wife and one Colonel had gone to the Police Station. In his cross examination, the quintessence of what he stated is that on 29.12.2006, he had gone to house No. D-5 for the first time. He reached there between 11.00 or 12.00 O' Clock. At that time, the people had collected in large number and the police was also present there in strength. The police did not block the road and no brick batting took place. He remained there up to 3 P.M. He did not talk to any T.V. anchor on that day. He admitted that he had told T.V. anchors that Moninder Singh had got recovered a hacksaw (Aari) and that at the behest of Moninder Singh, his daughter Rimpa Haldar was killed. After the disclosure of this incident, his wife and one Colonel had gone to lodge the report. He did not tell the Colonel that Moninder Singh had brought out the hacksaw. He had informed his wife. He could not tell the reason why his wife did not mention about the recovery of hacksaw in F.I.R. The hacksaw was about one and a half to two ft fitted with wooden handle. The papers which he had filed were given to Jitin Sarkar at the Police Station.

P.W.-3 Satish Chandra Mishra deposed that he was a retired Bank officer and at present, he was engaged in social works and was serving as Senior Social worker. On 12.1.2007, at about 1.30, he was called at house No. D-5, Sector 31. One Gullu Dutt Mishra was also called there. In D-5, C.B.I. Officer alongwith C.F.S.L. Officer and employees were present. The lock of house No. D-5 was sealed. In his presence seal was broken and they entered in the Drawing Room and in his presence, C.B.I. had taken in his possession several articles. Dwelling on topography of the house, he deposed that behind the house, there is an enclosed lane and several bones and clothes were collected after digging. The memo was prepared by C.B.I. Officers and all the articles were sealed and he had signed the memo which was marked as Exhibit Ka-6. On 12.1.2007 after completing the search, the house was locked and police and guards were deployed to guard the house. Gullu Dutt was also present on the next day alongwith him. On 13.1.2007 again lock was opened. Several bones and shoes and Chappals were recovered/collected from lane behind that house. In the drain situated in front of the house, scooping of drain yielded 50 polythene bags containing body parts. He could not see them as the same emitted bad odour. Separate packets of shoes and Chappals were prepared and he affixed his signatures thereon. All the body parts and bones were recovered and kept in a box of card board and sealed. He had also signed alongwith Gullu Dutt. At about 3-4 P.M. Surendra Koli was brought on the spot by C.B.I. A memo was prepared which was also contained his signature, and was marked as Exhibit Ka-7. In cross examination the quintessence of what he stated is that on 12.1.2007 he was not summoned by any Police Officer. It is correct that he

was president of Resident Welfare and used to look after the work of cleaning and used to receive complaint. He had written several times to Development Authority for cleaning the drains. The drain in front of D-5 was blocked. In front of all the houses, drains were covered by stones. He had not gone behind the building and he could not tell whether there was any door opening in the service lane. He had seen the gallery when C.B.I. were taking out bones. When the bones were recovered, stinking permeated the surrounding. He also stated that memos were prepared. He had signed the papers. He denied the suggestion that nothing was recovered in his presence.

P.W.-4 Dr. D.K. Sharma deposed that he was Medical Superintendent, All India Medical Institute, Delhi. He was working there from 8th November 1991. On 13th February C.B.I. got examined two persons for forensic and psychotic test. On 15.2.2007, a Board was constituted. He had submitted his report to C.B.I. which was marked as Exhibit Ka-8. The Board consisted of Dr. T.D.Dogra, Professor and Head of Forensic Medicine, Dr.R.K.Chadha, Professor Psychotic Department, Dr. Manju Mehta, Professor of Clinical Psychology, Dr. Mamta Sood, Assistant Professor Psychotry and Dr. Sanjay Arya Associate Professor Administration. All the above members of the Board were post Graduates of their respective disciplines. They had submitted a report according to their own experience. In cross examination he denied that he was not member of the Board. The report was based on the experience and tests. He admitted that in his presence, no test was carried out.

P.W.-5 Doly Haldar deposed that she resided alongwith her family in village Nithari , her husband and two sons. Her daughter had died (was killed). Her name was Rimpa Haldar. She was aged about 14 years. Her husband plies rickshaw. She deposed that she used to work as Maid Servant to supplement the income. In 2005, she fell ill. At that time, she used to work in Sector 30. When she was ill, she took her daughter alongwith her for assistance. She used to go for work at about 5.00-5.30 A.M. She did not know the day and date when she last time worked. Her daughter did not return from work. She was wearing white pyjama, white kurta with red flower, black banyaeen. She was also wearing ear-ring and nose-pin. She (Doli Haldar) returned at 12.00-12.30 but did not find her daughter. She searched for her and informed her husband. Both searched her daughter in village Nithari and approached the police out post and Police Station but her report was not registered and they told them to go and search. She searched her daughter again but police did not register her report. After present incident, she lodged the report after about six months. During that period, she was searching for her daughter. In Nithari, she heard that clothes of children were recovered and went to Sector 20 Police Station for identifying the clothes and recognised clothes of her daughter. She had recognised Chunni and Bra. The police had sealed those clothes and her signature was obtained. Those papers are Exhibit 3 and 4. She had recognised her signature also. She further deposed that she had identified the clothes before the Magistrate. Her blood sample was also taken by the police. In cross examination, the quintessence of what she stated is that she had been residing in Nithari for about six years. She worked as Maid Servant in four houses of Sector 30. She does not know the names of the owner of those houses. She admitted that when she was going to identify the clothes, one Colonel was accompanying her.

P.W.-6, Dr. Mamta Sood deposed that in October 2005, she was posted as Assistant Professor, All India Medical Institute, Delhi. She is M.D in Psymetric and diploma in Psychological Medicines. She was posted on the same post from January 2007 to February 2007. On the direction of Dr. Sharma, a committee was constituted and she was also one of the members of the said committee. The committee had to conduct mental test of Surendra Koli. Surendra Koli

was referred by C.B.I. Surendra Koli was sent for Forensic Psychotic Assessment. The whole committee examined him and found that he was suffering from Necrophilia and Necrophiliac. She identified the signature of Dr. M.Mehta, Dr. R.K.Chadhdha, Dr. S. Arya, Dr. D.D.Dogra. They were working along with her. They had also participated in conducting the mental test. The report of the committee was marked as Exhibit Ka-10. The committee reached the conclusion that accused Surendra Koli was fully capable of participating in the proceeding of the test and in arriving at the conclusion that they had taken the help of medical science and research. All the documents relating to the test were filed which run into twenty pages. On the basis of these tests, it was found that Surendra Koli was not suffering from any psychotic disorder or mental illness. In the cross examination she admitted that Necrophilia is a kind of paraphilia which is kind of sexual perversion disorder. They arrived at the conclusion on the basis of history, systematic psychological testing E.E.G. and M.R.I. Brain. In the test no medicine was administered. The history, it is deposed, was disclosed by Surendra Koli. She had also identified Surendra Koli in the Court.

P.W.-7 Mukesh Kumar deposed that he was driver of J.C.B. Machine. On 15.1.2007, he had gone to dredge up the drain in village Nithari and number of people gathered there. He had cleaned the drain on the direction of C.B.I and scooping led to recovery of dregs and thereafter, he was standing at a distance while C.B.I got engaged in their work. He had identified the paper and his signature which was marked as Exhibit Ka-11. On the next day, he had also dredged up the drain by J.C.B. The C.B.I. had told him that he had scooped the mud from the drain and he was called upon him to sign the memo which was prepared and was marked as Exhibit Ka-12. In the cross examination the quintessence of what he stated was that he could not tell the exact time when he started dredging up drain. He further deposed that after scooping mud from the drain, he stood at a distance of about 400 Meter. He denied the knowledge as to what was recovered from the debris.

P.W.-8 Dr. Manish Kummath, Senior Demonstrator, Department of Forensic , All India Medical Institute, Delhi deposed that he was working on the same post in the month of December 2005. He received a direction by the Head of the department for going to the place of occurrence along with C.B.I. On 12th he alongwith Mr. Behra reached Nithari, the place of occurrence. At that time Surendra Koli was not there nor J.C.B. Machine was there. He went inside the house No. D-5 alongwith C.B.I. They started sieving the earth from behind the building. They also sieved the soil in the gallery. They recovered pieces of bones, Chappals, clip and clothes and they all kept the same in a packet and sealed the same. The seizure memo was prepared by C.B.I. (Ext. Ka-13). On the next day on 13th he again reached the place of occurrence. J.C.B. Machine was also there. He collected 58 pieces of bones, 47 pieces of clothes smear and torn, 17 Chappals of different shapes, hair lock and in polythene pouch some tissues and bones were recovered. Pieces of ropes, pieces of wire and pieces of cable wire were also recovered. Bangles of different sizes were also recovered and 49 packets were prepared which were containing bones and soft tissues of children. Shoes and Chappals were of different sizes, (Ext. Ka-14). Similarly, on 15.1.2007 and 16.1.2007 biological materials were recovered. There were seven biological materials, one femur bone of human. Seizure memos were prepared by C.B.I, (Ext. Ka-11). On 16.1.2007 again he went at the place of occurrence and recovered three biological materials and sealed in three separate bags and dirty clothes were sealed in separate polythene, (Ext. Ka-12). He further deposed that the bones etc. which were recovered were sent to Forensic Medical department of AIIMS. Dr. T.D.Dogra requested the Director of AIIMS to constitute a board of seven doctors and accordingly a board was constituted and he was also one of the members of the said board.

They had to examine material and detailed analysis was to be done and they had to be sent for D.N.A. Test. This committee had received in all 17 parcels. Details of the same were mentioned in paper No. 131Aa/1 to 131A/a172, (Ext. Ka-15). These parcels contained bones, soft tissues, organs, teeth and some bones of animals. They were sealed separately. The articles consisted of kidney, intestine, glureal muscle etc., which are also parts of this report, (Ext. Ka-16). They had also prepared the sets of bones to ascertain the gender whether female or male and their heights, (Ext. Ka-17). They had prepared in all 19 sets and two skulls. They had prepared a joint report which is in the file of S.T. No. 439/07 (Ext. Ka-18). According to this report Surendra Koli was brought to AIIMS. He had identified the sets of skeleton and he also informed that button Exhibit 12/1 was probably from a grey colour sweater of Rimpa. He also deposed that accused A-2 was also given a dead body of unknown person and piece of chalk and asked to demonstrate how he used to cut the dead bodies. This was done in presence of team of doctors and no police personnel were present there. At that time, it is deposed, Surendra Koli was in a composed condition and he was not mentally disturbed. He demonstrated with chalk the specific area from where he used to cut the bodies. After examining the recovered bones, tissues and organs he came to conclusion that A-2 used to slice the body parts in the same manner as demonstrated by him before the team of Doctors. He also disclosed that he used to severe neck from body by using knife. The report is marked as Exhibit Ka-18. The report is signed by all the doctors. The bones were sent to Hyderabad for D.N.A. Examination. After receiving the report from Hyderabad, they had prepared their report, (Ext. Ka-19). According to this report at serial No. 4, they arrived at a conclusion that D.N.A. Report , table No.-4, Annexure-4 and page 28 refers to Exhibit SK-17 TE was D.N.A profile of upper jaw of set No. 17 which was biological print of Anil Haldar and Ajit Haldar apart from this D.N.A profile of Ajit Haldar who was brother of deceased that was similar to that of the deceased Rimpa Haldar. In the cross examination, he stated that on 12th at about 8 A.M he reached the department and left the department between 8.30 and 9 A.M. and on 12th he was intimated that he should reach the department at 7 A.M. He could not tell as to what was the specific purpose for which he was called to Department. He could not tell the precise number of C.B.I personnel who had collected at the place of occurrence. He also stated that after they had reached the place of occurrence, they were asked to ensconce in the car for about 45 minutes. They sat there as called upon to do and thereafter, they were taken inside the house and at the time the house was wide open. Only those persons had entered into the house who came alongwith them. He also stated that the C.B.I. persons had broken open the seal of the gate when they were sitting in the car. Dwelling on topography of place of occurrence, he stated that the gallery faces the gate of the house. He also stated that there was a drain between gate and road which was covered. There was a garden on the right side of the gallery and thereafter there was dwelling place. There were about 10-15 persons at that time. Dr. Behra was also alongwith him. He could not tell whether the items recovered could be thrown from other houses in the gallery. Articles which were recovered were handed over to C.B.I. Surendra Koli was not alongwith him. On the next day also Surendra Koli was not there. The water was poured on the bones which were recovered from digging the earth. They returned about 11 P.M. Bones alongwith blood of parents of the deceased and brother of the deceased were sent for D.N.A. testing. He stated that he can only opine about age of the deceased. He opined that age of Rimpa was between 12 to 18 years. He further stated that the age was determined by bones. He denied that this report was prepared in the office of C.B.I. He denied the suggestion that the C.B.I. has completed the process and he only affixed his signature on the papers.

P.W. 9 Virendra Dagar deposed that on 18.1.2007 he was posted in the office of F.C.I. as Daftari. He stated that his D.G.M. had directed him to reach C.B.I. office at Lodhi Road. Suraj PraKash had also accompanied him. When he reached C.B.I. office, Ajay Singh and other officers of C.B.I. were already there. Surendra Koli was also present there. He deposed that A-2 in his presence volunteered that he could get the axe recovered by which he used to commit murders. The witness identified Surendra Koli in the court. Recovery memo was also prepared which was also signed by Surendra Koli, (Ext. Ka -20). Thereafter, they reached house no. D-5 Sector 31 NOIDA alongwith A-2, and one doctor of CFSL was also alongwith them. On pointing out of Surendra Koli, one axe was recovered from the bushes which were situated on the right side out of the house. A sealed packet containing the axe was opened in the court and he identified his signature on the papers. He identified the axe which was recovered on the pointing out of Surendra Koli. He also stated that the C.B.I. had prepared the site plan of the place from where the axe was recovered. Copy of the site plan is marked as Ext. Ka-22. In his cross examination he admitted that he did not receive any written order from his office. He further deposed that house No. D-5 was sealed and the lock was opened by the C.B.I. He admitted that axe was not smeared with blood and only one and two stains of blood were there. He admitted that there was no blood on the axe. He denied the suggestion that he was a got up witness and he was deposing under the pressure of C.B.I.

P.W. 10 Dr. Sanjeev Lalwani was serving at the relevant time as Asstt Professor in AIIMS New Delhi. He deposed that in the month of February, 2007 he was posted in Medical Department in AIMS, New Delhi as Assistant Professor. On 3.2.2007 he received a letter from S.P. CBI embodying request that all the skeleton and bones which were recovered from D-5 Sector 31 be shown to Surendra Koli in the absence of police officers or CBI personnel attended with further request that Surendra Koli be shown an unknown dead body so that it could be ascertained as to how he used to cut the pieces. It was further requested that the process should be video-graphed. A letter was sent for videography to the Director CFSL, which is marked as Ext. Ka-22. On 3.2.2007, a meeting was called of all the members of the Medical Board and Dr. Chitranjan Bahara, Dr. Manish Kumat, Dr. Pushpa Dhar, Dr. S.V.Rey, Dr. Anukumar Raina, Dr. T.D. Dogra were present alongwith him. Dr. Adarsh Kumar was absent. All the bones were kept on table at 19 places which were arranged according to their measurement. On 4.2.2007, SP CBI was requested to produce Surendra Koli. On 4.2.2007 at 11 a.m, Surendra Koli was brought in custody by CBI. All the sets which were prepared by the team were shown to Surendra Koli. At that time, no officer of the CBI was present. There was a block of hair of black brown colour which was shown to Surendra Koli and he told that this bunch of hair was of Payal. In the report at item no. 6, he recognized the button of grey colour sweater of Rimpa. When he was shown the separate pieces of skull and asked about the cut marks, he told that he used to separate them with kitchen knife and other cut marks could be on account of digging. The report is marked as Ext. Ka-18. Surendra Koli was shown a dead body and he was asked to show as to how he used to cut the pieces of dead body and in this connection, he was given a piece of chalk. He deposed that Surendra Koli put marker on separate parts of the body in order to show as to from which point he cut the bodies. The report aforesaid is marked as Ext. Ka-8. Surendra Koli also disclosed that the operation of separating various parts of a body used to entail about three hours. The whole process was photographed by Gautam Rai of CFSL. The report is marked as Ext. Ka-18. The doctors, it is deposed, also affixed their respective signatures on the report. The video cassette was sealed which has been submitted by him and is on the record bearing No. 440 of 2007. In the cross examination, the quintessence of what he stated is that the report was sealed but the

signature of Surendra Koli was not obtained; that on 4.2.2007 at about 11 a.m. Surendra Koli was brought by CBI, and all the members of the board were present but medical report of Surendra Koli was not prepared. He admitted that in the video cassette, a cloth is on both hands of accused A-2. He denied the possibility that CBI had caused injury on the stomach of Surendra Koli and that is why that Surendra Koli is shown keeping both his hands down. He had not found any signs of injury on Surendra Koli. It is stated that Surendra Koli stayed there for about one and half hours. He denied the suggestion that when Surendra Koli was brought, his right hand was broken from shoulder. There was no injury on his face. There is no injury shown in the video. He also denied the suggestion that when Surendra Koli was brought he was tortured or was in tipsy condition.

P.W. 11 Pappu Lal deposed that on 29.12.2006 he was residing in servant quarter of D-2. Police personnel had called him. On the pointing out of Surendra Koli police had recovered bones and other articles from behind House No. D-5, which were 15 in numbers and the memo was also prepared which was signed by him and other witnesses. Copy was given to Surendra Koli and his signature was obtained, (Ext. Ka-23). On the same day, it is deposed, on pointing out of Surendra Koli, one knife was recovered from the water tank situated on the roof and the memo was prepared and he affixed his signatures on the same, which is marked as Ext. Ka-24. He further deposed that on 31st December 2006, he was again called by the police and he had signed the memo which is marked as Ext. Ka-25. He also deposed that in his presence, drain was also scooped and bones were also recovered and memo was prepared which is marked as Ext. Ka-23. On 29.12.2006, on the pointing out of Surendra Koli, large number of clothes, Chunni, and Bra were recovered and recovery memo was also prepared by the police. He also signed the recovery memo, which is marked as Ext. Ka-26. In the cross examination, the quintessence of what he stated is that he is a private servant and has six children. His wife also works. She used to work in D-2. D-2 is adjacent to D-5. Prior to year 2006 he never visited D-5. D-5 is visible from D-2. The service lane of D-5 is not connected with D-2. His daughter was also missing who was aged about 8 years. His daughter was missing from 10.4.2006. On 11.4.2006, he had given a written report to the police. He had no knowledge about the place from where his daughter was missing. He had lodged the report at police station Sector-20. He did not receive any information from any one that his daughter was missing around house no. D-5. The police personnel had called him on 29.12.2006, and when he reached there, large number of people were already present there. He had not seen Moninder there. He admitted that he is not literate. He stated that the bones were packed in polythene and buried under the earth. They were recovered after digging and when he reached there digging was going on.

P.W. 12. Kehar Prasad deposed that he is a native of village Nithari and he is residing there since birth and that his house is in the propinquity of the mosque. He also deposed that on the ground floor, he has a shop and on the first floor there are rooms which are given on rent to rickshaw pullers. About 21/2 to 3 years back, he deposed, Anil Haldar, rickshaw puller was his tenant and used to reside there alongwith his wife and children. His daughter Rimpa Haldar got missing and he had gone to police out post for lodging the report. In the cross examination, he stated that he could not tell about Rimpa Haldar and exhibited his ignorance about the children of Anil Haldar.

P.W. 13 Chandra Shekhar was posted as Metropolitan Magistrate, Patiala House, New Delhi during the period i.e 1st, 2nd and 3rd March, 2007. He deposed that on 1.3.2007, Dr. Miss Kamini Lau, ACMM directed him for recording the statement of accused Surendra Koli under

section 164 Cr.P.C. He had recorded the statement of Surendra Koli under section 164 Cr.P.C. He is present in the court. He deposed that the whole proceeding was video graphed and transcript was also prepared. After recording of the statement he had sealed the statement and sent the same to ACMM in an envelope under the seal of the court. Envelope is on record bearing no. 63/5307. He further deposed that on 1.3.2007, he had received the order, Ext. Ka-36 of the ACMM for recording the statement of Surendra Koli and videography. On 1.3.2007, he had taken Surendra Koli to video conferencing room. He alongwith Surendra Koli and Shyam, Videographer was present there. Before videography, he satisfied himself that the room was properly closed and nobody could make any sign or gesture from outside. At that time, Surendra Koli was not handcuffed. Firstly, he introduced himself to Surendra Koli and he obtained full satisfaction that Surendra Koli was inclined to give his statement voluntarily. He had told him that in case, he recorded his confession, he could be convicted on the basis of said confession. He further asked A-2 if he wanted to get his confession recorded and after getting his nod, he started recording the statement of Surendra Koli. Two copies of videography were prepared. He had also prepared the transcript of the video. Page No. 1 to 48 are the transcripts. He had signed each and every paper of the transcript and Surendra Koli also signed the same. The paper is marked as Ext. Ka-38. This transcript is paper no. 1 to 48 and they were prepared in three days. During the preparation of the transcript, Surendra Koli was present. In preparing the transcript, two stenographers namely Pravin Singhaniya and Kirpal Singh Sajwan were present alongwith him. In the confessional statement, Surendra Koli had disclosed only his involvement clarifying that no other person was involved. He deposed that he got drawn in videography and audiography of the confessional statement as he had been ordered to do so by ACMM regard being had to the seriousness of the crime. In the cross examination, this witness had admitted that on paper no. Ka-38 before obtaining the signature of Surendra Koli, he was made aware of the contents of the same in Hindi. He had put questions to A-2 in Hindi not in English and he had also mentioned the same. He admitted that statement was written in English but he had read it over to him in Hindi. He also stated that Surendra Koli was brought from Central Jail by ASI Shamu or Shanu and no other person was with them. He brought Surendra Koli after lunch on 1.3.2007. He denied the suggestion that when Surendra Koli was brought before him, some injection was administered to him and he lost his senses. It is also denied that statement of Surendra Koli was already written. He could not tell as to when paper No. Ka-29 was prepared by Surendra Koli. He had no knowledge whether this paper was written by Surendra Koli or by any other person. He admitted that on this paper, no date is mentioned. He further admitted that he could not tell as to whether Surendra Koli furnished information separately about the dead bodies or the case. He denied the suggestion that he prepared the statement in consultation with the officers of CBI. In reply to a court question how he had monitored the video and audio conferencing and transcription, he informed that on 1.3.2007, video and audio conferencing was over and he started preparing the transcript on the basis of video audio conferencing but this work could be completed on 3.3.2007. Transcript was prepared by playing the CD and the same was opened each day in the presence of the accused. This transcript was prepared on the basis of videography/audiography.

P.W. 14 Dr. Nandinaini Madhusudan Reddy was posted as Staff Scientist, Laboratory of DNA Finger Printing Services, Hyderabad from February, 2005 to March, 2007. He deposed that he had done his M.Sc. in Biotechnology, PHD in Molecular Genetic and had undergone Post Doctoral Training from Yale University, USA. He supervised about 250 cases of DNA as Staff Scientist. He also deposed that he had done the DNA test of Godhara incident. In connection

with this case, on 9.2.2007, he had received skeleton samples from AIMS and along-with the letter which was received for the report, four boxes were also received containing skeleton remains and blood samples. The letter and the boxes were received on 8.2.2007. On 9.2.2007, Senior Technical Examiner, Sri S.P.R. Prasad had informed Dr. T.D. Dogra about the receipt of the same. The seals of the boxes were intact. After analysis of the skeleton remains and blood samples, he had submitted the report to DIG CBI, New Delhi and the copy of the same was sent to Dr. Dogra. He further deposed that DNA test is a sophisticated scientific test, and every child, it is scientifically believed, received 50-50% chromozomes from his parents. When the DNA test is done on a child, fifty-fifty genetic materials, he deposed, match with the parents. They had compared genetic qualities of the bones with the blood samples and those which were found similar, the report was prepared and sent. They had received 46 blood samples and large number of bones. A team of seven persons was formed for preparing the DNA report because the samples were in a very large number. He was also one of the members of the team. All the seven persons of the team were specialists and he was supervising and coordinative head of the team. The report was completed on 13.3.2007. This report was forwarded by the Director C.D.F.D, (Ext Ka-39). The report, he deposed, runs from page no. 12 to 17 which has been signed by him, Smt. Versha, Psychiatrist and Dr. Anupama Raina, Scientist AIMS. This report was prepared unanimously by them (Ext. Ka-40). Annexure-1 is the list of skeleton remains and paper nos. 18 to 27 are the original of the same. The sample of blood stains which are described in Annexure-2 are paper nos. 28 to 30 which are marked as Ext. Ka-42. Annexure -3 consists of paper nos. 31 to 36 which is the copy of the original, which is marked as Ext. Ka-43. Annexure-4 consists of paper nos. 37 to 45 which is the copy of the original, which is marked as Ext. Ka-44. Annexure-5 consists of paper nos. 46 to 81 which is the copy of the original, which is marked as Ext. Ka-45. According to the reports submitted by him, blood samples of Vandana SarKar and Jatin SarKar matched with the DNA of skeleton remains of his daughter. The blood samples of Smt. Santara Devi and Karanbir matched with the DNA profile of skeleton remains of their biological daughter. The blood samples of Smt. Laxmi and Shri Pappu matched with the DNA profile of skeleton remains of their biological daughter. The blood samples of Smt. Doly Haldar and Shri Anil Haldar matched with the DNA profile of skeleton remains of their biological daughter. DNA profile of Smt. Durga Prasad matched with the skeleton remains of her biological daughter. DNA profile of blood samples of Smt. Sunita and Jhhabbu matched with the skeleton remains of their biological daughter. DNA profile of blood samples of Smt. Urmila matched with the skeleton remains of her biological daughter. DNA profile of Smt. Rita SarKar matched with the skeleton remains of her biological daughter. In the cross examination, the quintessence of what he stated is that in the matter of deceased Rimpa Haldar, blood samples of Doly Haldar, father Anil Haldar and brother Abhijeet Haldar were sent. DNA profile matched with the blood samples of her parents. There is no nexus between DNA and blood group. They had taken out DNA from the teeth of skull and in those cases where DNA could not be obtained from teeth the same have been obtained from the long bones like humerus. He denied the suggestion that he was not present at the time of testing and the report was prepared by some other person. He admitted that DNA profile of two persons could not be same unless both are mono-zygotic twins. He however asserted that DNA test is never wrong and it is always 100% correct. He also suggested that DNA can be taken out from any part of the body except red blood cells. He denied the suggestion that DNA could not be obtained from the skeleton remains of Rimpa Haldar. He denied the suggestion that he prepared the report under the pressure exerted by the CBI.

P.W. 15 Constable Shoraj Singh (CC 117) deposed that on 20.7.2007, he was posted as

constable clerk in Sector 20 NOIDA. On the said date Anil Haldar, son of Munindhar Haldar had brought one written report Ext. Ka-2. He entered the same in the GD No. 61 at 6.50 p.m. The original GD is on the record paper no. 11-A/1. He deposed that the report was regarding the missing of Km. Rimpa Haldar who was aged about 14 years. G.D. is marked as Ext. Ka-46. In the cross examination, he deposed that the informant came alone alongwith the report of missing of his daughter. He had no knowledge who had prepared the report. The written report was brought to him and thumb impression was not affixed in his presence. He denied the suggestion that the report was prepared by him at the police station.

P.W. 16 S.I. Satpal Singh deposed that at the relevant time, he was posted as SI In police station Sector 20 NOIDA. He further deposed that paper no. 9-A/1 was prepared by him on 3.1.2007. He also deposed that Smt. Doly Haldar wife of Anil Haldar R/o Nithari police station Sector 20 accompanied by some one, came to the police station and she was shown a bundle relating to Nithari incident and she had identified a chuuni white coloured and a black coloured bra was also identified by her which she told, Rimpa was wearing last time. He had prepared the recovery memo and the same was sealed and was deposited in the Malkhana. He had prepared the recovery memo in the presence of witnesses of recovery memo, which is marked as Ext. Ka-47. In the cross examination, he deposed that the clothes were identified in his presence. One Shailendra Kumar had accompanied her. The clothes which were identified by the mother of the girl were told to have been worn by the girl last time. A sealed packet was opened and at that time only he was present. He had no knowledge that who had called the mother of the girl and how she reached there. He denied the suggestion that clothes were neither taken out from Malakhana (store-house) nor the same were shown to Doly Haldar. He further denied that it was wrong to say that clothes were lying outside the police station.

P.W. 17 Constable 781 Kunwar Pal deposed that he was posted at the police station since 2005 and on 20.7.2005; Anil Haldar had lodged a report of his missing daughter Km. Rimpa Haldar. A report of missing was noted in GD No. 61 at 6.50 p.m. Original G.D was prepared by constable clerk Shoraj Singh who was posted alongwith him and he recognized his writing, which is marked Ext. Ka-46. Paper No. 62 is special report of missing which in the handwriting of Head Moharrir Rajveer, which is marked as Ext. Ka-48. On 3.1.2007, Colonel Shailesh Prasad had given a report bearing the thumb marks of Doly Haldar and report no. 32 at 5.05 p.m. was registered at case crime no. 3 of 2007 under section 376, 302, 201 I.P.C. Missing report no. 61 of 2005 was altered to offences under section 376, 302, 201 IPC and case was registered accordingly, as would be borne out from G.D. No. 32. Carbon copy is marked as Ext. Ka-41. Report was prepared by Head Moharrir Rajveer which is marked as Ext. Ka-42. In the cross examination, he admitted that GD of missing dated 20.7.2005 was not prepared by him and the same was prepared by Constable Shoraj Singh. He further stated that Doly Haldar came to the police station all alone and the written report was brought by her. He was told that the report was prepared by Colonel Shailesh Prasad. He denied the suggestion that Doly Haldar and Shailesh came to the police station and prepared the report on his instructions.

P.W. 18 Dr. S.L. Vaya, Dy. Director, conducted NARCO and poly graphic tests. The Sessions Judge rejected her testimony on the ground that such tests have no legal value and we also agree with the finding of the Sessions Judge, and therefore, her testimony was rightly eschewed from consideration.

P.W. 19 Shri Gaurav Verma, City Magistrate, deposed that in the month of February, 2007, he was Dy. Collector Gautam Budh Nagar and on the direction of District Magistrate, Gautam Budh Nagar on 2.2.2007, he reported at CBI office, New Delhi. He met there with Inspector

M.S. Phartyal. He told him that blood samples of the family members of the victims are to be taken in his presence. Thereafter he reached AIMS, Delhi alongwith the officials of CBI. Anil Haldar, Smt. Doly Haldar and Abhijit Haldar were present there. On the original DNA report, he recognized the photo which was taken by the CBI. He identified the signature and seal which he had signed, (Ext. Ka-55, 56 and 57). On these forms, he had mentioned that blood samples were taken in his presence and thereafter, he signed and affixed the seal of his office. After obtaining the blood samples they were separately sealed and he had signed and Dr. Anupama Raina also signed on these papers. The left and right thumb marks in the presence of those whose blood samples were also obtained. The samples, he deposed, remained with Dr. Anupama Raina. In the cross examination, he deposed that he did not certify the thumb marks of the victims. He explained that he did not certify the thumb marks because the CBI had not asked him to do so. His signatures do not find place on these forms. These forms were prepared by Dr. Anupama Raina. He also deposed that when the doctors were taking the samples, he was sitting there. He also stated that he had a seal which was affixed. He admitted that the seal for the first time was used. He had taken the seal from his office. The samples were sealed by the doctors of the AIMS in his presence.

P.W. 20 Durga Prasad deposed that on 11.1.2007 police had called him to witness the recoveries. Surendra Koli and M.S. Pandher were also alongwith the police. In his presence Surendra Koli told that he could get the knife recovered which he has used to cut the dead bodies. Chhabbu Lal was also present there. Surendra Koli was taken to D-5 Sector 31. Dwelling on topography, he stated that there was a water tank behind this house and an electric pole was also there. Under the electric pole, digging was done and digging yielded a knife on the pointing out of Surendra Koli and the same was sealed by the police and memo was also prepared. He signed the memo. Copy of the same was given to Surendra Koli. Police personnel had also signed the memo and Chhabbu Lal affixed his thumb marks, (Ext. Ka-58). He had identified the knife in the court. He further deposed that this knife was recovered on the pointing out of Surendra Koli. He identified his signature on the cloth. In the cross examination, he deposed that he was a car driver. On 11.1.2007, he was on leave because his daughter was missing and he was disturbed. On that day, he was present in his house. The police had called him from his house. He had seen the house no.D-5. There is no passage for reaching the place of recovery from the house. The access is from the outside of the building. The place of recovery from the house is approachable within 1 and half minutes. No other person of the public was present there. Only 3-4 police personnel alongwith them were present. The police had not taken out the knife, and it was Surendra Koli who took out the knife. He denied the suggestion that the police had shown him the knife in the police station and he signed there.

P.W. 21 Smt. Sapna Misra, Special Judicial Magistrate (CBI) Ghaziabad deposed that on 7.4.2007 she was posted as Special Judicial Magistrate CBI. In crime No. CBI RC No. 2,3,7,8,10.13, 14, 15 and 17, the clothes and articles recovered by the police and CBI were collected during investigation and received in a sealed condition from CFSL, New Delhi were produced and they prayed to her for getting identification of the those articles done by the family members of the deceased persons. She deposed that she accepted the request of the Inspector CBI. The articles were kept in two boxes and one carton was produced in the court. The seal was opened on her direction. Thirty two sealed envelopes were recovered. The description of the identification is mentioned in the order dated 7.4.2007. The original order is in the file of S.T. No. 439 of 2007. She identified her signature. The order was prepared on her dictation by her stenographer. True copy of the order is marked as Ext. Ka-59. During the

identification proceedings, the relatives of the victims have signed or affixed their thumb impression on item nos. 1 to 7. Item no. 8 is of Mukesh Kumar who is related to the victim Km. Payal and Sunil Vishwas and Smt. Iti Vishwas are parents of victim Pushpa. The signatures and thumb marks were obtained in her presence. In the cross examination, she deposed that she had obtained the signature and thumb marks of those persons who have identified the articles. She admitted that she got signature of Anil Haldar and Doly Haldar and they have signed in their native language i.e Bengali. She admitted that she did not know Bengali. She did not mention their names in Hindi. She had prepared the order on the day when the relatives of the victims were present in the court. She did not know whether the letter was sent to the relatives of the victims on 3.4.2007 and on the said date, this order was passed. She admitted that in the order, it has not been disclosed which of the clothes were identified and only reference to CFSL is mentioned.

P.W. 22 Dr. A. K. Mittal deposed that he was posted as Assistant Director, Scientific Laboratory, Agra in January, 2007. He has experience of 19 years of forensic science. He has inspected more than 100 places of occurrence and submitted his report. He also deposed that Addl. D.G.P. Meerut Zone and Addl. D.G.P. Technical Services required the help of Scientific Laboratory, Agra in connection with Nithari incident. Addl. D.G.P. Technical Service, Lucknow had requested through Fax Dr. J.R. Sethi for deputing a team of C.F.S.L to Nithari. Original copy of the Fax is on the record of S.T. No. 439 and the photo copy of the same is Ext. Ka.-60. On 3.1.2007, Joint Director, Smt. Sangeeta directed him to constitute a team of 7 persons for inquiring at Sector 20 NOIDA on the recovered human skeletons and on other aspects. Copy of the letter is marked as Ext. Ka-61. Team of 7 persons was constituted consisting of the department's specialists including two scientific officers and one photographer. Photo copy of the constitution of the team is marked as Ext. Ka-62. This team remained there from 4.1.2007 to 6.1.2007 in House No. D-5 Sector 31. During the scientific tests, 17 places were marked and in all 81 photos were taken. A test was conducted regarding the presence of blood stains, and also any suspicious looking signs and also other signs. On the place of occurrence in the preliminary enquiry, 21 items were collected on 5.1.2007. 25 Articles were handed over to U.P. Police. A memo of the enquiry was prepared which has been signed by 6 police officers and all the members of the team. photo copy of this report is marked as Ext. Ka-63. It is further deposed that on 6.1.2007, 8 articles were collected which included bones and they were handed over to the police. A memo was also prepared which is marked as Ext. Ka-64. They had also prepared a comprehensive report of test from 4.1.2007 to 6.1.2007. The report was forwarded to S.S.P. Gautam Budh Nagar on 20.1.2007. Photo copy of the same is marked as Ext. Ka-65. In the initial test of item nos. 1 to 9 the same were found positive and the test on item nos. 11 to 13 yielded suspicious spots apart from blood. On 8.1.2007 on the direction of C.J.M. Gautam Budh Nagar S.I. Om Pal Sharma brought skeleton and bones in his office alongwith bundles and parcels which was received by Clerk Shri Rajdeep Kashyap,(Ext. Ka. - 66). On 12.1.2007, a letter was received from the office of CJM Gautam Budh Nagar containing request to return the articles which were required for investigation by CBI. All the articles were handed over to CBI Inspector Ajay Singh. In compliance of the order of CJM Gautam Budh Nagar and S.P. CBI, all the bones and skeleton were handed over, (Ext. Ka-67). All the 17 bundles were received in sealed condition in his office and without breaking the seal they were handed over to CBI. In the cross examination the quintessence of what he stated was that he had received summons from the court but he deposed that in so far as items mentioned at Sl. nos. 1 to 9, in the preliminary examination, it was not mentioned whether it was human blood or of any other. Exhibits 11 to 13 containing blood stains could not be examined. He further

deposed that he had only made preliminary examination.

P.W. 23 Manoj Kumar deposed that he has been residing at house no. Type-1, Water Works compound, Sector 31, NOIDA for the last three years. In the year 2005 also, he was residing at the said address and used to play cricket with his friends. The play-ground where he used to play cricket was facing D-5. He deposed that in the month of March 2005, while he was playing cricket in the field, on being hit the cricket ball fell in the vacant place situated behind D-5. He had scaled the wall of the said house in order to collect the ball. At the time when he was collecting the ball, he saw a piece of flesh resembling human hand which was wrapped in polythene. This gave fright to him and he rushed back with the ball and thereafter, discussed the matter with elders of the locality. He did not go to that place again. It is further deposed that next day, he enquired from the self same elders who told that the police had visited the place and had seen the flesh and that there was nothing to be scared. He also deposed that his statement was recorded by the CBI after efflux of two years of the occurrence. In the cross examination, he stated that he could not tell the precise time and that he did not open the polythene and he was scared. He explained that in the polythene, he found something resembling human hand. He asserted that he had seen it. He however, stated that he did not disclose this fact to other children although the children had curiously enquired. He also explained that he had discussed the matter with local elder Surendra Ji and his own uncle Ram Kishan. He precisely explained that he told them that he had seen a piece of flesh which was looking like a human hand. He could not tell the date and stated that it was beginning of the month of March. He did not inform the police and he never went there again.

P.W.-24, Surendra Singh deposed that he was living near house No. D-5, Sector 31. In the month of March 2005, some children were playing cricket and the ball went behind the gap of D-5. He deposed that when he came back from duty, it had already grown dark and at that time, Manoj had narrated to him that when he had gone to collect his ball behind D-5, he saw some raw flesh packed in polythene there. Upon hearing all this from Manoj, he, in the company of other persons, went to the police outpost situated in sector 26 and apprised them of what was narrated to him. Four police personnel belonging to the said outpost visited the place and inspected the site after scaling over the wall of D-5. However, they did not find anything looking like human flesh and giving articulation to their doubt that it might be some part of animal and some one had might thrown some flesh, the police personnels covered the same with earth. He also deposed that after an efflux of about two years of the incident, C.B.I. has interrogated him. In the cross examination the quintessence of what he stated is that he had seen flesh which was in the middle of the wall of the D-5 and it was at a distance of two ft from D-5. He was alongwith Jai PraKash, Mahendra Verma, Munna etc. They did not lodge any written report. This incident took place in the last week of February 2005 or first week of March 2005. He stated that the polythene was not opened in his presence and the C.B.I. personnel did not dig the place in his presence.

P.W.-25 Dr. Rajendra Singh deposed that he has been serving as Principal Scientific Officer in C.F.S.L from the year 1987 and he has been serving at the present place of posting from the year 2004. Dwelling on his qualification, he stated that he had done his M.Sc., B.Ed, M.Phill and thereafter completed Ph.D. in Physics. He stated that during this period, he had examined about 2500 samples and had appeared as witness in as many as 800 cases. On 13.1.2007, he deposed, he was posted on the same post. He also deposed that he alongwith C.B.I. and public witnesses had gone to sector 31 wherein the house in dispute i.e D-5 leading the

CFSL team. They reached there at about 10 A.M. In his presence bones, clothes smeared with

earth, Chappals and bangles were recovered. They were separately sealed in his presence. Thereafter, while scooping muck from the drains, bones, body parts, clothes, shoes, Chappals were recovered. The recovery continued up till 11.30 p.m. Memo of the recoveries was prepared. He and other witnesses had signed the same, (Ext. Ka-40). On 18.1.2007, he was posted in the C.F.S.L. He had gone to D-5 Sector-31. Surendra Koli was also escorted there and he recognised A-2 who was present in Court. He got recovered an axe from the bushes of lawn and recovery memo was prepared. The axe was seized and recovery memo was prepared. He identified the axe, (Ext. Ka-22). He stated that in his department, a letter was received from S.P., C.B.I. dated 01.02.2007 alongwith Exhibits. Photo copy of letter was marked as Exhibit K-68. They had received 55 sealed and one unsealed parcels which are marked as Exhibit Ka-68. After examination of all the articles, he deposed, they had submitted their report dated 15.3.2007. In the report from page Nos 26 to 34, the opinion/conclusion of the test was mentioned. He explained that his report related to plain edged weapon explaining further Aari (hacksaw) was not a plain edged weapon, (Ext. Ka- 69). On 20.3.2007 and 25.8.2007, he was posted in the C.F.S.L. He had examined weapons employed in the commission of the crime which were recovered by the C.B.I. in his laboratory, which included one axe two knives and opinion was obtained regarding the cutting of human organs with these weapons and after the tests, he opined that it was possible that these weapons were used for cutting of body parts. The weapons were sealed after obtaining their photographs and his report was prepared by the team, (Ext.Ka-70). They had also prepared a drawing according to their measurement and which was signed by the members of the team, (Ext. Ka-71). He identified the writing of Dr. T.D. Dogra who was Professor and Head of the same department. He had signed a letter accompanying the report, (Ext. Ka-72). Lastly, he deposed that after the tests, they came to conclusion that for cutting the body parts, these weapons which he meant axe and knives were made use of for cutting the body parts and that no weapons like Aari (hacksaw) or edged weapons could be said to have been used in the commission of the crime. In the cross examination, the quintessence of what he stated is that on the first day, he went to D-5 colony alongwith his Director Dr. S.R. Singh, Dr. Mahapatra, Dr. Shimla and Videographer Mr. Rai. All of them affixed their signatures on recovery memo. He did not know whether on 13.1.2007, the signatures of accused on the recovery memo were also obtained or not. On the said date, C.B.I. had brought accused. He also stated that in his presence on the disclosure of accused, C.B.I made recovery of an axe. The axe was recovered from the bushes after entering into D-5. The lawn, he explained, was situated in front of the house. The bush was like a creeping plant or straggly sticking to the wall. The axe was hidden in the bush and not embedded in the soil. There were some stains on the axe. He could not tell whether the axe contained blood stained or not without scientific examination. The axe could be used for cutting the body parts. He denied the suggestion that the body parts could not be cut by the axe. On the wooden handle of axe signatures were not obtained. There were two independent witnesses and he could not tell their names. When his team reached house No. D-5, lock on the gate of the house was sealed. He could not tell who had opened the lock. On different occasions different articles were sent to them for examination. The accused escorted by C.B.I. had entered. When they were standing in lawn, accused started unravelling the entire details to them. On 13.1.2007, when he had gone alongwith C.B.I., bones bangles, Chappals were recovered. They were recovered in his presence. They were recovered from behind the house, front drain and drain situated in side of the house. He also deposed that these articles were not recovered on the pointing out of the accused but those articles were recovered in his presence and were sent for examination. They were sealed in his presence. He could not tell the precise number of pairs of Chappals, number of bones, number of clothes and bangles

were recovered. He had mentioned all these things in detailed report. He reached house about 11A.M. and remained there up to 11 P.M. He could not tell the time when the officials of C.B.I. left that place. He denied the suggestion that the axe was not recovered on the pointing out of A-2 and that it was wrongly planted on him. He also denied the suggestion that the report was prepared at the dictate of or on the direction of C.B.I.

P.W.-26 Lieutenant Colonel Shailesh deposed that he had been residing for the last 10 years at A-87 Sector-30, Noida. From 2005 to 2007, Doly Haldar was employed as maid servant doing menial work in his house. He also deposed that she was still serving in his house and she was also working prior to 2005. In the month of February 2005, Rimpa Haldar d/o Doly Haldar went missing. Doly Haldar and her family members made assiduous search for her but she was no-where traceable. On 03.1.2007, he had accompanied Doly Haldar to the police station and in his presence, Doly Haldar had recognised the clothes of her daughter which were sealed by the police. A recovery memo was prepared and he had also signed the same which was marked as Exhibit Ka-47. He deposed that since Doly Haldar was unlettered, he had scribed the report on dictation of Doly Haldar. The report was marked as Exhibit Ka-73. In his cross examination, the quintessence of what he stated was that he had prepared the report at the police station. He denied the suggestion that he had prepared the report on the dictation of Sub Inspector. He denied the suggestion that Doly Haldar could not speak Hindi. After writing the report, firstly he read over contents of report to Doly Haldar and thereafter, she affixed her thumb impression thereon. She had taken Ink pad and paper from the police station for affixing the thumb impression. When he had prepared the F.I.R, husband of Doly Haldar was also present. He was given a table and chair by the police. He had not signed on Exhibit Ka-73. He had mentioned his name as scriber. He denied the suggestion that he had prepared the report at the instance of Sub Inspector. He also denied the suggestion that Doli Haldar did not dictate the contents of the report.

P.W.-27 Smt. Pratibha deposed that she used to go to work in Rail Vihar and used to commute between Rail Vihar Sector 30 and NOIDA and in this connection, she took the route via Sector 31. She identified the accused Surendra Koli who was present in court. She further told that he had accosted her in D-5. She was called by him at about 2 P.M. after she was returning after completing her menial work. He had asked to come inside but she declined. She deposed that he asked her whether she wanted to do cleaning and sweeping work upon which she asked him to call the aunty outside. Thereafter, he went inside and again came out and informed that the aunty was too old and infirm and was unable to walk and again solicited her to come inside and opened the gate but she refused to go inside. Thereafter, she further deposed, he never beckoned or called her. She recalled after the incident of calling, she had seen Surendra Koli twice or thrice on the roof. She also recalled that this incident occurred about 3-4 weeks prior to Nithari incident. She had not seen any other person talking with him. She deposed that Surendra Koli lived near water tank Nithari. Her statement was recorded in Delhi. In the cross examination the quintessence of what she stated is that for the last 10 years she used to commute via the same route and she had not seen Surendra Koli. She was not acquainted with Surendra Koli prior to this occurrence. There were several other routes but this route was the main route convenient to her. When he had called her accused was standing near the main gate and she was standing on the road. She did not know any Suresh, Sunita and Payal. Police did not record her statement. No one came to enquire about the incident. After the incident news reporter came to her house. No police Officer or higher Officer recorded her statement. She was never interrogated nor was she ever called. She could not know how her name came to be mentioned. She did not make any complaint. Surendra Koli called her and she did not go.

She denied the suggestion that C.B.I. had asked her to tell that Surendra Koli called her. She also stated that she was deposing because this reason that Surendra Koli had called her. She denied the suggestion that she was deposing at the behest of C.B.I. She also stated that C.B.I personnel called her today, therefore, she came. Her statement was recorded in the Court but she did not tell the name of that Court. C.B.I. had taken her to that Court.

P.W.-28 Poornima deposed that she was studying in class VIII in Saraswati BaliKa Vidyalaya. At the relevant time, she deposed that she was studying In Class V, in Social Underage Foundation School which is situated in Sector 7 and she used to go to this school via the way which passes in front of house No. D-5. She recognised Surendra Koli. She also deposed that once she was returning from S.O.F School, there were flowers in house No. D-5 and its branches were coming from house No. D-5. He asked her to come inside and collect flower, but she refused to go inside the house stating that her mother would scold her. She returned home. She also deposed that once more she was called by Surendra Koli. She did not remember as to whether she was called by Surendra Koli either prior to this incident or subsequent to it. At that time, she was on way alongwith her two sisters. Both sisters moved ahead leaving behind her. Surendra Koli asked her to come inside on the pretext that the prayers were being held inside the house. She was called around 10 A.M. for prayers. In cross examination, she stated that Surendra Koli had called her only. Her sisters were not called. She also stated that there were other routes for going to school. She used to go her school through this route prior to this occurrence. She never talked to Surendra Koli. When she was called on the pretext of prayer, there seemed to be no one inside the house nor any noise was there. When Surendra Koli was calling her, he was at the gate of house at that time. She did not raise any alarm. She did not lodge any report at police station nor disclosed the incident of flower. The incident was one relating to summer season. At that time several flowers including roses were there. At that time, he was standing out side the gate. She had not plucked the flowers which were hanging outside the wall. She had asked him to give her flower. Prior to this occurrence she never met Surendra Koli. She had not made any complaint. She denied that she was deposing about the incident relating to flower and prayer under the pressure of the C.B.I. She stated that she was interrogated earlier by the CBI. Once she was interrogated in Sector 34 and Tees Hazari Court and her statement was also recorded there. She did not know Mukesh, Sunita and Baby Payal. She denied the suggestion that she was falsely deposing about the incident of flower or prayer on being tutored by C.B.I .

PW-29 Ajai Singh deposed that since 2001, he had been serving in C.B.I. and on 12.1.2007 also he was posted in C.B.I. On the direction of higher Officer on 12.1.2007 he had gone to Vidhi Vigyan Pryogshala, Taj Road, Agra and he had collected 17 sealed packets, post-mortem report etc. from Forensic Lab Agra from Smt. Sangeeta. A list thereof was prepared which was signed by him and Joint Director Sangeeta. Original list was kept by Forensic Department Agra and a copy thereof was given to him alongwith a letter dated 12.1.2007. He had deposited all the articles alongwith list in the Malkhana C.G.O., complex and he did not allow anyone to open. He also deposed that Ishwar Singh constable C.B.I was also alongwith him.

P.W.-30 S.I. Sahastra Pal Singh deposed that on 31.12.2006 he was posted as S.S.I. PS Sector 20, Noida. On that date during the scooping of front drain of house No. D-5 Sector 31, bones, hairs, bangles, Chappals and cloths were recovered. Investigating Officer Dinesh Yadav was also present there. On his direction, he had prepared the recovery memo of bones and he had signed the same, (Ext.Ka-25). In the cross examination he stated that prior to his reaching at D-5 other police force had already reached there. He could not remember whether

he had gone there alone or alongwith someone else. He had reached within 15 minutes. He had gone after 12 O'clock. He stated that he could pinpoint his departure time after seeing in G.D. It is further stated that a large crowd had already gathered. However, he denied that recovery was made in the presence of crowd. The recoveries were made in the presence of witnesses Ram Kishan and Pappu. Surendra Koli was not present there. He denied the suggestion that recovery memo was prepared at the police station. Articles recovered were sealed after cleaning. However, he stated that the fact is not mentioned in the recovery memo.

P.W-31 S.I. Chhotey Singh deposed that on 29.12.2006, he was posted as S.I. Sector 20. On that date Dinesh Yadav C.O, who is the Investigating Officer of Case crime No. 838 of 2006, under sections 366,376,302,201,120B I.P.C., P.S. Sector 20, Noida alongwith him, other police inspectors, police force and Surendra Koli accused had taken him to the place of occurrence on the basis of confessional statement of the accused. The accused had confessed and disclosed that Dipika @ Payal was murdered by him and her skull was buried under the soil behind the house. It was also deposed that the accused also disclosed that her sleepers were also concealed under the soil. He has also disclosed that knife by which her neck was cut was concealed behind the house and remaining part of the body had been thrown in the drain and the knife was concealed in house No. D-5, Sector 30 Noida. He also deposed that on the same day before going to the place of occurrence on the direction of Dinesh Yadav, Moninder Singh was also arrested and they arrived D-5, Sector -31. Large people had already gathered there. For maintaining the peace, S.I. Vinod Pal, S.I. Sukhpal Singh, S.I. Gajendra Singh and others were deployed there. Custody of Surendra Koli was taken and Monindra Singh was also left in the custody of C.O. and other persons out side the house. Witnesses Ram Kishan and Pappu Lal were also associated with the recovery. Surendra Koli reached the place between two walls after jumping from the wall, and the witness also reached there and from the place, a human skeleton was recovered and after cleaning the soil, a pair of sleeper of DeepiKa @ Payal was also found buried there. Recovery memo of chappal was also prepared. He also deposed that A-2 also disclosed that other skulls were also found buried in that area and he could get them recovered. In all 15 human skeletons were recovered from him. Human skulls were also recovered. After the inquest proceeding of bones and skulls, they were sealed in two separate bundles. Station House Officer P.P.Singh Yadav was directed to get the post-mortem and then recovery memo of recovered cloths were prepared and knife and purse were recovered. He had prepared the recovery memo of human skeleton and 15 human skull on the direction of Dinesh Yadav. The original recovery memo, he stated, was on the record of S.T. No. 439 of 2007, and the photo copy of the same was marked as Exhibit Ka-23. In the cross examination he deposed that he had arrested Surendra Koli alongwith Investigating officer on 29.12.2006. Both the accused were arrested on the same day. Surendra Koli was arrested in front of Government Hospital Nithari. He also stated that in arresting accused A-2, S.I. Vinod Pandey, S.I. S.P.Singh, S.I. Gajendra Singh, S.I. Devendra Singh alongwith Dinesh Yadav C.O. had participated. He also stated that A-2 was arrested at 8 A.M. After his arrest he confessed to commission of the crime and thereafter he was taken to the place of occurrence. After the arrest, he was not taken to the police station. He had given his statement at the place where he was arrested. The interrogation entailed about 2 and 3 hours. The proceeding of interrogation was noted down by C.O. Some other persons of public was also present there. He did not ask the name of the witnesses of public. Enquiry was made in his presence. Surendra Koli had disclosed that Payal was murdered by him and her skull was thrown behind the house and body was thrown in the drain and he had volunteered for its recovery. Apart from the name of Payal, he did not divulge the names of any other victims. The recovery from the drain

was made in his presence. Bones were recovered from the drain out side the house. They were recovered about 2 metre away from the wall of house No. D-5. He could not tell whether the drain outside the house No. D-5 was fully covered or not? In his presence the covering of drain was removed. The covering of drain was demolished by bulldozer of Nagar Nigam. Demolition of covering of drain is not mentioned in the recovery memo. On pointing out of Surendra Koli, the skull was recovered after removing the soil. These skulls were recovered from behind the house. Recoveries entailed several hours. He also deposed that the accused A-2 was brought to the police station from the place of occurrence in the evening. Copy of recovery memo was given to Surendra Koli. Before lodging him behind the bar in police station, his body was searched. The witness could not tell about what was recovered from the search of the body of A-2. He denied the suggestion that all the proceedings took place at the police station and they did not go to the place of occurrence. He stated that several persons participated in digging the soil leading to recovery of skulls and Pappu and Kishan were also there and they were assisting in digging.

P.W-32 S.I. Jagat Singh Visht deposed that he was Malkhana Incharge in S.B.C.I., Delhi from March 2000 to 10.4.2007. He is a formal witness and he had deposited the articles/case property and kept the same in sealed condition.

P.W.-33 S.K. Chadhdha deposed that he had been in the service of C.F.S.L. since 1972. During investigation of the Nithari cases, he deposed, a board was constituted consisting of Scientists of C.F.S.L. He also deposed that he alongwith Dr. Rajendra Singh, S.K. Singla, Dr.V.K. Mahapatra, Dr. Gautam Rai, Dr. R.S. Chauhan, Dr. Harnedra Prasad, Dr.Ashok Kumar, Dr.Abhitosh Kumar, Dr.U.S. Thakur formed part of the board. He also deposed that Director C.F.S.L supervised the working of the board. Dweling on his qualification, the witness deposed that he had passed B.Sc., A.I.C.(Chemistry) besides obtaining Certificate Course, Forensic Science and finger print expert examination. He deposed that he has already examined about 2000 cases. He recognised signature (Ext. Ka-76) of Dr. S.R.Singh, Director C.F.S.L. Stating that he was posted alongwith him. Dr. Vibha Rani, he stated, is incharge C.F.S.L. He also recognised her signature (Paper No. 137 A/2 to 137 A/12) (Ext. Ka-77). The witness was shown paper no. 141-A/1 in the writing of Dr. V.K. Mahapatra. He recognised the signature and photo copy is Ext. A-78. The witness was shown paper No. 143/1 to 143/2 which is in the writing of Gautam Rai and he recognised the same and photo copy is marked as Exhibit Ka-79. The witness was also shown Paper No. 144-A original of which is in the S.T. No. 439 of 2007. These papers he stated, were signed by Dr. A.Day and he witnessed the same. Photo copy thereof is marked as Exhibit Ka-80. Paper No.156A/1 to 156A/9, which are on the record of S.T. No. 439/07, he deposed, are in the hand writing of B.K. Mahapatra. He identified the same and photo copy of which is marked as Exhibit Ka-81. He also stated that Paper No. 158A/1, paper No. 158A/2 which are on the record of S.T. No. 439 of 2007 and were signed by Suresh Kumar Singla were identified to be in his hand writing photo copy of which are marked as Exhibit Ka-82 paper No. 160 A/1 to 160A/2 which are on the record of 439 of 2007 were also identified to be in hand writing of Dr. B.K Mahapatra. The witness identified his signature photo copy of which is marked as Exhibit Ka-83. Paper No. 161 A/1 which is on the record of S.T. No. 439 of 2007, bears the signature of S.K.Singla. The witness identified the signatures of S.K.Singla. Photo copy thereof is marked as Exhibit Ka-84. In the cross examination, the quintessence of which is that on 12.1.2007 and on 13.1.2007 he had gone to the place of occurrence. When he reached there, the gate was locked. He stated that C.B.I. did not record his statement. He stated that the recovery memos were prepared of the articles which were recovered from house. The axe smeared with earth was also recovered under the bush inside

the house. Accused Surendra Koli had gone to the place of occurrence on 13th Jan 2007. The axe was recovered on 13th Jan 2007. The articles were recovered from the drain which was situated in front of the house and from the gallery behind the house. The seal of the lock was broken by the C.B.I. and thereafter they entered into the house. He denied the suggestion that recovery was not made in his presence. The memo were prepared in the place of occurrence. He could not tell how many pair of chappals were recovered. He admitted that the reports relating to which he identified the signature of the persons, were not signed by the persons in his presence. He further denied that report was prepared under the pressure of C.B.I.

P.W.-34 S.I. Ram Kishan deposed that he had been serving in C.B.I. S.B.B., Delhi since the year 1978. He further deposed that he had remained posted in this branch from July 2007 to September 2007. He had taken the case property of connected Nithari Case 1(S)/07 to 19 (S)/07 to C.F.S.L., Chandigarh. He had collected the articles on 14.1.2003 in sealed condition and the same were deposited at C.F.S.L.,Chandigarh in sealed condition. He opened the seal and on 14.9.2007, he brought the articles from C.F.S.L., Chandigarh and deposited the same in the C.B.I. Malkhana in sealed condition. Entry on register of Malkhana on page 25, serial No. 105 was made and signed the photo copy of the same which is marked as Exhibit Ka-85. In the cross examination, he deposed that he had collected articles in sealed condition and deposited the same in C.F.S.L. Chandigarh and from Chandigarh, he has deposited the same. He stated that C.F.S.L. had not open the articles in his presence.

P.W. 35 Dinesh Yadav deposed that in the month of December, 2006 he was posted as C.O. City I Gautambudh Nagar. On the order passed by C.J.M. Gautambudh Nagar, case crime no. 838 of 2006 under section 363, 366 was registered at police station Sector 20 NOIDA. The investigation was started by S.I. Simarjeet Kaur. On the order passed by Hon'ble High Court, the investigation was transferred to C.O. City, Gautambudh Nagar and it was entrusted to his predecessor Ramesh Rohtagi. On 27.11.2006, he was appointed investigating officer of the case. S.O.G. Incharge S.P. Singh, Gajendra Singh, Chhotey Singh, Vinod Pandey and the then station house officer, Police station Sector 20 were associated alongwith him. During the investigation on 29.12.2006, Surendra Koli was arrested and was interrogated and he confessed to have committed the murder of Payal alias Dipika and he had concealed her purse, Chappal and weapons and volunteered to get them recovered. He also confessed to have committed murders of other children of Nithari further stating that he (A-2) used to throw the head behind the gallery and body in the drain. He reached D-5 alongwith Surendra Koli and on his pointing out a knife was recovered in the water tank of a Bathroom of the first floor, recovery memo of which was prepared. The original copy of the recovery memo is on the file of S.T. No. 439 of 2007 and the copy of the same is marked as Ext. Ka-24. This witness also identified the knife which was recovered on the pointing out of Surendra Koli. He further deposed that on 29.12.2006, on the pointing out of Surendra Koli, 15 skulls and bones were recovered from the Gallery in the presence of of witnesses Pappu Lal and Ram Kishan. Original recovery memo is on the file of S.T. No. 439 of 2007 and the copy of the same is marked as Ext. Ka. 23. On 31.12.2006, during the scooping of drain in front of D-5 bones bangles and Chappals were recovered and memo was prepared. Original recovery memo is on the file of S.T. No. 439 of 2007 and the copy of the same is marked as Ext. Ka. -25. All the recovered articles were sealed. On his direction, site plan was prepared. Photo copy of the original site plan is Ext. Ka-86. On 11.1.2007, on the pointing out of Surendra Koli, knife was recovered, recovery memo of which was also prepared. Copy of the memo is marked as Ext. Ka-87. He had also identified the knife which was recovered. The skulls and bones which were recovered sent to CFL, Agra on the directions of C.J.M. Gautambudh Nagar. On 5.1.2007 accused was

sent for NARCO test, Polygraphy and brain mapping test to forensic Directorate, Gandhi Nagar, Ahmdabad. In the cross examination, he deposed that two knives were got recovered by Surendra Koli, first knife was recovered on 29.12.2006 and the second on 11.1.2007. The witnesses of recovery memo Pappu, Jhabbu and Ram Kishan are resident of vicinity of D-5. He had arrested Surendra Koli on 29.12.2006 at 8 a.m. After the arrest the accused was brought to the police station. He admitted that Surendra Koli and Muninder were interrogated at the police station on 3.12.2006. He denied the suggestion that he had asked Muninder Singh Pandher to produce Surendra Koli before him. He had no knowledge that Muninder's driver Satpal had brought Surendra Koli on 27.12.2006. He had produced Surendra Koli before C.J.M. Gautambudh Nagar on 30.12.2006 around 3.30 or 4.00 p.m. The statement of Surendra Koli was written on his dictation by his peshKar. On 29.12.2006, no hacksaw was recovered. One hacksaw was recovered but recovery memo was not prepared by him. This hacksaw was without any handle and it was only a blade. On 1.1.2007, recovery memo of hacksaw was prepared on his direction by S.I. R.R. Dixit. On 29.12.2006 S.I. Chhotey Lal was accompanying him. Surendra Koli had confessed to have committed the murder of Payal. In the gallery behind the house, some bones were lying and some were embedded in the earth and they were taken out. He admitted that the drain in front of the house No. D-5 to D-6 was covered and there was a slab in front of D-5 and one slab was broken. The drain was scooped with the help of JCB machine by the employees of Municipal Corporation. On 29.12.2006, a mobile was recovered on the pointing out of Surendra Koli. The slippers of the deceased were recognized by the father of the deceased. The purse of Payal, deceased was also recognized by her father. The father of Rimpa Haldar was not present. He admitted that on 29.12.2006, during search operation, a passport no. 209027 issued from Chandigarh was recovered and he seized the same. This passport was of Muninder Singh Pandher. He further deposed that on the passport on 31.1.2005, immigration seal of Brisbane Airport is affixed and on 15.2.2005, immigration of Indira Gandhi International Airport Delhi is affixed. He has denied the knowledge as to when the seal of immigration is affixed. He admitted that in the immigration seal of Australia, there is no signature. The passport is marked as Ext. Kha-1.

P.W. 36 constable Surendra deposed that in the year 2005, he was posted in CBI. Since January, 2007, he is posted in CBI, SEB-I. On 21.1.2007 he had taken the Nithari case property from SCB-1, Malkhana in sealed condition and deposited the same in the Hyderabad FSL Hyderabad and after the examination, he had deposited back the same in the Malkhana on 5.2.2007 in the sealed condition. He did not allow any one to tamper with the seal. The entry in the Malkhana is marked as Ext. Ka-88. On 16.1.2007, he alongwith Ajay Singh had taken the seized property in the sealed condition to AIMS and he has made the entry to that effect in the issue register which is marked as Ext. Ka-89 on 29.1.2007. He also deposed that he alongwith Ajay Singh had taken the property to CFSL Delhi for testing and on 20.3.2007, he had brought the properties back from CFSL and deposited the same in the Malkhana of CBI. The entry in the Malkhana of CBI is marked as Ext. Ka 90. On 13.4.2007 he had taken the case property in sealed condition alongwith Ajay Singh for testing to AIMS and entry in the register is marked as Ext. Ka-91.

P.W. 37 Inspector M.S. Phartiyal deposed that in the year 2007, he was posted as Inspector CBI, and a team of CBI was constituted for investigating the Nithari case. A notification was issued by the Government on 10.1.2007 (Ext. Ka-92). On 11.1.2007 S.P. Shri Gilani registered the case and investigation was transferred to him. F.I.R. is marked as Ext. Ka-93. For assisting him in the investigation, he deposed, Inspector Ajay Singh, Inspector Stephon and Inspector Layak Ram were also deployed. On 14.1.2007, he interrogated Anil Haldar; on 16.1.2007, he

interrogated Dolly Haldar; on 18.2.2007, he interrogated Pappu Lal; on 11.5.2007, he interrogated Kehar Prasad; on 8.3.2007, he interrogated Durga Prasad; on 18.1.2007, he interrogated Purnima and on 19.4.2007, he interrogated S.I. Chhotey Singh. On his direction, Inspector Stephon recorded the statement of Kunwar Pal on 27.4.2007, statement of Manoj Kumar on 16.3.2007 and statement of Surendra Singh on 11.5.2007. On 30.1.2007, Ajay Singh recorded the statement of Pratima. He had taken the possession of the Boxes prepared by the Inspector of police. During the investigation, Anil Haldar and Dolly Haldar did not tell him that they had visited D-5 on 29.12.2006. He also deposed that he took in possession the original record of the case which was seized by the police and the photo copies there are marked as Ext. Ka-47 and Ext. Ka-46. He had also seized the clothes of the deceased, memo of which was prepared which is marked as Ext. Ka-94. He deposed that on the request of the accused his 164 Cr.P.C. statement was recorded. On 27.2.2007, he deposed that accused (A-2) had given an application in his own writing for confessing the crime, which is marked as Ext. Ka-29 which he filed before the ACMM Patiala House Court with an application on 28.2.2007 where he had been produced. Thereafter, the accused was sent to judicial custody and after receipt of the certificates from Jailer and Doctor (jailer) his (A-2) statement under section 164 Cr.P.C was recorded. He further deposed that when the statement was recorded, he was in judicial custody. His statement was recorded on 1.3.2007 and the confession was video-graphed and audiographed. At the time of recording of the statement neither he nor any officer of C.B.I was present. The witness has identified the accused before the court. He had applied for the copy of the statement of the accused, which is marked as Ext. Ka-37. On 3.3.2007, he had received two CDs, transcript in 48 pages and the receipt thereof is marked as Ext Ka-37. During the investigation, he had got identified the clothes of the deceased. He also deposed that he had submitted the charge sheet against the accused. During the investigation he found that Muninder Singh Pandher was not involved in the crime. There was no evidence against him. During the investigation it was found that from 30.1.2005 to 15.2.20065 Muninder Singh Pandher was in Australia alongwith his wife, therefore, he was not charge sheeted. In the cross examination, he deposed that Surendra Koli was taken in his custody on 21.1.2007. The investigation was transferred to him on 14.1.2007. He had recorded the statement in English and the translation in Hindi was read over to the witnesses. On 14.1.2007, and on 16.1.2007, he deposed that he had visited the place of occurrence. He recorded the statement of Dolly Haldar in Hydel Guest House in the presence of her husband and she told him the colour of the clothes which the deceased was wearing. He had also told that she had recognized the clothes in the police station. He met Dolly Haldar 3-4 times. On 14.1.2007, he had recorded the statement of Anil Haldar, and statement of Dolly Haldar was recorded on 16.1.2007. After recording of 164 statement he had not taken Surendra Koli in custody. He was sent to Jail. He further deposed that on 19.4.2007, he recorded the statement of S.I. Chhotey Singh who told him that all the recoveries were made by Surendra Koli. He had received the papers of all the scientific test of Surendra Koli and Pandher and in none of the report, role of Pandher transpired. During investigation, he found that on 30.1.2005, Muninder Singh Pandher had gone to Australia and he had also inquired about that. All the documents are in the custody of CBI. According to the entries made in the passport, Muninder Singh Pandher returned on 15.2.2005. He could not tell the number of flight. He further deposed that number of flight is mentioned in the charge sheet and the number of flight by which he returned is also mentioned therein. He further deposed that there was no evidence against Muninder Singh Pandher.

P.W. 38 Ramesh Prasad Sharma deposed that he knew Dr. Naveen Chaudhary, whose

bungalow no. is D-6, NOIDA and he works there. He also deposed that the boundaries of D-5 and D-6 are adjacent. He further deposed that he was a cook in D-6 and he reaches there at about 8 or 8.15 a.m and works there till 9 or 10 p.m. Earlier owner of D-5 was Mr. Jindal. He has been working in D-6 for the last about 15-16 years. He also deposed that he knows Surendra Koli and Muninder Singh Pandher well and both are present in the court. They have been living in D-5 since January, 2004. He had seen Surendra Koli who was serving as a servant of Moninder Pandher. He had seen Koli cutting small trees with a small axe between September and October, 2006. During summer, occasionally, he felt foul smell emanating from behind D-5. In the cross examination, he deposed that he did not know in what field his master specialised. He Knows this much that he is M.D. and sits in the office and does not treat the patient. He deposed that Doctor Saheb had purchased D-6 about 12 - 14 years back. He also deposed that it is in his knowledge that his master was arrested in the year 1997 in some kidney scam matter. There are guards posted outside the house and they remain on guard round the clock.

C.W. 1 S.I. Raviraj Dixit deposed that on 1.1.2007, Dinesh Yadav, C.O. had directed him that he should take accused Surendra Koli and Moninder Singh Pandher to the place of recovery for recovery of hacksaw as they had volunteered to get the weapons recovered with which they committed the crime. HCP Sitaram, constable Sarvesh Kumar and constable Jitendra Singh were also accompanying him. He had gone there in a official Jeep driven by Naval Kishore. After reaching D-5, they opened the seal affixed on gate and entered. He also deposed that Surendra Koli entered first followed by Moninder Singh Pandher and they followed the accused persons. He further deposed that the accused persons took them to the first floor of the house and then to the bathroom and both of them got recovered one hacksaw and told that they have committed the murder with this hacksaw. Recovery memo was prepared, which is marked as Ext. Ka-103. In the cross examination the quintessence of what he stated is that this hacksaw was without handle and it was only blade. This hacksaw was got recovered by Surendra Koli and Moninder was standing alongwith him. There was no public witness. There was no mark on the hacksaw. He admitted that there is no reference in G.D. He again admitted that this blade was got recovered by Surendra Koli. On the question being asked by the court are as under :which of the accused persons got recovered the hacksaw to which he answered that both the accused were standing together and hacksaw was got recovered by Surendra Koli. Again he was asked that he has mentioned in the recovery memo that hacksaw was got recovered by both Moninder Pandher and Surendra Koli to which he answered that both were standing together and hacksaw was brought out by Surendra Koli and therefore, he had mentioned the names of both the accused.

D.W. 1 Devendra Kaur wife of Muninder Singh Pandher deposed that on 28.1.2005 she had gone to Australia. She had gone to the house of niece of her husband in Mellbourn and stayed there for a month. Moninder Singh Pandher had gone to Gold Coast, Australia on 30.1.2007 and from there he reached at Mellbourn and he remained alongwith her till 14.2.2005 and returned to India on 15.2.2005. She had brought original passport, copy thereof has been filed in the court. In the cross examination she stated that she has one son, and earlier she used to live in Kaushambi, Ghaziabad. Her husband had purchased D-5 from Sohan Singh. Surendra Koli works in D-5 as a servant. After about 2 - 3 months of shifting in D-5, Surendra Koli started serving as servant. She further stated that they had shifted to D-5 in the year 2004 and Surendra Koli was employed on reference of Sohan Singh.

D.W.-2 Pan Singh deposed that he knows Surendra Koli and Moninder Singh. He is driver of

Moninder Singh. On 25.12.2006 the police had come to the house and they had called Moninder Singh Pandher and Surendra Koli, Surendra Koli had gone to his village. Satpal was sent to call Surendra Koli and Satpal returned alongwith Surendra Koli on 27.12.2006 and thereafter he and Moninder Singh took Surendra Koli to the police station and he was detained there and both of them came back to the house. On 28.12.2006, police came and took away Moninder Singh Pandher. On 29.12.2006 at about 10.20 - 10.35 he reached police station and came back to D-5. He had not seen Moninder Singh Pandher and Surendra Koli on 29.12.2006 and the police reached there about 2.30 or 3.00 p.m. He did not know whether D-5 was sealed. Only one servant Kehar was present there. In the cross examination, he admitted that he is still driver in the company of Pandher. He admitted that when police came, he and Kehar were asked to leave D-5. He did not know whether police reached there at 11.30 as he was not present. He had not seen Surendra Koli and Moninder Singh Pandher in D-5 on that day. He denied the suggestion that he was deposing falsely as he was servant of Moninder Singh Pandher.

The Sessions Judge after evaluating evidence on record, recorded verdict convicting the appellants as afore-stated.

We have heard the learned counsel for the appellants, and also the complainant. We have also heard learned counsel for the State authorities.

Case of accused Surendra Koli (hereinafter referred to as A-2)

Firstly, we will take up the case of A-2 namely, Surendra Koli. As a prologue, it may be noted that the case hinges on circumstantial evidence. The principles of law are well established by catena of decisions of the Apex Court that where the evidence is of circumstantial nature, the facts and circumstances from which the conclusion of guilt is to be deduced and drawn should, in the first instance, be fully established and the facts so established should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of conclusive nature and they should not be explainable on any other hypothesis except that the accused is guilty. In other words, there must be chain of evidence so complete as to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. The Apex Court in various decisions also held that if the murders have been committed in a very cruel and revolting manner, then the evidence should be scrutinised more closely. In the case of Kashmira Singh v. State of M.P.AIR 1952 SC 159, it was observed in para 2 "The murder was particularly cruel and revolting one and for that reason, it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induces an insensitive reaction against a dispassionate judicial scrutiny of the facts and law." In the case of Mausam Singh Roy v. state of West Bengal (2003 Vol 12 SCC 377), the Apex Court observed in para 28 "It is also settled principle of criminal jurisprudence that the more serious a offence, the stricter decree of proof, since a higher degree of assurance is required to convict the accused."

In the light of the above principles, we proceed to deal with the case of Surendra Koli accused appellant. The learned Sessions Judge reckoned with following incriminating circumstances against the accused.

(1) (a) the parents of Rimpa Haldar were tenant in the year 2005 in the house of Kehar Prasad (P.W.2) in village Nithari Sector 31 NOIDA.

(b) A report of missing was lodged by P.W. 1 Anil Haldar and P.W. 5 Doli Haldar on 30.7.2005 about missing of their daughter on 8.2.2005 when she had gone to work in the houses of sector 30 and 29.

(2) Moninder Singh Pandher was owner of D-5 Sector 31 and Surendra Koli was living 24 hours as a servant of Moninder Singh Pandher.

(3) Arrest of accused Surendra Koli and Moninder Singh Pandher in case crime no. 838 of 2006 under section 363, 366 IPC.

(4) On 29.12.2006, after the arrest of accused, on the basis of confessional statement of Surendra Koli, recovery of a knife, chapal, purse, skulls, bones.

(5) Out of recovered articles, Chunni and Bra of Rimpa Haldar which was gone missing on 8.2.2005, were identified by her mother Doli Haldar (P.W.5) and her father (P.W.2).

(6) Surendra Koli was in the habit of standing outside the house and alluring the girls and children on the pretext of arranging work and other allurements.

(7) Recovery of skulls, bones, hair, Chapal, clothes from Nali in front of house and gallery behind the house.

(8) Comparison of D.N.A of relatives of victim and recovered skulls and bones.

(9) Demonstration of procedure of cutting of bodies before committee.

(10) Recovery of another knife on 11.1.2007 on the pointing out of Surendra Koli.

(11) On 18.1.2007, recovery of axe on the pointing out of Surendra Koli in the presence of witnesses.

(12) confessional statement of Surendra Koli.

Incriminating Circumstance no. 1.

In so far as incriminating circumstances as enumerated at instance 1 (a) and (b) are concerned, there is no dispute about this circumstance. Anil Haldar P.W.2 deposed that he alongwith wife and three children were tenant in the house of P.W. 12 Gaya Prasad and Rimpa Haldar had gone missing about 2 and 1/2 years back. P.W. 2 and P. W 5 Doli Haldar deposed that their daughter had gone missing on 8.2.2005 when she had gone for working. They made several attempts for lodging the report but their report was not registered. Thereafter, a report about missing was lodged by Anil Haldar. P.W.15 Clerk Constable Sheo Raj Singh had also admitted that on 20.2.2005, he had registered a case a G.D. Entry no. 61 was made. Constable Kunwar Pal P.W. 17 deposed about lodging of the report. These circumstances have not been called in question by anyone.

Incriminating Circumstance no. 2.

The incriminating circumstance at instance no. 2 is also not in dispute that Moninder Singh Pandher was the owner of house no. D -5 and Surendra Koli was working as his domestic servant.

Incriminating Circumstance no. 3.

Incriminating circumstance no.3 is not disputed that case crime No. 838 of 2006 was registered under section 363 and 364 IPC and was investigated by P.W.35 Dinesh Yadav and on 29.12.2006 Surendra Koli and Moninder Singh Pandher were arrested by him.

Incriminating Circumstance no. 4.

Incriminating circumstance at instance no. 4 relates to various recoveries on 29.12.2006 in pursuance of disclosure statement made by Surendra Koli.

P.W. 11 Pappu Lal is a witness of recovery memo and he has lent full support to recoveries. He is also a witness of recovery memo of knife marked as Ex Ka 24 recovered on the pointing out of Surendra Koli.

P.W. 31 S.I. Chhote Singh also deposed that on 29.12.2006, on the basis of disclosure statement of Surendra Koli that Surendra Koli had committed murder of DipiKa alias Payal and he had buried the skulls in the enclosed gallery of the house and remaining portions were thrown in the Nala. He also confessed to have concealed the knife in his house. P.W. 35 Dinesh Yadav also supported the prosecution case in all its pros and cons.

> (i) The firstly the learned counsel for the appellant fiercely challenged the admissibility of the recovery. Sri Gopal S. Chaturvedi Senior Advocate, canvassed that the disclosure statement was one relating to murder of one Payal and in the disclosure statement name of Rimpa Haldar was not mentioned and therefore,the said recovery cannot be stretched to include the murder of Rimpa haldar.
>
> (ii) The second submission canvassed by Sri Chaturvedi is that the recoveries were not "distinctly" related to the disclosure statement and therefore they are inadmissible. It was further argued that the recoveries were made on several dates and recoveries of 29.12.2006 were distinctly related to disclosure statement of Surinder Kol and it is not certain whether Rimpa Haldar body parts were recovered on 29.12.2006.
>
> (iii) The place of recoveries is outside the house and the place is accessible to all. Therefore, it cannot be presumed that appellant had concealed them.

In support of his statement, the learned counsel cited decision of the Apex Court in Laxman Singh v. State A.W C 1952 SC 167, Ram Kishan v. Mithai Lal Sharma v. State of Maharashtra AIR 1955 SC 104, Qurban Hussain v Mohd. Ahmad AIR 1965 SC 1616, Ranga Billa v. State 1970 SC 1934, Zafar Hussain Datagir v. State of Maharashtra AIR 1971 SC 1831, Thema v. State of Mysore AIR 1971 SC 2016, Buxi Singh v. State of Punjab, Mohd. Inayatullah v. State of Maharashtra AIR 1976 SC 483 Net Raj Singh v. state of M.P. AIR 1973 Vol 3 SCC 525, Sanjai alias KaKa v. State AIR 2001 SC 979, Lamba Ji v. state of Maharashtra 2001 Vol 10 SCC 340, State of Maharashtra v. Praful B. Desai 2003 Vol 4 SCC 601, Amit Singh BhiKam Singh Thakur v. State of Maharashtra 2007 (2) SCC 310Gijaganda Surai v. State of KarnataKa 2007 SCC (Crl.) 135, Hari Singh v. State of Haryana 2008 Vol 3 SCC (Crl.) 246. and Abdul Wahab Abdul Majid v. State of Maharashtra JT 2009 Vol 5 SC 58.

All the decisions cited by Sri Gopal S. Chaturvedi are one relating to applicability of Section 27 of the Evidence Act.

Section 27 of the Evidence Act being germane is excerpted below.

"27. Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence , in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

The confessions made to a police officer and a confession made by any person while he or she is in police custody cannot be proved against that person accused of an offence. Of course, a confession made in the immediate presence of a Magistrate can be proved against him. So also Section 162 Cr. PC bars the reception of any statements made to a police officer in the course of an investigation as evidence against the accused person at any enquiry or trial except to the extent that such statements can be made use of by the accused to contradict the witnesses. Such confessions are excluded for the reason that there is a grave risk of their statements being involuntary and false. Section 27, which unusually starts with a proviso, lifts the ban against the admissibility of the confession/statement made to the police to a limited extent by allowing proof of information of a specified nature furnished by the accused in police custody. In that sense Section 27 is considered to be an exception to the rules embodied in Sections 25 and 26 .

The first requisite condition for utilising Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused.

Though in most of the cases the person who makes the disclosure himself leads the police officer to the place where an object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible under Section 27. It could very well be that on the basis of information furnished by the accused, the investigating officer may go to the spot in the company of other witnesses and recover the material object. By doing so, the investigating officer will be discovering a fact viz. the concealment of an incriminating article and the knowledge of the accused furnishing the information about it. In other words, where the information furnished by the person in custody is verified by the police officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section 27. Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the police officer chooses not to take the informant accused to the spot, it will have no bearing on the point of admissibility under Section 27, though it may

be one of the aspects that goes into evaluation of that particular piece of evidence.

In Mohd Inayatullah v. State of Maharashtra 1976 SCC (Crl.)199, SarKaria, J analysed the ingredients of the section and explained the ambit and nuances of this particular clause in the following words:

"The last but the most important condition is that only ''so much of the information' as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word ''distinctly' means ''directly', ''indubitably', ''strictly', ''unmistaKably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase ''distinctly relates to the fact thereby discovered' is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered." (emphasis in original)

In Anter Singh v. State of Rajasthan (2004 Vol 10 SCC 657, after considering various decisions, the Apex Court has summarised the various requirements of section 27 as follows:

> "(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provisions has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescription relating to relevancy of other evidence connecting it with the crime in order to make facts discovered admissible.
>
> (2) The fact must be discovered.
>
> (3)The discovery must have been in consequence of some information received from the accused and not by the accused's own act.
>
> (4) The person giving information must be accused of an offence.
>
> (5) He must be in the custody of a police officer.
>
> (6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.
>
> (7) Thereupon only that portion of the information which relates distinctly or strictly to the facts discovered can be proved. The rest is inadmissible.

It was further held that the word "distinctly" means directly, indubitably, strictly, unmistakably. The word has been advisedly used to limit and define the scope of probable information. The phrase "distinctly" relates to the fact thereby discovered and and is the lynch-pin of the provisions. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partially lifting of the ban against confessions and statement made to the police is that if a fact is actually discovered in consequence of information given by the accused it affords some guarantee of truth of that part and that part only, of information which was the clear immediate and proximate cause of the discovery. No such guarantee or assurance attaches to

the rest of the statements which may be indirectly or remotely related to the facts discovered. It was further observed that at one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses and that it does not include mental fact. Now, it is fairly settled that the expression "fact discovered" includes not only physical object produced but also a place from which it is produced and the knowledge of the accused as to this.

A perusal of the disclosure statement as deposed by P.W. 35 Dinesh Yadav shows that Surendra Koli confessed and stated to the effect "Payal ilias DeepiKa Ko Mene Mar Diya Hai UsKa Purse, Chappal Tatha Ala Katla Chaku Mene Chhipa Rakhe Hain, Me Baramad Kara Sakta Hoon." He further confessed that "Nithari ke Anya Bachon Ki Bhi Hatyayein Ki Hain Jinke Sar Pichhe Ko Gallery Main Tatha Dhadh Nale Me Phaik Diye Hain" Thereafter skeleton and bodies parts were recovered . The first part of the disclosure statement relating to murder of Payal ilias DeepiKa is inadmissible as it does not relate to recovery of the body parts and knife. The information given by Surendra Koli which led to the discovery of bodies parts and other articles is admissible in evidence under section 27 of the Evidence Act. The submission of the learned counsel for the appellants that disclosure statement is about murder of Payal and not about Rimpa Haldar has no substance.

The next submission advanced across the bar by learned counsel for the appellant that recoveries are not distinctly related to the murder of Rimpla Haldar is not correct that it was disclosure statement which led to recoveries and which subsequently found to be connected with the body remains of Rimpa Haldar. The submission of learned counsel for the appellant that place of recovery is accessible to all, is also not loaded with any substance inasmuch as discoveries were made on the basis of information given by the accused and it was in his exclusive knowledge which led to discovery.

In the case of State of Maharashtra v. Suresh (2000 Vol I SCC 471), the Apex Court has considered the provisions of Section 27 of the Evidence Act and held that "three possibilities are there when an accused points out the place where a dead body or incriminating material was concealed without stating that it was concealed by him. One is that he himself could have concealed it. Second is that he would have seen somebody else concealing it and the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about concealment was on the ground of one of the last two possibilities, the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who could offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well justified course to be adopted by the criminal court that the concealment was made by him. Such an interpretation is not inconsistent with the principles embodied in section 27 of the Evidence Act."

This incriminating circumstance is a pivotal link in the chain of circumstances.

Incriminating Circumstance no. 5

This incriminating circumstance pertains to recovery of Chunni and bra of Rimpa Haldar deceased which she was wearing before her mysterious disappearance. In this connection is relevant the testimony of P.W 5 Doli Haldar, mother of Rimpa Haldar who consequent upon getting news that skeletons, cloths of children, who were missing, have been recovered from

D-5, had gone to the Police station and had identified the Chunni and bra of her daughter namely, Rimpa Haldar. It has also come in her statement that she had identified the above articles before the Magistrate also. In the court, she had identified the Chunni and bra of Rimpa Haldar as Ext I. P.W. 21 Smt. Sapna Misra proved the identification of articles by the relatives of victims and they had signed and affixed their thumb impression. She also deposed that Anil Haldar and Dolly Haldar had signed in their native language i.e. Bengali. It is also worthy of notice to note that she had lodged the first information report after identifying the cloths of her daughter in the police station.

We have very closely scanned her testimony and evidence on record and to sum up, we are of inescapable view that there is no manner of doubt that Chunni and bra which were recovered from D-5 and identified by Doli Haldar P.W. 5 were of Rimpa Haldar. It is also worthy of notice that this witness had lodged the First Information Report after identifying Chunni and bra of her daughter. The tenor of the report which she had lodged also evinces that she did not entertain any shred of doubt about the death of her daughter. In the facts and circumstances, we cannot but lend ear to the practical aspect that no mother can lodge the report of the murder of her daughter only on the basis of mere suspicion. The testimony of P.W.5, Doli Haldar also receives reinforcement from D.N.A test report the essence of which is that D.N.A of one of the skeleton was of biological daughter of Anil Haldar and Dolli Haldar. The suggestion of the defence that Chunni and bra which are alleged to have been identified by P.W. 5 are easily available in the open market, in our opinion, has no grouting in the foundation and therefore, we are of the view that there is nothing on record to discredit or impeach the testimony of P.W.5, and we must say, is fully reliable and inspires full confidence and also finds support from D.N.A. report. In view of the above, we are of irresistible view that the prosecution has successfully proved this incriminating circumstance.

Incriminating circumstance No. 6.

This circumstances pertains to the uncanny habit of Surendra Koli A-2. The version on the record is that he used to lure girls and children into the house i.e. D-5. The learned counsel appearing for the State drew our attention to the evidence which is to the effect that he was in the habit of standing outside the House i.e. D-5 and used to allure girls and children on the pretence of arranging works for them. In order to prop up this circumstance, the prosecution examined P.W. 27 namely Pratibha and P.W. 28 namely Purnima. The quintessence of what Smt. Pratibha P.W. 27 deposed is that she used to go to work in Rail Vihar and thus, used to commute between Rail Vihar Sector 30 and NOIDA and she took the route via Sector 31. She knew Surendra Koli. He had once accosted her to come inside the house on the pretext that maid servant was required for doing house hold work, while she was on way back at about 2 O'clock after finishing menial work. She refused to go inside and instead, asked him that aunty should come out if a maid servant is required upon which he went inside and returned concocting excuse that Mataji was very old and infirm and she was unable to come out and asked her to come inside and then began opening the gate but she did not go inside. Thereafter, it is further deposed, he never accosted her. However, she stated that she had seen him twice or thrice on the roof of D-5. The defence assailed her testimony on the premises that her statement was not recorded by the police and that she was enticed by the C.B.I into giving evidence on dotted line.

We have very carefully examined the testimony. There is no suggestion forthcoming to evince why she was deposing falsely against Surendra Koli. Further no enmity has been suggested. In our considered view, the Sessions Judge rightly placed credence on her testimony.

The next witness examined to prop up the circumstance is P.W. 28 Purnima. At the relevant time, she was studying in class 5th in Social Under-age Foundation School. She identified Surendra Koli in Court and narrated the events to the effect that when she used to go to school through the way passing D-5 and once she was on way back from the School, she had demanded flowers from the branches which were hanging out of boundary wall of D-5. Surendra Koli had called her inside the house to pluck flowers but she refused to go inside stating that her mother would scold her. She further deposed that once again when she was passing through the way in front of D-5 alongwith her sisters and when her sisters went ahead of her, Surendra Koli had accosted her inside on the pretext that Puja was going on but again she refused to go inside.

We have closely scanned her testimony and nothing has been elicited from her cross examination to discredit or impeach her deposition. She admitted that she had not made any complaint to anybody. She also admitted that when he had accosted her, he was standing at the gate and there were other passers-by. She denied the suggestion that she was deposing at the instance of C.B.I. Her testimony lends corroboration to the testimony of P.W. 27 Smt. Pratibha. At the time of her deposition, it would appear, she was only 14 years of age and she was examined after about 2 years of the incident. In our firm opinion, she withstood the test of gruelling and extensive cross examination. Both the testimonies i.e. P.W. 27 and P.W. 28, props up the incriminating circumstances that Surendra Koli was in the habit of standing outside ostensibly on the look out of his next prey and used to give allurements to girls and children.

Incriminating circumstance no. 7.

This circumstance relates to recovery of skulls, bones, Chappals, etc in front of the house D-5 and gallery behind it. In connection with this circumstance, the testimonies of P.W. 3 S.C Misra, P.W. 7 Mukesh Kumar, P.W. 8 Manish Kumar and P.W. 25 Dr. Rajendra Singh are relevant.

The witnesses deposed that on 12.1.2007, 13.1.2007, 15.1.2007 and 16.1.2007, they were present at D-5 and large number of bones, skulls, Chappals etc were recovered from the place in front of D-5. P.W. 3 Satish Chandra Mishra is a senior social worker. He deposed about recovery of bones and skulls on 12.1.2007 from D-5. He quintessentially deposed that recovery memo Ex Ka 6 was prepared by the C.B.I and that on 13.1.2007 bones, shoes, Chappals were recovered and recovery memo Ex. Ka 7 was prepared and he had signed the recovery memo. P.W. 7 Mukesh Kumar is a driver of J.C.B. Machine which was plied to scoop and dredge up the Nala on 15.1.2007. He deposed that he had dredged up the Nala by J.C.B. Machine.

P.W. 8 Dr. Manish Kummath is a senior demonstrator in the Department of Forensic All India Medical Institute. He deposed that on 12.1.2007, he had collected the pieces of bones, Chappals, clips and cloths from D-5 and recovered articles were seized and seizure memo Ex. Ka 13 was prepared. On 13.1.2007 he had collected 58 pieces of bones of different sizes and 47 pieces of dirty cloths, 17 pieces of Chappals of different sizes, lock of hairs, biological material containing soft tissues and bones pieces of plastic wraps, pieces of wire and cable and pieces of bangles. Recovery memo Ex. Ka 14 was prepared. He further deposed that on 15.1.2007,and 16.1.2007 biological materials were collected and recovery memo Ex. Ka 11 and Ex. Ka 12 were prepared. P.W. 25, Dr. Rajendra Singh is Principal Scientific officer Officer,

C.F.S.L New Delhi was present at D-5 alongwith C.B.I and public witnesses and in his presence bones skulls shoes and Chappals were recovered and recovery memo Ex.Ka 14 was prepared. There is nothing on record nor anything has been brought to our notice which may render the testimonies unworthy of reliance and therefore, We are of the view the testimonies of all these witnesses are reliable. P.W. 8, Manish Kummath and P.W. 25 Rajendra Singh are highly qualified persons and there is no plausible or cogent reason on record why they would falsely depose against the accused. The Sessions Judge rightly considered this circumstance and we, in the facts and circumstances, do not propose to differ from the view of the Sessions Judge that the prosecution successfully proved this circumstance also.

Incriminating Circumstance no. 9.

The Sessions Judge has relied upon the testimonies of P.W. 8 Manish Kummath and P.W. 10 Dr. Sanjeev Lalwani in support of this circumstance. These witnesses deposed that a Committee was constituted and he was also one of the members of the said Committee. He further deposed that dead body of one unknown person was shown to Surendra Koli and a piece of Chalk was also given to him so that he could demonstrate the manner in which he used to cut the bodies into pieces and in their presence accused marked the portion of dead body. The Committee thereupon examined recovered bones and found that marking done by Surendra Koli tallied with the marks on the recovered bones. P.W. 10 deposed that A-2 was shown a dead body and he was asked to show as to how he used to cut the pieces of dead body and A-2 put marks on separate parts of the body in order to show as to from which point he cut the bodies. He also disclosed that the operation of separating various parts of a body used to entail three hours.

We have bestowed our thoughtful consideration to the opinion of the committee and the provisions of law and in our opinion report of this committee is not admissible in evidence. It would transpire from the testimony of P.W. 8, Manish Kummath that when Surendra Koli was brought before the committee, he was in police custody. He also deposed that Surendra Koli was asked to demonstrate how he used to cut dead bodies into pieces and thereafter, he marked the portion of dead bodies with chalk. This circumstances amounts to his confession. In this connection, section 26 of the Evidence Act may be noticed and it envisages that no confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

In the case of Aghnoo Nagesia v. State of Bihar AIR 1966 SC 119, paragraphs 13 and 14 being germane to the point under consideration are abstracted below.

> "13. Now, a confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact, i.e., some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also, every other admission of an incriminating fact contained in the statement is part of the confession.

14. If proof of the confession is excluded by any provision of law such as S. 24, S. 25 and S. 26 of the Evidence Act, the entire confessional statement in all its parts including the admissions of minor incriminating facts must also be excluded, unless proof of it is permitted by some other section such as S. 27 of the Evidence Act. Little substance and content would be left in Ss. 24, 25 and 26 if proof of admissions of incriminating facts in a confessional statement is permitted."

Learned A.G.A canvassed that the deposition of P.WS. 10 and P.W. 8 are admissible because sections 24-30 limit the admissibility of statement and the demonstration of cutting of body by A-2 is admissible under section 8 of the Evidence Act. The testimonies of P.W. 8 and P.W. 10 go to show that the demonstration of marking the body parts in response to a question as to how he used to cut the body parts is not admissible under Section 8 of the Evidence Act. In the case of Queen Empress v. Abdullah reported in I.L.R 7 Alld. 3385 (F.B.) (1885), it was held that "If a person was found making such statement without any question first being asked his statement might be regarded as a part of his conduct. But where the statement is made merely in response to some question or suggestion it shows a state of things introduced not by the fact in issue, but by the interposition of some thing else. For these reasons, I think that the signs made by the accused cannot be admitted by way of "conduct" under section 8 of the Evidence Act."

In the instant case the demonstration of A-2 was in response to a question as to how he used to cut the dead body is not admissible under section 8 of the Evidence Act. The Sessions Judge has wrongly relied upon this as an incriminating circumstance which is inadmissible in Evidence Act. We are eschewing this circumstance from consideration.

Incriminating circumstance no. 10

This circumstance relates to recovery of one knife on 11.1.2007 on the pointing out of Surendra Koli. The witness relied upon in support of this circumstance is P.W. 20 Durga Prasad who deposed that on 11.1.2007 in his presence, Surendra Koli got recovered one knife after digging soil under an electric pole. Recovery memo Ex. Ka 58 was prepared. Having considered the matter in entirety, we are of the opinion that this circumstance is admissible under section 27 of the Evidence Act.

Incriminating Circumstance no. 11

This circumstance relates to recovery of axe on the pointing out of Surendra Koli. P.W. 9 Virendra Dagar, P.W. 25 Dr. Rajendra Singh and P.W. 33 S.K.Chadha are the witnesses who were relied upon in support of this circumstance. The witnesses consistently deposed that on 18.1.2007 on the pointing out of Surendra Koli, an axe was recovered. These witnesses are not alleged to have any animus against Surendra Koli nor any such animus has been suggested. This circumstance, we must say, is also admissible.

Incriminating circumstance no. 12

This is the last incriminating circumstance. The witness who was relied upon in connection with this incriminating circumstance is P.W. 13 Chandra Shekhar, Metropolitan Magistrate Patiala House new Delhi. This witness recorded the confessional statement of Surendra Koli in compliance of the order passed by Addl. Chief Metropolitan Magistrate New Delhi.

The act of recording confessions under section 164 of the Code of Criminal Procedure is a very

solemn act and, in discharging his duties under the said section, the Magistrate must take care to see that the requirement of sub-section (3) of Section 164 Cr.P.C. are fully satisfied. It would of course be necessary in every case to put the questions and the questions intended to be put under sub-section (3) of Section 164 Cr.P.C. should not be allowed to become a matter of a mere mechanical enquiry. No element of casualness should be allowed to creep in and the Magistrate should be fully satisfied that the confessional statement which the accused wants to make is in fact and in substance voluntary. The whole object of putting questions to an accused person who offers to confess is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise having reference to the charge against the accused person as mentioned in section 24 of the Indian Evidence Act. There can be no doubt that when an accused person is produced before the Magistrate by the Investigating Officer, it is of utmost importance that the mind of the accused person should be completely freed from any possible influence of the police and the effective way of securing such freedom from fear to the accused person is to send him to Jail custody and given him adequate time to consider whether he should make a confession at all.

Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of influence proceeding from a source interested in the prosecution still lurking in the mind of the accused. In case the Magistrate discovers on such an enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self interest, of course of trial, even if contrive subsequently to retract the confession. Beside administering the caution, warning specifically provided for in the first part of sub-section (2) of Section 164 Cr.P.C., namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow. He should also, in plain language, be assured of protection from any sort of apprehended torture or pressure or such extraneous agent like police, in case he declines to make the statement and he give the assurance that even he declines to make the confession he shall not be remanded to police custody. The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that the statement the accused makes, is not born out of any extraneous influence exerted on him. That indeed is the essence of a "voluntary statement within the meaning of the provisions of Section 164 Cr.P.C.". Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such on the record, proof of compliance that the imperative requirement of the statutory provision, as would satisfy the court that sits in judgement in the case that the confessional statement was made by the accused voluntary and the statutory provisions were strictly complied with. Section 164 of the Code of Criminal Procedure is a salutary provision which lays down certain precautionary rule to be followed by the Magistrate regarding a confession so as to ensure the voluntariness of the confession and the accused be placed in a situation free from threat or influence of the police. Section 164 Cr.P.C. provides for safeguards for an accused. The provisions contained therein are required to be strictly complied with.

In the light of the above, we have carefully examined the testimony of P.W. 13 in order to

judge whether confessional statement has been recorded in accordance with law and whether the confessional statement is voluntary and inspires confidence.

The testimony of P.W. 13 Chandra Shekhar evinces that the confessional statement was recorded by him in a separate room and before recording the statement, he had satisfied himself that no body can see from outside the room. Certain questions were put to the accused and he had introduced himself and also informed him that nobody can compel him for making confessional statement and that he was also explained that he was not bound to make his confessional statement and he was also informed that confessional statement could be used against him and thereafter, the Magistrate was satisfied that the accused was willing to give his statement. He was also satisfied that accused was voluntarily giving his statement and he was satisfied that no fear, coercion or undue pressure was in the mind of the accused and thereafter, his statement was recorded and after recording of the statement, the learned Magistrate gave the requisite memorandum in compliance of section 164 (4) Cr.P.C.

The confessional statement of Surendra Singh Koli in so far as it is relevant to the charges framed against the accused is quoted below.

> "ACHHA; HANJI
>
> MAI GHAR KE AAGE SE NITHARI GAON KE LIYE RAASTA JAATA HAI.
>
> ACHHA; AUR VAHI PE MATLAB RASTE MAI HAMARA GHAR HAI, D-5, SECTOR 31 HAI, MAIN VAHA PAR NAUKRI 2000 JULY, 2004 SE NAUKRI KAR RAHA HOON VAHA PAI, TO USKE BAAD FIR MAI GATE PAR KHADA HO KAR AA JATA THA, TO MAIN PURI TARAH SE PATA NAHI HAI, LEKIN 2005 SHURU SHURU KI BAAT HAI, TO JANUARY YA FEBRUARY KI BAT HAI, TO US TIME MAI GHAR PE AKELA HI THA, TO AIK LADKI SECTOR 30 KE TARAF SE NITHARI KI TARAF AA RAHI THI, JO JISKA NAAM DIKHANE PAR AUR BAAD MAI PATA CHALA KI ISKA NAAM RIMPA HAI, FIR ISKO KAAM KI LIYE MAINE BULA LIYA ANDAR, USKO ANDAR LAATE HI MAINE, USKO BALA, KI SAMNE SE MATLAB JO HAI, ABHI MADAM AA RAHI HAI, MAI PAISE KI BAAT KARWA DETA HOON, HAN AUR JAISE HI WO ANDAR KO DEKH RAHI THI, MAINE PEECHE SE ISI KI CHUNNI SE ISKA GALA DABA KAR AUR ISKO BEHOSH KAR DIYA, AUR USKE BAD ISKE SAATH SEX KARNE KA KOSHISH KIYA, AUR SEX KARNE KA KOSHISH KIYA, THODI DER KOSHISH KARNE KE BAAD, JAB SEX NAHI HO PAYA MERE SE, MAINE GALA DABA KAR ISKO BHI MAR DIYA USI KI CHUNNI SE.

ACHHA; KYON MAR DIYA?

BILKUL, MAN MAIN ISI TARAH KA PRESSURE BANA THA KI ISKO KAAT KAR KHOON KARKE, ACHHA; TO USKE BAAD TURNAT BAAD ISKO UPAR BATHROOM MAI LE KAR GAYA, USI TIME MERE KO KOI YE NAHI THA KI MATLAB, KABHI KOI GHAR PAR AA JAIGA YA KOI BAAT HO JAIGI, YA KUCH HO JAIGA MATLAB MUJHE IS CHEEZ KA KOI WOI NAHI THA MATLAB PATA HI NAHI LAGA, FIR MAINE USKO UPPAR BATHROOM MAI LE KE CHALA GAYA, UPAR BATHROOM ME LE JAR KAR, NEECHE AYA, FIR KITCHEN MAI AAKAR CHAAKOO LE KE GAYA, AUR USI TIME ISKO TURANT KAT KAR KE AUR ISKA MAINE BAJU AUR YE SEENE KA AIK PIECE BHI KHAYA THA, ACHHA; HANJI, JO MAINE GHAR MAI HI MATLAB KITCHEN MAI BANAYA THA.

KITCHEN MAI BANAYA THA?

HANJI AUR JAB MATLAB MATLAB SHAM KO KITNA KHAYA YE MERE KO PURI TARAH SE DHYAN

NAHI HAI, SHAM KO JAB MERE KO CHAR PANCH BAJE MATLAB JAB PURE TARAH SE MAN SHANT HUA, USKE BAAD MAINE DEKHA KI MATLAB KI DRAWING ROOM ME HEE ISKE SARE CHAPPAL WAGARAH SAB DRAWING ROOM MAI HI PADI HUI THI TAB TAK, MATLAB, TAB KOI WO NAHI THA, MATLAB ACHHA; JAISE NASHA TYPE KA, MAI KUCHH NAHI KARTA JAISE MAIN DAROO, PAAN BEDI CIGARETTEE GUTKA KUCH BHI NAHI KHATA, ACHAA; TO IS TARAH KA MERA, MERE KO MAN MAI FEELING HOTI THI, KISI KO KATOON KHAOON KAR KE, KI THODE DIN KE BAAD KI BAAT HAI, KAREEB MAHINA BHAR KE BAAD KI BAAT HAI, USKE BAAD USI LADKI KO MAINE SHAAM KE TIME MAIN JITNA KHAYA USKE BAAD, USSE MAN SHANT HO GAYA, AUR USKE BAD MAIN UPPAR BATHROOM ME GAYA UPAR DEKHA, TO BATHROOM ME USKO KAT KE SAB FAILI HI THI VO, JO MERE KO US TIME KATNE KE TIME KUCH PATA HI NAHI THA KI MAINE ISKO KYA KIYA HAI KARKE, ACHHA; AUR USKE BAAD FIR MAINE USKO DAR KE MAARE FATA FAT PANNIYON MAI BHAR KARKE USKO BATHROOM ME RAKH DIYA AUR DHO KE RAAT KO BAKI UKKO MATLAB GHAR KE PEECHE EK BALLERY HAI, JAHA MATLAB KO AA JA NAHI SAKTA HAI, WAHA GALLERY MAI FAIK DIYA THA USKO."

The testimony of P.W. 13 and confessional statement show that provision of section 164 Cr.P.C have been strictly complied with.

The Sessions Judge has placed credence on the confessional statement. Shri Gopal S. Chaturvedi, Senior Counsel, appearing as amicus curiae for the appellant Surendra Koli assailed the confessional statement on the premises that the confessional statement was not a voluntarily statement as the statement itself smacks that Surendra Koli was tortured by the police; Surendra Koli was in police custody for a very long time. In his confessional statement, Surendra Koli stated that he was shown the photographs of the girls and the names were disclosed by the police. He also stated that he was tortured by the police and the police extracted confession from him. Same photographs which he is alleged to have identified before the police but he had refused to confess the crime before the C.B.I when the self same photographs were shown to him. It was further submitted that during the police custody he was tortured. It is further submitted that it was the duty of the prosecution to establish that the confession was voluntary. He was produced before the Magistrate on 28.2.2007 and on very next day i.e. on 1.3.2007 his confessional statement was recorded. The accused had no sufficient time to become free from the influence of the police; the learned magistrate on 1.3.2007 did not allow much time to the accused for reflection after explaining that he is not bound to make confession. It is further argued that after explaining the provisions of law provided under section 164(2) Cr.P.C. the accused should have been remanded to the judicial custody and thereafter, his confession should have been recorded so that the fear created by the police could wash out from the mind of the accused. The next ground urged for challenge is that the learned magistrate has cross-examined the accused and many incriminating questions were put to him and lastly, it was submitted that videography could not be done for recording the confessional statement as section 164(4) specifically provided that confessional should be recorded in the manner provided in section 281 Cr.P.C.

To give prop to his submissions, Shri Chaturvedi placed reliance on the following decisions of the Apex Court:

Nathu V. State of U.P. reported in AIR 1956 SC 56 - In this case, the Apex Court has observed that "it appears to us that the prolonged custody immediately preceding the making of confession is sufficient, unless it is properly explained, to stamp Exhibit P-15, as involuntary. P.W. 33 made no attempt to explain this unusual circumstance. It is true that with reference to this matter the appellant made various suggestions in the cross examination of P.W. 33, such

as that he was given 'bhang and liquor, or shown pictures or promised to be made an approver, as they have been rejected and rightly as unfounded. But that does not relieve the prosecution from its duty of positively establishing that the confession was voluntary, and for that purpose, it was necessary to prove the circumstances under which this unusual step was taken."

In this case the appellant was kept separately in the custody of CID Inspector from 7.8.1952 to 20.8.1952 and the confession was recorded on 21.8.1952 and the Apex Court had further observed that in coming to that conclusion, the High Court failed to note that P.W. 33 had offered no explanation for keeping the appellant in separate custody from the 7th to 20th August and that is a matter which the prosecution had to explain if the confession made on 21.8.1952 was to be accepted as voluntary.

Aher Raja Khima V. State of Saurashtra AIR 1956 SC 217 - In this case, the Apex Court observed that now the law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. It was further observed that it is abhorrent to our notions of justice and fair play, and is also dangerous, to allow a man to be convicted on the strength of a confession unless it is made voluntarily and unless he realises that anything he say may be used against him; and may attempt by a person in authority to bully a person into making a confession or any threat or coercion would at once invalidate it if the fear was still operating on his mind at the time he makes the confession if it would appear to him reasonable for supposing that by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

Sarwan Singh V. The State of Punjab AIR 1957 SC 637- In this case, the Apex Court held that prima facie whether or not the confession is voluntary would be a question of fact and we would be reluctant to interfere with a finding of such question of fact unless we are satisfied that the impugned finding has been reached without applying the true and relevant legal test in the matter. As in the case of evidence given by the approver, so too unfortunately in the case of the confession of Sarwan Singh the attention of the learned Judges below does not appear to have been drawn to some salient and grave features which have a material bearing on the question about the voluntary character of the confession.

From a glance through this case, it would transpire that Sarwan Singh was arrested on 25th November. His clothes were found to be blood-stained and he is alleged to have been favourably inclined to help the prosecution by making the statement which led to the discovery of incriminating articles. All this happened on the 25th itself and yet, without any ostensible explanation or justification, Sarwan Singh was kept in police custody until 30th November. That is one fact which is to be borne in mind in dealing with the voluntary character of his confession.

What happened on 30th November is still more significant. On this day he was sent to the Magistrate for recording of his confessional statement. The evidence of the Magistrate Mr. Grover shows that the accused was produced before him at about 2.30 p.m. He was given about half an hour to think about the statement which he was going to make and soon thereafter the confessional statement was recorded. The Apex Court had rejected the confessional statement and further observed that "However, speaking generally it would, we think, be reasonable to insist upon giving an accused persons at least 24 hours to decide whether or not he should make a confession. Where there may be a reason to suspect that the

accused has been persuaded or coerced to make a confession, even longer period may have to be given to him before his statement is recorded."

Chinna Gowda V. State of Mysore (1963) 3 SCR 517- In this case the Apex Court had rejected the confessional statement of Manjappa Naika and observed that the record does not show that when Manjappa Naika was produced before the Magistrate on March, 27, 1958 and remanded by him to the judicial custody he was given due warning by the Magistrate and told that he should reflect that whether he should make any confession at all.

Pyare Lal V. State of Rajasthan AIR 1963 SC 1094 - wherein it has been held by the Apex Court that under S. 24 of a confession would be irrelevant if it should appear to the court to have been caused by any inducement, threat or promise. The crucial word is the expression "appears" is "seems". It imports a lesser degree of probability than proof. The standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed. Even so, the laxity of proof permitted does not warrant a court's opinion based on pure surmise. A prima facie opinion based on evidence and circumstance may be adopted as the standard laid down. To rephrase it, on the evidence and the circumstances in a particular case it may appear to the court that there was a threat, inducement or promise, though the said fact is not strictly proved. It is further observed that the threat, inducement or promise must proceed from a person in authority and it is a question of fact in each case whether the person concerned is a man of authority or not. What is more important is that the mere existence of the threat, inducement or promise is not enough but in the opinion of the court, the said threat, inducement or promise shall be sufficient to cause a reasonable belief in the mind of accused that by confessing he would get an advantage or avoid any evil of a temporal nature in reference to the proceeding against him. While the opinion is that of the court, the criteria is the reasonable belief of the accused. The section therefore, makes it clear that it is the duty of the court to place itself in the position of the accused and to form an opinion as to the state of his mind in the circumstances of a case.

Chandran V. The State of Tamil Nadu (1978) 4 SCC 90 - wherein the Apex court has observed that where the Magistrate did not follow the memorandum as required by sub section (4) of section 164 Cr.P.C the Magistrate had certified that "I hope that this statement was made voluntarily". The court had rejected and observed that if, the Magistrate recording a confession of an accused person produced before him in the course of police investigation does not, on the face of the record, certify in clear, categorical term his satisfaction or belief as to the voluntary nature of the confession recorded by him, nor justifies orally as to such satisfaction or belief, the defect would be fatal to the admissibility and use of the confession against the accused at the trial.

In the case of State of M.P. V. Dayaram Hemraj AIR 1981 SC 2007 the confessional statement was not accepted by the courts on the ground " the confessional statement recorded by the Magistrate was in the form of question and answer. The record shows that he was virtually cross examined and whatever he said was in answer to leading questions put by the learned Magistrate.

Shivappa V. Sate of KarnataKa (1995) 2 SCC 76 - wherein the Apex Court has held that "it appears to us quite obvious that the Munsif Magistrate P.W. 13 did not make any serious attempt to ascertain the voluntary character of the confession. The failure of the Magistrate to make real endeavour to ascertain the voluntary character of the confession impels us to hold that evidence on record does not establish that the confessional statement of the appellant

recorded under section 164 Cr.P.C. was voluntary.

Dhanajaya Reddy V. State of KarnataKa (2001) 4 SCC 9- wherein the Apex Court has held that "Omission to comply with the mandatory provisions, one of such being as incorporated in sub-section (4) of Section 164 is likely to render the confessional statement inadmissible. The words "shall be signed by the person making the confession", are mandatory in nature and the Magistrate recording the confession has no option. Mere failure to get the signature of the person making the confession may not be very material if the making of such statement is not dispute by the accused but in cases where the making of the statement itself is in controversy, the omission to get the signature is fatal.

In the case of Babubhai Udesinh Parmar Vs. State of Gujarat (2007) 1 SCC (Crl.) 702 the Apex Court has held that Section 164 provided for safeguards for an accused. The provisions contained therein are required to be strictly complied with. But, it does not envisage compliance with the statutory provisions in a routine or mechanical.

Sri G.S.Chaturvedi, Senior Advocate argued that section 164 Cr.P.C provides manner of recording confessional statement and it should have been recorded in accordance with the procedure prescribed attended with further submission that confessional statement should have been recorded as provided under section 281 Cr.P.C and videography is not permissible and in this connection, emphatically placed credence on paragraphs 7 and 8 of State of U.P. v. Singhara Singh AIR 1964 SC 358 which reads as under:

> "(7) In Nazir Ahmed's case, 63 Inds App 372 :(AIR 1936 PC 253 (2) the Judicial Committee observed that the principle applied in Taylor v. Taylor, (1876) A Ch. D. 426 to a Court, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, applied to judicial officers making a record under S. 164 and, therefore,held that the magistrate could not give oral evidence of the confession made to him which he had purported to record under S. 164 of the Code. It was said that otherwise all the precautions and safeguards laid down in Ss. 164 and 364 , both of which had to be read together, would become of such trifling value as to be almost idle and that "it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves."
>
> (8) The rule adopted in Taylor v. Taylor (1876) 1 Ch D 426, is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore cannot be in the course of investigation record a confession except in the manner laid down in S. 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of S. 164 including the safeguards contained it it for the protection of accused persons would be rendered nugatory.

A perusal of the confessional statement goes to show that the Magistrate before recording confessional statement had strictly followed the provisions of Section 164 Cr.P.C. He had put questions to find out whether he was voluntarily giving statement on oath and he was also warned that the confession can be read against him. He was also satisfied before recording the statement that the accused was free from any kind of coercion or pressure. In the case of Nathu (supra), the Apex Court did not rely on confession regard being had to the fact that on 7.8.1952 to 20.5.1952, he was kept separately in the custody of the C.I.D. Inspector and his confession was recorded on 21.8.1952. No explanation was offered for keeping the appellant in separate custody. Considering this the Apex Court held that that is a matter which the prosecution has to explain if the confession made on 21.8.1952 was to be accepted as voluntarily. Reverting to the present case, it would appear that A-2 was produced before Addl. Chief Metropolitan Magistrate Patiala House in Delhi and he was transferred to judicial custody. On 1.3.2007, he was produced before the Magistrate for recording his confession. He was brought from the judicial custody. It would thus transpire that the facts of Nathu's case being distinguishable from the facts on record, the same cannot be imported for application to the facts of the present case.

The next case relied upon by the learned counsel is Aher Raja Khima (supra), the Apex Court in that case held that before accepting the confession, the court has to be satisfied that it was voluntary and at that stage, the question whether it is true or false, does not arise. In the light of what has been held in the case (supra) we have delved into the facts of the present case. It would transpire that before recording the confession the Magistrate had satisfied himself that the confession was voluntary.

The next case that has been cited for consideration, is Sarwan Singh v. State of Punjab (supra). The Apex Court in that case did not accept the confession of accused Sarwan Singh regard being had to the fact that he was arrested on 25th Nov and his cloths were found to be blood stained and he was kept in police custody uptil 30th Nov. On 30th Nov, he was produced before the Magistrate to record his confessional statement and he was given about half an hour to think about statement which he was going to make and soon thereafter, the confessional statement was recorded. In the instant case, A-2 was produced before Magistrate on 28.2.2007 and he was remanded to judicial custody and confessional statement was recorded on 1.3.2007. There is no discernible illegality in recording of confession.

The learned counsel then cited the case of Chinna Gowda (supra). In that case the Apex Court rejected the confessional statement on the ground that when he was remanded to judicial custody, record does not show that he was given due warning by the Magistrate and told that he should reflect that he should make any confessional at all. Reverting to the facts of the present, it would clearly transpire that the said decision was rendered in different context and on the basis of different facts and hence the same cannot be imported for application to the present case.

In the case of Pyare Lal cited above, the Apex Court held that under section 24 of the Evidence Act, the confession would be irrelevant if it should appear to the court to have been caused by any inducement, threat or promise and it was pointed out that it is the duty of the court to place itself in the position of the accused and to form an opinion as to the state of his mind in the circumstances of the case. Again the ration of that flows from different perspective and facts and hence the same cannot be imported for application to the facts of the present case.

In the case of Chandran (supra), it was observed by the Apex Court that the memorandum as required by sub section (4) of section 164 Cr.P.C in which the Magistrate had certified that " I hope that this statement was made voluntarily" was held to be fatal.

In the case of Shivappa (supra), the Apex Court rejected the confession on the ground that the Magistrate did not make any serous attempt to ascertain the voluntary character of the confession and on this ground confessional statement was rejected. The facts of the present case are totally different. In the instant case, before recording confession, the Magistrate had fully satisfied himself that confession is voluntary and there is no coercion or threat extended to the accused.

In the case of Dhanjaya Reddy (supra), the omission to comply with the mandatory provisions, , one of such being as incorporated in sub section (4) of Section 164 is likely to render the confessional statement inadmissible. Reverting to the facts of the present case, it would transpire that the Magistrate had given memorandum in strict compliance of sub section (4) of Section 164 Cr.P.C. Hence there appears to be basis for importing the ratio to the facts of the present flowing from the decision (supra).

The next decision cited across the bar is Daya Ram Hemraj. In this case the confessional statement was not accepted because it was in the form of question and answer and also record shows that accused was virtually cross examined and whatever he had was in answer to leading question put by the Magistrate. Coming to the facts of the present case, it would appear that no such leading questions were asked by the Magistrate. There is no such cross examination of accused also. Some questions were put to the accused to clarify certain pints but nothing incriminating was elicited by asking some questions. Most of the words of Surendra Koli were repeated by the Magistrate to keep him on the track. Hence, the said decisions is also unavailing qua the present case.

It is also worthy of notice here that no suggestion was made to P.W. 37 namely M.S.Phartiyal that the accused was tortured or coerced to record any confession. In cross examination he admitted that after recording of statement under section 164 Cr.P.C he had not taken Surendra Koli in custody. There is no material on record to suggest that any kind of threat, coercion or inducement was employed to obtain the confessional statement.

The next ground urged for assailing the confessional statement is that there is no provision for videography of the confessional statement and further the same is not admissible in evidence.

We have bestowed our anxious considerations to the submissions of the learned counsel. In this connection, section 4 of the Information and Technology Act 2000 provides that wherein law provides that information or any other matter shall be in writing or in the type written or printed form, then notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is (a) rendered or made available in an electronic form, (b) accessible so as to be useful for subsequent reference.

Section 65 (B) (I) of the Evidence Act being relevant is quoted below.

"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 of any fact stated therein of which direct evidence would be admissible."

In the case of State of U.P. v. Singhara Singh (supra), the Apex Court held that if confession is not recorded in proper form as prescribed by Section 164 read with section 281, it is mere an irregularity which is curable by section 463 on taking evidence that the statement was recorded duly and has not injured the accused in deference on merits. In this case, apart from videography, transcription was also prepared. IN the above conspectus, we feel called to say that the submission of learned counsel is not loaded with any substance and confession is admissible.

Retracted Confession

The confession has been retracted by Surendra Koli when he was examined under section 313 Cr.P.C. It is well settled that a confession, and truthfulness, is an efficacious proof of guilt. The satisfaction of the first test that confession was perfectly voluntary is a sine-qua-non for its admissibility in evidence. If the first test is satisfied, the court must, before acting upon the confession reach the finding that what is stated therein is true and reliable, which judging the reliability of such a confession, or for that matter of any substantive piece of evidence, there is no rigid canon of universal application. The court should carefully examine the confession and compare it with the rest of the evidence in the light of the surrounding circumstances and the probabilities of the case.

In the case of Alok Nath Dutta Vs. State of West Bengal reported in (2007) 12 SCC 230 the Apex Court has observed that in a case where confession is made in the presence of a Magistrate confirming the requirement of section 164, it is retracted at a later stage, the court in our opinion, should probe deeper into the matter. Despite procedural safeguards contained in the said provision, in our opinion, the learned Magistrate should satisfy himself whether the confession was of voluntary nature. It was further observed that in case of retracted confession, the courts while arriving at a finding of guilt would not ordinarily rely solely thereupon and would look forward for corroboration of material particulars. The Apex Court has also observed that however, "we are not unmindful of the fact that in this country retraction are as plentiful as confessions. In a case of retracted confession, the court should evidently be a little slow in accepting the confession although the accused may not be able to fully justify the reasons for his retraction.

In the case of Pooran V. State of Punjab AIR 1953 SC 459, the Apex Court held that caution and prudence in accepting a retracted confession is ordinarily rule. In the case of Balbeer Singh Vs. state of Punjab, reported in AIR 1957 SC 216, it was held that although if a retracted confession is found to be corroborated in material particulars it may be the basis of conviction. In the case of Alok Nath Dutta (Supra) in paragraph 115 the Apex Court has held that "we may notice in 1950s and 1960s corroborative evidence in "material particulars" was the rule". (See Puran, Balbir Singh and Nand Kumar V. State of Rajasthan) A distinctiveness was made in later years in favour of "general corroboration" or "broad corroboration".

It was further observed that whatever be the terminology one rule is almost certain that no judgement of conviction shall be passed on an uncorroborated retracted confession. The court shall consider the materials on record objectively in regard to the reasons for retraction. It must arrive at a finding that the confession was truthful and voluntary. Merit of the confession being the voluntariness and truthfulness, the same, in no circumstances, should be

compromised.

In the light of the above observations made by the Apex Court we see that the confessional statement has been corroborated in material particulars of the case.

(i) in his confessional statement, A-2 has admitted his guilt of killing several children between the year 2005-2006 and after his arrest on his disclosure statement large number of skeletons were recovered;

(ii) in his confessional statement, A-2 has admitted to have killed Rimpa Haldar and according to the DNA report one of the skeletons was of biological daughter of Anil Haldar and Dolly Haldar.

(iii) Chunni and Bra of Rimpa Haldar was also recovered on the basis of his disclosure statement;

(iv) A-2 has admitted that after killing the children he used to throw the body parts in the enclosed gallery or in the Nala situated in front of D-5.

(v) Two knives and one axe was recovered in pursuance of his disclosure statement; He had admitted that he had cut the dead body of Rimpa Haldar into pieces with knife.

(vi) P.W. 23 Manoj Kumar had seen a piece of flesh looking like a human hand behind the gallery in the year 2005;

(vii) In the opinion of the doctor bones were cut by sharp edged weapons as admitted by the accused Surendra Koli in his confession.

(viii) In his confessional statement A-2 has admitted that he used to stand at the gate of D-5 to lure the children and the testimonies of Poornima P.W. 27 and Pratibha P.W. 28 shows that both were tried to be lured by Surendra Koli but fortunately they escaped from his clutch.

(ix) Surendra Koli also admitted that he was living in D-5.

Surendra Koli (A-2) has retracted his confession when he was examined under section 313 Cr.P.C. We are not accepting his retraction for the following reasons.

(1) His confession was recorded by the Magistrate after strictly complying with the provisions of Section 164 Cr.P.C on 1st March 2007 and transcription was made on 2nd and 3rd March 2007. On 2nd and 3rd March 2007 he was brought from judicial custody and remained present throughout the day with P.W. 13 Chandra Shekhar and still he did not evince any desire to retract his confession. During the trial, a suggestion was made that when he was brought before the Magistrate he was injected with some medicine and he became unconscious but in his statement under section 313 Cr.P.C he had not made any such allegation and stated that he was coerced to give statement.

(2) P.W. 37 M.S.Phartiyal was not suggested that there was torture by C.B.I. In his confessional statement he has made allegation only against police which according to him had tortured him and compelled him to identify the photographs of the victims but before C.B.I he had not identified some photographs which are not of his victims. The investigation to C.B.I was transferred on 10th Jan 2007 and he (A-2) was produced before the Magistrate for recording of his confessional statement after a very long time

i.e. 28.2.2007 and confessional statement inspires full confidence.

(3) The confessional statement was recorded on 1.3.2007 and statement under section 313 Cr.P.C was recorded on 11.11.2008 and during this period he did not retract the confession. We are of the view that the retraction of confession is an after-thought and has genesis in advice.

(4) The confession is corroborated in material particulars by other cogent and reliable evidence.

(5) The confessional statement is voluntary and truthful.

In the above conspectus, the conclusion that we converge to, is irresistible that the prosecution has successfully proved all the incriminating circumstances except circumstance no. 8 which is held to be inadmissible in evidence and the chain of circumstances is complete and the Sessions Judge rightly recorded findings of conviction against A-2 which we also affirm

Accused Moninder Singh Pandher (hereinafter referred to as A-1)-

In so far as this accused is concerned, it would transpire that C.B.I did not submit charge sheet against him. M.S.Phartiyal who is arrayed as P.W. 37 was serving in C.B.I as Inspector and he was assigned the investigation of this crime. He deposed that during investigation, he found that complicity of A-1 had not transpired in the crime nor any evidence could be collected against him. He also deposed that during investigation, it was detected that from 30.1.2005 to 15.2.2005, A-1 was away in Australia alongwith his wife". It is in this backdrop that charge sheet was not submitted against him.

It would transpire from the record that an application came to be moved by Anil Haldar P.W. 2 embodying the prayer to summon A-1 under section 319 Cr.P.C citing the ground that on the evidence adduced on behalf of the prosecution, prima facie evidence of involvement of A-1 was found. The grounds for summoning A-1 are substantially as under:

(1) Various murders were committed in house D-5 Sector 31, Noida and Moninder Singh Pandher is the owner of the said house and he resides therein.

(2) On the pointing out of M.S. Pandher, Aari (hacksaw) was recovered .

(3) Deposition of the Doctor that body parts were not cut by Aari (hacksaw) is only his opinion.

(4) In the confessional statement of Surendra Koli under section 164 Cr.P.C. His confession to having committed the crime alone, does not mean that M.S.Pandher was not involved.

We have given our serious thought to the grounds relied upon by the Sessions Judge for exercising power under section 319 Cr.P.C and in our opinion, certain infirmities which are writ large may be noticed here. In our opinion, out of four grounds, grounds 3 and 4 cannot be reckoned with as evidence against A-1.

It may be stated that the learned Sessions Judge summoned Moninder Singh Pandher under section 319 Cr.P.C in fact only on the basis of two incriminating circumstances namely (1) he was the owner of house D-5 where all the murders had been committed and (2) one hacksaw was recovered on the pointing out of Moninder Singh Pandher. The significance of these two

circumstances should be embarked upon for scrutiny on the basis of materials on record. Regarding circumstance no.1 for summoning A-1, there is no dispute but the prosecution evidence is to the effect that on 8.2.2005 when Rimpa Haldar was murdered, he was in Australia and there was no evidence before the Sessions Judge to connect A-1 with the aid of Section 120 B IPC. Anil Haldar P.W. 2 deposed in his testimony in connection with incriminating circumstance No.2. According to P.W. 2, Anil Haldar, recovery of Aari (hacksaw) took place on 29.12.2006. In juxtaposition of the above testimony, we would refer to the testimony of P.W.35, Dinesh Yadav. He deposed that Aari (hacksaw) was recovered on 1.1.2007. He admitted that on 1.1.2007 the hacksaw was recovered but he had not prepared the recovery memo because of the law and order problem. The recovery memo, according to him, was prepared on his direction by S.I. R.R.Dixit. He clarified that the said Aari (hacksaw) was without any handle and it was a simple blade. S.I.Ravi Raj Dixit was summoned by the court and examined as C.W.1. He has stated in his deposition that on 1.1.2007, he was posted at Police Station Sector 20 as Sub Inspector. On that day, Dinesh Yadav had directed him to take Surendra Koli and Moninder Singh Pandher who were in their custody for recovery of Aari (hacksaw). He admitted that Aari (hacksaw) was got recovered by Surendra Koli and Moninder Singh Pandher was accompanying him. He clarified that both were standing together. He also stated that there was no public witness at that time. He again clarified that Aari (hacksaw) was got recovered by Surendra Koli. To a question put by the court as to which of the accused got recovered the Aari (hacksaw), he replied in clearer terms that both the accused were standing together and Aari (hacksaw) was got recovered by Surendra Koli. Again he was confronted with the contents of recovery memo in which substance of what is mentioned is "Surendra and Moninder who were proceeding ahead of others, went to the first floor and then to bathroom and took out one Aari (hacksaw) from the projection above the window (Jungla) behind the curtain which was situated in the bathroom beside the door". He further clarified in his deposition that Surendra and Moninder both were standing together and Surendra Koli handed over the Aari (hacksaw) and therefore, he mentioned the names of both the persons. He also stated that Aari (hacksaw) was recovered on the basis of joint disclosure statements and Aari (hacksaw) was got recovered by Surendra Koli.

In the case of Lachhman Singh v. The State AIR 1952 S.C 167, the Apex Court in para 11 laid down as under:

> "For the purpose of this appeal, however it is sufficient to state that even if the argument put forward on behalf of the appellants, which apparently found favour with the High Court, is correct, the discoveries made at the instance of Swaran Singh cannot be ruled out of consideration. It may be that several of the accused gave information to the police that the dead bodies could be recovered in the Sakinala, which is a stream running over several miles, but such an indefinite information could not lead to any discovery unless the accused followed it up by conducting the police to the actual spot where parts of the two bodies were recovered. From the evidence of the head constable as well as that of Bahadur Singh, it is quite clear that Swaran Singh led the police via Salimpura to a particular spot on Sakinala, and it was at his instance that bloodstained earth was recovered from a place outside the village, and be also pointed out the trunk of the body of Durshan Singh. The learned judges of the High Court were satisfied, as appears from their judgement, that his was "the initial pointing out" and therefore the case was covered even by the rule which, according to the counsel for the appellants, is the rule to be applied in the present case."

It is also relevant to point out that recovery of Aari (hacksaw) was not in pursuance of any disclosure statement. The evidence of P.W. 26, Dinesh Yadav manifests that he deposed only that Aari (hacksaw) was recovered on 1.1.2007 and recovery memo was prepared by R.R.Dixit C.W. 1. The testimony of C.W. 2 manifests that Dinesh Yadav P.W. 35 directed him to take the accused persons to the place of recovery as both have confessed to have committed the murder and that they had agreed to get it recovered. The testimony of C.W.1 has the complexion of hearsay evidence in nature and therefore, the same is inadmissible. The next aspect that comes to the fore front is that the Aari (hacksaw) was recovered without any disclosure statement and therefore it is not admissible under section 27 of the Evidence Act. We have already mentioned in the earlier part of the body of this judgement that Section 27 lifts the ban against the admissibility of the confession/admission made to the police to a limited extent by allowing proof of information of a specified nature furnished by the accused in police custody and in that sense section 27 is considered to be an exception to the rules embodied in sections 25 and 26 of the Evidence Act. In the case of Bahadul v. State of Orissa AIR 1979, SC 1262, the Apex Court in para 4, made the following observation:

"As regards the production of the tangla by the accused before the police, the High Court seems to have relied on it as admissible under section 8 of the Evidence Act. As there is nothing to show that the appellant had made any statement under S. 27 of the Evidence Act relating to the recovery of this weapon hence the factum of recovery thereof cannot be admissible under Section 27 of the Evidence Act. Moreover, what the accused had done was merely to take out the axe from beneath his cot. There is nothing to show that the accused had concealed it at a place which was known to him alone and no one else other than the accused had knowledge of it. In these circumstances, the mere production of the tangla would not be sufficient to convict the appellant."

Another significant feature of the case is that the said Aari (hacksaw) was not connected with the crime. The learned Sessions Judge has framed charges against Surendra Koli which we have already enumerated in the earlier part of the judgement that he had committed the crime with knife/axe. In his confessional statement, Surendra Koli confessed to have cut the dead bodies into pieces with a knife. Therefore, the Aari (hacksaw) was not the weapon of the crime for the purposes of this trial whereas the charge against A-1 is for committing murder of Rimpa Haldar. Even otherwise, the recovery of the Aari (hacksaw) on the pointing out of Surendra Koli cannot be taken to be an incriminating circumstance against A-1.

After summoning, it would appear, M.S.Pandher was charged under section 201, 302, 364 and 376 IPC read with section 120 B IPC. We are also of the opinion that there was no sturdy material before the Sessions Judge warranting summoning of the A-1 under section 319 Cr.P.C. In the case of Brindaban Das and others v. state of West Bengal reported in 2009 (2) SCC (Crl.) 79, the Apex Court has laid down that in matters relating to invocation of powers under section 319 Cr.P.C, the Court is not merely required to take note of the fact that the name of a person who has not been named as an accused in the F.IR has surfaced during the trial, but the Court is also required to consider whether such evidence would be sufficient to convict the person being summoned. It was further observed that the power under section 319 Cr.P.C is to be invoked, not as a matter of course, but in circumstances where the invocation of such power is imperative to secure the ends of justice. The fulcrum on which the invocation of Section 319 Cr.P.C rests, is whether the summoning of persons other than the named accused would make such a difference to the prosecution as would enable it not only to prove its case but to also secure the conviction of the persons summoned. It is only logical that there

must be substantive evidence against a person in order to summon him for trial, although he is not named in the charge sheet or he has been discharged from the case, which would warrant his prosecution thereafter with a good chance of his conviction.

Another infirmity that comes to the fore front is that after the summoning of A-1 the Sessions Judge did not order retrial of A-1 which is mandatory under section 319 Cr.P.C. Section 319 Cr.P.C being germane to the point under discussion is excerpted below.

> "319. Power to proceed against other persons appearing to be guilty of offence:- (1) Where, in the course of any inquiry into, or trial of an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
>
> (2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
>
> (3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial or, the offence which he appears to have committed.
>
> (4) Where the Court proceeds against any person under sub-section (1), then-
>
> > (a) the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard;
> >
> > (b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

In Shashi Kant Singh v. Tarkeshwar Singh (2002 (v) SCC 738, paragraph 9 being relevant on the point is excerpted below.

> "9. The intention of the provision here is that wherein the course of any enquiry into or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the court, it would not be sufficient to only tender the witnesses for the cross examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross examination of the newly added accused is the mandate of section 319 (4). The words "could be tried together with the accused" in section 319 (1) appear to be only directory. "could be" cannot under these circumstances be held to be "must be". The provision cannot be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person can

not be tried together with the accused who was before the court when order under section 319 (1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the court on the basis of the evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the court."

The learned counsel for the complainant submitted that the following witnesses were recalled by the accused A-1 and no prejudice is caused to him.

(1) P.W. 2 Anil Haldar, (2) P.W.16 Satya Pal Singh, (3) P.W. 3 Shastrapal Singh, (4) P.W. 35, Dinesh Yadav, (5) P.W. 37 M.S.Phartyal and (6) P.W. 38 Ramesh Prasad.

On 11.8.2008, the counsel appearing for A-1 appended endorsement that they do not propose to cross examine any other witnesses. Tendering of witnesses only for cross examination is not sanctified by the Code of Criminal Procedure. It will be pertinent at this stage to refer to section 138 of the Evidence Act which provides as under:

"138. Order of examinations - Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not to be confined to the facts which the witness testified on his examination-in-chief.

Direction of re-examination - The re-examination shall be directed to the explanation of matters referred to in cross-examination, and if new matter by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

The aforesaid view we are taking receives reinforcement from the decision of Sukhwant Singh v. State of Punjab (1995) 3 SCC 367 in which the Apex Court ruled as under:

"Section 138 envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by the prosecution. There is, in our opinion, no meaning in tendering a witness for cross examination. Tendering of a witness for cross examination, as a matter of fact, amounts to giving up of the witness by the prosecution as it does not choose to examine him in-chief."

It is worthy of mention that the provisions of section 319 Cr.P.C. are mandatory. Section 319 (4) envisages that a proceeding in respect of such person shall be commenced afresh and witnesses reheard. The Apex Court in Shashi Kant Singh (supra) has held that fresh examination-in-chief and not only their presentation for the purpose of cross examination of the newly added accused is the mandate of section 319 (4) of the Cr.P.C.

Section 273 Cr.P.C being also relevant to the point under discussion is excerpted below.

"273. Evidence to be taken in presence of accused:- Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

Explanation - In this Section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code."

On the point under discussion, we may usefully refer to a vintage decision which still holds good and it is Bigan Singh v. King Emperor AIR 1928 Patna 143, the quintessence of what has been held is that "The provisions of S. 353 (Section 273 in New Code) require that with certain exceptions the evidence should be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader. A contravention of this express provision does not come within the description of error, omission or irregularity and the waiver of any objection by the accused's pleader on this score does not improve the case of the prosecution."

The next decision which also is of pivotal importance is Sukanraj v. State of Rajasthan AIR 1967 Rajasthan 267. It was held there in to the effect-"In my opinion, the provisions of Section 537 of the Code of Criminal Procedure cannot be attracted to cure a defect of procedure which infringes the mandatory requirement of the Code. This violation is clearly an illegality and not an irregularity."

In view the above, there can be no doubt that the trial of Moninder Singh Pandher was vitiated.

Sri B.P.Singh Thakre, Senior Advocate prayed that the case of A-1 be remanded for re-trial as he admits that there is infringement of section 319 Cr.P.C. which has been held to be mandatory.

We have given our anxious considerations to the submission made across the bar by Sri Thakre Senior Advocate requesting for remand of the case for retrial of the appellant Moninder Singh Pandher on the ground of violation of section 319 (4) Cr.P.C. This Court under section 386 (b), in an appeal from a conviction-, it brooks no dispute, is empowered to reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial. The appellant Moninder Singh Pandher has been sentenced to death. Under section 368 Cr.P.C, it is envisaged, the High Court may order retrial on the same and an amended charge. In the case of Rama Shanker Singh v. state of West Bengal , 1962, SC 1239, the Apex Court held to the effect-"The sentence of death passed by the Court of Sessions in a reference under Section 374 of the Code cannot be executed unless it be confirmed by the High Court. Under section 376 Cr.P.C. The High Court dealing with a case submitted to it under section 374 (1) may confirm the sentence or pass any other sentence warranted by law, or (b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or ? may acquit the accused person. These powers are manifestly of wide amplitude and exercise thereof is not restricted by the provisions of section 418 (1) and 423 of the Code of Criminal Procedure, irrespective of whether the accused who is sentenced to death, prefers an appeal, the High Court is bound to consider the evidence and arrive at an independent conclusion as to the guilt or innocence of the accused and this the High Court must do even if the trial of the accused was held by jury." It was further observed that "The High Court had also to consider what order should be passed on the reference under section 374, and to decide on an appraisal of the evidence whether the order of conviction for the offences for which the accused were convicted was justified, and whether, having regard to the circumstances, the sentence of death was the appropriate sentence."

In the case of Subhash v. State of U.P (1976) 3 SCC 629, para 6 of the said judgement being

relevant is quoted below.

"Before referring to the evidence in the case, it has to be mentioned that the High Court had before it not only the appeal filed by the accused but also a reference made by the Sessions Court for confirmation of the capital sentence under section 374 of the Code of Criminal Procedure. Time and again, this Court has pointed out that on a reference for confirmation of the sentence of death, the High Court is under an obligation to proceed in accordance with the provisions of sections 375 and 376 of the Criminal Procedure Code. Under these sections, the High Court must not only see whether the order passed by the Sessions Court is correct but it is under an obligation to examine the entire evidence for itself, apart from and independently of the Sessions Court's appraisal and assessment of that evidence. From the long line of decisions which have taken this view, it would be enough to refer to the decisions in Jumman v. State of Punjab, Rama Shanker Singh v. State of West Bengal and Bhupendra Singh v. State of Punjab."

In the case of Ukha Kohle v. State of Maharashtra, AIR 1963 SC 1531, the para 11 of the said decision being relevant on the point is excerpted below.

> "11. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was for reasons over which he had no control, prevented from leading or tendering evidence material to the charge and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again."

Reliance was placed in the said decision on Ramanlal Rathi v. the State AIR 1951 Cal 305 and Harries, C. J., observed as under:

> "If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example if evidence had been wrongly rejected which should have been admitted or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case".

Having considered the above decisions and regard being had to the facts on record,after the appraisal of entire evidence, we do not propose to direct for retrial inasmuch as we have converged to the firm opinion that there is no admissible evidence against A-1 in this case.

Now we will reckon with the incriminating circumstances relied upon by the trial court for convicting accused A-1. The incriminating circumstances are enumerated to the effect-

> (1) In the disputed kothi D-5 Sector 31, NOIDA, Moninder Singh Pandher was residing continuously from the year 2004 till the disclosure of Nithari incident and Surendra Koli was living in the self same Kothi as a servant,

(2) Dozens of murders relating to Nithari were committed in this very Kothi.

(3) Pieces of dead bodies were thrown after wrapping them in polythene in the front of D-5 and behind the gallery and

(4) Confessional statement of Surendra Koli.

Incriminating circumstance no. 1- There is no dispute about this circumstance. Ownership of D-5 is not in dispute and it also brooks no dispute that Surendra Koli was employed as domestic servant.

The Sessions Judge considered the testimony of P.W. 38, Ramesh Prasad Sharma who deposed that A-1 and A-2 are residing in the house in question from around January 2004. He has seen Surendra Koli (A-2) working as a servant. It is also relevant to mention this incriminating circumstance relied upon by the Sessions Judge against A-2. The Sessions Judge mentioned that Moninder Singh Pandher was owner of D-5 Sector 31 and Surendra Koli was living 24 hours (round the clock) as a domestic servant of Moninder Singh. There is no evidence that A-1 was present in D-5 on 8.2.2005. On the contrary, there is uncorroborated testimony of P.W. 37 M.S.Phartiyal on record which bears out that A-1 was in Australia from 30.1.2005 to 15.2.2005. D.W. 1 Smt.Devendra Kaur also deposed that A-1 was with him in Australia from 30.1.2005 to 15.2.2005 and her testimony is also not challenged. As regard summoning on the basis of incriminating evidence, the plea of alibi was rejected by the Sessions Judge. It may usefully be stated that the trial court held that the burden of proof of his plea of alibi was of A-1. He had examined his wife Devendra Kaur as D.W. 2 which is a secondary evidence and if the plea of alibi is claimed, the burden lies on the accused to prove and the burden would not shift to the C.B.I to discharge it. It appears that the trial court wanted the accused to examine himself to discharge this burden. The evidence of D.W. 1 was not a secondary evidence. Her testimony propounding alibi is not assailed. No suggestion was made to D.W. 1 that Moninder Singh Pandher was not in Australia during the period between 30.1.2005 to 15.2.2005. In connection with this aspect, we may advert to a decision of the Apex Court in State of U.P. v. Babu Ram (2000) 4 SCC 515 in which the Hon. Court ruled as under:

> "Depositions of witnesses, whether they are examined on the prosecution side or defence side or as court witnesses, are oral evidence in the case and hence, the scrutiny thereof shall be without any predilection or bias. No witness is entitled to get better treatment merely because he was examined as a prosecution witness or even as a court witness. It is judicial scrutiny which is warranted in respect of the depositions of all witnesses for which different yardstick cannot be prescribed as for those different categories of witnesses." (Emphasis supplied)

Another aspect worthy of notice is that it was not the case of the prosecution that A-1 was in house D-5 on the particular date. The testimony of P.W. 37 is crystal clear that he did not find any evidence incriminating A-1 and that he was in Australia. In such circumstances, it cannot be said that there was a burden to be discharged by the A-1. There was no witness on the record who had spoken about the presence of A-1 in D-5 on 8.2.2005 when Rimpa Haldar was murdered. In view of Section 315 (1) (b) Cr.P.C it is postulated that accused failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial. It is also necessary to mention that in order to discharge the burden, accused can rely on the material brought on record and he need not examine himself. In this connection,

we may refer to the case of Krishna Janardhan Bhat v. Dattatrya G Hegde reported in (2008) 4 SCC 54, in which the Apex Court observed that an accused for discharging the burden of proof placed upon him under a statute, need not examine himself. He may discharge his burden on the basis of the materials brought on record. An accused has a constitutional right to maintain silence. The courts below committed a serious error in proceeding on the basis that for proving the defence, the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the court is not a correctly oriented approach. The Sessions Judge has erroneously considered this circumstance as incriminating circumstance against A-1.

Incriminating Circumstances 2 and 3- These circumstances relate to various murders committed in D-5 and recovery of body parts. The Sessions Judge has reckoned with that in the confessional statement, wherein Surendra Koli admitted that he had committed various murders and dead bodies were thrown outside and behind D-5. A large number of skulls, bones and biological materials were recovered and the learned Sessions Judge likened D-5 to not less than a slaughter house further observing that foul smell must be emanating within a radius of one km and it is difficult to believe how people who were residing in the building, did not have any knowledge of the carnage. In the face of this observation, let us refer to confessional statement. The statement revealed that one lady or girl was murdered after an interval of every month or one month and a quarter and her body parts were thrown in the gallery and in the Nala and before decomposition of one body another murder was committed. It is beyond comprehension how this circumstance is reckoned to be incriminating to A-1. There is no such evidence on record that there was foul smell within an area of one Km. Again there is no evidence that there was foul smell. On the contrary, the testimony of P.W. 38 namely, R.P.Sharma runs to the effect that during summer, he occasionally felt foul smell emanating from behind D-5. During investigation of the case, several persons visited D-5 and no one spoke about any foul smell pervading the house. In his confessional statement it is clarified by Surendra Koli that he used to throw the body parts after wrapping them in polythene and therefore, chances of foul smell were very bleak.

In connection with the above, let us delve into the decision of the Apex Court in Tanvi Ben v. PanKaj Kumar Divetia v. state of Gujarat, AIR 1997 SC 2193, the Apex Court laid down that "This Court has clearly sounded a note of caution that in case depending largely upon circumstantial evidence, there is always danger that conjectures and surmises may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of innocence of the accused." Reverting to the facts of the instant case, it brooks no dispute that all the murders have been committed inside D-5 and Sessions Judge relied upon confession of A-2 in which he has confessed to have committed all the murders including that of Rimpa Haldar.

The last incriminating circumstance alluded to by the learned Sessions Judge is that in the confessional statement, Surendra Koli stated that prior to joining service as servant of Moninder Singh Pandher, he had worked in several houses but he never indulged in such offences. The reason for that is that Moninder Singh Pandher used to bring call-girls and sometime he used to bring 2 or 3 girls. He used to sleep alongwith two or three girls. When these girls used to come to his house, Surendra Koli used to cook and Moninder Singh Pandher used to revel in drinking liquor with them. Watching Moninder Singh Pandher in indulging all these activities, it is stated, criminal propensity and lust accentuated in him and gradually,

overtaken by criminal propensity, he used to commit murder. The confessional statement shows that when Moninder Singh Pandher was not bringing in girls, then his mind did not detract and when Moninder Singh repeated this behaviour again, his criminal propensity used to be aroused.

It appears that the Sessions Judge reckoned with the circumstance of the lascivious habit of A-1 of bringing in call girls to D-5, an act of debauchery as disclosed in the confessional statement of Surendra Koli. This habit of A-1 could hardly be understood as incriminating circumstance to attract the provision of Section 120 B IPC. Having considered the matter in all its ramifications, we must say that this incriminating circumstance does not commend itself for attracting the provision of Section 120 B IPC. The basic ingredients of Criminal Conspiracy are (a) an agreement between two or more persons (b) an agreement must relate to doing or causing to be done either (i) an illegal act or (ii) an act which is not illegal in itself but is done by illegal means. It therefore leave no manner of doubt that meeting of mind of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. The act of A-1 in bringing girls to D-5 (one of them was Payal) cannot qualify to be covered under the definition of conspiracy for committing the murder of Rimpa Haldar. If we closely examine the confessional statement of Surendra Koli, it would crystallise that there was no meeting of mind between A-1 and A-2 to lure Rimpa Haldar inside the house and commit various offences. There is not an iota of evidence to attract the provision of section 120-B I.P.C. against A-1 qua confession of A-2 under section 30 of the Evidence Act. It is also worthy of notice here that this incriminating circumstance is based on confessional statement of co accused.

Section 30 of the Evidence Act postulates that when more persons than one are being tried jointly for the same offences and confession made by one such person affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such person as well as against the person who makes such confession. Explanation to it, postulates that offence as used in section includes abetment or attempt to commit the offence.

In the case of Badri Prasad Prajapti Vs. State of M.P. 2005 Crl. L.J. 1856 (MB) the court observed as under:

(i) there must be joint trial for the same offence

(ii) it must be a confessional

(iii) the confession of guilt must affect himself and others, i.e. implicate the maker substantially to the same incident as the other accused;

(iv) the confession of guilt must be proved.

In the instant case, the confession does not have an adverse impact upon A-1. Both A-1 and A-2 were tried together for committing the murder of Rimpa Haldar. The only provision in the Evidence Act which provides for admissibility of confession of co-accused is section 30. which cannot be brought to bear for application to the present case. There is no crucial material in the confession of A -2 impinging upon A-1 regarding the murder of Rimpa Haldar for which he is charged with. On the other hand, confessional statement of Surendra Koli as regards Rimpa Haldar excludes the involvement of any other person. He specifically mentioned that at that time, he was alone in the house. The relevant portion of confessional statement regarding

Rimpa Haldar is mentioned in the earlier part of judgement where we were dealing with incriminating circumstance no. 12 against Surendra Koli. The Sessions Judge erroneously relied upon the confession of Surendra Koli against A-1 inasmuch as in view of Section 30 of the Evidence Act, this cannot be read against A-1.

The object of the section 313 Cr.P.C is to give an accused an opportunity to explain the incriminating circumstances being cited against him. Section 313 Cr.P.C being relevant is excerpted below:

313. Power to examine the accused :--(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court -

> (a) may, at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;
>
> (b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:
>
> > Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under Clause (b).
>
> (2) No oath shall be administered to the accused when he is examined under sub-section (1).
>
> (3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.
>
> (4)The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for, or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

A-1 was examined under section 313 Cr.P.C. on three dates but no question regarding the murder of Rimpa Haldar, it would appear, was put to the accused. Question no. 1 pivots on the evidence of P.W. 38, Ramesh Prasad Sharma, who had seen A-1 in D-5. Question no. 2 relates to Surendra Koli who was a domestic servant in the house of A-1. Question no. 3 relates to the statement of Anil Haldar regarding recovery of Aari (hacksaw) on 29.12.2006. Question no. 4 relates to the statement of P.W. 2 Anil Haldar who had heard him saying that Payal had taken Rs. 2500/- for one night stand and she was blackmailing him. Question no. 5 relates to the statement of P.W. 2 Anil Haldar who had heard that A-1 had asked A-2 to commit murder of Payal. No other circumstance was put to the accused. Again, he was examined under section 313 Cr.P.C. and he was asked about the statement of C.W. 1 S.I. R.R. Dikshit who stated that on 1.1.2007 A-1 alongwith A-2 had reached D-5 and both alongwith the police party went inside the house; that Surendra Koli was ahead of A-1. The Next question relates to the recovery of Aari (hacksaw) on the pointing out of Surendra Koli. Again the statement under Section 313 Cr.P.C. was recorded in which question was put regarding the confessional statement of Surendra Koli by the Metropolitan Magistrate, Delhi. The next question is about the confessional statement of Surendra Koli in which he disclosed that A-1 used to bring girls and used to sleep with them in D-5. Sector 31 NOIDA and out of them, one girl was Payal. The Sessions judge could not cull out any inculpatory part of Surendra Koli's statement leaning

against A-1. The only thing construed unfavourably to accused Moninder Singh Pandher was that A-1 used to bring girls in his house and one of them was Payal but nothing has been asked regarding the charge of conspiracy of murder of Rimpa Haldar and other offences.

In the conspectus of the above discussions made above, we converge to the irresistible view that there is no evidence on record against A-1 and therefore, we are not inclined to remand the case, as prayed for by the counsel for the complainant for re-trial under section 319 Cr.P.C.

We can fully understand that though the case superficially viewed bears an ugly look so as to prima facie shock the conscience of any court, yet suspicion however great it may be, cannot take the place of legal proof. A moral conviction, however, strong or genuine cannot amount to a legal conviction supportable in law.

The findings of conviction recorded by the trial court against A-1 are set aside and he is acquitted of the charges levelled against him.

Adverse remarks against P.W. 13, P.W. 37 and counsel for C.B.I.

The Sessions Judge as we have been able to glean from the judgement, before reckoning with the incriminating circumstances against A-1, had made certain observations in paragraph 74 which in fact have the complexion of adverse remarks against the Investigating officer arrayed as P.W. 37, against the Magistrate arrayed as P.W. 13 and also against the learned counsel representing the C.B.I. The learned Sessions Judge, it would transpire, concurred with the arguments of the learned counsel for the complainant. The first reason advanced in the judgement for impeaching the impartiality of the C.B.I is that the memo of recovery of the Aari (hacksaw) was surreptitiously withheld by the C.B.I. In connection with the above, the trial court referred to the deposition of P.W. 35 Dinesh Yadav. This witness admitted that when the case was transferred to C.B.I, all the documents were made over to the C.B.I and the C.B.I did not forward the recovery memo of the Aari (hacksaw) to the court. In connection with this, reliance was placed on Section 173 (6) of the Cr.P.C. Having traversed upon the decision of the trial court, we feel called to say that the learned Sessions Judge misconstrued the provisions of Section 173 (6) Cr.P.C. To prop up our view, we would refer to section 173 (5) of the Cr.P.C which envisages that the police officer shall forward to the Magistrate alongwith report (a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation, (b) the statements under section 161 Cr.P.C of all the persons whom the prosecution proposes to examine as its witnesses. In both the clauses, the discretion is of the prosecution to forward only those documents on which it intends to rely or examine those witnesses on which the prosecution proposes to rely. Section 173 (7) also vests the prosecution with discretion and it postulates that where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of or any of the documents referred to in sub section (5). Section 173 (6) refers to those statements and documents which are forwarded to the Magistrate under section 173 (5) Cr.P.C. This provision permits the police officer to request the Magistrate to exclude from the copies to be granted to the accused (a) any part of such statement which is not relevant to subject matter of the proceeding, (b) that its disclosure to the accused is not essential in the interest of justice and is inexpedient in the public interest.

It is also pertinent to point out here that Dr. Rajendra Singh P.W. 25 who is, by all reckoning, an absolutely independent witness, deposed that the Aari (hacksaw) was not used in the

crime. The learned Sessions has, in her judgement, remarked that there was no occasion for the Doctor to have given any such opinion when Aari (hacksaw) was not sent for examination. The Sessions Judge further remarked that Doctor should have deposed only in respect of knife and axe which were sent for his opinion. It was this testimony that led the Sessions Judge to remark that Dr. Rajendra Singh P.W. 25 was helping the accused. During cross examination, it would appear, no question was put to Dr. Rajendra Singh for his clarification and by this reckoning, we feel compelled to say that the learned Sessions Judge was not justified in drawing any adverse inference in making such remarks which cast reflection upon the integrity and impartiality of the witness.

P.W. 13 Chandra Shekhar, A.C.M.M Delhi had recorded the confessional statement of A-2. During recording of confessional statement of A-2, the learned Magistrate, it would transpire, had queried specifically whether any other person was involved alongwith him to which he replied in clearer terms that no other person was involved alongwith him. The learned Sessions Judge also animadverted upon the impartiality of P.W. 13 Chandra Shekhar as to why he had asked this question. We have scanned his testimony and it would transpire that during his cross examination, his attention was not drawn to this fact. In the above perspective, we feel constrained to say that the learned Sessions Judge was not justified in making any adverse comment against P.W. 13 Chandra Shekhar and P.W. 25 Dr. Rajendra Singh. We may again refer to what the learned Sessions Judge observed in her judgement. The learned Sessions Judge at one place observed that confessional statement was voluntary, truthful and without any coercion and in the next breath at another place, she cast severe doubt about the voluntariness, and truthfulness of the confessional statement which is nothing but blowing hot and cold in the same breath.

It is also worthy of notice that no question was posed to P.W. 13 Chandra Shekhar and P.W. 37 M.S.Phartiyal regarding their conduct. The settled position in law is that unless witnesses are confronted, no adverse inference should have been drawn. In this connection, we may refer to decision of the Apex Court in Sunil Kumar v. State of Rajasthan reported in 2005 SCC (Crl.) 654 in which it was observed as under:

> "Additionally, no question was asked of the Investigating officer as to the reason for the alleged delayed dispatch of the F.I.R. Had this been done, the investigating officer could have explained the circumstances. That having not been done, no adverse inference can be drawn."

Another aspect which induced the learned Sessions Judge to impeach the impartiality of C.B.I is that P.W. 37, M.S.Phartiyal had admitted in his deposition that during investigation, he found that A-1 was in Australia between the period 30.1.2005 to 15.2.2005 alongwith his wife and further that the counsel appearing for the C.B.I did not advance arguments qua the culpability of A-1. The C.B.I is represented by Sri H.Ahaluwalia, Punit Ahaluwali, J.P.Singh and S.C.Bahar and it is observed that they did not advance arguments against A-1 although prima facie evidence was found against A-1 and he was summoned under section 302, 364, 376 read with section 120-B and 201 IPC. It was further observed by the learned Sessions Judge that these counsel were duty bound to assist the court and not telling the prosecution case as it is. In so far as conduct of lawyers representing C.B.I is concerned, we must say, there was no plausible material before the C.B.I for connecting A-1 with the crime. In so far as Anil Haldar P.W. 2 is concerned, looking to what he has stated in his statement, our doubt on the impartiality of this witness is heightened. The aspect which arouses our suspicion about him are that he deposed that on 29.12.2006, Aari (hacksaw) was recovered and he was present in

D-5. He further deposed that Moninder Singh Pandher was telling that he had paid Rs. 2000/- to Payal for one night stand and she was blackmailing him and consequently, he asked his servant to do away with her. His statement that he had gone to D-5 on 29.12.2006 when Aari (hacksaw) was recovered does not inspire confidence. There is unambiguous evidence that Aari (hacksaw) was recovered on 1.1.2007. Another reason which heightens doubt in our mind about the veracity of the testimony of P.W. 2 is that his wife had lodged the report on 3.1.2007 against A-1 and A-2 but the report is reticent about recovery of Aari (hacksaw) or about statement of Moninder Singh Pandher given to the police officer. It is also worthy of notice that the Sessions Judge did not attribute recovery of Aari (hacksaw) either to A-1 or A-2 nor it is mentioned as incriminating circumstance against A-1 and yet the Sessions Judge let out scathing remarks against the counsel for the C.B.I.

As we have been able to cull out from the materials on record, the C.B.I chose not to file charge sheet against the appellant Moninder Singh Pandher for the following reasons; firstly, no evidence or material connecting him with the crime had been elicited in the investigation; secondly, appellant Moninder Singh Pandher was abroad and his passport and endorsement thereon showed that he was in Australia during the period betwen30.1.2005 to 15.2.2005. The summoning of Moninder Singh under section 319 Cr.P.C was on the application of complainant's counsel. It is not the case that A-1 was summoned suo motu by the court or on the application of C.B.I. Regard being had to the discussions made at prolix length above, we may sum up that the Sessions Judge was harsh in criticising the conduct of the witnesses and the counsel for the C.B.I. In our considered view, the comment and criticism was neither called for nor justified as there is nothing on record to show that the witnesses were helping A-1 and therefore it will be too much to impute motive to the witnesses. In State of U.P. v. Mohd. Naim AIR 1964 SC 703, the Apex Court in the matter of disparaging comments by courts, laid down that "it is relevant to consider (a) Whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct." Be that as it may, the criticisms embodied in the judgement against P.W. 13, P.W. 37 and counsels for the C.B.I are unwarranted and without any valid basis and therefore, the same are ordered to be expunged in suo motu exercise of power under section 482 Cr.P.C.

In connection with the above, we may refer to Popular Muthaiah's case reported in 2006 Vol 7 SCC 296, the quintessence of what has been held therein is that inherent power can be exercised concurrently with the appellate or revisional jurisdiction and no formal application is required to be filed there-for.

Lastly, the question that arises for our anxious consideration is whether imposition of death sentence to the appellant Surendra Koli in the facts and circumstances of the case is justified?

Under the old code of criminal Procedure, ample discretion was given to the courts to pass death sentence as a general proposition and the alternative sentence of life term could be awarded in exceptional circumstances, that too after advancing special reasons for making this departure from the general rule. The new Code of 1973 has entirely reversed the rule. A sentence for imprisonment for life is now the rule and capital sentence is an exception. It has also been made obligatory on the courts to record special reasons if ultimately death sentence is to be awarded. A Constitutional Bench of the Supreme Court in the case of Bachan Singh Vs. State of Punjab A.I.R. 1980 898 while upholding the constitutional validity of the death sentence voiced that as a legal principle death sentence is still awardable but only in rarest of

rare cases when the alternative option of lesser sentence is unquestionably foreclosed.

Coming to the aspect whether penalties of death should be sustained in the facts and circumstances of the case, we feel called to advert to the guidelines laid down in stream of decisions commencing from Bachan Singh v. State of Punjab 1980 (2) SCC 684 and thereafter reiterated in subsequent decisions namely Machchi Singh v. State of Punjab 1983 (3) SCC 470 and Devender Pal Singh v. State of N.C.T. Of Delhi 2002 (5) SCC 234. The guidelines laid down in Bachan Singh's case (Supra) may be culled out as under:

> (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty, the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the crime.
>
> (iii) Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

In Machchi Singh and others v. State of Punjab (1983), the Supreme Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in Bachan Singh to cases where the "collective conscience" of a community may be shocked. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between aggravating and mitigating circumstances.

In Devender Pal Singh's case (Supra), the Apex Court regard being had to both the cases supra, expanded the formulation for imposing extreme penalty. The guidelines may be abstracted below as under:

> 1. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.
>
> 2. When the murder is committed for a motive which evinces total depravity and meanness e.g. Murder by hired assassin for money or reward, or cold blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.
>
> 3. When murder of a member of a Scheduled Caste or minority community etc is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of bride burning or dowry deaths or when murder is committed in order to re-marry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

4. When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons or a particular caste, community, or locality are committed.

5.When the victim of murder is an innocent child or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community."

On a comparative study of mitigating and aggravating circumstances, the learned Sessions embodied her view on the aspect in the judgement impugned herein. While dwelling on the question of quantum of punishment, she summed up the woeful and eerie feature of the case and gave vent to her view stating that gravity of the crime committed by the accused is indeed shocking to the conscience. She has summed up that the accused person has ravished a poor, hapless girl and thus, he has committed a gruesome cold blooded heinous atrocious and cruel crime which has hardly any parallel in the history. She further observed that the crime committed by the accused could not have been committed even in the era when there was no civilization. Again, it was observed that a comparative study of the arguments advanced across the bar leads her to observe that on one hand humanity is crying for security and on the other hand bewailing parents of an innocent girl are crying for being shielded from the misdemeanour of the lustful ravishers. She further observed that innocent girl has fallen prey to the hands of beasty ravishers and the incident is indeed shocking, tragic, lachrymose, hair raising, and heart rending. She further observed that an innocent girl of 14 years was subjected to beasty ravishment and subsequently, she was killed in a most brutal and blood curdling manner and not only this, her body was chopped into pieces and after wrapping the parts in polythene the same were thrown. She has also observed that barbarity of the accused did not stop at it; he also cooked some selected parts of the body and used to consume the same with frenzy.

The incident and events thereafter as have been unravelled in the case are most distressing and indeed shocking and stir the conscience and disturb the equanimity.

We have considered the submissions of counsel for the appellant as to what should be the punishment in the totality of circumstances. That the appellant is father of two children, could hardly constitute a mitigating circumstance in the facts and circumstances of the present case.

The crime indulged in by A-2 is not only gruesome, and cold but blooded, blood curdling, heinous, atrocious and cruel and in the totality of circumstances, we would not forbear from expressing that the accused Surendra Koli is a menace to the society. In the facts and circumstances of the case, option of awarding sentence of life imprisonment is unquestionably foreclosed. It brooks no dispute that it is in exceptional case where the crime committed by accused is so gruesome, diabolical and revolting which shocks the collective conscience of the community that the accused be visited with death penalties. There cannot be any doubt that the case of accused A-2 falls within the category of the rarest of rare cases. The depraved and brutish acts of Surendra Koli call for only one sentence and that is death sentence. We agree with the reasoning of the Sessions Judge awarding death sentence and affirm the sentence of death awarded by the trial court to Surendra Koli.

It is also clarified that the findings recorded by us are only confined to the murder of Rimpa Haldar and the court below shall not be import any observation/comments in the body of this judgement for being applied to the decision while hearing other cases relating to Nithari

incident.

Lastly, we record our hearty appreciation for the able service and assistance rendered by Sri Gopal S.Chaturvedi Senior Advocate Amicus Curiae assisted by Sri Samit Gopal Advocate in the true spirit of friend and officer of the Court.

The appeal of Moninder Singh Pandher (A-1) is allowed. His conviction and sentence awarded by the trial court is set aside and he is acquitted of the charges levelled against him. He shall be set at liberty forthwith unless wanted in any other case.

The appeal of Surendra Koli (A-2) who is incarcerated in jail is dismissed. His conviction and sentences awarded by the trial court are affirmed.

In the above conspectus, the reference in sofar as it relates to Moninder Singh Pandher is not accepted. The reference in sofar as Surendra Koli is concerned, is accepted.

MH

Sept 11, 2009