

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 14th January, 2010*
Judgment Delivered on: 19th February, 2010

+ **CRL.APPEAL No.626/2008**

SANDY @ VED PRAKASH & ORS.Appellants
Through: Mr.R.N.Mittal, Sr.Advocate with
Mr.Manoj Kumar and Mr.Nitin Sharma,
Advocates

Versus

STATERespondent
Through: Mr.M.N.Dudeja, Advocate

CRL.APPEAL No.690/2008

JASBIR @ LILLYAppellant
Through: Mr.D.C.Mathur, Sr.Advocate with
Mr.Rakesh Kumar and Mr.Suwarn
Rajan, Advocates

Versus

STATERespondent
Through: Mr.M.N.Dudeja, Advocate

CRL.APPEAL No.42/2010

DEVENDER @ KALAAppellant
Through: Mr.Manoj Kumar and Mr.Nitin Sharma,
Advocates

Versus

STATERespondent
Through: Mr.M.N.Dudeja, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 21.05.2008, the appellants; Devender @ Kala s/o Ram Kumar, Sandy @ Ved Prakash s/o Rajpal, Sanjay s/o Zile Singh, Sheel @ Sushil s/o Mahabir Singh and Jasbir @ Lily s/o Balbir Singh, have been convicted for the offences punishable under Section 376(2)(g) IPC and Section 306 IPC read with Section 34 IPC. For the offence punishable under Section 376(2)(g) IPC, the appellants have been sentenced to undergo imprisonment for life and pay fine in sum of Rs.5,000/-; in default to undergo simple imprisonment for a period of six months. For the offence punishable under Section 306 IPC read with Section 34 IPC, the appellants have been sentenced to undergo rigorous imprisonment for a period of five years and pay fine in sum of Rs.5,000/-; in default to undergo simple imprisonment for a period of six months.

2. The broad contours of the case set up by the prosecution against the appellants is that in the afternoon of 12.01.2002 when one Ms.'B' (herein after referred to as the "Deceased") was on her way to the agricultural fields owned

by her family, the appellants caught hold of her and committed rape upon her. On being raped by the appellants, the deceased felt so humiliated that she decided to end her life and on returning home consumed sulphas tablets. The deceased also administered sulphas tablets to her three years old daughter Kumari 'K'. The deceased and her daughter were removed to the hospital where the daughter of the deceased survived but the life of the deceased could not be saved. Before her death, the deceased wrote the names of the appellants on a slip of paper and told her brother-in-law Rajesh PW-1, mother-in-law Chand Kaur PW-5 and brother Sartaj PW-10, that she had been raped by the persons whose names she had written on the aforesaid slip of paper. Further the deceased also told HC Surender Kumar PW-23, that the appellants have raped her at the time when he was removing her to the hospital, i.e. the deceased made two declarations pertaining to the circumstances of her death soon before she died the same day.

3. The fact that the deceased died a suicidal death is not in dispute. The fact that the deceased committed suicide by consuming sulphas tablets is also not in dispute.

4. We need not note the investigation conducted by the police in the present case save and except the facts pertaining to the seizure of slip of paper on which the deceased had purportedly written the names of the appellants soon before the death, the post-mortem report Ex.PW-14/A of the deceased and the FSL report Ex.PW-33/A for the reason nothing much turns thereon. Of course we have to note the testimony of the witnesses who have deposed of the facts of what the deceased told them.

5. Relevant would it be to note that on 12.01.2002 at about 01.30 P.M. Dr.Pankaj Kumar examined the deceased at the time when she was admitted in the hospital and prepared the MLC Ex.PW-37/C of the deceased. The relevant portion of the MLC Ex.PW-37/C of the deceased reads as under:-

“Alleged H/o Gang by many (? 4 in no.) people”

6. Thereafter at around 2.00 P.M. Dr.Divya Aggarwal PW-2, examined the deceased and prepared the MLC Ex.PW-2/A of the deceased. The relevant portion of the MLC Ex.PW-2/A of the deceased reads as under:-

“There is no mark of injury seen on back, breast, axiller or abdomen or thigh or perineum.....

....Mark of semen on xiphisternum and abdomen”

7. After conducting the medical examination of the deceased, Dr.Divya Aggarwal PW-2, handed over the vaginal swab of the deceased to Const. Chand Ram PW-32, who handed over the same to SI Satbir Singh PW-34, the police officer entrusted with the investigation of the present case, who seized the same vide memo Ex.PW-34/C.

8. On the same day i.e. 12.01.2002 SI Satbir Singh PW-34, seized the slip of paper Ex.PW-1/B on which the deceased had purportedly written the names of the appellants soon before her death from the residence of the deceased vide memo Ex.PW-34/A. A perusal of the aforesaid slip of paper Ex.PW-1/B shows that following five names/words are written thereon:- (i) Sady (ii) Seel (iii) Ram Kuwar (iv) Zale Ka (v)Lily.

9. Since the deceased could not be saved by the doctors and she died, on 13.01.2002 the body of the deceased was sent to the mortuary of Safdarjung Hospital where Dr.Komal Singh PW-14, conducted the post-mortem of the deceased and prepared the report Ex.PW-14/A. The post-mortem Ex.PW14/A of the deceased records that the possibility of rape being committed upon the deceased

cannot be ruled out. It is relevant to note that the post-mortem report Ex.PW-14/A of the deceased records that '*Alleged H/o committing suicide consumption of Al. phosphide tablets, after been raped by four people as per FIR 9/2002 dtd 12.1.2002*'. The post-mortem report Ex.PW-14/A of the deceased further records that following injuries were found on the person of the deceased:-

“There were nail marks over-

(a) inner surface of left leg 1 cm X 5 mm

(b) outer surface of left leg 2 mm X 2 mm

(c) over right parasternal border near the right breast 2 mm X 2 mm

(d) on the right thumb 2 mm X 1 mm

Bruise over the lower limb and the gums 1 cm X 2 mm.

There was bruise at the posterior vaginal wall, near introits, bruise over the left labia minora 2 mm X 2 mm.”

10. On 18.01.2002 Inspector Mahavir Singh PW-30, seized some papers containing some writings stated by Rajesh PW-1, the brother-in-law of the deceased, to be in the hand of the deceased, as recorded in the memo Ex.PW-30/A.

11. The materials seized during the investigation of the present case including the vaginal swab of the deceased were sent to the Forensic Science Laboratory. The papers containing the admitted handwriting of the deceased and

the slip of paper Ex.PW-1/B were sent to the Office of the Government Examiner of Questioned Documents.

12. Vide FSL report Ex.PW-33/A it was opined that semen was detected on the vaginal swab of the deceased. Vide report Ex.PW-38/A Sh.I.S. Rao, a handwriting expert, opined that the document Ex.PW-1/B is written in the handwriting of the deceased.

13. Armed with the post-mortem report Ex.PW-14/A of the deceased, the FSL report Ex.PW-33/A, the report Ex.PW-38/A and various seizure memos prepared during the investigation and citing the persons; namely, Rajesh PW-1, Chand Kaur PW-5, Sartaj PW-10, HC Surender Kumar PW-23, SI Om Dutt PW-29 and I.S.Rao PW-38 as witnesses, a charge sheet was filed against the appellants.

14. Needless to state the appellants were sent for trial. Charges were framed against the appellants for committing offences punishable under Sections 376(2)(g) and 306 IPC.

15. Rajesh PW-1, the brother-in-law of the deceased deposed that on 12.01.2002 at about 12.30 P.M. when he came to his house he saw the deceased vomiting and the brother of the deceased was present. On enquiry the deceased told him that five persons from the village had

raped her and that she had written their names on a slip of paper (Ex.PW-1/B) and had kept the same on top of the refrigerator. Thereafter his mother came to the house. When they again enquired from the deceased, she told them that Sandy, Sheel, younger son of Zile, middle son of Ram Kumar and Lily had raped her. The deceased further told them that when she was going to the agricultural fields owned by her family aforesaid five boys obstructed her. Sheel pressed her mouth while Sandy and Lily forcibly lifted her and laid her on the ground. The sons of Zile and Ram Kumar caught hold of her hands. First of all, Lily committed rape upon her and thereafter remaining four boys raped her one after the other. She further told them that she has consumed sulphas tablets as she was feeling ashamed. She also told them that she had administered sulphas tablets to her daughter 'K'. He informed the police about the aforesaid incident whereupon the police arrived at his residence and removed the deceased and her daughter 'K' to the hospital. He accompanied the deceased to the hospital.

16. On being cross-examined about the presence of Sartaj (the brother of the deceased) at the residence of the deceased, he stated that (Quote): *'Sartaj was already present in the house. He must have also seen B vomiting. I do not know whether my bhabhi disclosed anything to Sartaj*

or not before my arrival.' On being cross-examined about the first aid given to the deceased, he stated that (Quote): *'We administered her desi ghee so that the poison which she had taken out comes out in the form of vomiting.... Vol. my mother gave first aid to her. The deceased was given ghee and lot of water. She tried to make her vomit.'* On being cross-examined about the name of appellant Devender, he stated that the deceased had told him that middle son of Ram Kumar had committed rape upon her and that she does not know his name. He stated that his family and Ram Kumar belong to same extended family (kunba). He further stated that save and except appellant Sanjay his family and all the accused belong to same extended family (kunba).

17. Chand Kaur PW-5, the mother-in-law of the deceased, deposed that on one day in the year 2002 she had gone to the agricultural fields owned by her family. At around 12 P.M. when she came back to her house she saw that the deceased was vomiting and that her younger son Rajesh and brother of the deceased Sartaj were also present there. Sartaj, the brother of the deceased, had come to their house in connection with the festival of Sakranti. On making enquiries from the deceased, she told her that five persons namely Sheel, Lily, Sanjay, Kala and Sandy have raped her. The deceased further told her that she has consumed

sulphas tablets as she was feeling ashamed. The deceased also told them that she had administered sulphas tablets to her daughter K. The witness deposed that she had administered ghee to the deceased at the time when the deceased was vomiting.

18. Sartaj PW-10, the brother of the deceased, deposed that on 12.01.2002 he had gone to the house of the deceased to give gifts to the deceased in connection with the festival of Sakranti. When he reached there he saw that the deceased was vomiting and that brother-in-law of the deceased Rajesh was also present there. When he enquired from Rajesh he told him that five boys from the village have raped the deceased and that the deceased has consumed sulphas tablets. He made enquiries from the deceased but she was unable to speak. Thereafter Rajesh administered ghee to the deceased upon which the deceased told him that five boys namely Sandy, Sheel, one son of Ram Kumar, Sanjay who is son of Zile and Lily have raped her. She further told him that she had written the names of the aforesaid five boys on a slip of paper and kept the same on the top of refrigerator. In the meantime, the mother-in-law of the deceased also arrived there. Thereafter a PCR van came there and removed the deceased to the hospital. Rajesh was also accompanying the deceased at the time when she was

removed to the hospital. On being questioned about the presence of Rajesh in the house of the deceased, he stated that Rajesh was already present at the residence of the deceased at the time when he reached there.

19. HC Surender Kumar PW-23, deposed that he was present in the police control room when at around 12.55 P.M. he received a telephonic call informing him that a lady residing in the house of Kehar Singh has been raped and that she has consumed poison. On reaching the aforesaid house he saw that the deceased and one small girl have consumed poison. He removed the deceased and the girl to Sanjay Gandhi Hospital in PCR van. On the way to the hospital, the deceased told him that Sanjay, Kala, Leelu and other persons had raped her.

20. Since there was a variation between the statement of HC Surender Kumar under Section 161 Cr.P.C. and his testimony in the court, HC Surender Kumar was cross-examined by the prosecutor. On being cross-examined about the statement made by the deceased to him, he stated that: (Quote) *'It is correct that the names disclosed were Sanjay S/o Zile Singh, Kala S/o Ram Kumar, Lilli S/o Balbir. It is correct that she had stated that there was fourth person whose name she does not know.'* He further deposed

that the deceased told him that she had consumed sulphas tablets as she was feeling ashamed on account of the fact that she had been raped by the aforesaid persons. He flashed the aforesaid information given by the deceased to the police control room.

21. SI Om Dutt PW-29, deposed that on 12.01.2002 he was posted as duty officer at the police control room. At around 12.55 P.M. he received a wireless information to the effect that a lady residing in the house of Kehar Singh has been raped and that she has consumed poison.

22. On being cross-examined by the learned Additional Public Prosecutor about the wireless information received by him in relation to the incident in question he stated that (Quote): *'It is correct to suggest commander C-75 gave information to me on wireless that 'B' W/o Dalbir aged 30-31 years had been raped by Sanjay S/o Zile Singh, Lilli S/o Dalbir, Kala S/o Ram Kumar and by one other person at 10 O' clock.'* He deposed that he had handed over the original PCR form recording the aforesaid message to the investigating officer. He further deposed that the said PCR form is not present in the documents filed by the prosecution before the trial court. (However, it may be noted here that a PCR form recording the aforesaid message was

filed by the prosecution before the trial court and is part of the record).

23. I.S.Rao PW-38, a handwriting expert, deposed that the report Ex.PW-38/A was prepared by him.

24. In their statements under Section 313 Cr.P.C. the appellants pleaded innocence and denied everything.

25. In defence, appellants Jasbir Singh and Sanjay examined two witnesses namely Dr.A.K.Pandey DW-1 and Dr.Gopal Bhagat DW-2.

26. Dr.A.K.Pandey DW-1, Incharge, Medical Office, MCD Primary Health Centre, Mehrauli deposed that appellants Jasbir Singh and Sanjay were admitted in MCD Primary Health Centre, Mehrauli in 11.01.2002 as they were suffering from gastroentitus and that they were discharged from the said centre on 14.01.2002.

27. Dr.Gopal Bhagat DW-2, deposed that he was working as Chief Medical Officer in MCD Primary Health Centre, Mehrauli between the years 1996 and 2003. He deposed that village Laudpur (place of residence of the appellants) is at a distance of about 30-35 kms from the said centre. Appellants Jasbir Singh and Sanjay were admitted in MCD Primary Health Centre, Mehrauli in 11.01.2002 and that

they were discharged from the said centre on 14.01.2002. On being cross-examined about the facilities available at the said centre he deposed that (Quote): *'It is correct that the health center is not a super speciality hospital for gastro-intelstinal cases. It is correct that there are other primary health center between village Ladpur and my center in vicinity of Mehrauli.'*

28. Holding that the dying declarations made by the deceased to Rajesh PW-2, Chand Kaur PW-5, Sartaj PW-10 and HC Surender Kumar PW-23 is an admissible piece of evidence and that the said dying declarations are reliable as the post-mortem report Ex.PW-14/A of the deceased and FSL report Ex.PW-33/A duly corroborate the same (rape), the learned Trial Judge has convicted the appellants. With regard to the evidence adduced by the defence, learned Trial Judge has held that the evidence of Dr.A.K.Pandey DW-1 and Dr.Gopal Bhagat DW-2, does not inspire any confidence for the reason it cannot be believed that appellants Jasbir Singh and Sanjay would travel a distance of 30-35 kms to get themselves treated for gastroentitus at MCD Primary Health Centre, Mehrauli particularly when the said centre was not even a super-speciality hospital for gastro-intestinal cases.

29. From the narratives noted by us in the preceding paragraphs, it is evident that the main plank of the case of the prosecution against the appellants is the statements made by the deceased to Rajesh PW-1, Chand Kaur PW-5, Sartaj PW-10 and HC Surender Kumar PW-23 soon before her death.

30. Pertaining to the alleged statements made by the deceased as spoken of by Rajesh PW-1, Chand Kaur PW-5, Sartaj PW-10 and HC Surender Kumar PW-23, it was urged by learned counsel for the appellants that if it was held that the appellants were not guilty of the charge of abetting the suicide of the deceased, the statements of the deceased pertaining to the offence of rape cannot be treated as dying declarations under Section 32(1) of the Evidence Act 1872 and hence the same would be inadmissible in evidence.

31. Thus, we first proceed to consider whether the offenders (whoever committed the rape) could be held guilty for abetting the suicide of the deceased. While discussing this aspect we would be proceeding on the assumption that the deceased told that she was raped by the appellants and due to shame she decided to end her life. We may not be understood to mean that we have returned a finding against the appellants at this stage that they had raped the

deceased. We shall be discussing this aspect at the next stage of our decision when we discuss the contours of Section 32(1) of the Evidence Act 1872 and the evidence brought on record.

32. The word 'suicide' in itself is nowhere defined in Indian Penal Code, however its meaning and import is well known and requires no explanation. 'Sui' means 'self' and 'cide' means 'killing', thus implying an act of self-killing. In short a person committing suicide must commit it by himself, irrespective of the means employed by him in achieving his object of killing himself.

33. Suicide by itself is not an offence under either English or Indian criminal law, though at one time it was a felony in England. In England, the former law was of the nature of being a deterrent to people as it provided penalties of two types namely:- (i) Degradation of corpse of deceased by burying it on the highway with a stake through its chest; (ii) Forfeiture of property of deceased by the State. At present, there is no punishment for suicide under English law.

34. In India, suicide in itself is not an offence for successful offender is beyond the reach of law, however

attempt to commit suicide is an offence punishable under Section 309 IPC.

35. The offence of abetment of suicide is made punishable by Section 306 IPC which reads as under:-

“If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable for fine.”

36. Section 306 does not define the expression “abet” nor is the expression defined in Chapter II of Code, which deals with general explanations. However, Chapter V of Code makes provisions with respect to abetment. Section 107 in this Chapter defines “abetment” in following terms:-

“A person abets the doing of a thing, who-

First- Instigates any person to do that thing; or

Secondly- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2- Whoever, either prior to or at the time of the commission of an act, does anything

in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

37. As per the prosecution the deceased was raped in the fields. She returned home and decided to take poison as she thought that the humiliation heaped upon her has blackened her face and she had no face to show in the society. With this feeling of dejection, despair, humiliation and frustration she fed a sulphas tablet to her infant daughter and consumed sulphas tablets herself. The rapists have not been alleged to have conspired with the deceased for the doing of the act of consuming sulphas. The rapists have not been alleged of doing any act in conspiracy or any illegal omission. The rapists have not been alleged to aid, much less intentionally aid the deceased in consuming sulphas. Thus, the second and the third limb of Section 107 IPC are just not attracted. The question would be whether the first limb is attracted i.e. whether can it be said that the rapists instigated the deceased by their act of rape to consume sulphas.

38. The Madhya Pradesh High Court and the Andhra Pradesh High Court have taken diametrically opposite views. In the decisions reported as Mohd Hafeez v State of MP MANU/MP/0238/2009 and Kokkiligadda Veeraswamy v State

of AP 2005 Cri.L.J. 869 it has been held that an accused by raping a girl instigates her to commit suicide if there is a proximate and live link between the offending act of the accused and the commission of suicide by the girl. Two Judges of the same Court have taken the opposite view in the decisions reported as Battula Konadulu v State of AP MANU/AP/0833/2006 and Deepak v State of MP 1994 Cri.L.J. 767 where the aforesaid question was answered in negative.

39. What is the meaning of the word 'instigation' occurring in Section 107 of the IPC?

40. The answer to the aforesaid question can be found in the following observations of Supreme Court in the decision reported as Chitresh Kumar Chopra v State (2009)

11 SCALE 24:-

"Thus, to constitute "instigation", a person who instigates another has to provoke, incite, urge or encourage doing of an act by the other by "goading" or "urging forward". The dictionary meaning of the word "goad" is "a thing that stimulates someone into action: provoke to action or reaction" (See: *Concise Oxford English Dictionary*); "to keep irritating or annoying somebody until he reacts" (See: *Oxford Advanced Learner's Dictionary - 7th Edition*). Similarly, "urge" means to advise or try hard to persuade somebody to do something or to make a person to move more quickly and or in a particular direction, especially by pushing or forcing such person.

Therefore, a person who instigates another has to "goad" or "urge forward" the latter with intention to provoke, incite or encourage the doing of an act by the latter. As observed in **Ramesh Kumar's** case (supra), where the accused by his acts or by a continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide an "instigation" may be inferred. In other words, in order to prove that the accused abetted commission of suicide by a person, it has to be established that: (i) the accused kept on irritating or annoying the deceased by words, deeds or wilful omission or conduct which may even be a wilful silence until the deceased reacted or pushed or forced the deceased by his deeds, words or wilful omission or conduct to make the deceased move forward more quickly in a forward direction; and (ii) that the accused had the intention to provoke, urge or encourage the deceased to commit suicide while acting in the manner noted above. Undoubtedly, presence of mens rea is the necessary concomitant of instigation.

In the background of this legal position, we may advert to the case at hand. The question as to what is the cause of a suicide has no easy answers because suicidal ideation and behaviours in human beings are complex and multifaceted. Different individuals in the same situation react and behave differently because of the personal meaning they add to each event, thus accounting for individual vulnerability to suicide. Each individual's suicidability pattern depends on his inner subjective experience of mental pain, fear and loss of self-respect. Each of these factors are crucial and exacerbating contributor to an individual's vulnerability to end his own life, **which may either be an attempt for self-**

protection or an escapism from intolerable self. (Emphasis Supplied)

41. In the decision reported as Gangula Mohan Reddy v State of AP 2010 (1) SCALE 1, the Supreme Court observed as under:-

“Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

The intention of the Legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide.” (Emphasis Supplied)

42. A similar view was taken by Supreme Court in the decision reported as Sanju @ Sanjay Singh Senger v State of MP (2002) 5 SCC 371 wherein it was observed as under:-

“The word ‘instigate’ denotes incitement or urging to do some drastic or unadvisable action or to stimulate or to incite. Presence of mens rea, therefore, is the necessary concomitant of instigation. (Emphasis Supplied)

43. The ratio of the afore-noted decisions is that in order to convict an accused for an offence punishable

under Section 306 IPC, in respect of the act of instigation, it has to be proved by the prosecution that the accused had the “intention” to instigate the deceased to commit suicide.

44. In the instant case, can it be said that the rapists had the “intention” to instigate the deceased to commit suicide?

45. The answer to the aforesaid question is an emphatic “no” for the reason there is no material on the record wherefrom it could be inferred that the rapists raped the deceased with an intention to instigate her to commit suicide.

46. Thus, we hold that in the facts of the instant case, the rapists of the accused cannot be held liable for the offence of having abetted the suicide of the deceased.

47. We now deal with the vexed question, whether at all the dying declarations, assuming that they were made, by the deceased are admissible in evidence for the offence of gang rape.

48. With the advent of adversarial trials, it was recognized that oral evidence must be direct. In the context of the Indian Law of Evidence, Section 59 of the Indian Evidence Act 1872 mandates that except for contents of

documents and electronic records, facts must be proved by oral evidence. Section 60 of the Indian Evidence Act 1872 mandates that oral evidence must, in all cases whatever, be direct i.e. if it refers to a fact seen it must be the evidence of he who saw; if it refers to a fact heard, it must be the evidence of he who heard and if it refers to a fact perceived by any other sense or any other manner, it must be the evidence of he who says that he perceived. But, directed by necessity, exceptions to the said general rule of law were recognized under the common law and find a reference even under the Indian Evidence Act 1872. The rule excluding hearsay evidence stands relaxed under Section 32 of the Indian Evidence Act 1872 which makes admissible through the mouth of some-body else a statement of fact made by a person who is dead or cannot be found or becomes incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expenses, but limited to clause 1 to clause 8 of Section 32 of the Indian Evidence Act 1872. It may be noted at the outset that statements of relevant facts made by a person who is dead are treated as a relevant fact.

49. Since we are dealing with an issue of the admissibility of a statement made by a dead person i.e. the

deceased in the context of the charge for rape, in the backdrop of the circumstance that as per the prosecution, feeling ashamed by her being gang raped and feeling dejected as she thought that her face has been blackened in society, the deceased committed suicide; we need to discuss the applicability of Section 32 (1) for the proof of the deceased being raped through the medium of her statement made to various persons. Since the deceased admittedly died soon thereafter and had made the statement after she had consumed sulphas tablets and death was in her contemplation, we shall be referring to the statement as a dying declaration as loosely understood and then determine whether in law as well the same can be treated as her dying declaration and admissible for the charge of rape.

50. In the context of a statement made by a person who is dead, Section 32(1) of the Evidence Act stipulates as under:-

“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question.”

51. A bare reading of Section 32(1) of the Evidence Act 1872 makes admissible two types of statements i.e. those which fall within either the first limb or the second

limb of Section 32(1). The first limb of Section 32(1) uses the expression '*as to the cause of his death*' and the second limb uses the expression '*as to any of the circumstances of the transaction which resulted in his death*'. But, the second limb stands immediately qualified by the further expression '*in cases in which the cause of that person's death comes into question*'.

52. Now, ex-facie, the expression '*cause of his death*' does not mean '*resulted in his death*'. The two are distinct expressions and convey two different meanings. The first is narrower than the second. The first expression '*cause of his death*' may be linked to the well recognized principle of '*causa causan*' and in that setting, the expression '*cause of his death*' would mean the immediate act (*cause*) which resulted in death without any intervening event. It would mean that the death resulted as the immediate and direct consequence of the act and in the field of criminal law would require that the death of the person is an integral part of the offence of which the person against whom the accusation is made is charged of. The second limb of Section 32(1) does not have a root in the common law principle of law pertaining to dying declarations, but embodies '*a policy of*

the law keeping in view the peculiar social circumstances in India'.

53. Indian law on the question of the nature and scope of dying declaration has made a distinct departure from the English law where only the statements which directly relate to the cause of death are admissible. The second part of Clause (1) of Section 32, viz., "*the circumstances of the transaction which resulted in his death, in cases in which the cause of; that person's death comes into question*" is not to be found in the English Law.

54. This distinction has been clearly pointed out in the decision reported as *Rajindra Kumar v. The State* AIR 1960 Punjab 310, where the following observations were made: "*Clause (1) of Section 32 of the Indian Evidence Act provides that statements, written or verbal, of relevant facts made by a person who is dead are themselves relevant facts when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case, in which the cause of that person's death comes into question. It is well settled by now that there is difference between the Indian Rule and the English Rule with regard to the necessity of the declaration having been made under expectation of death.*

In the English Law the declaration should have been made under the sense of impending death whereas under the Indian Law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been Under the expectation of death.”

55. The aforesaid distinction pithily brought out by the decision of the Punjab High Court has been cited with approval in para 18 of the decision reported as AIR 1984 SC 1622 Sharad Birdichand Sarda Vs. State of Maharashtra.

56. To what extent the expression '*in cases in which the cause of that person's death comes into question*' which expression immediately succeeds the preceding expression '*as to any of the circumstances of the transaction which resulted in his death*' restricts the span of the preceding expression.

57. If it is interpreted to mean that it restricts the sweep of the expression '*as to any of the circumstances of the transaction which resulted in his death*' by limiting the same to the cause of the death of the person and cause meaning the direct cause without any intervening event, we find no escape from the conclusion that though appearing to be different, the two limbs of Section 32(1) would in essence be the same. Such an interpretation would violate the well

recognized rule of interpretation that where the legislature has used two expressions, it is presumed that the legislature has intended to convey two different meanings and requires the Court, as far as the language permits, to interpret the words and phrases in a manner that nothing becomes otiose i.e. redundant.

58. Dealing with Section 32 of the Evidence Act and quoting with approval passages from the 'Law of Evidence' by Woodroffe & Amir Ali, in the decision reported as AIR 1959 SC 18 Ratan Gond Vs. State of Bihar, the Supreme Court observed as under:-

"The only relevant clause of Section 32 which may be said to have any bearing is clause (1) which relates to statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. In the case before us, the statements made by Aghani do not relate to the cause of her death or to any of the circumstances relating to her death; on the contrary, the statements relate to the death of her sister.

In the 'Law of Evidence' by Woodroffe & Amir Ali, (Vol. II) the authors have collected all the cases at one place and indicated their conclusions thus:

To sum up, the test of the relevancy of a statement under Section 32(1), is not what the final finding in the case is but whether the cause of the death of the person making the statement comes into question in the case. The expression 'any of the circumstances of the transaction which resulted in his death'; is wider in scope than the expression 'the cause of his death'; in other words, Clause (1) of Section 32 refers to two kinds of statements: (1)

statement made by a person as to the cause of his death, and (2) the statement made by a person as to any of the circumstances of the transaction which resulted in his death.

The words 'resulted in his death' do not mean 'caused his death'. Thus, it is well settled that declarations are admissible Only in so far as they point directly to the fact constituting the res gestae of the homicide; that is to say, to the act of killing and to the circumstances immediately attendant thereon, like threats and difficulties, acts, declarations and incidents, which constitute or accompany and explain the fact or transaction in issue. They are admissible for or against either party, as forming parts of the res gestae."

59. The aforesaid passage clearly brings out two important legal facets. Firstly, the test of relevance is not what the final finding in the case is, but whether the cause of the death of the person making the statement comes into question in the case and secondly that the declarations would be admissible even when they constitute the res gestae of the homicide as long as the declarations pointedly direct to a fact constituting the res gestae of the homicide.

60. We may hasten to add by way of clarification that the expression res gestae used by the Supreme Court is not to be understood in the context of res gestae as understood under Section 6 of the Evidence Act. The Supreme Court has clearly used the expression in its generic sense.

61. To remove them away from the category of hearsay evidence it has to be ensured that the statements

of the deceased even pertaining to circumstances of the transaction which resulted in his death and of course statements pertaining to what caused his death must have proximate relation to the actual occurrence. This has been highlighted by the Privy Council in the celebrated decision reported as AIR 1939 PC 47 Pakala Narayana Swami Vs. Emperor. Lord Atkin had laid down the following tests:-

"It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible.... Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae" Circumstances must have some proximate relation to the actual occurrence.... It will be observed that "the circumstances are of the transaction which resulted in the death of the declarant."

62. As a matter of legal history, we may note that the aforesaid declaration of law in Pakala Narayan Swami's case has been consistently followed by various High Courts

and was cited with approval in para 11 of the decision in Sharad Birdichand Sarda's case (supra).

63. In para 12 of the decision in Sharad Birdichand Sarda's case (supra), the Supreme Court cited with approval a passage from a decision of the Calcutta High Court reported as Protima Dutta Vs. The State 81 Cal WN 713 as under:-

“This observation taken as a whole would, in my view, imply that the time factor is not always a criterion in determining whether the piece of evidence is properly included within “circumstances of transaction”..... “In that case the allegation was that there was sustained cruelty extending over a period of three years interspersed with exhortation to the victim to end her life.” His Lordship further observed and held that the evidence of cruelty was one continuous chain, several links of which were touched up by the exhortation to die. “Thus evidence of cruelty, ill-treatment and exhortation to end her life adduced in the case must be held admissible, together with the statement of Nilima (who committed suicide) in that regard which related to the circumstances terminating in suicide.”

64. Thus, it can safely be said that in addition to the two legal facets noted in para 59 above which flow out of the decision of the Supreme Court in Ratan Gond's case (supra) a third legal facet flows out from the aforesaid decision of the Calcutta High Court which has been approved by the Supreme Court, being that, even in cases of suicide statements of facts relating to the circumstances

terminating in suicide would be admissible under Section 32(1) of the Evidence Act.

65. In para 21 of the decision in Sharad Birdichand Sarda's case (supra) 5 propositions were held as emerging from the language of Section 32(1) of the Evidence Act, being as under:-

“(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death, It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) *The second part of Clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.*

(4) *It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.*

(5) *Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant."*

66. Let us have a look to illustration (a) to Section 32 of the Evidence Act. It reads as under:-

"The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts."

67. We highlight the last part of the illustration, which pertaining to a case of rape, treats as a relevant fact statements made by the victim of rape as to the cause of her death referring even to the rape. The illustration brings out the umbilical relationship between an offence; the circumstances of the transaction pertaining to the offence and; the death. Indeed there exists a direct and organic relationship between the three and gives primacy to none. In the Treatises on the law of evidence: Sarkar's Law of Evidence (12th Edition) at page 353 the learned authors of the Treatises while bringing out the distinction between the English Law and Indian Law, with reference to case law have written:-

“Under the English law, it is essential to the admissibility of dying declarations, first, that the declarant should have been in actual danger of death at the time when they were made; secondly, that he should have had a full apprehension of his danger; and lastly, that death should have ensued. These three things must be proved to the satisfaction of the judge, before a dying declaration can be received: Both in England and America, evidence of this description (dying declarations, is not admissible in any civil case and in criminal cases it is not admissible upon charges other than homicide; or as to homicides other than that of the declarant. The latter part of this limitation was somewhat infringed in R Vs. Baker 2 M & Rob 53. In R Vs. Hind, 8 Cox 300, in which R Vs. Baker, sup was cited, POLLOCK CB, held adopting the doctrine of R Vs. Mead, 2 B & C 605, that the true rule confined the declarations to charges involving the

homicide of the declarant. These restrictions do not appear in Section 32. It is not required that the maker should be in expectation of imminent death, nor is it restricted to cases of homicide only. It is admissible also in civil cases.

Summary – Thus under the Act-

(1) A dying declaration is relevant whether the person who made it was or was not, at the time when it was made under expectation of death, that is, it is immaterial whether there existed any expectation of death at the time of the declaration. In a Calcutta case it has been observed that the necessity of recording a dying declaration arises only when the hopes of life are given up. Upendra Vs. R 52 CLJ 425. It is common sense that there is no need to record dying declaration until that stage is reached or it is apprehended that a person will not survive.

[In re Shk Tinoo, 15 WR 11 and R Vs. Ujrail, 2 NWP 12, it was held that before a dying declaration was admitted it should be proved that the person making it knew that he was dying or believed himself to be in danger of approaching death. It was decided under Section 29 of Act 2 of 1855 which was similar to the English Law with the exception that the declarant might have entertained hope of recovery].

(2) The admissibility of dying declaration is not confined to the case of homicide only, but it would be admissible, whatever the charge may be, provided the cause of death comes under enquiry: Illustration (a) shows that in a charge of rape, a woman's dying declaration is admissible as to the circumstances of the transaction resulting in her death. In England a dying declaration is not admissible to prove rape [R Vs. Newton, 1 F & F 641], or robbery [R V Lloyd, 4 C & P 233].

(3) A dying declaration is admissible in this country in civil suits, under the terms, "whatever may be the nature of the proceeding in which the cause of death comes into question." Thus in a

suit for damages for death caused by a railway accident due to the negligence of the company, the declaration of the passenger killed, as to the cause of his death is admissible. Illustration (a) shows that it is receivable in civil as well as in criminal cases."

68. It thus stands crystal clear that the second limb of Section 32(1) of the Evidence Act 1872 is not restricted by the fact that in the cases before the Court, with reference to the cause of the maker's death, the death has to be a fact in issue i.e. the death is not an ingredient of the offence. In whatever manner the cause of death comes into question, in a proceedings where the circumstances of the transaction have a proximate and a direct cause with the person's death, whatever be the offence under enquiry, the statements would be admissible in evidence.

69. This goes on to evince the fact that learned Judges and fraternity of Jurists could not have been impervious of the fact that there are two distinct expressions used in Section 32(1), and there are two distinct limbs of the said Section; obviously, the second following the first and thus neither the two limbs nor the two expressions could be given a meaning which is but the same; the learned Judges and Jurists have been conscious of the fact that the two limbs and the two expressions embody two distinct meanings. They were conscious that any

interpretation which disregarded the aforesaid had to be discarded as unacceptable.

70. As in the instant case, where the victim of rape, due to the perceived social stigma, moved by passion and in the heat of the passion, consumes a poisonous substance propelled by the thought that death is the only panacea to wriggle out of the shame of being raped, there obviously would be an organic relationship between the act of rape and the suicide; the bond being the shame caused by the act of rape and the panacea of being freed from the shame by dying.

71. Section 32(1) can be looked at from another angle. The expression used by the legislature is "*cases in which the cause of his death comes into question*" and not the expression "*offences in which the cause of his death comes into question*". The use of expression "cases" in Section 32(1) of Evidence Act is suggestive of the fact that it was the intention of the legislature that the admissibility of statements under Section 32(1) of the Evidence Act 1872 is not to be restricted to only for offences where death is an integral part of an offence. In all cases where the death of a person comes into question (not in issue) such statements would be admissible in evidence.

72. The view which we have taken after elaborately noting the precedents, finds a confirmation by us, in the decision of the Division Bench of the Allahabad High Court reported as 2002 Cri.L.J. 301 Santosh Kumar & Ors. Vs. State of U.P. where the accused were charged for having raped and murdered a young girl. The charge of murder failed. It was proved that the young girl committed suicide. The statements of the young girl pertaining to her being raped were held admissible under Section 32 of the Evidence Act. Incidentally, we may also note that the Petition for Special Leave to Appeal against the aforesaid decision of the Allahabad High Court being SLP (Cri.) No.1975/2002 was dismissed in limine vide order dated 12.7.2002.

73. The death of the deceased in the instant case and her being raped is a frozen reality. A criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a Court to identify the culprit with reference to the evidence brought before it and in the evaluation of evidence whenever barriers of legislative enactments are encountered, law must witness dynamic evolution to respond to the challenge i.e. the challenge of identifying and discovering the offender at law.

74. In the backdrop of above discussion, we proceed to consider whether the dying declarations made by the deceased fulfil the conditions of Section 32(1) of Evidence Act 1872.

75. The dying declarations made by the deceased can be conveniently divided into following two parts: - (i) I consumed sulphas tablets; (ii) because I was raped and I cannot stand the humiliation of being raped. The statements certainly relate to the circumstances of the transaction pertaining to her death and thus in view of the law afore-noted, the same has to be treated as admissible as a dying declaration.

76. It need hardly be re-emphasized that the transaction which has resulted in the death of the deceased is the act of consumption of sulphas tablets by the deceased. The same was when the passion of being the victim of a crime was burning within the deceased, who consumed sulphas in the heat of the moment, immediately upon returning to her house. In Sharad Birdhichand Sharda's case (supra) it has been held that the circumstance which has even a casual connection with the death of the deceased is the "circumstance of the transaction which has resulted in death of the deceased".

77. Learned counsel for the appellants had relied upon the decision of the Supreme Court reported as Sudhakar & Anr v State of Maharashtra (2000) 6 SCC 671 to contend that second part of the dying declaration of the deceased does not relate to any circumstances of any transaction which has resulted in the death of the deceased and is thus not admissible in evidence.

78. The facts of Sudhakar's case (supra) are that the case set up by the prosecution against the accused was that the deceased was working as a teacher in a municipality school and the first and second accused were employed as headmaster and teacher respectively in the same school. On 09.07.1994 when the school was closed in the afternoon and all the students had gone back to their homes, the accused came in the room where the deceased was sitting and closed the door and windows of the room. The deceased was forcibly subjected to sexual intercourse by the accused. On 20.07.1994 the matter was reported to the police, on which day the police officer recorded the statement Ex.P-59 of the deceased. It was further the case of the prosecution that having failed to withstand the humiliation of having being raped by the accused, the deceased committed suicide on 22.12.1994. Charges were framed against the accused for committing offences punishable under Sections 376(2)(g)

and 306 IPC read with Section 34 IPC. Treating the statement Ex.P-59 of the deceased as an admissible piece of evidence under Section 32(1) of Evidence Act, the trial court and High Court convicted the appellants of the charges framed against them. The issue before Supreme Court was whether the statement Ex.P-59 of the deceased can be admitted in evidence under Section 32(1) of Evidence Act. After noting the contents of the statement Ex.P-59 of the deceased, Supreme Court was of opinion that the statement Ex.P-59 of the deceased does not state any fact regarding the cause of death of the deceased and therefore at the most the same could be stretched to say that the said statement refers to “circumstances of the transaction” resulting in death of the deceased. Thereafter Supreme Court proceeded to consider whether the statement Ex.P-59 of the deceased relates to any circumstance of the transaction which has resulted in the death of the deceased. In light of the facts that the deceased committed suicide after more than five and half months of the incident of rape and that there was no evidence on record to show that the deceased at or about the time of making of the statement Ex.P-59 had disclosed her mind for committing suicide allegedly on account of being raped by the accused, Supreme Court was of the view that the statement Ex.P-59

of the deceased does not relate to any of the circumstance of the transaction which has resulted in death of the deceased and thus the same cannot be admitted in evidence under Section 32(1) of Evidence Act.

79. A careful reading of the judgment in Sudhakar's case (supra) shows that there are two material differences between the facts of Sudhakar's case (supra) and the present case. As already stated in preceding paras, in Sudhakar's case (supra), the facts which greatly influenced Supreme Court to come to a conclusion that the statement made by the deceased as to the circumstance of commission of rape upon her person by the accused does not relate to "circumstances of any transaction which has resulted in death of the deceased" were that the deceased committed suicide after more than five and half months of the incident of rape and that there was no evidence on record to show that the deceased at or about the time of making of the statement had disclosed her mind for committing suicide allegedly on account of being raped by the accused. The same is not the position in the present case. In the present case, not only the deceased committed suicide within few hours of incident of rape, she clearly stated that she is committing suicide as she cannot withstand the humiliation on being raped by the appellants.

80. With reference to the testimony of Rajesh PW-1, Chand Kaur PW-5, Sartaj PW-10 and HC Surender Kumar PW-23, it is evident that as per the prosecution the deceased made more than one dying declaration.

81. Two submissions were urged by learned counsel for the appellants to question the veracity of the testimony of the said witnesses and thereby to question the sanctity of the dying declarations made by the deceased. It was firstly urged that a mere glance at the contents of the stated dying declarations made by the deceased as claimed by the witnesses shows that they are unreliable as there is material contradiction between the contents of the dying declarations sought to be proved by the witnesses. Learned counsels highlighted that as per Rajesh PW-1, Chand Kaur PW-5 and Sartaj PW-10, the deceased told them that she was raped by five persons i.e. the appellants, whereas as per the dying declaration made by the deceased to HC Surender Kumar, as claimed by him, the deceased told him that she was raped by four persons; three of whom she named but could not recollect the name of the fourth. Counsel argued that in view of contradictions between the contents of different dying declarations made by the deceased, the same should be rejected as being unreliable.

82. It was urged that there are contradictions in the testimony of Rajesh, Chand Kaur and Sartaj. We shall be noting the same while dealing with them soon hereinafter.

83. In relation to the capability of the deceased to make dying declarations, learned counsel argued that the testimony of Rajesh PW-1, Sartaj PW-10 and Chand Kaur PW-5, shows that either Rajesh or Chand Kaur had administered ghee to the deceased at the time when the deceased was vomiting. According to learned counsel, said persons must have given ghee to the deceased to make her speak, which shows that the deceased was not able to speak prior to the giving of ghee by Chand Kaur and thus the claim of Rajesh and Sartaj that the deceased has spoken something to them before Chand Kaur came is false.

84. Law with respect to multiple dying declarations is well settled. In the decision reported as Nallam Veera v Public Prosecutor, High Court of AP (2004) 10 SCC 769 Supreme Court observed as under:-

“....in case of multiple dying declarations each dying declaration will have to be considered independently on its own merit as to its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there are more than one dying declaration, it is the duty of the court to consider each of them in its correct perspective

and satisfy itself which one of them reflects the true state of affairs.”

85. A similar view was taken by Supreme Court in the decision reported as Sreerama Murthy v State of AP AIR 1998 SC 3040.

86. On the issue of the condition of the deceased to be in a speaking condition, with respect to her being administered ghee by Chand Kaur, we note that it is a safe home remedy to make a person drink ghee to vomit and in cases of suspected or known cases of poisoning, to flush out the stomach ghee is administered. Rajesh PW-1, has clearly deposed that ghee was given to the deceased to make her vomit so that poisonous substance which was consumed by the deceased comes out with the vomit. We thus do not find any merit in the argument of the counsel that ghee was given to the deceased to make her speak and that prior thereto she was not in a position to speak.

87. As per Rajesh, Sartaj and Chand Kaur, the deceased not only gave the names of her rapists but even told them that she had written their names on the slip Ex.PW-1/B.

88. Per-se, Ex.PW-1/B has no meaning by itself as on it are written five names: Sady, Seel, Ram Kuwar, Zale Ka

and Lily. But great meaning is acquired by the said slip if supplemented with the testimony of Rajesh, Sartaj and Chand Kaur.

89. While considering and evaluating the testimony of said three witnesses who are the family members of the deceased, we feel that in the backdrop it has to be kept in mind that as per HC Surender Kumar PW-23, to whose testimony substantial corroboration is found in the testimony of SI Om Dutt PW-29, the deceased had told HC Surender Kumar PW-23 that four boys had raped her. She could not remember the name of the fourth and disclosed the names of only three, being Sanjay son of Ziley Singh, Kala son of Ram Kumar, Lilli son of Balbir. We note that said fact has been contemporaneously recorded in the PCR form by SI Om Dutt PW-29 whose attention was not drawn when he deposed that a photocopy of the form part of the judicial record and for said reason he wrongly stated that the PCR form is not present in the documents filed by the prosecution.

90. As already noted herein above, following five words are written on the document Ex.PW-1/B: - Sady, Seel, Ram Kumar, Zale Ka and Lily. According to the prosecution, the word 'Sady' is a reference to appellant Sandy @ Ved

Prakash; that word 'Seel' is a reference to appellant Sheel @ Sushil; that word 'Lily' is a reference to appellant Lily @ Jasbir; that word 'Ram Kumar' is a reference to appellant Devender @ Kala for his father's name is Ram Kumar and that word 'Zale Ka' is a reference to appellant Sanjay as his father's name is Zile.

91. Pertaining to Ex.PW-1/B we find that vide report Ex.PW-38/A it has been opined that the same is written in the handwriting of the deceased. I.S.Rao PW-38, the author of the report Ex.PW-38/A was subjected to a very detailed and lengthy cross-examination but nothing tangible could be elicited there-from. But, in view of our further findings pertaining to the testimony of Rajesh, Sartaj and Chand Kaur and the possibility of the said 3 persons contriving to give a meaning to the inchoate contents of the slip Ex.PW-1/B resulting in our not accepting the testimony of the said 3 persons in respect of the dying declaration of the deceased, it hardly matters whether it has been proved that the slip was in the handwriting of the deceased.

92. Our discussion hereinafter pertaining to the slip Ex.PW-1/B being written by the deceased is on the basis that the same was written by the deceased either soon before consuming sulphas tablets or after consuming the same. It is

thus clear that the same was written by the deceased when she was on the verge of a nervous breakdown. The deceased obviously was not in a proper frame of mind and could not have gathered her thoughts at the time when she wrote the slip and that is the reason why the deceased has scribbled five words without anything more.

93. Is there a possibility that the deceased did not muster the courage to speak with her own mouth the names of her tormentors or is there is a possibility that she did not name the males who were her tormentors out of shame and only said that her body has been defiled by the boys whose identity could be gathered with reference to the slip Ex.PW-1/B on which she had written their names and finding the said slip and inchoate document, Rajesh, Sartaj and Chand Kaur put their heads together and gave a meaning to the said words. In answering this question we note that Rajesh PW-1 has admitted that save and except appellant Sanjay all other appellants and his family were from the same clan (*kunba*). Now, Rajesh, Sartaj and Chand Kaur would presumably have some knowledge of who loafs around together in the village. Ram Kumar and Zile are elderly men. They could not be the possible rapists. It is thus possible, in any case the possibility cannot be ruled out that

Rajesh, Sartaj and Chand Kaur have contrived to give a meaning to the inchoate slip Ex.PW-1/B.

94. That apart, we find discrepancies of some material consequence in the testimony of Rajesh, Sartaj and Chand Kaur.

95. Whereas Rajesh PW-1, deposed that Sartaj was already present at the house of the deceased at the time when he arrived there, Sartaj PW-10, has deposed to the contrary. He has stated that Rajesh was already present in the house and was with the deceased when he reached the matrimonial house of his sister i.e. the deceased.

96. Whereas Rajesh PW-1, has deposed that the deceased told him that she does not know the name of the son of Ram Kumar (Devender) who raped her and identified him by telling him i.e. Rajesh that it was the middle son of Ram Kumar, but Chand Kaur PW-5 has deposed that the deceased had told her the name of appellant Devender.

97. Both Chand Kaur PW-5 and Sartaj PW-10, have deposed that the deceased had told them the name of appellant Sanjay. If the deceased knew the name of appellant Sanjay, then there was no occasion for her to write

the name of the father of appellant Sanjay on the slip Ex.PW-1/B, to make a reference to appellant Sanjay.

98. Despite the fact that as per Rajesh PW-1, Sartaj PW-10 and Chand Kaur PW-5, the dying declaration was made to them by the deceased in the presence of each other, there is considerable difference in the contents of dying declaration of the deceased stated by each one of them. As per Rajesh PW-1, the deceased gave the names of three appellants; namely Sandy, Sheel and Lily; as per Sartaj PW-10, the deceased gave the names of four appellants namely Sandy, Sheel, Sanjay and Lily and as per Chand Kaur PW-10, the deceased gave the names of all the appellants.

99. Under the circumstances we conclude that with respect to the testimony of Sartaj, Rajesh and Chand Kaur, since there is a possibility that the three had contrived to give meaning to an inchoate document, it would be unsafe to rely upon their testimony to infer the guilt of the accused.

100. Dealing with the testimony of HC Surender Kumar PW-23, it has to be noted that he is not a resident of the village and would not be expected to know the names and the parentage of the young boys in the village. That none of the appellant has a previous criminal record is also important for the reason if they were bad characters of the

area or had an unhealthy past record, there was scope to urge that HC Surender Kumar knew the names and parentage of the appellants and thus falsely testified against them. It is in this context it assumes significance that HC Surender Kumar disclosed that the deceased told him on the way to the hospital that four persons have raped her; that the names of three persons who raped her were Sanjay s/o Zile Singh, Kala S/o Ram Kumar, Lilli S/o Balbir and that she does not know the name of fourth person. That HC Surender Kumar did not give the name of the fourth person also suggests that he has contrived nothing, for the reason if he had wanted to contrive, he could have well named four boys.

101. That HC Surender Kumar could not have contrived to name three boys is to be further appreciated with reference to the fact that he flashed, whatever was told to him by the deceased, over the wireless to the police control room where SI Om Dutt PW-29 recorded the said information in the PCR form, photocopy whereof is still in the Trial Court Record, but since nobody drew the attention of SI Om Dutt PW-29 to said fact when he deposed, he stated that the PCR form had not been filed by the IO, but stated that as told to him by HC Surender Kumar he had recorded in the PCR form that the deceased had said that Sanjay son of Zile

Singh, Kala son of Ram Kumar and Lilli son of Balbir and a fourth person whose name she did not know had raped her.

102. It is most important to note that HC Surender Kumar PW-23, had no acquaintance with appellants Sanjay, Devender and Lily. Therefore, HC Surender Kumar could not have flashed the names and parentage of the said appellants to the police control room around the time of the removal of the deceased to the hospital unless the deceased told him so.

103. There is yet another circumstance which needs to be noted. The MLCs Ex.PW-37/C and Ex.PW-2/A of the deceased record that the deceased was raped by four persons. Interestingly on the MLC Ex.PW-37/C it has been written: "*Alleged history of gang by many (?4 in number) people*". The fact that the MLCs Ex.PW-37/C and Ex.PW-2/A of the deceased contain a recording consistent with the deposition of HC Surender Kumar pertaining to the oral dying declaration made by the deceased attaches a ring of truth to the testimony of HC Surender Kumar.

104. That a dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence and thus it has to be judged and appreciated like any other

piece of evidence is well settled law. A dying declaration which stands the test of credibility requires no corroboration.

105. Thus, we conclude by holding that the dying declaration made by the deceased to HC Surender Kumar has to be accepted in view of the sterling testimony of HC Surender Kumar and the same being corroborated by the testimony of SI Om Dutt PW-29 and to some extent by the contents of the two MLCs of the deceased.

106. There are two documents which corroborates the dying declaration made by the deceased to HC Surender Kumar PW-23.

107. A faint argument was made that the deceased was not even raped. It was predicated on the MLC Ex.PW-2/A of the deceased in which no injuries were noted on the body of the deceased.

108. In the opposite direction, on the post-mortem report Ex.PW-14/A injuries in the form of nail marks on inner surface of the left leg, outer surface of the left leg, over right para sterna border near the right breast, on the right thumb were noted. Bruise marks over the lower limb and the gums as also posterior vaginal wall and left labia minora were noted.

109. Why should Dr.Komal Singh PW-14 fabricate a post-mortem report?

110. But there is no evidence that Dr.Divya Aggarwal acted negligently?

111. We do not find the post-mortem report Ex.PW-14/A and the MLC Ex.PW-2/A as mutually contradictory documents for the reason the injuries noted in the post-mortem report are very superficial in nature and experience guides us that minor abrasions, bruises and nail marks do not show immediately and can be distinctively seen with the passage of time. Slap a person hard on the cheek. Nothing would be shown immediately. After some time the cheek would acquire a reddish tinge and if the slap is very hard, after some time the reddish tinge acquires a bluish hue.

112. In any case, in view of the testimony of HC Surender Kumar PW-23 and the testimony of SI Om Dutt PW-29 it stands established through the dying declaration of the deceased that she was raped by four boys, three of whom she not only named but gave their parentage and that she was impelled into consuming sulphas tablets because she thought that she had no face to show in the society. The same establishes that the deceased was indeed raped. Why would she have consumed sulphas? Why did she give a

sulphas tablet to her daughter? Obviously the mind of the deceased was disturbed in the highest category of disturbance and under the facts and circumstances is another piece of circumstance where from the factum of her being raped can be inferred.

113. Appellant Sanjay and Jasbir, two out of the three boys named in the dying declaration made by the deceased have led evidence in defence to prove that on the day when the crime was committed they were admitted at the MCD Primary Health Centre at Mehrauli, a village kilometers away from the village where the crime was committed and where they resided i.e. village Laudpur. It is settled law that where a false plea of alibi is set up and further documents are fabricated to prove the same, such conduct of the accused is indicative of the guilt.

114. It is a strange coincidence that Sanjay and Jasbir both contacted gastroentitus on the same day. It is strange that as per DW-1 and DW-2, both were discharged on the same day. It is strange that inspite of medical help being available nearby the village in which they resided, the two went to village Mehrauli which is about 30 to 35 kilometers away. Now, the MCD Primary Health Centre at Mehrauli has no specialist or super-specialist in gastrointestinal diseases.

115. We concur with the reasoning of the learned Trial Judge that the defence of alibi by the said two accused is false and that both of them have contrived with DW-1 and DW-2 to create false evidence. This conduct of the said two appellants is an additional piece of incriminating evidence against them.

116. To sum up, the result of the above discussion is as follows:-

(i) The conviction of appellants Sanjay, Devender and Jasbir for committing offence punishable under Section 376(2)(g) IPC is upheld. Their conviction for the offence punishable under Section 306 IPC is set aside.

(ii) Appellants Sandy and Sheel are acquitted of all the charges framed against them.

117. On the issue of sentence to be imposed on appellants Sanjay, Devender and Jasbir for the offence of gang rape, notwithstanding the unfortunate event of the deceased committing suicide soon after the rape because

of the perceived sense of public humiliation, but law prohibiting a Judge from being swayed by emotions, we take note of the fact that Sanjay, Devender and Jasbir are young in age and though law requires to be held against them that they are matured enough to understand the nature of their acts, yet the level of maturity would not be that of a person who has weathered the seasons of life; we further take note of the fact that the three have no past history of criminal activity or criminal intent and the instant incident is the solitary crime committed by them, on the issue of sentence we feel that the ends of justice would be met if the three are imposed the sentence to undergo rigorous imprisonment for ten years and pay a fine in sum of Rs.25,000/- each; in default of payment of fine to undergo simple imprisonment for a period of six months. We further direct that if the fine is realized the same would be invested in the name of the daughter of the deceased till she attains the age of 21 years.

118. Since the appellants are in jail, appellants Sandy @Ved Prakash son of Rajpal and Sheel @Sushil son of Mahabir Singh are directed to be set free forthwith. The other three appellants whose appeals are dismissed qua the charge of gang rape shall suffer the sentence as

modified by us, however, they would be entitled to benefit of Section 428 Cr.P.C.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

February 19, 2010
dkb / mm