Reserved

Court No. - 36

Criminal Misc. Bail Application No. 29593 of 2014

IN

Case :- CRIMINAL APPEAL No. - 294 of 2014

Appellant	Dr. Rajesh Talwar
Respondent	State Of U.P. And another.
Counsel for Appellant	Ms. Rebecca M. John, Senior Advocate assisted by Sri Tanveer Ahmad Mir & Sri Vikram D. Chauhan, Advocates
Counsel for Respondent	Sri S.N. Tripathi (AGA) for State of U.P. S/Sri Anurag Khanna & Raunak Chaturvedi Advocates for the CBI

Connected with:-

Criminal Misc. Bail Application No. 29581 of 2014

IN

Case :- CRIMINAL APPEAL No. - 293 of 2014

Appellant	Dr. (Smt.) Nupur Talwar
Respondent	State Of U.P. And Another
Counsel for Appellant	S/ Sri Dileep Gupta, Senior Advocate assisted by Tanveer Ahmad Mir & Vikram D. Chauhan, Advocates
Counsel for Respondent	S/Sri Rajiv Sharma, R.K. Saini, Additional Government Advocates for State of U.P., Sri Anurag Khanna & Sri Raunak Chaturvedi Advocates for the CBI

Hon'ble Rakesh Tiwari,J.
Hon'ble Anil Kumar Agarwal,J.

(**By Hon'ble Rakesh Tiwari, J**.)

Heard learned counsel for the parties on the bail applications in the aforesaid appeals and perused the record.

The appellants have preferred these bail applications under Section 389(1) Cr.P.C. in Criminal Appeal No. 293 of 2014 under Section 374(2) Cr.P.C. Dr. (Smt.) Nupur Talwar versus State of U.P. and Another & in Criminal Appeal No. 294 of 2014, Dr. Rajesh Talwar versus State of U.P. and another on behalf of appellants (both in Jail since 25.11.2013) residents of A-1/71, Azad Apartments, Aurobindo Marg, New Delhi.

The aforesaid two bail applications are entwined by same set of facts and emanate from the common order and judgment of conviction dated 25.11.2013 and order sentencing punishment dated 26.11.2013 passed by Addl. Sessions Judge/ Special Judge Anti-Corruption,(C.B.I.), Ghaziabad in these two connected appeals, for committing murder of their minor daughter Aarushi aged about 14 years and domestic help Hemraj aged about 45 years, hence, they have been heard together and are being decided by this common order.

By the impugner judgment and orders, the accused persons were sentenced to rigorous imprisonment for life under section 302 read with section 34 IPC with fine of Rs.10,000/- each and in default of payment to further undergo six months simple imprisonment; to undergo five years rigorous imprisonment under section 201 read with section 34 I.P.C. with fine of Rs.5,000/-each in default of which to further undergo simple imprisonment of three months. Apart from these sentences of punishment, Dr. Rajesh Talwar in addition, is also convicted under Section 203 IPC and sentenced to one year simple imprisonment with a fine of Rs.2,000/- and in default thereof to undergo simple imprisonment of one month.

Preliminary objections have been raised by Sri Anurag Khanna Counsel for CBI and Sri S.N. Tripathi, AGA representing the State to the effect that:-

1. The Criminal Appeals have been preferred under Section 374(2) Cr.P.C. with grounds for decision of the appeals on facts and law. Merely filing of appeals do not entitle the appellants to be released on bail particularly when the appellants in these appeals have reproduced only dates & events of the case in their bail applications without taking specific grounds under Section 389(1) Cr.P.C. as grounds for consideration of bail applications by the Court are different from that for consideration of appeal.
2. The non-existent facts and circumstances narrated in the bail applications have been distorted by the appellants by their own interpolations and the issues in question averred therein are those which basically require decision on the appeals.

Hence, for all these aforesaid preliminary objections the bail applications of the appellants are liable to be rejected.

On being called upon for reply on the preliminary objections, Ms. Rebecca M. John, learned Senior Counsel for the appellants has placed before us paragraphs 4 and 5 of the supplementary affidavit filed on behalf of the appellants, which read thus:-

> "4. That the appellant craves leave of this Hon'ble Court to prefer following specific grounds for grant of suspension of sentence and bail pending hearing of the appeal which are taken without prejudice to each other herein below.
> 5. Grounds for suspension of sentence/bail."
> (5.1 to 5.17)

She would argue that it has also been specifically averred in para 1 of the bail application along with the affidavit that facts mentioned in the appeals form part of the bail application but in order to avoid any technical objection the facts mentioned in the application for bail and suspension of sentence along with grounds for bail specifically taken in the supplementary affidavit which may be considered; that facts to be adjudicated in appeal would necessarily have some bearing on the consideration of bail

applications as consideration of grounds under Section 374(2) Cr.P.C. and 389(1) Cr.P.C. may be different, though are subject to the settled principles of law covenanted in the provisions but have a nexus as grounds for bail are derived from the facts in the appeal.

Upon hearing the learned counsel for the parties on the preliminary objections and perusal of the relevant provisions we are of the view that parameters for consideration of legal grounds for decision of the appeal preferred under Section 374(2) Cr.P.C., are independent to grounds under Section 389(1) Cr.P.C. for bail/suspension of sentence but facts for deciding the appeal or grant of bail may be common. However, in the instant case at hand, specific grounds in the supplementary affidavit on behalf of the accused persons have been taken for grant of bail to the accused persons.

In our considered opinion, it would therefore, be too harsh and unfair to deprive a person convicted for life by the trial Court from consideration of his bail application only for technical reason that he has not specifically taken specific grounds in his bail application. This wound be unreasonable and amount to denial of opportunity to such a person from consideration of his innocence for grant of bail/ suspension of his sentence particularly in circumstances where the order of the trial Court may suffer from vice of mis-appreciation of evidence and facts, or misreading law but these cannot be appreciated without hearing. In these circumstances if an accused is denied hearing on his bail application merely because specific grounds have not been mentioned therein which can be culled out from the facts and circumstances mentioned therein and is curable, and would not be fatal for consideration of bail/suspension of sentence. In any case, this technicality has been taken care of by the appellants by preferring specific grounds for bail in the supplementary affidavit.

Therefore, there remains no impediment in the instant case in hearing of the bail applications of the accused in the appeals under consideration. Preliminary objection is accordingly, decided.

ARGUMENTS IN CRIMINAL APPEAL NO. 294 OF 2014, DR. RAJESH TALWAR VERSUS STATE OF U.P. AND OTHERS, FOR GRANT OF BAIL/SUSPENSION OF SENTENCE.

Submission made by Ms. Rebecca M. John, Senior Counsel on behalf of accused-appellant Dr. Rajesh Talwar is that he along with his wife Dr. (Smt.) Nupur Talwar was taken into custody by Noida police on 23.5.2008 and tried for murder of their only teenaged daughter Aarushi and domestic help Hemraj and that during trial the CBI had moved the Court of Special Judicial Magistrate (CBI) on 11.7.2008 by means of an application, inter alia, that no evidence had surfaced against the appellants during the investigation of the case, therefore, he may be released from judicial custody. Consequently the Court below granted bail to him. The CBI also filed a closure report at the stage when the alleged materials being relied upon by the prosecution had yet to be tested on the anvil of cross-examination citing some shortcomings in the circumstances. The stand of the prosecution before the trial Court also was that two contrary views were possible as such the case against the appellant was one which would always never be beyond reasonable doubt; that pursuant to the order passed by Special Magistrate (CBI) during the trial the appellant Dr. Rajesh Talwar remained on bail w.e.f. 11.7.2008 to 25.11.2013 and abided by all the conditions that had been imposed upon them as conditions of bail. It is also submitted that the appellants did not misuse their bail and not only remained available to the authority but also cooperated with them in trial of the case after charges were framed on 25.5.2012 till culmination of the trial on 25.11.2013. They were again taken into custody after being held guilty of the alleged offences by the learned trial Court vide the judgment impugned in the present criminal appeals.

It is submitted in support of the bail applications that learned trial Court itself came to the conclusion that the appellant Dr. (Smt.) Nupur Talwar and accused Dr. Rajesh Talwar are not a menace to the orderly society hence, in this view of the matter even if the appellants are granted bail during the course of pendency of these appeals they are not likely to abscond from law or take any untoward step prejudicial or detrimental to the fair adjudication of the appeal; that it is settled parameter of law that appeal against conviction is a matter of right of the accused and is considered as a continuity of trial. Hence, there would be no predicament whatsoever if the appellants are released on bail by the High Court, suspending the sentence pending hearing of these appeals particularly when the hearing of the criminal appeals in the context of pendency of admitted appeals in the High Court at present may take considerable period of time in its final decision, as appeals of 1982-83 are at present being taken up by this Court and the coordinate Benches hearing appeals of similar nature. The appellants have excellent cases and their appeal have sanguine hope of success and in case the appellants are finally acquitted of all the charges after the appeals are heard, then continued incarceration of the appellants till then would be a travesty in its own-self.

The Counsel emphatically argues that it is admitted case of both the parties that case in hand in totality is a case of circumstantial evidence. There are no eye-witnesses to the incident as far as alleged commission of offences is concerned.

The impugned judgment passed by the trial Court suffers from a large number of errors on factual and legal parameters and has wrongly portrayed the scene of crime e.g. the learned trial Judge in the impugned judgment incorrectly returned an observation that the wall dividing the bedrooms of deceased Aarushi and the appellant and his wife was a wooden partition

whereas from the evidence of the Investigating Officer PW-39 Sh. AGL Kaul it is clear *"that the wall separating the room of deceased Aarushi and the appellant's bedroom was a cement and brick wall (pucca wall). In this wall earlier there used to be a door which had been closed and ply/wood paneling had been done on both sides of the wall i.e. from the side of the bedroom of appellant and from the side of the room of deceased Aarushi."* Moreover, the appellants had also in their statement under Section 313 Cr.P.C. had stated that the wall was three fold i.e. wood paneling on both sides of the brick wall. The errors on factual and legal parameters are :-

(a) The edifice on which the prosecution case is based was the presence of Hemraj in Aarushi's room in a sexually compromising position. The learned trial Court while appreciating the matter on the merits of evidence committed a fundamental error in returning a finding that Hemraj was actually present in the room of Aarushi in the night intervening 15th & 16th May, 2008. This circumstance was not proved at all, in as much as there was no evidence of presence of blood, sputum, semen, biological fluid, body hair, public hair, skin or any other part of Hemraj either on Aarushi's bed or for that matter in the entire room. In this regard a large number of blood scrapings had been taken by forensic experts and were subjected to forensic examination like DNA test, human blood testing etc. during the course of investigation. However, the result of these clearly indicated that the blood scrapping, blood on Aarushi's mattress, bed-sheet, pillow cover were only of Ms. Aarushi. Hence, the finding returned by the court below of alleged presence of Hemraj in Aarushi's room was erroneous and baseless.

(**b**) The trial Court at the very initial and nascent stage on the point of conviction, erroneously observed that- " the dead body of domestic servant Hemraj was found on the terrace of the house on 17.5.2008 and there is nothing to suggest that intruder(s) perpetrated this fiendish and flagitious crime" is based on no

evidence or possibility of an intruder having committed the crime for the reason that the learned trial Court on this point disregarded the admitted position of CBI which itself had found more than credible evidence of involvement of outsiders like Krishna, Vijaymandal and Rajkumar who had made voluntary disclosure statements giving vivid details as to how double murders were committed by them, yet the accused-appellant had been convicted. Though there was irrefutable documentary evidence available on record that the murder weapon (kukari) had been discovered pursuant to discourse made by accused Krishna yet the trial Court failed to appreciate that the said murder weapon had also been endorsed by the post mortem Doctors i.e. Dr. Naresh Raj and Dr. Sunil Dohre in their opinion dated 31.7.2008 and that it further ignored the report dated 6.8.2008 submitted by seven Member Committee of Experts belonging to CFSL and AIIMS of which two Doctors of postmortem were members wherein the said Kukari was again opined to be the probable weapon of offence and lastly as per the DNA and forensic report of CDFD, Hyderabad dated 6.11.2008, DNA of Hemraj was found on "purple colour pillow cover". belonging to erstwhile accused Krishna and recovered from his premises along with the Kukari onh 14.6.2008 by the CBI investigators. Thus, there was plethora of evidence available on record that the crime was committed by accused persons Krishna, Vijaymandal and Rajkumar and not the appellants, therefore, the trial Court has ignored overwhelming evidence as an alternative hypothesis available on record regarding intruder committing the murder. This approach of the learned trial Court was clearly erroneous.

A further error in recitation of facts, which goes to the root of the matter was committed by the learned trial Court . For example it has been observed by it that on 17.5.2008 when the lock of the roof door was broke open, the dead body of Hemraj was found in extremely putrefied condition. In this backdrop the trial Court has

observed that Dr. Dinesh Talwar brother of accused & accused Dr. Rajesh Talwar were asked to identify the dead body but the accused stated that he could not recognize the dead body, however, Ram Prasad, Rudra Lal of Nepali origin and other persons who had gathered there identified the dead body of Hemraj. The gross-error committed by the trial Court is apparent from the evidence available on record and the cross-examination which clearly proved beyond any reasonable doubt that Dr. Dinesh Talwar and appellant no.2, Rajesh Talwar had identified the dead body of Hemraj readily as per the testimony and cross-examination of P.W.29, Mahesh Kumar Mishra.

(c) It is urged that Bharti Mandal, being the maid of the house, came daily for sweeping and mopping. She would have known that the door in Hemraj's room, opening into the passage between the outer and inner grill and mesh doors, was non-functional. Otherwise, she would have suggested Dr. Nupur Talwar to come through the other door of Hemraj's room, opening inside the passage and let her in. Hence, from her conduct and conversion, an inference can be drawn that Hemraj's door opening into the passage, was non-functional and used to remain closed at all times. Learned trial Court fell into a serious error by not holding that Bharti Mandal's material improvements were dis-believable and to this extent caused grave miscarriage of justice in the entire matter and convicted and condemned the appellant illegally rendering the impugned judgment and order on the point of conviction and sentence as bad in law and liable to be quashed and set aside.

Criticizing the evidence of Bharti, the maid the Counsel also submits that she in her statement clearly stated that she had unlatched the middle mesh door; that Umesh Sharma (PW-15) has mentioned that the outer grill door would open with a jerk and with a lot of noise and Hari Singh (PW-31) confirmed that Shashi Devi

had stated that the outer mesh door used to remain stuck. Accused-appellant Dr. Nupur Talwar in her statement under Section 313 Cr.P.C. has given a detailed explanation in this regard. Umesh Sharma (PW-15) has confirmed that the door of Hemraj's room opening into the passage used to remain closed as a fridge was kept near it. Mahesh Mishra (PW-29) and Sri K.K. Gautam (PW-7) have confirmed the presence of a fridge and a table in Hemraj's room as such the door of Hemraj's room opening into the passage was non-functional and never opened; that this 'theory' of putting hand on outer mesh door' by Bharti, which did not open, was a material improvement based on tutoring, and makes a significant shift in the case against the appellants; that Dutta Ram Nanoria (PW-34) stated that Bharti had not mentioned of putting her hand on outer door at the time when her statement under Section 161 Cr.P.C. was recorded. hence, her statement to this extent is not reliable. Learned counsel for the appellants has relied upon the case of **Rudder versus State of U.P.**, AIR 1957 All.238 based on a full Bench judgment of this Court in **Subedar versus State of U.P.,** Criminal Appeal No. 77 of 1952 in support of his aforesaid contention.

The evidence led by the prosecution in this case is categorized by the learned counsel as based on a fabricated statement made by Bharti about outermost grill and mesh door (a statement made by her for the first time in Court) for which she was duly confronted twice. Given the fact that in cross-examination, the value of Bharti's testimony had been diminished, the prosecutor, if he was due to his role of upholding the truth, ought to have re-examined Bharti and cleared the ambiguity, if any, once and for all. According to her, the prosecution has for the first time set up this case in Court and nothing prevented them from questioning her about the door in Hemraj's room as to whether it was being used or whether the outermost grill door was ever latched from inside. However, as the prosecution failed to do so hence, an adverse inference should be

drawn against them.

According to him, the culpable exaggeration and improvements of Bharti Mandal are so material in nature, that in one stroke, a fresh case is reconstructed against the appellants and as such when the structure of the case is altered, no credence can be given to the witness' testimony; that Bharti Mandal was always aware that the outermost grill and mesh door had not been latched from inside. She saw Dr. Nupur Talwar standing behind the inner mesh and grill door and was aware that the inner mesh and grill door was not opening and that is why she asked for the key. If she knew that the outermost grill and mesh door was latched from inside, she would have told Dr. Nupur Talwar to unlatch this outermost grill and mesh door and she would have disputed Dr. Nupur Talwar's claim that Hemraj had gone for milk. An ingenious reconstruction was done by the counsel for the CBI during their reply to the arguments advanced on behalf of the appellants that Dr. Nupur Talwar sent Bharti downstairs, opened Hemraj's door which opens into the passage, unlatched the outermost grill and mesh door, latched the inner grill and mesh door from inside and retraced her steps back into the house from Hemraj's room. Therefore, the whole case of the prosecution is based on reconstruction and not actual evidence. As prosecutorial reconstruction is not evidence the Apex Court has warned against succumbing to this temptation in **Bhagirath versus State of M.P**., AIR 1976 SC-975.

(d) Another error pointed out is that PW-36 Dr. Naresh Raj who conducted the post mortem of the deceased Hemraj during the course of his testimony admitted that as per his post mortem report the injuries nos. 6 & 7 on the head of Hemraj were there is no muscle. These injuries in the circumstances, would have been caused pro-fused bleeding continuously for a long time causing the pools of blood of Hemraj on Aarushi's bed, mattress, bed-sheet

and other articles/ parts of her room. As a matter of fact the CBI in their final report had admitted that there was no presence of Hemraj's blood any where in Aarushi's room, on her pillow cover or her bed-sheet Similarly, if the prosecution case is believed that body of Hemraj was taken up the stairs to the terrace then his blood ought to have been found on the stairs as well as the place on terrace where it was found. However, this was not the case as PW-39 himself admitted in his testimony that there was no forensic evidence even of cleaning of blood on the stairs or anywhere else at the scene of the crime. As per the prosecution case Hemraj was not murdered in Aarushi's room at all. Hence, this circumstance was not proved by the forensic evidence/DNA evidence available and also on the parameters of circumstantial evidence as well as from the point of view of human probability which is the parameter to be adopted in testing the circumstances as noticed by the trial Court in a catena of decisions referred in the impugned judgment on the point of conviction.

(e) Both the doctors, namely, Dr. Naresh Raj & Dr. Dohre, who had conducted the post mortem of deceased Hemraj and & Ms. Aarushi committed medical blasphemy during the course of their testimonies the crucial parts of their statements were overlooked by the learned trial court while returning a finding against the appellants. Dr. Naresh Raj PW-36 had stated on oath the reason for swelling of the penis of deceased Hemraj was on account of the fact that he was bludgeoned in the midst of a sexual intercourse and because of this virtually an erection in that organ remained even after his death. This Doctor in his cross-examination claimed to have based his opinion on account of his experiences in his own marriage. Despite these the trial Court believed their statements in part which suggest the theory of their present testimonies where it was detrimental to the prosecution case. Similarly, PW-5 Dr. Dohare was castigated by the learned trial court at various junctures in the judgment impugned despite the fact that

he had stated that his observations were a matter of subjective finding,which otherwise, are inadmissible in evidence and have no role to play in forensic science observing that his conduct was suspicious and untruthful, yet, the learned trial court chose to believe the material improvements made by him which went to the root of the matter. These findings were contrary to the observations made in the postmortem report of deceased Aarushi wherein he categorically wrote 'NAD' i.e. 'No Abnormality Detected' as far as her private parts were concerned. The learned trial Judge also chose to construe the presence of vaginal discharge to be definite evidence of occurrence of sexual activity despite the testimony of prosecution witness PW-5 Dr. Dohare to the effect that vaginal discharge can be present in young girls. This was further substantiated by DW-3 Dr. Urmil Sharma who confirmed that vaginal discharge was often found in young girls. In view of the above, the circumstance pointing to the presence of any sexual activity in Aarushi's room was extremely doubtful. The slides prepared to check as to whether the white discharge was from outside source, did not show the presence of any spermatozoa.

(f) The learned trial court by ignoring the reconstruction of crime by scientific methods like a sound simulation, polygraph, brain mopping and psychological tests etc. carried out by the experts on 10.6.2008 was admissible U/s. 45 of Indian Evidence Act which clearly proved that the appellant could not have heard the sounds of ingress and egress of intruder into the apartment in the intervening night between 15 & 16 May 2008; that this was not at all dealt with by the trial Court in the impugned judgment & order and that by applying "the principle of last seen" by shifting the burden of proof upon the appellant/accused persons not withstanding the fact that prosecution witnesses had themselves given graphic details of how the double murders of Aaurshi and Hemraj had been allegedly committed which has come out particularly in the testimony of Dr. M.S. Daniya (PW-38) & AGL

Kaulr (PW-39), hence, in such circumstances burden ought not to have been shifted upon the appellants notwithstanding the fact that more than adequate explanations on preponderance of probabilities were available in the evidence adduced, the statement U/s. 313 as well as the defence evidence on account of which the burden even if shifted had clearly been rebutted. However, the learned trial court erred on these counts. ...

Lastly the learned counsel for the appellants would argue that the learned trial court in the impugned judgment and order on the point of conviction while dealing with the settled parameters of law on the aspect of testing a case of circumstantial evidence relied upon a catena of decisions of the Apex Court cautioning the Courts not to give decision on "may be true" but on "must be true".The judgment of conviction must be based on clear, cogent and unimpeachable evidence produced by the prosecution before an accused is condemned as a convict. However, most unfortunately, it is stated that when the learned trial court was contended in dealing with the evidences both oral and documentary that had been adduced on record in this case. The findings recorded by the learned trial court were in the realm of "possibilities", "probabilities" and virtually, "may be", rather than, "must be". For example-

a) in regard to the evidence pertaining to continued activity of internet router throughout the night intervening between 15/16.05.08, after discussing the evidence on record, the learned trial court returned a finding, "*that both accused are acquainted with internet functioning and therefore, they '**may have**' continued with the stop and start activity till 13:11:44 hours on 16.5.08 with an intent to confuse and camouflage the investigating agency and also to create evidence in their own favour."*

b) On similar lines, the learned trial court while considering the proposition as to how blood got embossed on the Sula Wine Bottle, the Kingfisher Bottle, the 2 liter Sprite Bottle, admittedly recovered from Hemraj's room as well as the Ballantine

Scotch Bottle from the Dining Table, the learned trial court returned the following observations:-

> *i) "**It is possible**, in all human probability that accuseds may have created evidence of such nature which may have confused the investigators".*
>
> *ii) "**There is every possibility**, that Whisky from the Ballantine Scotch Bottle was consumed and taken by Dr. Rajesh Talwar."*
>
> *iii) "**It is also possible**, that Whisky Bottle "**might**" have been lifted by Dr. Rajesh Talwar after wearing gloves."*
>
> *iv) "**It is also possible**, that the Sula Wine "**may have**" also been taken by Rajesh Talwar, when he was extremely and extensively in tension after committing the crime."*

c) Similarly, while dealing with the circumstance of presence of blood stains on the stairs leading to the roof which was a very vital circumstance in the entire trial against the version of three prosecution witnesses, the version of eight prosecution witnesses was to the contrary, yet again the learned trial court returned the finding saying that , *"**possibility** of clearing of blood stains on the stairs and railing by the accused after commission of the crime in the night cannot be ruled out."*

d) Again while dealing with the circumstance as to whether there was evidence of purported dragging of the dead body of Hemraj allegedly in a bed-sheet through the stairs onto the roof, the learned trial court again observed that- *"It is **possible** that after bludgeoning Hemraj with a golf club he was carried in a bed sheet by both the accused to the terrace when he was in a state of concussion....."*

Besides the aforesaid instances, it is urged that the learned trial court at other numerous places also resorted to convict the Appellants condemning them on the presumption of "**may be**", "**there is a possibility**" or "**there is a likelihood**", etc. To this extent, the learned trial court failed to appreciate the law

enunciated by the Hon'ble Supreme Court of India in **Prakash vs. State of Rajasthan (2013) 4 SCC 668 and Manjendran vs. State of NCT of Delhi (2013) 7 SCC 132,** wherein it reiterated that in a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance by way of reliable and clinching evidence and the circumstances so proved must form a complete and unbreakable chain on the basis of which no conclusion or hypothesis, other than the guilt of the accused, can be reached. To this extent, the learned trial court returned findings which are in the teeth of the law enunciated by the Hon'ble Apex Court on the aspect of circumstantial evidence, on the aspect of proof beyond reasonable doubt, on the aspect of appreciation of oral and documentary evidence, on the aspect of drawing presumptions and on the aspect of relying upon witnesses, who were condemned in part by the learned trial court itself.

Hence, it would be in the interest of justice that the appellant is granted bail during the pendency of appeal as he has on bail during the course of trial also.

ARGUMENTS IN CRIMINAL APPEAL NO. 293 OF 2014, DR. (SMT.) NUPUR TALWAR VERSUS STATE OF U.P. AND OTHERS.

Sri Dileep Kumar, learned Senior Counsel while adopting the arguments advanced by Ms. Rebecca M. John, Senior Advocate submits that-

1- The impugned judgment & order dated 25.11.2013 on conviction and order dated 26.11.2013 on sentence passed by the learned ASJ and Designated Judge under the Prevention of Corruption Act, Ghaziabad are illegal erroneous, based on ill-appreciation of facts as well as non-appreciation of settled parameters of law and contemplation of evidence, oral & documentary, on assumption surmises and conjectures glossing over the innocence of appellants beyond any reasonable doubt on

the dint of explanation given by them under Section 313 Cr.P.C.

1. The learned trial Court committed fallacy in the case by shifting the burden of proof on the appellants which finding is against the settled principles of law as burden to prove the guilt of the accused is on the prosecution. The trial Court in the present case proceeded with on an ill premise that burden to prove their innocence under Section 106 of Indian Evidence Act was on the appellants which in the facts and circumstances of this case was not applicable, even otherwise strong evidence was available on record proving their innocence as such the impugned orders and judgment in mis-appreciation of evidence and mis-direction in approach are liable to be set aside, not being based on preponderance of probabilities.

2. The learned trial Court has also committed fatal error in appreciating prefatory and basic facts regarding the complaint being scribed by appellant no.2 at his residence in the morning hours of 16.5.2008; that about the falsity statement of P.W.34 when he stated that FIR no. 695 of 2008 was lodged by appellant no.2 himself and statement of Mahesh Kumar Mishra (PW-29) who stated that there was no blood stains, wiped blood stains, bloody footmarks etc. on the stairs going up to the roof on 16.5.2008 and there was only blood mark on the lock of the roof door etc.

4. The trial Court has turned a blind eye to the cross-examination of P.W. 39, AGL Kaul. The trial Court observed that- " *that AGL Kaul, Dy. S.P., CBI in course of investigation inspected the scene of crime created an email and directed Rajesh Talwar to produce golf stick prior to that Rajesh Talwar was enquired about one missing golf stick, but, he had not given satisfactory explanation thereof. S.P. CBI, Dehradun had asked Rajesh Talwar that when golf stick was missing, how and he had produced the complete set, then, on behalf of Rajesh Talwar, one Ajay Chadha wrote an email to Sri Kaul stating that one golf stick was found in the attic/loft in the room opposite to Aarushi's room during cleaning of the flat."*

5. It is also stated that the trial Court has committed illegally in observing that- *" factual observations to this extent were bereft of any evidentiary support. To this extent, the learned trial Court committed a fallacy and the same clearly indicates that the very premise of the impugned judgment and order on the point of conviction in the very recital of facts suffers from errors apparent on the face of the record, rendering the impugned judgment and order bad in law and liable to be quashed and set aside."*

6. Sri Dileep Kumar, learned counsel for appellant Dr. (Smt.) Nupur Talwar also submits that following golden principles are essential for deciding a case:-

(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances must be or should and not may be established.

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say they should not be explained on any other hypothesis except that the accused is guilty.

(iii) The circumstances should be of a conclusive hypothesis and tendency.

(iv) They should exclude every possible hypothesis except the one to be proved.

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

He would argue that assuming the prosecution story as true that teenaged Ms. Ms. Aarushi was found in a comprising position with the domestic servant Hemraj in her bedroom during the intervening night of 15/16.5.2008 causing the appellants to commit the crime is not supported by the medical evidence. The post mortem report of Ms. Aarushi shows that nothing abnormal was detected in any of her private parts. Dr. Sunil Dohre has stated in his evidence that the opening of the vaginal cavity was prominent

and wide, the whitish discharge appeared as though it had come from outside, the hymen of victim was old, torn and healed, the mouth of her vaginal cavity deep was very wide so much so the vaginal canal could be seen from it, indicating that the same had been tempered with. Dr. Sunil Dohre further stated that a surgical sharp instrument and a golf stick has been used to commit the crime. When Dr. Sunil Dohre was confronted with all his culpable improvements he conceded that these were his "subjective findings" which are never recorded**.** He also admitted that as per the pathologist report, no spermatozoa was found and further that he was never shown the scalpel or golf stick but was merely shown a Kukri; that he was a member of the Committee set up under the Department of Forensic Medicine and Toxicology, AIIMS, New Delh, which submitted its report. Likewise, Dr. Naresh Raj (PW-36) has stated that the penis of Hemraj was swollen which suggests that he was either in the course to commit sexual intercourse or was actually performing when allegedly seen by the accused but admits that he had no training in forensic science and further states that his evidence pertaining to the engorged penis of Hemraj was on his own personal experience of a married man; that D.W. 2 exhibited a surgical scalpel as Ex.Kha-1 and has stated that a prosthodenist rarely keeps a scalpel at home. Dr. R.K. Sharma (DW-4) retired head of forensic medicine at AIIMS, New Delhi has categorically stated that a golf stick injury results in a depressed fracture, and cannot be of the dimension stated in the post mortem report, as the bone on the back of the head is curved whereas the surface of the gold stick is flat. It is also stated that the court below reached the conclusion that both the deceased were engaged in sexual intercourse and has dismissed the exaggeration and lies by Dr. Sunil Dohre; that the trial Court has dismissed the evidence of D.W.3 and D.W.4 on the ground that they are partisan witnesses and while agreeing that Dr. Naresh Raj's testimony was ludicrous, has yet upheld the sexual intercourse theory.

In the aforesaid circumstances, the motive of the crime cannot be said to have been established when no blood of Hemraj was detected from Aarush's room. Despite this, the trial Court has come to the erroneous finding that Hemraj's DNA was found on a pillow with its cover from the room of Aarushi. This is contrary to the evidence of P.W.6 where the exhibit was opened in Court and the pillow cover had an endorsement 'from servant's room." It is submitted that when the purple colour pillow cover recovered from Krishna's room showed up the blood and DNA of Hemraj, the I.O. AGL Kaul, after the Court had taken cognizance and summoned the appellants, went to CDFD, Hyderabad and coerced them into issuing a clarification. If that be the conduct of the CBI, nothing prevented them from getting a " clarification" from the witness Bharti regarding the door.

Learned counsel for the appellant then would argue that as per the Sound Test Report conducted on 10.6.2008, sound of someone approaching Aarushi's room and opening the door to her room may not be heard by a person sleeping in the parents' room and that person sleeping in parents' bedroom cannot hear the opening and closing/bolting of entry/exit door i.e. the main door of the house. Sri AGL Kaul (PW-39) has admitted that the wall between the room of Aarushi and the room of parents was a pucci wall; that it is the consistent stand of the appellants that they slept through the incident and heard nothing. The argument made by the C.B.I. that the sounds simulation test was conducted to verify whether the appellants had heard the sound of falling spoon, is false, mischievous and not based on an iota of evidence on record. The sound simulation test was conducted only to verify whether or not any sound could be heard in the room of the appellants, given the fact that two Air-Conditioners were running and the appellants were in deep sleep; that the trial Court has given a finding against the appellants regarding influence exerted on the post mortem of Aarushi by Dr. Sunil Dohre (PW-5). However, the prosecution did

not produce either T.D. Dogra or Dr. Dinesh Talwar as witnesses to substantiate this allegation.

As regards the phone record of Dr. Dinesh Talwar recovered and seized by the CBI, the same did not reflect any phone call to Dr. Dogra or to AIIMS EPBX. Dr. Sunil Dohre (PW-5) has been confronted with the improvements regarding the allegations of any influence by Dr. T.D. Dogra. Dr. Sunil Dohre has not stated this fact in first five statements to the Investigating Officer. He has not deposed before the Court that he was placed under any pressure from Dr. Dinesh Talwar.No suggestion has come from the prosecution during the trial that he did not write anything in his report because at that time he was under the pressure of the appellants. The pressure on Dr. Dohre is a theory, is absurd, because he was an employee of the U.P. Government and it was the U.P. Police who had arrested Dr. Rajesh Talwaron 23.5.2008.

His next argument is that as opposed to prosecution witnesses relied upon by the prosecution to highlight that there were blood stains on the stairs leading upon to the terrace outside the flat of the appellants, as many as 8 witnesses have deposed to the contrary, including P.W.1 Chunni Lal Gautam, the Crime Scene Photographer. Mahesh Mishra (PW-29) has stated that there was no blood on the stairs. Bharti Mandal (PW-10), Umesh Sharma (PW-15), Punees Rai Tandon (PW-12), Dutta Ram Nanoria (PW-34) and Vikas Sethi (DW-5) have nowhere stated that there was any blood stains on the stairs or the railing. Post mortem report of Hemraj shows no back injuries. He was wearing Chappals. No person wearing chappals can be dragged up a height of approximately 40 stairs by a man and a slender woman. Sri AGL Kaul (PW-39) has admitted that there was no report of any expert that blood stains were wiped from the stairs.

Learned counsel for the appellants has relied upon the following case laws on the point that the deceased were last seen in the company of the accused-appellants and on the point of Section 106 of the Indian Evidence Act as well as on burden of proof.

1. *AIR 1997, SC 2193,* ***Taniven Pankajkumar Divetia versus State of Gujrat; (****Paragraphs 9, 35, 40,44,45 & 46)*
2. *1984 (4) SCC-196,* ***Sharad Birdhichand Sarda versus State of Maharashtra****, (Paragraph 197)*
3. *AIR 1992 SC-758,* ***Sakharam versus State of Madhya Pradesh (****Paragraphs 5&8)*
4. *2006 (12) SCC-306,* ***Vikramjit Singh Alias Vicky versus State of Punjab*** *(Paragraphs 14 &16)*
5. *2003(12) SCC-377,* ***Mausam Singha Roy versus State of West Bengal*** *(Paragraphs 27 & 28)*

Learned counsel for the appellants summarizes his arguments by saying that the appellants only need to establish their innocence through the preponderance of probabilities. This they have done, in the alternative theory developed within the CBI case; there is an alternative weapon Kukri. The blood stained Kukri was never sent for advanced DNA examination despite an application moved by the appellants during the trial. Alternative suspects- Krishna, Vijay Mandal and Raj Kumar, who were arrested and remanded to custody through judicial orders, based on the investigation conducted by the CBI. Conclusive evidence in the form blood and DNA of Hemraj from the purple pillow cover recovered from Krishna's room.Bharti Mandal is not a reliable witness and was in fact a tutored witness. In any event, she categorically stated that the inner iron and mesh door was latched from the outside. Dragging theory is completely unsubstantiated. The medical evidence is nothing short of a fairy tale. No blood of Hemraj in Aarushi's room was found. The contention of the CBI that a near fatal blow on the head by using a golf stick would not result in flow of blood is neither based on any medical or forensic expert opinion, nor any evidence proved on record, but is merely a prosecutorial opinion that cannot be relied upon or given any credence to. The

fingerprints from the Ballantine bottle did not match with either of the two appellants. The blood stained palm print on the terrace did not match with either of the two appellants. No DNA or other forensic evidence from the palm print could connect Rajesh or Nupur Talwar with it. The CBI itself moved an application under Section 169 Cr.P.C. on 11.7.2008 stating that they had no ocular, medical or forensic evidence, including the blood stained palm print, blood stained shoe print and the clothes of the appellants connecting the appellants with the crime; that the subsequent weapons i.e. golf stick and scalpel were never produced in Court or shown to the post mortem Doctors, they were incapable of causing the injuries on the deceased. P.W. 39 admits that Rajesh Talwar had presented the complete set of the golf sticks. P.W. 32 has stated that on 31.10.2008 he received the 12 golf clubs from Rajesh Talwar on the directions of AGL Kaul. Appellant Dr.Rajesh Talwar was in custody from 23.5.2008 to 11.7.2008 and thereafter, has been in custody since 25.11.2013 and appellant Dr. Nupur Talwar was in custody from April, 2012 to September, 2012 and thereafter, has been in custody since 25.11.2013. Dr. Nupur Talwar was never an accused during investigation and no material evidence was found against her either by the NOIDA Police, the First team of the CBI or its second team. Between May, 2012 when the trial commenced, and November 25,2013, when the appellants were convicted, they appeared in the trial Court for more than 200 hearings and the trial concluded in a fast track manner.

Penultimate argument of learned counsel for the appellants is that the trial Court itself came to a conclusion that the case was based on grave & sudden provocation and if the prosecution case is admitted to be correct without demur, then to this extent on account of grave & sudden provocation a conviction U/s 302 IPC was not justified, hence the learned trial Court erred on this count as well. It is submitted that in the process of assessing the evidence on record, this Court is required to separate the grain

from the chaff. However, if the grain cannot be separated from the chaff, then this Court cannot reconstruct an absolutely new case for the prosecution as has been held in **Balaka Singh versus State of Punjab**, AIR 1975 SC-1962.

It is lastly assured on behalf of the appellants that as a matter of record that appellants are persons with absolute clean antecedents and have never had a brush with law before and in case bail is granted to them or an order suspending their sentence of conviction is passed by this Court, they shall not take any step which may be deemed to be prejudicial in fair adjudication of the appeal. They have strong roots in the society and shall not abscond or flee from justice and would abide by all the conditions that would be fixed by this Hon'ble Court. The appellants in view of aforesaid factual and legal errors committed by the learned trial Court deserve a direction that his sentence be suspended pending hearing of the appeal in the peculiar facts and circumstances of the case.

Per contra, Sri Anurag Khanna, learned counsel for the respondent submits that the trial Court has appreciated the evidence led before it and reached to an unequivocal and impeccable conclusion that only the appellants are responsible for committing these ghastly crimes. He has relied upon the following circumstances mentioned in the judgment, which unerringly point out towards their guilt and none else:-

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

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

3)- That the dead body of the servant Hemraj was found lying

in the pool of blood on the terrace of flat no. L-32, Jalvayu Vihar on 17.05.2008 and the door of terrace was found locked from inside;

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

5)- That the door of Ms. Aarushi's bed-room was fitted with automatic click-shut lock. P.W.-29 Mahesh Kumar Mishra the then S.P. (City), N.O.I.D.A. has deposed that when he talked to Dr. Rajesh Talwar on 16.05.2008 in the morning, he had told him that in the preceding night at about 11.30 P.M. he had gone to sleep with the key after locking the door of Ms. Aarushi's bed-room from outside. Both the accused have admitted that door of Ms.Aarushi's bed-room was having automatic-click shut lock like that of a hotel, which could not be opened from outside without key but could be opened from inside without key. No explanation has been offered by the accused as to how the lock of Ms. Aarushi's room was opened and by whom;

6)- That the internet remained active in the night of the gory incident suggesting that at least one of the accused remained awake;

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

8)- That there was no disruption in the supply of electricity in that night;

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

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

11)- That there is no evidence of any larcenous act in the flat;

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

13)- That the house maid Bharti Mandal has no where stated that when she came inside the flat both the accused were

found weeping;

14)- That from the testimony of Bharti Mandal it is manifestly clear that when she reached the flat and talked to Dr. Nupur Talwar then at that time she had not complained about the murder of her daughter and rather she told the maid deliberately that Hemraj might have gone to fetch milk from Mother Dairy after locking the wooden door from outside. This lack of spontaneity is relevant under section 8 of the Evidence Act;

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

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

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

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

19)- That the door of the terrace was never locked prior to the occurrence but it was found locked in the morning of 16.05.2008 and the accused did not give the key of the lock to the police despite being asked to give the same;

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

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

22)- That the motive of commission of the crime has been established;

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

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

25)- That pattern of head and neck injuries of both the accused persons are almost similar in nature and can be caused by golf-club and scalpel respectively;

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

27)- The manner in which the murders were committed is not the handiwork of single accused and rather the murders were committed and evidence destroyed by both the appellants in furtherance of their common intention which is apparent from the facts and circumstances as discussed above.

The evidence which has come against the appellants and appreciated by the trial Court:-

Our attention has been drawn towards the evidence of Umesh Sharma (PW-15) driver of the appellants which has come against the appellants and appreciated by the trial Court which shows that appellants as well as the deceased were last seen together on the fateful night and murdered within a short duration in the confines of the house.

As per the post mortem reports of both the deceased, they were done away with between 12 a.m. to 1 a.m. of the intervening night of 15/16.5.2008. There was a very short gap between time and the death of both the deceased. All of them were last seen together and there is no evidence that any outsider had come inside the house and had gone away quietly after committing the murders of the daughter and the servant, where body was taken up the roof from the stairs but without disturbing the said sound sleep of the parents sleeping in the immediate next room.

Premises had not been broken into and the flat was not found locked from outside but was closed from inside.

Bharti Mandal (PW-10), the maid who was the first witness to reach the house of appellants at about 6.00 A.M. on 16.5.2008 deposed that when she for the first time put her hand on the outer iron grill door it did not open and on pressing the bell for the third time appellant Nupur Talwar opened the wooden door and started talking to her from inside of inner iron grill door and told her that Hemraj might have gone to fetch milk from Mother Dairy. Thereafter, appellant Nupur Talwar sent her downstairs towards balcony to collect key which she will throw from the balcony. When she came for the second time after taking key and pushed the same door, it opened. Bharti then went to the inner iron grill door and the same was also not locked as told to her by Nupur Talwar from inside that it was only latched from outside.

Post Crime Conduct of the Appellants:-

Bharti Mandal (PW-10) deposed that when she entered the house after opening the latch of the inner iron grill door, she found both the appellants were weeping. She at first thought that theft has taken place as cause of grievance but on her asking the reason accused Nupur Talwar hugged Bharti and told her to see what had happened inside. Appellant took her to the room of Aarushi where Bharti stood at the door of Aarushi's, The appellant Nupur Talwar went inside the room and uncovered the bed sheet covering the body of Aarushi whose throat had been slit. "She got frightened and at this point of time Nupur Talwar told her see what Hemraj had done".

Another witness Punish Rai Tandon (PW-12) deposed that at about 6.15 a.m. on 16.5.2008 reached the house of appellants and found appellant Nupur Talwar sitting on the sofa. Appellant

Rajesh Talwar and his father-in-law were in the bedroom of Rajesh Talwar. Dr. Nupur Talwar's mother told him that Hemraj had fled after killing Aarushi. He went to the room of Dr. Rajesh Talwar tried to console him by touching him on which Rajesh Talwar immediately pushed his hand away and went to the room of Aarushi. On enquiring whether police has been informed, he was told by the father of Dr. Nupur Talwar that firstly he would inform his son residing in Dubai and thereafter police would be informed. Then father of Dr. Nupur Talwar came out of the house and the witness also came out, went to his house and informed the security from his phone that an incident has happened in L-32, flat of the appellants.

Varinder, Security Guard (PW-9) deposed that when he received information on phone about the incident, he rushed to the flat of the accused and was told by appellant Rajesh Talwar that their servant had murdered their daughter and ran away. He further deposed that he again went to the flat with constable Pawan when Dr. Rajesh Talwar after opening the door had shown them the dead body of Aarushi. He also deposed that during the night he had rather noticed any suspicious movement of anybody nor any other guard told him about this. Pawan Kumar (PW-28) also corroborated the statement of P.W.9 and stated that when he went to the flat of the appellants with Security Guard he found that the main gate of the flat L-32 was latched from inside. He knocked the door and the appellant Rajesh Talwar came and opened the door then the witness went inside the flat. He also deposed that Rajesh Talwar opened the door of Aarushi and showed them the dead body which was covered with white cloth.

Sanjay Gautam (PW-4) deposed that when he went to the flat he found both the appellants strolling here and there and were talking to people. He was surprised to see that there was no sign of grief on their faces and they were trying to remain away from their

daughter.

Mahesh Kumar Mishra (PW-29), the then Addl. S.P. deposed that when he reached the flat he was told by appellant Rajesh Talwar that they had locked the room of Aarushi at about 11.30 p.m. and went to sleep in his room along with the key of Aarushi's room. The room of Aarushi could be opened from inside without the key but could not be opened without key from outside. Appellant Nupur Talwar told that they found their daughter dead when Bharti came to the house and thereafter they informed their relatives. The witness deposed that he found that there was no sign of grief or sorrow on the appellants and they were very nervous during his questioning. He also deposed that on his asking about the key of Aarushi's room they told that somebody might have taken the key from their room.

Sanjay Chauhan, SDM, (PW-5) also corroborated the demeanor of appellants. S.I. Bachu Singh (PW-33), who deposed that he found both the appellants nervous. He also deposed that while preparing inquest, the appellants and their relatives refused to become witnesses. Dutta Ram Nanoria (PW-34) deposed that when he reached the spot he found room of Aarushi undisturbed. When he asked appellant Rajesh Talwar to provide him key of the terrace lock to which he replied that they should not waste time in breaking the lock otherwise Hemraj would flee to Nepal. He also deposed that both the appellants were extremely nervous, worried and defensive. P.W.5, Sanjay Chauhan further deposed that when he was in front of the flat, then appellant Rajesh Talwar was asking the police as to why they were wasting time in questioning them and instead they should go and search for Hemraj. Rajesh Varshney (PW-13), a friend of appellants deposed that when blood was noticed on the door, stairs etc. and brought to the notice of Rajesh Talwar, he came to the stairs and immediately went inside his flat. Dr. Rohit Kochar (PW-14) deposed that when blood was

noticed on the handle, door & stairs, appellant Rajesh Talwar was also told about this and police asked about the key of the lock then . Rajesh Talwar went inside his flat and did not come out.

Scene of crime was dressed up:-

Mahesh Mishra (PW-29), Bachu Singh (PW-33), Dutta Ram Nauneria (PW-34) and Chunni Lal (PW-1) have deposed that there was no blood on the toys, school bag, book (Three Mistakes of My Life) on the bed whereas there was blood on the bed and there were blood spatters on the wall behind the bed. There was also no blood on the school bag kept on the bed.

The body of Aarushi was dressed up/tempered with:-

Dr. Sunil Kumar Dohre (PW-5), who conducted the post mortem on the body of Ms. Aarushi(deceased) deposed that the mouth of the vaginal cavity was found open and vaginal canal was visible which means that during or after the process of rigor mortis, vaginal cavity was tempered with and in that situation vaginal cavity would remain in open condition. Dr. B.K. Mohapatra (PW-6) deposed that on the bed sheet on which the dead body of Aarushi was recovered, he did not find any DNA on the circular mark of the bed sheet. P.W. 33, P.W.29, P.W.34 and P.W.1 deposed that when they visited the scene of crime and saw the dead body of Aarushi, the trouser was lowered from waist, the T-shirt was slightly upper, the string of the trouser was unfastened.

Presence of blood on the lock, railing, handle of door of terrace and wiped blood on the staircase:-

Dr. Rajeev Varshney (PW-13) deposed that he found blood on the lock and he also observed blood on the stairs. Dr. Rohit Kochar (PW-14) in his statement also deposed that he saw red coloured footprints which appeared to be wiped and blood on the

handle of the door to the terrace. Dr. Sanjay Chauhan (PW-4) deposed that he climbed 2-3 steps of the staircase and found blood stains on the railing; that he observed that he blood stains were on the stairs which were going towards the terrace from the flat but there was no blood on the stairs going down below the flat. P.W. 34, Dutta Ram Nauneria deposed that he found blood on the lock of the terrace door and asked for the key to which appellant Rajesh Talwar asked him not to waste time for key and instead they should look for Hem raj.

About non-mentioning of rape/sex and post mortem report doctor was influenced:-

K.K. Gautam (PW-7) deposed that on 16.5.2008 at about 12 p.m. Dr. Sushil Choudhary a family friend of the appellants asked him on phone that they wanted that in the post mortem of Aarushi no mention of rape should be there. Dr. Sushil Kumar Dohre (PW-5) deposed that while he was going to perform post mortem Dr. Dinesh Talwar made him to talk with one Dogra Sahib to which he thought that he is Dr. T.D. Dogra of AIIMS, New Delhi. He talked to Dr. Dogra who asked him to take blood samples of Aarushi. Deepak (PW-10), Nodal Officer, Vodafone proved the call detail records which show that calls were made by Sushil Chodhary to K.K. Gautam as per Ex.Ka-24,25 and 27.

Recovery of dead body of Hemraj on 17.5.2008 by breaking lock and concealment of dead body of Hemraj:-

K.K. Gautam (PW-7), who deposed that on 17.5.2008 he was taken to the house of appellants where Dr. Dinesh Talwar, brother of appellant Dr. Rajesh Talwar took him to the terrace door and showed him the blood stains on the railing, stairs, lock, handle of the door of terrace and asked him to call police to break open the lock. From there the witness ran to Sri Mahesh Mishra ?. When lock was broke open in presence of police, the dead body of

Hemraj was found on the terrace. He had been murdered. There were signs of dragging of dead body of Hemraj from the centre of roof to the corner. It was covered with the panel of the desert cooler. There was also a pool of blood in the center of the roof and a grill dividing the two terraces which was covered with a big bed sheet. Dr. Dinesh Talwar was asked about the identity of the dead body to which she showed his ignorance. Mahesh Kumar Mishra (PW-29), Bachu Singh (PW-33) & Data Ram Naunoria (PW-34) also corroborated the statements of K.K. Gautam (P.W.7). Data Ram Naunoria (P.W.34) also deposed that Dr. Dinesh Talwar refused to sign the lock opening memo. Dr. Rajesh Talwar also reached the place when the dead body of Hemraj was recovered from the terrace but he also refused to identify it.

Postmortem reports of Aarushi and Hemraj:-

Dr. Sunil Dohre (PW-5), who conducted the post mortem examination on the dead body of Aarushi, deposed that he found four injuries on the person of Ms. Aarushi(deceased). Injury nos. 1 and 3 were caused with some blunt weapons and injury nos. 2 and 4 were caused with a very sharp weapon. He further stated that injury nos. 1 and 3 could be possible with a golf stick and injuries nos. 2 and 4 with some small surgical sharp weapon. The injuries nos. 1 and 3 were possibly caused before injury nos. 2 and 4 because hematoma was present under injury no.3. He further deposed that there was no sign of gushing out of blood in the shape of a fountain though the left carotid artery was found cut. Thus injury no. 4 could be a peri-mortem injury. During post mortm examination he found fracture in the left parietal bone of the head and hematoma 8 cm. x 5 cm. below the parietal bone. He also deposed that cause of death was due to shock and due to less blood. He also deposed about his mentioning of white discharge in the vaginal cavity during the external examination of the body of Aarushi and mentioned in the post mortem report and deposed that

the opening of vaginal cavity was prominent and was visible inside.

Dr. Naresh Raj (PW-36), who conducted the post mortem examination on the dead body of Hemraj, deposed that he found 7 ante-mortem injuries on the person of Hemraj. He found fracture on the back side bone of the head and found windpipe cut and both the chambers of the heart empty. He deposed that the death had occurred due to excessive bleeding on account of ante-mortem injuries and deposed that injuries nos.1,2,4 and 5 were possible due to dragging against a hard surface. Injury no.3 was possible with some hard, sharp object and injuries nos. 6 and 7 were possible with some hard object like a golf stick. He further deposed that injury no.3 could be possible with a surgical scalpel. He also deposed that penis of deceased was swollen and the reason for this was either he was in the act of sexual intercourse or was about to perform the same and his death occurred immediately also. Both the doctors have deposed that the blunt injuries i.e. on head and forehead of both the deceased are possible with golf stick and injuries on the neck are possible with a very sharp weapon like scalpel.

Dr. Sunil Dohre deposed that he was also present at the time of postmortem of Hemraj, whose neck was also found cut. The pattern of the cut on the necks of both the deceased was same. Both were clean cuts and the injuries were caused by hard and very sharp edged weapon.

Presence of Golf stick in the flat:-

Umesh Sharma (PW-15) in this regard deposed that while taking the Santro Car of Dr. Rajesh Talwar for servicing he took out 2 golf sticks, one mop and bucket from the boot of the car and had put it in the servant's quarter of Flat No. L-32 belonging to the accused. He also deposed that he participated in the identification of the golf clubs in the CBI office and signed the memo prepared there.

Laxman Singh (PW-16) deposed that he was witness when Umesh identified the golf sticks and the memo was prepared in his presence. Dy. S.P. CBI, Richpal Singh (PW-32) deposed that on 30.9.2009 on the directions of Sri A.G.L. Kaul, Chief Investigating Officer, CBI he seized 12 golf clubs from Dr. Rajesh Talwar. Sri A.G.L.Kaul, Addl. S.P./CBI deposed that Dr. Rajesh Talwar was asked to produce golf sticks. Dr. Rajesh Talwar was earlier also asked about one missing golf stick by earlier I.Os. but he did not give satisfactory reply. Dr. Rajesh Talwar produced the entire set of the golf sticks. Then he was asked to explain since one golf stick was missing, then how he produced the entire set ? To this on behalf of Dr.Rajesh Talwar an E-mail (Ex.Ka-96) was received in which it was mentioned that one golf stick was found by Ajay Chadha and appellant Nupur Talwar from the loft in front of Aarushi's room while they were doing cleaning.

Door of Aarushi's room was open when murders were committed:-

S.K. Singla (PW-24), Expert of CFSL, New Delhi deposed that he visited the scene of crime along with other experts and it was found that the door of Aarushi's room was having blood spot on the outer side of the door reaching to the conclusion that at the time of attack the door of Aarushi's room was open and in that situation blood came on the outer side of the door and on the wall on which this door was open. Dr. Rajender Singh (PW-27), CFSL Expert, had also deposed that during the incident the door of the room of Aaraushi was open.

Presence of DNA of both the deceased on Ballentines whiskey bottle (material object 5) but no blood stained finger prints on it:-

Amar Dev Singh (PW-3), CFSL, fingerprint expert, who examined the fingerprints lifted by him and by P.W.1 Chunni Lal, fingerprint expert of U.P. Police and found that finger prints were

not blood stained. Dr. B.K. Mahopatra (PW-6), Biology Expert of CFSL, found DNA of both the deceased on the said bottle. P.Ws. 1 and 3 deposed that in case a person had touched the bottle while wearing gloves or if he had wiped the blood portion of the bottle then fingerprint would not come.

Faint blood stains on clothes of appellants/No blood.

Dr. Rohit Kochar, who visited the house in the morning found no blood on the clothes of the appellants. As per report Ex.Ka-8 of P.W.6, Dr. B.K. Mahopatra, CFSL faint blood stains were on the clothes which were of Aarushi. The appellants version that since they touched their daughter so it was natural that her blood would come on their clothes is not believable as the witness even in the morning also said that there was no blood clothes of the appellants. Therefore, the trial Court has rightly held that it was not possible for the appellants that they would not hug their child when found murdered and in that case the whole clothes would be soiled.

The flat was found closed from inside when maid Bharti had come in the morning and in that situation no outsider could have entered the flat and committed the murders except the appellant and would consume whiskey after committing the murder of Hemraj on terrace and hiding him behind the lock. No outsider would even think to clean the private parts of Aarushi and nobody except the appellants would have benefit of hiding the dead body of Hemraj over their terrace covering it with desert cooler panel, spreading bed sheet over the partitioned grill.

He lastly submits that all the prosecution witnesses were either neighbours or friends of the accused persons or senior officers or their employees being nearby who reached at or near the point of time the Investigating Officers reached at the scene of crime in the morning of 16.5.2008 and have deposed about the

post crime conduct of appellants that they were not weeping, were seen remaining away from the dead body of their own daughter, looking nervous.

Sri S.N. Tripathi, learned AGA on behalf of the State submits that the appellants have been convicted to undergo RI for life along with other sentences as well as for destruction of evidence and for having mislead the investigation at crucial junctures. The post crime conducts of the appellants are so abhorrent that the society will be having a feeling of repulse if they are released on bail especially after a clear judicial finding of their guilt by the trial Court in the impugned orders & judgment.

He further submits that the appellants if released on bail shall ensure that appeals are not heard and decided at the earliest. Their previous conduct shows that they had done their best to delay the trial despite directions from this Court as well as Apex Court for expeditious trial and that the accused persons had not given their cooperation at the crucial junctures of investigation but gave a show of cooperation in scientific investigations for reconstruction of crime. They had tried to mislead investigation and the Court by showing ignorance of keys and deliberately misleaded the material witness Bharti Mandal in believing that Hemraj had gone to take milk after locking the door from outside which was infact locked from inside and was opened when Bharti Mandal was sent by Dr. (Smt.) Nupur Talwar to collect the duplicate key of outer door which she threw down from balcony and opened the outer door in the meantime. The scene of crime as witnessed by Bharti Mandal who was first on the spot showed that the body of Ms.Aarushi was covered with a bed-sheet. Later on, the evidence collected during the investigation showed that not only the body of Ms. Aarushi but also the evidence and scene of crime was tempered with, hence they may not be released on bail for all the aforesaid reasons.

IN REBUTTAL ,learned counsel for the appellants has pointed out that they have given their reply to the circumstantial evidence in a chart form along with the record which may be perused by the Court.

CONCLUSIONS:-

Considering that these appeals have been filed in four thick volumes of paper books and the labour put in their preparation we made specific query from the counsel for the appellants as to whether they would prefer to argue the appeal itself or only argue the bail application. We have been assured by the counsel for the appellants that they would only argue on the grounds taken by them for bail in the supplementary affidavit. However, while arguing the bail application the counsel have entered into entire merits of the appeal. It is for the sake of transparency in dispensation of justice that we have noticed their arguments on merits of the appeal but since we are not deciding the appeals, we shall deal with only those facts, grounds and the case laws cited by the counsel for the appellants which are necessary to decide their bail applications during pendency of the appeals.

Upon hearing learned counsel for the parties, on perusal of record and evidence recorded during trial, shorn of imagination of the witnesses and documents prepared under the influence of the appellants such as post mortem of Aarushi, report of the Seven Member Committee of Experts of CFSL and AIIMS etc. we find that following are the undisputed facts of the incident which took place on the night of 15/16.5.2008.

- The reaction and conduct of the accused persons on the alleged sudden discovery of the dead body of their only daughter Ms. Aarushi was not natural.
- Accused Dr. (Smt.) Nupur Talwar and Dr. Rajesh Talwar were

reluctant to lodge the FIR and had called their relatives who were present in the house when the police had come after receiving the information through Security Guard Virender Singh (PW-39) and Constable Pawan Kumar of the Jalvayu Vihar Society, Noida.

- The body of Hemraj was discovered on 17.5.2008 on the terrace of the building wearing Chappals and an imprint on the wall as well as smudged footprint which showed that terrace had also been dressed up as was Aarushi's room to mislead the investigation.
- Dr. Rajesh Talwar was arrested by the NOIDA police on 23.5.2008. The CBI took charge of the case on 1.6.2008 ;
- An application under Section 169 Cr.P.C. was moved by the CBI in which it has been stated that after arrest of the accused he vide order dated 2.7.2008 was remanded and remained in judicial custody up to 11.7.2008. That the case at that time was still being investigate during which polygraph test and psychological analysis/test of the accused was conducted and no deception was found in the test reports and that the clothes, shoes, and finger palm/foot prints of accused Dr. Rajesh Talwar were forwarded to CFSL, New Delhi for examination and expert opinion but the Scientific Examination results could not connect accused Dr. Rajesh Talwar with the crime and in view of the aforesaid circumstances, his further judicial custody remand is not required; that during investigation of the case, Krishna Thadaraj son of Sri Chitrabahadur, resident of L-14, Sector-25, Jalvayu Vihar Noida District Gautam Budh Nagar, U.P., Raj Kumar son of Sri Shiv Kumar, resident of Flat No. 35-A, Kanchanianga Apartment, Sector-35, P.S. Sector-20, Noida, U.P. and Vijay Mandal son of Sri Domain Mandal, resident of L-28, Sector-25, Jalvayu Vihar,Noida, U.P. were arrested on 13.6.2008, 27.6.2008 and 11.7.2008 respectively. They were granted bail by the Court. After having been found innocent during

trial as Super-sleuth of CBI who on investigation reached to the conclusion during investigation that the murders of Aarushi and Hemraj were not committed by Krishna, Vijay Mandla and Rajkumar. Therefore, Scientific test, alternate theory of murder having been committed by outsider(s) advanced by learned counsel for the appellants does not merit credence.

The accused have claimed themselves to be the pillar of the society, yet it appears from the record that they had tried to influence the Doctors from giving correct observations in their reports.

It also appears that instead of calling the police and reporting the matter to the police station they have called their relatives and have also tried to **influence the investigation** as noted by the trial Court in its impugned judgment which reads thus:-

> *"After completing the investigation Mr. Kaul reached to the conclusion that these twin murders were committed by the accused persons and not by Krishna, Rajkumar and Vijay Mandal or any other outsider. However, on interventions of super sleuths of C.B.I. closure report was laid by Mr. Kaul in the court of Learned Special Judicial Magistrate (C.B.I.), Ghaziabad on 29.12.2010/01.01.2011 who on receipt of the said report issued notice to the informant-Dr. Rajesh Talwar, who being aggrieved by and dissatisfied with the closure report filed protest petition seeking impetratory relief to direct C.B.I. for carrying out further investigation but the same was rejected. The closure report was also rejected by the Learned Magistrate on 09.02.2011 and took cognizance of the offence under section 190 (1)(b) of the code of criminal procedure and summoned both the accused persons to stand trial for offences punishable under sections 302/34 and 201/34 IPC. The said order was challenged in the Hon'ble High Court, Allahabad but without success. Thereafter, the matter was carried to the Hon'ble Supreme Court, where also it met its waterloo and the order passed by the Learned Magistrate was finally affirmed and received the imprimatur of the Hon'ble Court Apex."*

As regards the argument of the learned counsel for the appellants that they have excellent cases for bail and their appeal

have sanguine hope of success and in case the appellants are finally acquitted of all the charges after the appeals are heard, then continued incarceration of the appellants till then would be a travesty in its own-self is not worth consideration for the reason that this Court had at the very initiation of arguments on bail applications had specifically asked the counsel for the appellants as to whether they would like to argue the appeals particularly when the respondents had no objection as the trial Court record has been received and all the papers required are available in the form of paper book in the appeal, but the innocuous request of the court was declined by answer in the negative.

Admittedly, the instant case is based on circumstantial evidence. The gruesome murders were committed in the house of the accused-appellants which was in their possession and full control. Considering the facts and circumstances of this case particularly that no other person or outsider could have entered the flat of the appellants and committed the gruesome murders of Aarushi and Hemraj in the intervening night of 15/16.5.2008 except the accused persons who were last seen in the company of the deceased in the said flat at L-32 Jalvayu Vihar by Umesh Sharma, the driver of the accused Dr. Rajesh Talwar at 9.30 P.M. on 15.5.2008. Aarushi and Hemraj were not found alive at 6.00 A.M. on 16.5.2008 when house maid Bharti Mandal had come to perform her daily chores.

During the investigation it was also found that neither any outsider came inside the house in the intervening night of 15/16.5.2008 after 9.30 P.M. nor there was any evidence of forcible entry by any outsider(s) in the flat in the night of occurrence for committing of any crime as in that case all the main doors for ingress and egress would have been either open or latched from outside but maid Bharti did not see the outermost grill and mesh door as well as the mesh and grill door with the wooden door latched from outside. Outer mesh door was found to be locked for

her making a request to accused Dr.(Smt.) Nupur Talwar to open the same by duplicate key.

No outsider would dare to take Hemraj in a severally injured condition and after cutting his throat would put a lock in the door to ensure that his body is not discovered. There is also close proximity between the point of time of two murders and last seen the deceased in the company of both the accused. The hesitation and lack of cooperation of Dr.(Smt.) Nupur & Rajesh Talwar in providing the keys of the main door to the terrace and of the room of Ms. Aarushi are also strong indicators of non-cooperation of the accused at crucial junctures in investigation.

According to the admitted fact by Dr. Rajesh Talwar, they had retired to bed at about 11.30 P.M. Bharti Mandal, the maid was the first person to reach the flat at 6.00 A.M. in the morning of 16.5.2008 for doing her daily chores she had initially found the outermost grill and mesh door locked. On her ringing the call bell a number of times the wooden door was opened by Dr.(Smt.) Nupur Talwar with which inner grill and mesh door was attached in the same door frame, the maid was made to believe by accused Dr. (Smt.) Talwar that Hemraj, the servant might have gone to take milk from Mother Dairy, after locking the door and taking keys with him. On her query (Bharti Mandal) as to whether duplicate keys were not available she was informed by the accused that she is throwing down them from balcony of the house using which Bharti Mandal could come inside the flat after opening the lock fitted in the outer door/meshdoor. When the maid came back again she was informed by accused Dr. (Smt.) Nupur Talwar that the door was not locked which she could open. The dead body of Aarushi was shown to her by the accused saying look what Hemraj has done; At that time, body of Ms. Aarushi was on the bed covered with a bed-sheet.

Reconstruction of crime by means of polygraph, sound

stimulation, psychological and analysis/test etc. are irrelevant in criminal trial as it may be a useful exercise for the electronic media to reconstruct the scene of crime of any criminal incident or serious accident by way of graphics for its viewers to understand the unfortunate event and there is vast possibility of its not being accurate. There are known instances that lie detectors or polygraph tests etc. can be defeated by the persons or criminals having strong will power and control over their emotion and reaction. There was no eye witness of the incident except the accused in whose house the dead bodies of their daughter Aaurshi and servant Hemraj were found. Therefore, the prosecution having discharged its initial burden it was for the defence to explain the circumstances under Section 106 of the Evidence Act as to how the crime has been committed and scene of crime has been dressed up to screen the real offenders.

Admittedly, also none of the witnesses or the I.O. was present at the time of occurrence, therefore, their statements giving vivid details of the crime cannot be relied upon for arriving at the truth by reasonable deduction and discarding irrelevant evidence which may have crept in or introduced by the witness of their own imagination prepared or procured by exerting influence is out of consideration. We are, therefore, at this stage not impressed by the alleged errors in the judgment pointed out by the counsel for the appellants with regard to the evidence on reconstruction of the offence out of their own imagination in the peculiar facts and circumstances of the case. The court below has not erred using the words **"may be" " there is a possibility"** or **" there is likelihood"** etc. in its judgment for discarding the irrelevant- as a possibility or not a possibility. It is a case based on circumstantial evidence which have to be considered as possibilities and probabilities before the court concludes that except the accused person(s) no other person(s) has committed the offence in given circumstances of a particular case.

The appellants seem to be people of power and status who could influence witnesses, Doctors and Investigating team of the CBI and approach not only this Court but also the Apex Court at number of times. They could get filed application under Section 169 Cr.P.C. to the effect that no material against Dr. Rajesh Talwar has surfaced and also got manipulated final report in the case. At the time of incident they were residing in their own flat in L-32 Jalvayu Vihar, Noida but now they are residing outside the State and jurisdiction of the Court and if they are released on bail, they may not be available at the time of hearing of appeal which according to them would come up after 25-30 years from now. Any condition for bail may not deter them in achieving their aim.

Prima facie, no legal infirmity is found in the impugned judgment. We, therefore, do not see any mitigating circumstance why they be granted freedom on bail and not to undergo sentence awarded to them. We may not be misunderstood by any observations made above, as it is only for the purpose of disposal of bail application and are not on merits of the appeal.

We cannot refrain ourselves in observing that in the case of **Sidharth Vashistha versus State (NCT of Delhi),** AIR 2008, SC-2889, the Apex Court declined to release the accused-appellant on bail during pendency of appeal where the accused was acquitted by the trial Court but found guilty by the High Court in appeal. Considering the seriousness of the offence, the appeal was already on board and was likely to be heard within reasonable distance of time.

The contention of the appellants that they were on bail in the court below during trial are entitled to bail in appeal by this Court is devoid of merit in view of the law laid down by the Apex Court in the cases of **Gomti versus Thakurdas**, 2007, CrLJ. 2431(SC) and **Anil Ari versus State of West Bengal**, AIR 2009 SC 1564.

In **Kashmira Singh versus State of Punjab**, AIR 1977 SC-2147, it has been observed by the Apex Court that-*" the practice not to release on bail a person who has been sentenced to life imprisonment was evolved on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a reasonable distance of time. But the rationale of this practice can have no obligation where the Court is not in a position to dispose of the appeal for five or six years."*

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Though the trial Court in its judgment may have observed that the appellants-accused are not menace to the orderly society yet the High Court may not grant bail to an accused or suspend his sentence looking into the gravity of the offence, nature and the manner in which the crime has been committed. It has ample power and discretion to suspend the sentence but the discretion has to be exercised judiciously. It is important to note here that the above observations of the trial Court came to meet the arguments of CBI for awarding capital sentence to the appellants.

For all the reasons stated above, appellants Dr. Rajesh Talwar and Dr. (Smt.) Nupur Talwar are not entitled for grant of bail. Accordingly, Criminal Misc. Bail Application No. 29593 of 2014 and Criminal Misc. Bail Application No. 29581of 2014 are rejected and hearing of the appeals is expedited.

The appeals have been filed in bound volumes in the form of paper books with all the necessary documents, hence, no further paper book is required to be prepared. However, if any of the party feels that certain more documents or evidence on record of the court below are required, they may file the same on affidavit in the Court at the time of hearing after mutual exchange.

List the aforesaid criminal appeals for hearing on 28.5.2014.

Dated:-19.5.2014

CPP/SNT/RCT