A MUKESH

v.

STATE OF NCT OF DELHI

(Review Petition (Crl.) No. 570 of 2017)

B In

(Criminal Appeal No. 607 of 2017)

JULY 09, 2018

C **[DIPAK MISRA, CJI, R. BANUMATHI AND ASHOK BHUSHAN, JJ.]**

Review – Nirbhaya Case – Gang rape and murder of a young woman – All four accused convicted and sentenced to death by the trial Court – Death penalty confirmed by the High Court – Appeals dismissed by the Supreme Court – Review petition filed by one D *petitioner-accused – Held: In instant case, review petition does not disclose any ground, on which review jurisdiction can be exercised by the Supreme Court u/Art.137 r/w. Or.XLVII, r.1 of the Rules – Submissions raised by the petitioner were more or less same as it was advanced at the time of hearing of the appeal and Supreme* E *Court had already considered the relevant submissions and dealt with them in its Judgment – By review petition the petitioner cannot be allowed to re-argue the appeal on merits of the case by pointing out certain evidences and materials which were on record and were already looked into by the trial Court, High Court and Supreme* F *Court as well – Constitution of India – Art.137 – Supreme Court Rules, 2013 – Or. XLVII, r.1.*

Review – Power of the Supreme Court – Held: The power of review of the Supreme Court as envisaged u/Art.137 of the Constitution is no doubt wider than review jurisdiction conferred G *by other statutes on the Court – Art.137 empowers the Supreme Court to review any judgment pronounced or made, subject, of course, to the provisions of any law made by the Parliament or any rule made u/Art.145 of the Constitution – Constitution of India – Arts.137 and 145.*

H

Rejecting the Review Petition, the Court

HELD: 1. The power of review of the Supreme Court as envisaged under Article 137 of the Constitution is no doubt wider than review jurisdiction conferred by other statutes on the Court. Article 137 empowers the Supreme Court to review any judgment pronounced or made, subject, of course, to the provisions of any law made by Parliament or any rule made under Article 145 of the Constitution. [Para 5][903-C-D]

2. An application to review a judgment is not to be lightly entertained and this Court could exercise its review jurisdiction only when grounds are made out as provided in Order XLVII Rule 1 of the Supreme Court Rules, 2013 framed under Article 145 of the Constitution of India. As per rule, review in a criminal proceeding is permissible only on the ground of error apparent on the face of the record. [Paras 6, 7][903-E, G]

3. In review petition, petitioner submitted that police arrested accused-petitioner from Karoli, the State of Rajasthan on 17.12.2012 in the morning and he was shown to be arrested in the evening of 18.12.2012 at Safdarjung Hospital in Delhi. The High Court has dealt with this submission and has noticed that petitioner in his statement under Section 313 Cr.P.C. in an answer of question No.132 claimed that he was not apprehended at his village Karoli, Rajasthan but was apprehended at Ravidass Camp in Delhi. Police have shown a formal arrest on 18.12.2012 and this Court vide its judgment dated 05.05.2017 has also noticed the fact that accused was formally arrested at Safdarjung Hospital on 18.12.2012 at 6.30 p.m. at Safdarjung Hospital, in the evening. This submission does not make out any ground to hold that conviction and trial of the accused is vitiated in any manner so as to call for review of the judgment dated 05.05.2017. There is no apparent error in the Judgment dated 05.05.2017. [Paras 14, 29][908-G-H; 911-A-C]

4. Petitioner further contended that the illegal detention of Petitioner-accused in Karoli/Rajasthan on 17.12.2012 and failure to present him before the nearest Magistrate was not considered by this Court. The details of arrest of accused No.2-petitioner have been referred to in detail in the judgment dated 05.05.2017

and the various recoveries are also referred therein. [Para 44][917-B-C]

5. The argument that accused No.2-Petitioner does not know driving has not been raised during the trial or in evidence and also cross-examination of witnesses by the accused. Upon consideration of the evidence of PW-1 and other evidences including scientific evidence, this Court has arrived at the conclusion that accused no.2-Petitioner was driving the bus. Issue whether accused No.2- Petitioner has a driving licence for driving the bus or not has no relevance with regard to conviction recorded against the accused which has been affirmed by the High Court and this Court as well. [Para 35][913-A-C]

6. Petitioner has attacked the dying declarations of the victim. This Court had elaborately considered all the three dying declarations of the victims. All the three dying declarations having been relied by trial court, High Court and this Court and all arguments attacking the dying declarations having been considered and rejected, in its judgment dated 05.05.2017, the petitioner cannot be allowed to re-agitate the same issues which were already considered and expressly rejected by this Court. [Para 39][915-E-F]

7. Petitioner has attacked the evidence of P.W.1 and tried to point out certain contradictions and errors. This Court has examined the evidence of PW.1 extensively and have given ample reason for accepting the said evidence as reliable. The petitioner cannot be allowed to re-agitate the matter. [Paras 21, 42][909-F; 916-F]

8. Another contention raised by petitioner is that there were two different recoveries from accused No.2-petitioner during his detention only to falsely implicate him and this has not been considered by this Court. The arrest and recovery of accused No.2-petitioner have been referred and the details of arrest of all the accused and recovery of the articles recovered from each of them are also further referred to in judgment. In the light of various decisions, the scope of recoveries was considered and the arguments raised on behalf of accused No.2-petitioner were held to be untenable. The arguments now advanced raising doubts

about the arrest and recovery of articles, make no ground for reviewing the judgment dated 05.05.2017. [Para 43][916-F-H; 917-A-B]

9. The submissions which have been raised by Petitioner in this review petition are more or less the submissions which were advanced at the time of hearing of the appeal and this Court had already considered the relevant submissions and dealt them in its judgment dated 05.05.2017. This court had cautiously gone into and revisited the entire evidences on record and after being fully satisfied had dismissed the appeal. By the review petition the petitioner cannot be allowed to re-argue the appeal on merits of the case by pointing out certain evidences and materials which were on the record and were already looked into by the trial court, High court and this Court as well. [Para 46][917-E-G]

10. In review petition, the petitioner had tried to raise the plea that he was not in the bus and he has nothing to do with the incident. The factum of he being involved in the offence having been gone into by all courts and after marshalling the evidences, he having been convicted and sentenced, it is not open for the petitioner in the review petition to contend that he had nothing to do with the incident. [Para 47][917-G-H; 918-A]

Kamlesh Verma v. Mayawati and others **(2013) 8 SCC 320 : [2013] 11 SCR 25;** *Vikram Singh alias Vicky Walia and another v. State of Punjab and another* **(2017) 8 SCC 518 – relied on.**

Sow Chandra Kante and another v. Sheikh Habib **(1975) 1 SCC 674;** *P.N. Eswara Iyer and others v. Registrar, Supreme Court of India* **(1980) 4 SCC 680 : [1980] 2 SCR 889;** *Devender Pal Singh v. State, NCT of Delhi* **(2003) 2 SCC 501 : [2002] 5 Suppl. SCR 332;** *Suthendraraja alias Suthenthira Raja alias Santhan and Others v. State through Superintendent of Police CBI* **(1999) 9 SCC 323 : [1999] 3 Suppl. SCR 540;** *Prabhu v. Emperor* **AIR 1944 PC 73 – referred to.**

Case Law Reference

(1975) 1 SCC 674	**referred to**	**Para 6**
[1980] 2 SCR 889	**referred to**	**Para 7**
[2002] 5 Suppl. SCR 332	**referred to**	**Para 8**

[1999] 3 Suppl. SCR 540	**referred to**	**Para 8**
[2013] 11 SCR 25	**relied on**	**Para 9**
(2017) 8 SCC 518	**relied on**	**Para 10**
AIR 1944 PC 73	**referred to**	**Para 29**

CRIMINAL APPELLATE JURISDICTION: Review Petition (Criminal) No. 570 of 2017 in Criminal Appeal No. 607 of 2007.

From the Judgment and Order dated 13.03.2014 of the High Court of Delhi at New Delhi in Criminal Appeal No. 1398 of 2013 and Death Reference No. 6 of 2013.

Sidharth Luthra, Sr. Adv., Manohar Lal Sharma, Ms. Suman, Nitin Kumar Thakur, A. P. Singh, Vir Pal Singh, Ms. Geeta Singh Chauhan, Ms. Pratima Ravi, Ms. Richa Singh, Ms. Supriya Juneja, Ms. Shraddha Karol, Sameer Chaudhary, Ms. Drishti Harpalani, Arjun Vinod Bobde, Ms. Richa Relhan, Ms. Surabhi Sardana, Advs. for the appearing parties.

The Judgment of the Court was delivered by

ASHOK BHUSHAN, J. 1. The petitioner by this review petition filed under Article 137 of the Constitution of India prays to review the final judgment dated 05.05.2017 passed by this Court by which Criminal Appeal No. 607 of 2017 has been dismissed. The horrific incident which took place on 16.12.2012 in Delhi wherein a young lady of twenty three years (Nirbhaya, a changed name) was gang raped and brutally injured who subsequently died, in which the petitioner was one of the accused. The petitioner was convicted and awarded death sentence by Additional Sessions Judge (Special Fast Track Court) Saket Court Complex New Delhi. Delhi High Court confirmed the death reference and dismissed the criminal appeal filed by the petitioner challenging his conviction and sentence.

2. Aggrieved against the judgment of the Delhi High Court dated 13.03.2014, Criminal Appeal No. 607 of 2017 was filed by the petitioner which appeal was dismissed by this Court on 05.05.2017. Now, this application is filed to review the judgment dated 05.05.2017 dismissing the Criminal Appeal of the petitioner.

3. Before we enter into the submissions raised in this review petition, it is useful to recapitulate the scope and grounds available for exercise of jurisdiction by this Court under Article 137. Order XLVII

Rule 1 of the Supreme Court Rules, 2013 dealing with review is as follows:

> "i. The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record."

4. In various decisions, this Court has already settled the law with regards to the maintainability of review petition under Article 137 of the Constitution of India read with Order XL Rule 1 of Supreme Court Rules, 1966 in criminal appeals. Before we consider the points raised by the accused, we may usefully refer to some of the decisions.

5. The power of review of the Supreme Court as envisaged under Article 137 of the Constitution is no doubt wider than review jurisdiction conferred by other statutes on the Court. Article 137 empowers the Supreme Court to review any judgment pronounced or made, subject, of course, to the provisions of any law made by Parliament or any rule made under Article 145 of the Constitution.

6. An application to review a judgment is not to be lightly entertained and this Court could exercise its review jurisdiction only when grounds are made out as provided in Order XLVII Rule 1 of the Supreme Court Rules, 2013 framed under Article 145 of the Constitution of India. This Court in ***Sow Chandra Kante and another v. Sheikh Habib, (1975) 1 SCC 674*** speaking through Justice V.R. Krishna Iyer on review has stated the following in para 10:

> "10. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."

7. As per rule, review in a criminal proceeding is permissible only on the ground of error apparent on the face of the record. This Court in ***P.N. Eswara Iyer and others v. Registrar, Supreme Court of India, (1980) 4 SCC 680*** while examining the review jurisdiction of this Court

A *vis a vis* criminal and civil proceedings had made the following observations in paras 34 and 35:

> "34. The rule, on its face, affords a wider set of grounds for review for orders in *civil proceedings*, but limits the ground vis-a-vis *criminal proceedings* to "errors apparent *on the face* of the
B record". If at all, the concern of the law to avoid judicial error should be heightened when life or liberty is in peril since civil penalties are often less traumatic. So, it is reasonable to assume that the framers of the rules could not have intended a restrictive review over criminal orders or judgments. It is likely to be the other way about. Supposing an accused is sentenced to death by
C the Supreme Court and the "deceased" shows up in court and the court discovers the tragic treachery of the recorded testimony. Is the court helpless to review and set aside the sentence of hanging? We think not. The power to review is in Article 137 and it is equally wide in all proceedings. The rule merely canalises the
D flow from the reservoir of power. The stream cannot stifle the source. Moreover, the dynamics of interpretation depend on the demand of the context and the lexical limits of the test. Here "record" means any material which is already on record or may, with the permission of the court, be brought on record. If justice summons the Judges to allow a vital material in, it becomes part
E of the record; and if apparent error is there, correction becomes necessitous.
>
> 35. The purpose is plain, the language is elastic and interpretation of a necessary power must naturally be expansive. The substantive power is derived from Article 137 and is as wide for criminal as
F for civil proceedings. Even the difference in phraseology in the rule (Order 40 Rule 2) must, therefore, be read to encompass the same area and not to engraft an artificial divergence productive of anomaly. If the expression "record" is read to mean, in its semantic sweep, any material even later brought on record, with
G the leave of the court, it will embrace subsequent events, new light and other grounds which we find in Order 47 Rule 1, CPC. We see no insuperable difficulty in equating the area in civil and criminal proceedings when review power is invoked from the same source."

H

8. In ***Devender Pal Singh v. State, NCT of Delhi, (2003) 2 SCC 501***, it was held that review is not rehearing of the appeal all over again. The review is not an appeal in disguise. In ***Suthendraraja alias Suthenthira Raja alias Santhan and Others vs. State through Superintendent of Police, CBI, (1999) 9 SCC 323***, it was held as under:-

> "5. It would be seen that the scope of review in criminal proceedings has been considerably widened by the pronouncement in the aforesaid judgment. In any case review is not rehearing of the appeal all over again and to maintain a review petition it has to be shown that there has been a miscarriage of justice. Of course, the expression "miscarriage of justice" is all-embracing…"

9. The scope of review jurisdiction has been considered by this Court in a number of cases and the well settled principles have been reiterated time and again. It is sufficient to refer to judgment of this Court in ***Kamlesh Verma vs. Mayawati and others (2013) 8 SCC 320***, where this Court has elaborately considered the scope of review. In paras 17, 18, 20.1 and 20.2 following has been laid down:

> **"17.** In a review petition, it is not open to the Court to reappreciate the evidence and reach a different conclusion, even if that is possible. Conclusion arrived at on appreciation of evidence cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. This Court in *Kerala SEB* v. *Hitech Electrothermics & Hydropower Ltd.* held as under: (SCC p. 656, para 10)
>
> > "*10.* … In a review petition it is not open to this Court to reappreciate the evidence and reach a different conclusion, even if that is possible. The learned counsel for the Board at best sought to impress us that the correspondence exchanged between the parties did not support the conclusion reached by this Court. We are afraid such a submission cannot be permitted to be advanced in a review petition. The appreciation of evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has not been contended

A before us that there is any error apparent on the face of the record. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise."

18. Review is not rehearing of an original matter. The power of B review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. A repetition of old and overruled argument is not enough to reopen concluded adjudications. This Court in *Jain Studios Ltd.* v. *Shin Satellite Public Co. Ltd.*, held as under: (SCC pp. 504-505, paras 11-12)

C

"*11.* So far as the grievance of the applicant on merits is concerned, the learned counsel for the opponent is right in submitting that virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had been negatived. Once such a prayer had been refused, D no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. It is not rehearing of an original matter. A repetition of E old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.

12. When a prayer to appoint an arbitrator by the applicant F herein had been made at the time when the arbitration petition was heard and was rejected, the same relief cannot be sought by an indirect method by filing a review petition. Such petition, in my opinion, is in the nature of 'second innings' which is impermissible and unwarranted and cannot be granted.""

G **20.1.** When the review will be maintainable:

(*i*) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(*ii*) Mistake or error apparent on the face of the record;

H

(*iii*) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in *Chhajju Ram* v. *Neki* and approved by this Court in *Moran Mar Basselios Catholicos* v. *Most Rev. Mar Poulose Athanasius* to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in *Union of India* v. *Sandur Manganese & Iron Ores Ltd.*

20.2. When the review will not be maintainable:

(*i*) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(*ii*) Minor mistakes of inconsequential import.

(*iii*) Review proceedings cannot be equated with the original hearing of the case.

(*iv*) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(*v*) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(*vi*) The mere possibility of two views on the subject cannot be a ground for review.

(*vii*) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(*viii*) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(*ix*) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

10. This Very Bench speaking through one of us (Justice Ashok Bhushan) had occasion to consider the ambit and scope of the review petition in a criminal proceeding in ***Vikram Singh alias Vicky Walia and another vs. State of Punjab and another (2017) 8 SCC 518***. In para 23 of the judgement following has been stated:

A "23. In view of the above, it is clear that scope, ambit and parameters of review jurisdiction are well defined. Normally in a criminal proceeding, review applications cannot be entertained except on the ground of error apparent on the face of the record. Further, the power given to this Court under Article 137 is wider and in an appropriate case can be exercised to mitigate a manifest injustice. By review application an applicant cannot be allowed to reargue the appeal on the grounds which were urged at the time of the hearing of the criminal appeal. Even if the applicant succeeds in establishing that there may be another view possible on the conviction or sentence of the accused that is not a sufficient ground for review. This Court shall exercise its jurisdiction to review only when a glaring omission or patent mistake has crept in the earlier decision due to judicial fallibility. There has to be an error apparent on the face of the record leading to miscarriage of justice to exercise the review jurisdiction under Article 137 read with Order 40 Rule 1. There has to be a material error manifest on the face of the record with results in the miscarriage of justice."

11. Applying the parameters of the review jurisdiction as noticed above, we now proceed to examine the grounds given in the review petition to find out as to whether there are any grounds for exercising the review jurisdiction by this court to review the judgment dated 05.05.2017.

12. We have heard Shri M.L.Sharma learned counsel appearing for the petitioner and Shri Sidharth Luthra learned senior counsel appearing for the respondent.

13. In support of the review petition, Shri Sharma has raised various submissions which according to Mr. Sharma furnish grounds to review the judgment to protect the fundamental rights of the petitioner guaranteed under Articles 21, 20(3), 22(1) and 22(2) of the Constitution of India. We now proceed to examine the submissions in seriatim.

14. Shri Sharma submits that police arrested Mukesh from Karoli, the State of Rajasthan on 17.12.2012 in the morning and he was shown to be arrested in the evening of 18.12.2012 at Safdarjung Hospital in Delhi. He submits that Mukesh was not produced before the concerned Magistrate within twenty four hours of his arrest at Karoli which is violative of rights guaranteed under Articles 22(1) and 22(2).

15. Shri Sharma has further contended that police has coerced the petitioner to give his vakalatnama in favour of one V.K. Anand advocate, who was police sponsored advocate. He submits that the petitioner has given his vakalatnama in favour of Shri M.L. Sharma advocate in January 2013 and April 2013 but police imposed Advocate V.K. Anand as his advocate and compelled to give his confession statement under Section 313 Cr.P.C.

16. Shri M.L. Sharma further submitted that accused Mukesh was tortured by police with regard to which he also filed an affidavit in March 2013 before the trial court and this affidavit was not considered by this Court. It is submitted that statement under Section 313 Cr. P.C. of the petitioner was got recorded under torture of police.

17. One of the submissions of Shri Sharma was that accused Mukesh did not know driving of a bus and had driving licence which was only for LMV(Motorcycle).

18. It is further submitted by Shri Sharma that this Court has not considered the remand application filed by the IO Exh. PW.80/D2, which clearly proves that no disclosure existed till 22.12.2012.

19. One of the submissions which has been raised by Shri Sharma is that this Court had not adverted to the call details as per which accused Mukesh could not have been in the bus on 16.12.2012, since at that time a call was received by him from Ram Singh at 8.55 p.m.

20. Shri Sharma has attacked the second dying declaration recorded by the SDM, Usha Chaturvedi and submitted that in the police diary there is no mention of dying declaration recorded by the SDM, Usha Chaturvedi.

21. Shri Sharma has again attacked the evidence of PW.1 and tried to point out certain contradictions and errors.

22. Learned counsel submitted that as application for additional evidences under Section 391 Cr.P.C. remained pending before the Appellate Court and no orders were passed therein.

23. Shri Sidharth Luthra, learned senior counsel replying the aforesaid submissions contends that police on information received from one Ram Singh has reached to Karoli district, Rajasthan and reached at the house of Mukesh at 10.45 a.m. and apprehended the petitioner who

A was brought to Delhi and first taken to Vasant Vihar Police Station and after coming to know that IO was at Safdarjung Hospital, accused was taken to the said hospital where he was formally arrested at 6.30 p.m. on 18.12.2012.

24. Shri Luthra, learned senior counsel for the respondent has
B taken us to the proceedings of trial court and the orders passed by trial court in support of his submission that it was on the statement of Mukesh accused before the Court where he expressed a desire to discharge Shri M.L. Sharma the Court passed an order on 24.01.2013 discharging Shri Sharma on the request of accused and thereafter V.K. Anand was permitted to be engaged by the petitioner.
C

25. Opposing the submission regarding coercion and torture, Shri Sidharth Luthara submitted that Mukesh was in judicial custody and from judicial custody he used to go to Court to attend the trial. On several occasions, the Court interacted with the accused and in none of the occasion, accused at any point of time complained of any torture by
D police or jail authorities. Shri Luthra further submitted that Court had directed for medical checkups of Mukesh and also sought a report of Mukesh. The torture by police was never alleged or proved by the accused.

26. Learned Counsel for the respondent submits that the issue
E regarding not having driving licence for Bus was not raised during the trial or during the cross-examination of the witnesses, hence, at this stage, it cannot be allowed to be raised.

27. Shri Sidharth Luthra replying the submission regarding remand application dated 22.12.2012 submitted that after the arrest of accused
F on 18.12.2012, the accused was produced before the Magistrate on 19.12.2012 and after TIP was conducted on 20.12.2012 he was remanded in the police custody for three days on 22.12.2012, hence the remand application was given on 22.12.2012.

28. Shri Luthra replying the submission based on call details of
G Mukesh it is submitted that this Court in its judgment dated 05.05.2017 has elaborately considered all the evidences and held that Mukesh was in the bus, which was boarded by the prosecutrix and PW.1 at about 9.00 p.m. and it was proved that Mukesh was driving the bus. We have considered the submissions of both the parties and have perused the records.
H

29. Coming to the submission of arrest at Karoli, the High Court has dealt this submission in paras 288 to 294. The High Court has noticed in para 290 that petitioner in his statement under Section 313 Cr.P.C. in an answer of question No.132 claimed that he was not apprehended at his village Karoli, Rajasthan but was apprehended at Ravidass Camp in Delhi. High Court noticing the judgment of the Privy Council in the ***Prabhu v. Emperor, AIR 1944 PC 73*** had observed that conviction shall not be affected by any irregularity in his arrest. Police have shown a formal arrest on 18.12.2012 and this Court v*i*de its judgment dated 05.05.2017 has also noticed the fact that accused was formally arrested at Safdarjung Hospital on 18.12.2012 at 6.30 p.m. at Safdarjung Hospital, in the evening. This submission does not make out any ground to hold that conviction and trial of the accused is vitiated in any manner so as to call for review of the judgment dated 05.05.2017. There is no apparent error in the Judgment dated 05.05.2017.

30. Coming to the submission that Shri V.K. Anand, Advocate was forced on petitioner it is sufficient to note the order sheet of trial court which noticed all facts. In proceeding dated 24.01.2013 the Trial Court has recorded:

> "... Lastly, I have called accused Mukesh from JC, in my chamber and asked him about his counsel. He replied that earlier he had appointed Shri Manohar Lal Sharma, Advocate vide vakalatnamas dated 08.01.2013 and 09.01.2013 but now would like to change his counsel and has appointed Mr. V.K.Anand, Advocate, as his counsel before this court from today. Vakalatnama is filed. Shri Manohar Lal Sharma, Advocate, is thus discharged.
>
> Accused Mukesh even informed that he do not intend to avail the services of Shri N. Rajaraman, Advocate-on-record, in the Transfer Petition pending before the Hon'ble Supreme Court of India and that he had requested Shri V.K.Anand, Advocate, to be his counsel, even in the Hon'ble Supreme Court of India and to engage some other Advocate-on-Record.

Again when the accused made his request to avail the services of M.L. Sharma, said fact was recorded on 20.03.2013 proceeding and Shri Sharma started representing accused Mukesh. Subsequent order-sheet also indicates that Shri Sharma did not appear on several occasions, more than half a dozen of the dates, which were fixed for cross-

A examination on behalf of the accused then the Court was left with no option but to appoint a amicus curiae. The submission of Shri Sharma that Advocate V.K. Anand was forced on the accused against his will is wholly untenable and does not furnish any ground to review the judgment.

31. With regard to submission regarding torture by police, it is B sufficient to note that the trial court interacted with the accused on many occasions and on none of the occasions any complaint was made by accused. The accused was in judicial custody. The trial court in its proceeding dated 24.01.2013 recorded following:

> "....I have also enquired from accused Mukesh if he has any C complaint with regard to the manner in which he has been treated in custody but he replied that he has no complaint in this regard."

The submission of Shri Sharma that statement of accused recorded under Section 313 Cr.P.C. was under pressure and influence of amicus curiae has no legs to stand. The above argument is stated to be rejected D since the statement was recorded by the Court and the accused was coming from judicial custody and could not be tortured by the police as alleged. On the affidavit filed in March 2013, the trial court had promptly called for a report and matter was not further pursued by the trial court since no material came to substantiate the plea.

E 32. This Court in its judgment dated 05.05.2017 has held after marshalling evidence of PW.1 and other evidences including scientific evidences that Mukesh was driving the bus. The issue whether he had a driving licence for driving the bus or not has no relevance with regard to conviction recorded against the accused which has been affirmed by the High court and this Court as well.

F 33. This Court in its judgment has referred to recoveries made from the petitioner in para No. 127. Remand application was given by police after conclusion of T.I.P. Recoveries made from petitioner has been discussed and believed, we cannot permit the petitioner to argue the said issues again.

G 34. Learned counsel for accused No.2-Mukesh contended that accused No.2-Mukesh does not know driving as evidenced from his driving licence which shows that the licence was only for Light Motor Vehicle (LMV) and that he does not know how to drive a bus. Further contention of accused No.2-Mukesh is that as per the Call Details Record

H

(CDR), he could not have been present in the bus on 16.12.2012 at 08.55 p.m.

35. The argument that accused No.2-Mukesh does not know driving has not been raised during the trial or in evidence and also cross-examination of witnesses by the accused. Upon consideration of the evidence of PW-1 and other evidences including scientific evidence, this Court has arrived at the conclusion that accused no.2-Mukesh was driving the bus. Issue whether accused No.2-Mukesh has a driving licence for driving the bus or not has no relevance with regard to conviction recorded against the accused which has been affirmed by the High Court and this Court as well.

36. There is no merit in the contention that accused No.2-Mukesh could not have driven the bus and that he was not present in the bus at the time of the incident. It is to be noted that in the questioning under Section 313 Crl.P.C., accused No.2-Mukesh has clearly admitted that he was driving the bus and this has been elaborately referred to in para (302) of the Judgment as under:-

> "302. In his questioning under Section 313 Cr.PC, Mukesh, A-2, has admitted that he and A-1, Ram Singh (since deceased), are brothers. He has also admitted that on the night of 16-12-2012, he was driving the bus and that accused Pawan and Vinay Sharma were seated on the backside of the driver's seat, whereas Akshay and Ram Singh were sitting in the driver's cabin. The relevant portion of his statement under Section 313 Cr.PC reads as under:
>
> > "Q.2. It is in evidence against you that PW 1 further deposed that they inquired from 4-5 autorickshaw-walas to take them to Dwarka, but they all refused. At about 9 p.m. they reached at Munirka Bus-stand and found a white-coloured bus on which "Yadav" was written. A boy in the bus was calling for commuters for Dwarka/Palam Mod. PW 1 noticed yellow and green lines/stripes on the bus and that the entry gate of the bus was ahead of its front tyre, as in luxury buses and that the front tyre was not having a wheel cover. What do you have to say?
> >
> > Ans.: I was driving the bus while my brother Ram Singh, since deceased and JCL, Raju was calling for passengers by saying "Palam/Dwarka Mod".

A Q.4.: It is in evidence against you that during the course of his deposition, complainant, PW 1 has identified you accused Mukesh to be the person who was sitting on the driver's seat and was driving the bus; PW 1 further identified your co-accused Ram Singh (since deceased), and Akshay Kumar to be the person who were sitting in the driver's cabin along with the driver; PW 1 had also identified your co-accused Pawan Kumar who was sitting in front of him in two seats row of the bus; PW 1 had also identified your co-accused Vinay Sharma to be the person who was sitting in three seats row just behind the driver's cabin, when PW 1 entered the bus; PW 1 has also deposed before the court that the conductor who was calling him and his friend/prosecutrix to board the bus, Ext. P-1 was not among the accused person being tried in this court.

Ans.: Accused Pawan and accused Vinay Sharma were sitting on my backside of the driver's seat and whereas accused Akshay was sitting in the driver's cabin while my brother Ram Singh, since deceased was asking for passengers.

Q.5.: It is in evidence against you that after entering the bus PW 1 noticed that seats cover of the bus were of red colour and it had yellow-coloured curtains and the windows of the bus had black film on it. The windows were at quite a height as in luxury buses. As PW 1 sat down inside the bus, he noticed that two of you accused were sitting in the driver's cabin were coming and returning to the driver's cabin. PW 1 paid an amount of Rs 20 as bus fare to the conductor i.e. Rs 10 per head. What do you have to say?

Ans.: It is correct that the windows of the bus, Ext. P-1 were having black film on it but I cannot say if the seats of the bus were having red covers or that the curtains were of yellow colour as my brother Ram Singh, since deceased, only used to drive the bus daily and that on that day since he was drunk heavily so I had gone to Munirka to bring him to my house and hence, I was driving the bus on that day. I had gone to Munirka with my nephew on my cycle to fetch Ram Singh, since deceased, and that the other boys along with Ram Singh had already taken the bus from R.K. Puram. I was called by Ram Singh on phone to come at Munirka."

37. The contention raised by Mr. Sharma is that accused No.2-Mukesh was not present in the bus has been considered in the judgment of this Court in more than one place. Presence of accused No.2-Mukesh in the bus has also been considered while considering the presence of witness PW-82, Shri Ram Adhar in the bus in para (298). As pointed out above, in his questioning under Section 313 Crl.P.C., accused No.2-Mukesh has admitted that he and accused No.1-Ram Singh (since deceased) are brothers and on the night of 16.12.2012, he (accused No.2-Mukesh) was driving the bus and that accused-Pawan and accused-Vinay Sharma were seated on the back side of the driver seat whereas accused-Akshay was sitting in the Driver's cabin. Accused-Ram Singh and JCL, Raju were calling for passengers by saying "Palam/Dwarka Mod". When there is such clear admission in the questioning under Section 313 Cr.P.C, now the Petitioner-accused No.2-Mukesh cannot raise the plea denying his presence in the bus.

38. Another contention raised by accused No.2-Mukesh is that he could not have been present in the bus on 16.12.2012 at 08.55 p.m. as seen from Call Details Record (CDR) and that his phone number was giving the location of Lajpat Nagar. This issue has been elaborately argued and dealt with as overlapping of signals in close proximity is common.

39. This Court had elaborately considered all the three dying declarations. All the three dying declarations having been relied by trial court, High Court and this Court and all arguments attacking the dying declarations having been considered and rejected, in its judgment dated 05.05.2017, we are of the view that the petitioner cannot be allowed to re-agitate the same issues which were already considered and expressly rejected by this Court.

40. The victim made three dying declarations:- (i) statement recorded by PW-49 Dr. Rashmi Ahuja immediately after the victim was admitted to the hospital; (ii) Dying declaration (Ex.PW-27/A) recorded by PW-27 SDM Usha Chaturvedi on 21.12.2012; and (iii) dying declaration(Ex.PW-30/D) recorded by PW-30 Pawan Kumar, Metropolitan Magistrate on 25.12.2012 at 1:00 p.m. by multiple choice questions and recording answers by gestures and writing. In the first dying declaration (Ex.PW-49/A), the prosecutrix has stated that more than two men committed rape on her, bit her on lips, cheeks and breast and also subjected her to unnatural sex. In the second dying declaration (Ex.PW-27/A) recorded by PW-27, the victim has narrated the entire

A incident in great detail, specifying the role of each accused, rape committed by number of persons, insertion of iron rod in her private parts, description of the bus, robbery committed and throwing of both the victims out of the moving bus in naked condition. On 25.12.2012 at 1:00 p.m., PW-30 Pawan Kumar, Metropolitan Magistrate recorded the
B statement by putting multiple choice questions to the victim and by getting answers through gestures and writing. While making the third declaration, the victim also tried to reveal the names of the accused by writing in her own handwriting viz. "*Ram Singh, Mukesh, Vinay, Akshay, Vipin, Raju*".

C 41. All the contentions raised regarding the three dying declarations have been considered in detail in paras (148) to (192) and paras (395) to (417). Considering all the three dying declarations, in the light of well-settled principles, this Court held that all the three dying declarations are true, voluntary and consistent. Insofar as third dying declaration, this Court, in paras (408) to (412) held that the dying declaration made through
D signs, gestures or by nods are admissible as evidence and that proper care was taken by PW-30 Pawan Kumar, Metropolitan Magistrate and the third dying declaration recorded by in response to the multiple-choice questions by signs, gestures made by the victim are admissible as evidence. In the third dying declaration, the victim also wrote the names of the accused persons "*Ram Singh, Mukesh, Vinay, Akshay, Vipin,*
E *Raju*". So far as the name of accused Vipin written by the prosecutrix in the third dying declaration has been elaborately considered by this Court in paras (150) and (188) of the judgment.

42. This Court has examined the evidence of PW.1 extensively and have given ample reason for accepting the said evidence as reliable.
F The petitioner cannot be allowed to re-agitate the matter.

43. Yet another contention raised by Mr. Sharma is that there were two different recoveries from accused No.2-Mukesh during his detention only to falsely implicate him and this has not been considered by this Court. It is the further contention that the remand report filed by
G the I.O. (Ext. PW-80/D2) was not considered which implied that there was no disclosure existed till 22.12.2012 and the disclosures and recoveries shown are highly doubtful. The arrest and recovery of accused No.2-Mukesh have been referred to in paras (116), (117) and in the tabular column in para (128) and the details of arrest of all the accused
H and recovery of the articles recovered from each of them are also further

referred to in detail in para (441). In the light of various decisions, the scope of recoveries was considered in paras (129) to (137) and paras (442) to (452) and the arguments raised on behalf of accused No.2-Mukesh were held to be untenable. The arguments now advanced raising doubts about the arrest and recovery of articles, in our considered view, make no ground for reviewing the judgment. A B

44. Learned Counsel for accused No.2-Mukesh contended that the illegal detention of Mukesh in Karoli/Rajasthan on 17.12.2012 and failure to present him before the nearest Magistrate was not considered by this Court. As pointed out earlier, the details of arrest of accused No.2-Mukesh have been referred to in detail in para (116) of the judgment and the various recoveries are referred to in paras (116), (117), (127), (440) and (441) of the judgment. Identification of Samsung Galaxy phone (recovered from accused Mukesh) by PW-1 in the TIP proceedings held on 20.12.2012 corroborates recovery of articles from accused No.2-Mukesh (*vide* para (441)). Further, the DNA profile generated from blood strained pants, T-shirts and jackets recovered from accused No.2-Mukesh matching with the DNA profile of the victim corroborates the recoveries made from accused No.2-Mukesh *vide* paras (231) and (454). C D

45. When the appeal was decided, all applications if any pending shall stand closed and we do not find any ground to review the judgment on this count, especially when parties lead all the evidences which were in their power. E

46. We may observe that submissions which have been raised by Shri Sharma before us in this review petition are more or less the submissions which were advanced at the time of hearing of the appeal and this Court had already considered the relevant submissions and dealt them in its judgment dated 05.05.2017. This court had cautiously gone into and revisited the entire evidences on record and after being fully satisfied had dismissed the appeal. By the review petition the petitioner cannot be allowed to re-argue the appeal on merits of the case by pointing out certain evidences and materials which were on the record and were already looked into by the trial court, High court and this Court as well. F G

47. In review petition, the petitioner had tried to raise the plea that he was not in the bus and he has nothing to do with the incident. The factum of he being involved in the offence having been gone into by all H

courts and after marshalling the evidences, he having been convicted and sentenced, it is not open for the petitioner in the review petition to contend that he had nothing to do with the incident.

48. We after having heard learned counsel for the petitioner and learned senior counsel for the respondent and having gone through the grounds taken in the review petition, find that review petition does not disclose any ground, on which review jurisdiction can be exercised by this Court under Article 137 read with Order XLVII Rule 1 of the Supreme court Rules, 2013. Consequently, the review petition is rejected.

Ankit Gyan Review Petition rejected.