TEAM CODE: M116

3RD MANIPAL RANKA NATIONAL MOOT COURT COMPETITION

BEFORE THE HON'BLE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION UNDER ARTICLE 134(1)(b) OF THE INDIAN CONSTITUTION

IN THE MATTER OF

Naveen & Anr. ….. Appellants

Versus

State for NCT of Delhi & Ors. …..Respondents

MOST RESPECTFULLY SUBMITTED BEFORE THE HONOURABLE CHIEF JUSTICE AND HIS COMPANION JUSTICES OF THE SUPREME COURT OF INDIA

MEMORANDUM ON BEHALF OF APPELLANT

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JJA	Juvenile Justice (Care and Protection of Children) Act 2015
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STATEMENT OF JURISDICTION

The appellants have approached the Hon'ble Supreme Court under Article 134(1)(b) of the Constitution of India[1]

The Hon'ble Supreme Court has consolidated these aforementioned appeals in exercise of its inherent powers under order LV, Rule 5 of the Supreme Court Rules, 2013[2].

[1] Has withdrawn from trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to the death; or

[2] Where there are two or more appeals arising out of the same matter, the Court may at any time either on its own motion or on the application of any party, order that the appeals be consolidated. Unless otherwise ordered by this Court the liability of the parties to pay separate Court-fees shall not be affected by any order for consolidation.

SYNOPSIS OF FACTS

1. The cold evening of Delhi on 16th December, 2015 the twenty-two-year medico namely Sunita, who had gone with her friend Suneel, a medico, to watch a film at EP, while returning for the girls hostel was standing at Jawahar Circle. A classic Car 'Innova' 7seater, with all gadgets, bar, pillows and CC TV Camera etc. driven by a commerce graduate Shri Naveen along with his three co-students named Ramesh, Suresh and Dinesh (minor) stopped and offered them lift to drop at the girls hostel on Jawahar Lal Nehru Marg, which was readily accepted.
2. She got prey to the savage lust of this gang of four, who threw Suneel in a dense forest beyond Jagatpura after robbing him and giving threats of murder, where he became unconscious, was naked and all the four one by one assaulted her in the Car. Her private parts were ruptured to fulfill their pervert sexual appetite, unthinkable and sadistic pleasure.
3. The attitude, perception, the bestial proclivity, inconceivable self-obsession and individual centralism of the four made the young lady to suffer immense trauma and, in the ultimate eventuate, the life-spark that moves the bodily frame got extinguished in spite of availing of all the possible treatment that the medical world could provide. Her uterus, vagina and other parts were damaged by iron-rod. She was thrown out of the Car naked. The death took place at a hospital in IIMS, New Delhi where she had been taken to with the hope that her life could be saved.
4. Shri Suneel (PW-1) survived. A motor cycle arrived and the said man Shri Raj Kumar (PW-72) gave the shirt and contacted control room. The PCR Van took him to SMS Hospital for treatment. Sunita was searched by the police was found unconscious and naked, was provided with clothes and was carried to SMS Hospital and later to New Delhi.
5. Wide and vast publicity was given by the print and electronic media, the Government agency became active. In depth investigation was continuously made and to bring the charge, modern and progressive scientific methods were adopted. The Innova Car No. RJ-14c-476 was seized with iron rod, whisky bottles and glasses and CC TV footage.
6. The accused persons were arrested. Prosecutorix's and Suneel's mobiles were recovered along with a lady wrist watch make Sonata, her stained clothes and Rs. 1,000/- robbed from (PW-1). After arrest all the accused were medically examined.

The MLCs of all the first three accused show various injuries on their person, the struggle marks. Dying declaration of the deceased was also recorded in SMS Hospital. DNA tests were done.

7. FIR was filed on 20.12.2015 by (PW-1), which was handed over to S.I. Pratibha Sharma (PW-80) for investigation. Charge sheet filed on 3.1.2016 under sections 376(2)(g), 302, 120-B, 377, 365, 366, 396, 397, 307, 412, 201 and 34 of IPC and Sections 354(3) and 235(2) of Cr. P.C.

TRIAL COURT

8. The learned trial Judge directed the sentences under Sections 20B/365/366/376(2)(g)/377/201/395/ 397/412 IPC to run concurrently and that the benefit under Section 428 Cr.PC would be given wherever applicable. He further recommended that appropriate compensation under Section 357A CrPC be awarded to the legal heirs of the prosecutrix. That apart, as death penalty was imposed, he referred the matter to the High Court for confirmation under Section 306 CrPC.

HIGH COURT

9. The High Court vide judgment dated 13.3.2017, affirmed the conviction and confirmed the death penalty imposed upon the accused by expressing the opinion that under the facts and circumstances of the case, imposition of death penalty awarded by the trial court deserved to be confirmed in respect of all the four convicts.

SUMMARY OF ARGUEMENTS

CONTENTION 1: WHETHER THE CASE AGAINST APPELLANT ARE FALSE AND FABRICATED OR NOT.

It is humbly submitted before the court that the case against appellant are false and fabricated as the statement of PW-1 is bereft of doubt for several reasons **(a)** delayed registration of FIR **(b)** inconsistencies and omissions amounting to contradictions in the testimony of PW-1 **(c)** non-mentioning the name of assailants in FIR. The Appellant submits that if there is absence of explanation related to FIR fabrication it leads to create suspicion in mind about the story told by the PW-1.

CONTENTION 2: WHETHER THE AGE OF DINESH SHOULD BE CONSIDERED AS PER MATRICULATION SCHOOL CERTIFICATE OR MEDICAL CERTIFICATE ISSUED BY THE DOCTOR.

The appellant humbly submits before the Hon'ble Supreme Court that the age of Dinesh is in conflict as according to Matriculation certificate his age is 17 years which means he is a juvenile according to **Juvenile Justice Act, 2000** as in **Section 2 (k)** of this act a person is a juvenile who is under 18 years of age. The **JJ Rules, 2007** reveals that Matriculation Certificates be given importance in determination of age of a Juvenile.

CONTENTION 3: WHETHER THERE IS CRIMINAL CONSPIRACY OR NOT.

It is submitted before the hon'ble court that there was no criminal conspiracy as it is said by the respondent that there was a criminal conspiracy, to prove criminal conspiracy there must be a: -(a) An agreement for doing of an illegal act; (b)For doing by illegal means an act which may not itself be illegal.

CONTENTON 4: THAT THERE IS ADMISSIBILTY AND ACCEPTABILITY OF THE DYING DECLARATION OF THE PROSECUTRIX WHEN NO NAMES WERE SPELL OUT.

The appellant humbly submits before the Hon'ble Supreme Court that in the dying declaration nothing is mentioned about the names of the accused. Dying Declaration is mentioned in **Section 32(1) of Indian Evidence Act** which states that dying declaration is a statement given by the victim that is given just before the death and explain the cause of death. Oral Dying

Declaration of the deceased is not admissible evidence when the doctor opines that the deceased was not in such a state of mind at the relevant time to give any such statement.

CONTENTION 5: WHETHER THERE WAS INSERTION OF IRON ROD IN THE RACTUM AND VAGINA AFTER RAPE BY ALL THE CONVICTS.

It is submitted to the Hon'ble court that insertion of iron in the rectum and vagina after rape by all the convicts with reference to the CCTV footage mention in the facts by the side of respondent on the basis of electronic evidence under section 65B of Indian Evidence Act 1872 which says information which is printed on a paper, stored, recorded are admissible to the court.[3] But in section 65B(4) it's clearly states that before presenting any type of electronic evidence in the court it which require certificate of proof which says that all the evidence which is recorded are original and has no tampering, alteration.

CONTENTION 6: WHETHER THE PROPER PROCEDURE IS FOLLOWED DURING THE PROCESS OF RECOVERY OR NOT.

It is humbly submitted before the court that the ***Section 25 of the Indian Evidence Act***[4] speaks of a confession made to a police officer, which shall not be proved as against a person accused of an offence**.** ***Section 26*** of the Evidence Act also speaks that no confession made by the person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

[3] *Mukesh and Another v. State (NCT OF DELHI) and others,* 2017 SCC ONLINE SC 533
[4] *Indian Evidence Act,* 1872

ARGUMENT ADVANCED

CONTENTION 1: WHETHER THE CASE AGAINST APPELLANT ARE FALSE AND FABRICATED OR NOT.

It is humbly submitted before the court that the case against appellant are false and fabricated as the statement of PW-1 is bereft of doubt for several reasons **(a)** delayed registration of FIR **(b)** inconsistencies and omissions amounting to contradictions in the testimony of PW-1 **(c)** non-mentioning the name of assailants in FIR.

1.1 Delayed registration of FIR

The appellant humbly submits before the Hon'ble Supreme Court that there is delay in lodging FIR which viewed with suspicion because there is possibility of concoction of evidence against an accused. A First Information Report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial which is mentioned in **section 154** of Code[5]. In the case of ***Thuli Kali v. State of Tamil Naidu,*** the object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence.[6]

A. EFFECT OF DELAY

Delay in lodging the first information report quite often result in embellishment which is a creature of afterthought.[7] On account of delay, the report not only gets lack of the advantage of spontaneity, danger creeps in of the introduction of coloured version and concocted story as a result of deliberation and consultation.[8] It is, therefore, essential that the delay in the lodging of the first information report should be satisfactory explained[9]. In the case of ***Matisan Bhumji v. State of Jharkhand,*** it was stated that *"The object of insisting upon prompt lodging of FIR to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the part*

[5] Code of Criminal Procedure,1973
[6] *Thuli Kali v. State of Tamil Naidu,* (1972) 3 SCC 393
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*

played by them, the weapons used, if any. ***Any delayed version will be prone to introduction of a coloured version or exaggerated story****".*

In the present case, there is delay of 4 days[10] which are enough to concoct the story and the complaint being manipulated and the version of prosecutrix being untrue cannot be completely ruled out. By such delay in lodging FIR the case can be rendered doubtful. Also, suspicions arise as it is clear by the facts that Suneel was taken to the hospital by Police in PCR van[11] where they had an opportunity to take the statement as soon as he becomes conscious and at the time he had the opportunity to elaborate police about the entire incidence at that point of time but yet he waited for four days to pass which cannot be explained by him. Further, the prosecution cannot contend that the victim was not in a position to complain because it was the friend who lodged the FIR and not the victim herself. Therefore, the delay in the present case by no circumstances is explainable by respondent.

B. ABSENCE OF EXPLANATION OF DELAY IN LODGING FIR

The Appellant submits that if there is absence of explanation in the delay of registration of the FIR it leads to create suspicion in mind about the story told by the PW-1. In the case of ***Ram Dittu v. State of Himachal Pradesh[12],*** where there was delay of four days in lodging the First Information Report has not been satisfactory explained by which court stated that prosecution story cannot be accepted as trustworthy. Also in another case,

C. Judicial Reviews on Delayed FIR

In the case of ***Rajan Saha v. State of Tripura***[13] the Apex Court stated that undue and unreasonable delay in lodging the FIR inevitably give rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and considered its effect on the trustworthiness or otherwise of the prosecution version. Is another case of ***Anoop Singh v. State of Haryana[14]****,* it was held that delay of five days in lodging the FIR casts a serious cloud on the prosecution case It gives enough time to the complaint party to fabricate or concoct the story and to implicate the appellants falsely in the case. Where there is non-explanation of the delay in lodging the ***ejahar*** for five days, the accused is

[10] Refer Fact sheet, para 3.
[11] Refer Fact Sheet, para 2.
[12] *Ram Dittu v. State of Himachal Pradesh*, 1990 (1) Crimes 149 (HP)
[13] *Rajan Saha v. State of Tripura,* 2008 CrLJ 214, 2007 (4) GLT 855
[14] *Anoop Singh v. State of Haryana,* Crl Appeal No. S-68-SB of 2015

entitled to the benefit of the doubt[15]. The Worst feature of the prosecution case is the inordinate delay in lodging the First Information Report is a serious matter and renders the prosecution story highly suspicious[16].

From the above case laws, it is clear that there is serious concern about delayed in lodging FIR as four days are enough to concocted and fabricate the story which is a serious matter to concern about.

1.2 Non-mentioning the name of assailants in FIR

It is submitted before the Hon'ble Supreme Court that acquittal of an accused giving benefit of doubt on the ground that his name was not mentioned by PW-1 in FIR and as such it cannot he was one of the assailants.[17] If it is evident from the circumstances that it is hardly likely that the informant would have skipped reference to the facts in the statement against one of the accused, the Sessions Judge and the High Court ought not to have its significant.[18] The interference arising from the fact that the names of accused are not mentioned in First Information Report must vary from case to case.[19]

As per the **Section 9** of the **Indian Evidence Act, 1872**[20] *names or the description of the four accused were not mentioned in FIR and no* ***T.I. Parade*** *held and accused were identified only before the court four months after the occurrence- Held such identification not reliable in connecting the accused with crime.*[21]

1.3 Inconsistencies and omissions amounting to contradictions in the testimony of PW-1

It is humbly submitted that the omission(s) amount to contradiction, creating the serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence.[22] In the present case, the case of the prosecution is attacked contending that PW-1 is planted witness and that he keeps on improving his version. It is submitted that PW-1 is not

[15] *Manikal Acharjee v. State of Assam*, 1988 (1) crimes 205 (Gau)
[16] *Ram Chandra v. State of Rajasthan,* 1989 (3) Crimes 460
[17] *Nandu v. State,* 1976 CrLJ 250 (Ori-DB)
[18] *Jagdip Singh v. State of Haryana,* AIR 1947 SC 1978
[19] *Hallu v. State of M.P.,* 1974 SC 1936
[20] *Indian Evidence Act,* 1872
[21] *Mohd. Abdul Hafeez v. State of A.P.,* AIR 1983 SC 367
[22] *State of Rajasthan v. Rajendra Singh,* (2009) 11 SCC 106

reliable as had he been present at the time of occurrence, he would have endeavoured the victim and the nature of injuries as mentioned in para 1 of fact sheet on the person of PW-1 raises a serious doubt about his presence at the time of occurrence.

In the case of ***Syed Ibrahim v. State of A.P.*** the court said that "The courts have to label the category to which discrepancies belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so."[23] In the present case there are minor discrepancies in the statement of PW-1 but the material discrepancies. So, the statement of PW-1 was not having the credibility.

A. <u>Appreciation of evidence</u>

In ***Maharaj Singh's***[24] case, the Allahabad High Court held that by virtue of the explanation to Section 162(2) Cr.P.C., an omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

In the present case there are contradictions, inconsistencies, discrepancies, deficiencies, drawbacks and infirmities, which are not minor discrepancies on the fringe. The depositions of the prosecution witnesses were neither cogent nor coherent and do not inspire confidence. Still the learned trial court has relied upon their statements. The reliability of the witnesses, who have made improvements and have been confronted with their previous statements, has not been adjudged by the trial court keeping in mind the basic principles of appreciation of evidence applicable to a criminal trial.

In a recent judgment rendered by the Supreme Court in Essa @ ***Anjum Abdul Razak Memon vs. The State of Maharashtra***,[25], the Hon'ble Supreme Court dwelt at length on the aspect of improvements, discrepancies and contradictions which do not touch the core of the prosecution case as follows: - (JT, page 160 to 162)

[23] *Mukesh and other v. state (NCT) of Delhi & others* (2017) 6 SCC 1
[24] (1991) 28 ACC 506
[25] *Anjum Abdul Razak Memon vs. The State of Maharashtra,* JT 2013 (6) SC 1

> **276**. It is contended on behalf of the appellant that evidence of the aforesaid eye witnesses is unreliable, untrustworthy and without any basis in order to reach to the conclusion of any guilt to justify the detention of the appellant any further in custody. It is further submitted that substantial improvements have been made by these witnesses during their evidence. We are unable to accept the same.

In the present case, the star eye-witness is making the contradiction and the substantial improvements during the cross-examination in order to make it acceptable, as he was making a story-line because he didn't know the facts properly as, he was unconscious when thrown out of the bus. So, the eye-witness is unreliable, untrustworthy and his statement cannot be reliable in the court.

It is contended that there are vital contradictions in the statement of PW-1. It is contended that the PW-1 did not give the name of the accused in the FIR and that he kept on improving his version in particular, in the supplementary statement recorded. To contend the testimony of PW-1 is not trustworthy, reliance is placed on ***Kathi Bharat Vajsur And Anr. v. State of Gujarat***[26]**,** it is observed that when there are inconsistencies or contradictions in oral evidence and the same is found to be in contradiction with other evidence then it cannot be held that the prosecution has proved the case beyond the reasonable doubt.

[26] *Kathi Bharat Vajsur And Anr. v. State of Gujarat*, (2012) 5 SCC 724

CONTENTION 2: WHETHER THE AGE OF DINESH SHOULD BE CONSIDERED AS PER MATRICULATION SCHOOL CERTIFICATE OR MEDICAL CERTIFICATE ISSUED BY THE DOCTOR.

The appellant humbly submits before the Hon'ble Supreme Court that the age of Dinesh is in conflict as according to Matriculation certificate his age is 17 years which means he is a juvenile according to **Juvenile Justice Act, 2000** as in **Section 2 (k)** of this act a person is a juvenile who is under 18 years of age. The **JJ Rules, 2007** reveals that Matriculation Certificates be given importance in determination of age of a Juvenile. Further there are plethora of cases which prove that the matriculation certificate has primacy over medical test report.

2.1 DETERMINATION OF AGE UNDER JUVENILE JUSTICE LAWS EXPLICITLY PLACES RELIANCE UPON SCHOOL RECORDS.

Juvenile Justice (Care and Protection of Children) Act, 2000 does not lay down any fixed criteria for determining the age of the person. **Section 49(1)** of the Juvenile Justice (Care and Protection of Children) Act, 2000[27] provides for presumption and determination of age. According to the Provision, where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

From a reading of the above provision, it is clear that it provides that when it appears to the competent authority namely, the Board that the person brought before it is a juvenile, the Board is obliged to make it clear as to the age of that person and for that purpose the Board shall take such evidence as may be necessary and then record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be.

The JJ Rules 2007, through **Rule 12** lay down categorically procedure and principles to be followed in age determination. It requires the competent authority to determine age by seeking:

[27] *Juvenile Justice (Care and Protection of Children) Act,* 2000

(i) the matriculation or equivalent certificates, if available; and in the absence whereof;
(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat.

It further provides that "only in the absence of either (i), (ii) or (iii) of clause (a), above the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child."

So, in the present case **Rule 12** clearly applying as finding of age recorded following the above procedure "shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law." Medical Evidence regarding the age can be considered only if the date of birth mentioned in the school record is not available and could not be relied upon[28].A medical report cannot prevail up on school leaving certificate for the purpose of determination of age under any circumstances[29]. When the law itself prescribes a procedure for determination of age of juveniles, no other procedure should be followed[30].

The Supreme Court in ***Amit Das v. State of Bihar***[31]clarified that the review of judicial opinion shows that the court should not take a hyper technical approach while appreciating evidence for determination of age of the accused. If two views are possible, the court should lean in favor of holding the accused to be a juvenile in borderline cases. This approach was further confirmed by the Supreme Court in ***Rajendra Chandra v. State of Chattisgarh***[32] wherein it was held that the High Court has not erred in arriving at a conclusion that the accused was a juvenile as it has not followed any hyper technical approach. Even after the presence of over writing in the mark-sheets produced, the court completely relied upon the school certificates on the grounds of it being attested by the competent authority. This case thus reveals the fact that the apex judicial body itself is of the opinion that school certificates prevail over the hyper technical methods of age determination.

From the above-mentioned cases, it is clear that matriculation certificate of Dinesh prevails over the other methods of determining age. He is to be considered as juvenile under Juvenile Justice Act.

[28] *Ram Suresh Singh v. Prabhat Singh*, (2009) 6 SCC 681
[29] *Kali Prasad Patwa v. state of Uttar Pradesh*, 2002 (44) ACC 840 (All)
[30] *Mukesh Jagadish Vasava v. State of Gujarat*, 2009 (76) AIC 878 (Guj)
[31] *Amit Das v. State of Bihar AIR* 2000 SC 2264.
[32] *Rajinder Chandra v. State of Chhatisgarh*, (2002) 2 SCC 287.

2.2 ADMISSIBILITY OF SCHOOL CERTIFICATES AS EVIDENCE.

It is a non-ignorable fact that the JJ Act, 2000 in itself explicitly provides for placing reliance upon the school certificates instead of medical evidences and opinions. The provisions under the Indian Evidence Act further substantiate the evidentiary value of such documents produced before the court to prove age of the accused as well as victims. **Section 45**[33] deals with relevancy of opinion of experts. But on considering the general rule of law, the court always sees towards and weighs only direct evidences on the grounds that opinion differs from person to person and changes from time to time and place to place. The provision providing relevancy of opinions of experts is not absolute and will be taken only when the court is unable to form an opinion on its own. It can thus be construed that court seeks the medical opinion only when the documentary evidences fail to provide a satisfactory conclusion.

In the case of ***Purna Palai v. State***[34], it has been held that where direct evidence is found to be satisfactory and reliable, it cannot be rejected in view of hypothetical expert medical evidence. In ***Dinesh Kumar v. State***[35]**,** only on the record of other evidences, the testimony of medical witness was accepted. Even though the opinion of a doctor as to the age is valued under the law, it is not sufficient to fix the exact age[36] The estimate of a medical officer does not amount to proof and it is merely an opinion[37].

Section 35 of Indian Evidence Act states that an entry in any public book, register or record or an electronic record is a relevant fact. This provision whose liberal interpretation reveals the evidentiary value of public records. Entry in general register of a school maintained in the ordinary cause of its business cannot be doubted[38]. Under the Education Rules too every school whether Government or Private is obligated to maintain register of admissions with the prescribed particulars and such records are considered official records and are admissible under **Sec.35 of IEA**[39]**.**

[33] Indian Evidence Act,1872
[34] *Purana Palai v. State*, 1987 CrLJ 1406 (Orissa).
[35] *Dinesh Kumar v. State of Madhya Pradesh,* 1987 CrLJ 212.
[36] *Bishwanth Prasad v. Emperor,* AIR 1948 Oudh 1.
[37] *Mohammed Syedol Arrifin v. Yeoh Got Gark*, AIR 1916 PC 242.
[38] *Ashok Kumar Amritlal Patil v. State of Gujarat*, 2003 (4) Guj LR 3164.
[39] Vijaya Kari v. K Swarnalatha A 1893 AP 181, 189.

2.3 SEPARATE AND DISTINCT JUVENILE JUSTICE SYSTEM

Under the Indian law a person under the age of 18 is not allowed to vote[40], is considered minor for entering into a contract[41], a girl of age less than 18 cannot give consent for sexual relationships[42], a child of age less than 18 cannot marry[43], so in present scenario also the age of criminal responsibility in legal system that recognize the concept of the age of criminal responsibility for minor should not be fixed at too low an age level, keeping in mind the emotional, mental and intellectual maturity of children[44] and hence the age was decided by the Indian legislature at 18 years.

In present case, there is no need to push juvenile offender into adult criminal system as stated in **section 16** of Juvenile Act of 2000 that children between 16-18 years who have committed serious crime which was within the juvenile system and there was no need to push those children into adult criminal system. Transferring them to adult court will have a negative impact by obstructing their future education, employment and social opportunities but encourages future criminal activity.

In the case of ***Raghubir v. State of Haryana***[45] unreservedly rejects the idea of subjecting juvenile to the adult criminal justice system even for rare offence categories. The Supreme Court ruling goes a long way in the direction of juvenile justice system which is ideal. It accepts in principle the idea of separate and distinct juvenile justice system[46]. In ***Salil Bali vs Union of India***[47] also did not considered it necessary to answer the specific issues related to juvenile age raised before it.

Conviction of Dinesh in present case is not valid as his age is seventeen years and according to law he is considered as a minor or child[48] who is not responsible for any crime act committed by him/her because of his emotional, mental and intellectual immaturity and insufficient

[40] Article 326, The Constitution of India, 1950
[41] Section 11, The Indian Contract Act, 1872
[42] Section 375, The Indian Penal Code, 1860
[43] Section 5, The Hindu Marriage Act, 1955
[44] Age of criminal responsibility, Section 4 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice
[45] *Raghubir v. State of Haryana*, (1981) 4 S.C.C.210.
[46] B B Pandey, Commentary on Raghubir ruling right to exclusive treatment.
[47] *Salil Bali vs Union of India*, (2013) 7 SCC 705
[48] Section 2(k), The Juvenile Justice (Care and Protection of Children) Act, 2000

capacity to understand what is right and what is wrong. It is already stated above that Capital punishments or life imprisonment shall not be imposed for offences committed by person who is below eighteen years of age[49]. So, when one child is not capable of thinking the way other offenders are thinking, then how we impose same punishment for both of them. This will be injustice by giving death penalty in similar manner to both. A juvenile offender is product of unfavourable environment and is entitled to a fresh chance under better surroundings.

[49] Article 37, Conventions on the Right of the Child, 1990 and section 16 of Juvenile Justice (Care and Protection of Children) Act, 2000

CONTENTION 3: WHETHER THERE IS CRIMINAL CONSPIRACY OR NOT.

It is submitted before the hon'ble court that there was no criminal conspiracy as it is said by the respondent that there was a criminal conspiracy, to prove criminal conspiracy there must be a: -

- An agreement for doing of an illegal act;
- For doing by illegal means an act which may not itself be illegal.[50]

Thus, it is clear that for charge of criminal conspiracy, only an agreement itself is sufficient[51] but in the present case these grounds are not fulfilled.

The essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence.[52] In the case of criminal conspiracy what is to be proved is agreement and common design.[53] Unless it's shown that several accused persons has agreed either to do an illegal actor an act, which is not illegal, by illegal means, no charge of criminal conspiracy can succeed[54].

In ***Damodar v. State of Rajasthan***, a two-Judge Bench after referring to the decision *in Kehar Singh v. State (Delhi Admn.)*

- The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render those conspirators but the latter does.
- For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity.

As the above mention facts clearly states that agreement is the base of the offence of criminal conspiracy***. Section 34 of IPC*** When a criminal act is done by several persons in

[50] *1 S.K. SARVARI, RA NELSON INDIAN PENAL CODE* 1018 (10ed 2008); *Mir Nagvi Askari v. CBI,* (2009) 15 SCC 643: (2010) 2 SCC (Cri) 718
[51] *State of Karnataka appellate v.GM Sumanabai,* (2004) CrLj4112.
[52] *Suresh Chandra babri v. state of Bihar,* AIR 1994 SC 2420
[53] *Re Kodur Thimma Reddi,* AIR 1957 Andh Pra758, p 766, (1957)Cr LJ 1(SC)
[54] *Jagannath misra v. state of Orissa,* (1974) cur LT 1253.

furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone, as it clearly says that there was no common intention that was to achieved if there was a common intention that also there should be prior planning regarding this and the facts says that appellant afford the lift and there was no common intention.in the case of ***Mahboob Shah v. Emperor***[55] it was held that common intention within the meaning of this section implies a pre-arranged plan, and that to convict an accused of an offence, applying to this section, it should be proved that the criminal act was in concert pursuant to the pre-arranged plan.

Section 149 of IPC says, if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. As to fulfil the ingredients of criminal conspiracy section 149 as well as section 34 should be fulfilled but in the present case both the section ingredients are not being used by the appellant because there was no prior planning, common intention as well as common object. There is distinction between section 34 and section 149 which says as common intention is different from common object[56].

To substantiate a charge of conspiracy then respondent must prove the agreement between two or more persons to do an unlawful act or a lawful act by unlawful means. Where there was no direct or circumstantial evidence to hold that the accused had prior meeting of minds and an agreement to commit the alleged crime, the mere suspicion of the informant about the conspiracy of the accused cannot be the ground to convict them under section 120b of IPC[57].there can be no conspiracy without such agreement[58].

Though to establish the charge of conspiracy there must be an agreement, there need not be proof of direct meeting or combination nor need the parties be brought into each presence; the agreement be inferred from the circumstances raising a presumption of a common concerted plan to carry out the unlawful design.

[55] *Mahboob Shah v. Emperor*, AIR 1945 PC 118
[56] *Jhapsa kabari ors v. state of Bihar*, (2002) CrLJ 1297
[57] *Sattan alias satyendra ors v. state of Uttar Pradesh*, (2001) CrLJ676(ALL)
[58] *AH desai v. state of Mysore*, AIR 1956 Mys46

In the absences of any other evidence of conspiracy, mere evidence of motive is not sufficient to connect a man with the conspiracy[59]. Therefore, in the case of appellant they gave the lift, there was no prior planning done regarding, as well as there was no common intention involved.

The learned amicus ***Mr. Sanjay Hegde*** submitted that there is no specific evidence to prove that there was prior meeting of minds of the accused and that they had conspired together to commit grave offence by use of iron rod, resulting in the death of the victim and, therefore, insertion/use of iron rod by any one of the accused cannot be attributed to all the accused in order to hold them guilty of the offence of murder.

In the present case, there is no evidence proving the acts, statements and circumstances, establishing firm ground to hold that the accused who were present in the car were in not prior concert to commit the offence of rape. The respondent has established that the accused were associated with each other. As this statement is totally false as stated in above in section 34 and section 149 of IPC. If there was a criminal conspiracy on the behalf of prosecutors then there should be an agreement which is done by them, as mention the facts classic car Innova was stopped and they offered lift till girl's hostel, which was readily accepted[60]. By seeing to this it can be said that there was no criminal conspiracy from the side of persecutors.

[59] *Ekabban mondal v. emperor*, AIR 1937 Cal 756
[60] Moot proposition Page 1 para 1

CONTENTON 4: THAT THERE IS ADMISSIBILTY AND ACCEPTABILITY OF THE DYING DECLARATION OF THE PROSECUTRIX WHEN NO NAMES WERE SPELL OUT.

The appellant humbly submits before the Hon'ble Supreme Court that in the dying declaration nothing is mentioned about the names of the accused. Dying Declaration is mentioned in **Section 32(1) of Indian Evidence Act** which states that dying declaration is a statement given by the victim that is given just before the death and explain the cause of death.

4.1 DYING DECLARATION- MEDICAL EVIDENCE

Oral Dying Declaration of the deceased is not admissible evidence when the doctor opines that the deceased was not in such a state of mind at the relevant time to give any such statement[61]. In the present case, it is not justified that whether the victim is in a fit condition or not. The statements made by the victim in her dying declaration was not made in an unfit mental state. In the case of ***Ram Manorath v. State of U.P.[62],*** it was held that a dying declaration which suffers from infirmity cannot form the basis of conviction.

In the case of ***K. Ramachandra Reddy and Anr. v. Public Prosecutor[63],*** Each case of dying declaration has to be considered in its own facts and circumstances in which it is made. However, there are some well-known tests to ascertain as to whether the statement was made in reference to cause of death of its maker and whether the same could be relied upon or not. The Court also has to satisfy as to whether the deceased was in a fit mental state to make the statement. The Court must scrutinize the dying declaration carefully and ensure that the declaration is not the result of tutoring, prompting or imagination.

So, in the present case it is not clear that the victim is in a fit condition. Any medical certificate that justify the fit condition of victim while recording dying declaration is not given by the doctors which is against the law[64].

[61] *State of Manipur v. Okram Jitan Singh,* 2005 CrLJ 1646, 1650 (para 21)
[62] *Ram Manorath v. State of U.P.,* (1981) 2 SCC 654
[63] *K. Ramachandra Reddy and Anr. v. Public Prosecutor,* (1976) 3 SCC 618
[64] Section 32 (1) of Indian Evidence Act, 1872

CONTENTION 5: WHETHER THERE WAS INSERTION OF IRON ROD IN THE RACTUM AND VAGINA AFTER RAPE BY ALL THE CONVICTS.

It is submitted to the Hon'ble court that insertion of iron in the rectum and vagina after rape by all the convicts with reference to the CCTV footage mention in the facts by the side of respondent on the basis of electronic evidence under section 65B of Indian Evidence Act 1872 which says information which is printed on a paper, stored, recorded are admissible to the court.[65] But in section 65B(4) it's clearly states that before presenting any type of electronic evidence in the court it which require certificate of proof which says that all the evidence which is recorded are original and has no tampering, alteration.

As in the case of ***Anvar P.V. Versus, P.K. Basheer And Others***[66] it is mention that he Supreme Court has settled the controversies arising from the various conflicting judgments as well as the practices being followed in the various High Courts and the Trial Courts as to the admissibility of the Electronic Evidences. And held that secondary data in CD/DVD/Pen Drive are not admissible without a certificate U/s 65 B (4) of Evidence Act.

As the respondent has serious implications relies on the electronic data were the evidence are presented without the certificate in front of the court that evidence is not admissible in the court. In the cases related to anticorruption where the reliance is being placed on the audio-video recordings which are being forwarded in the form of CD/DVD to the Court. In all such cases, where the CD/DVD are being forwarded without a certificate U/s 65B Evidence Act, such CD/DVD are not admissible in evidence and further expert opinion as to their genuineness cannot be looked into by the Court as evident from the Supreme Court Judgment.

Sanjaysinh Ramrao Chavan vs. Dattatray Gulabrao Phalke[67] hon'ble high court said that audio and video CDs in question are clearly inadmissible in evidence therefore trial court has erroneously relied upon them to conclude that a strong suspicion arises regarding petitioners criminally conspiring with co-accused to commit the offence in question. Thus, there is no material on the basis of which, it can be reasonably said that there is strong suspicion of the complicity of the petitioners in commission of the offence in question[68].according to this it

[65] *Mukesh and Another v. State (NCT OF DELHI) and others,* 2017 SCC ONLINE SC 533
[66] *Ram Manorath v. State of U.P.,* MANU/SC/0834/2014
[67] *Sanjaysinh Ramrao Chavan vs. Dattatray Gulabrao Phalke*, MANU/SC/0040/2015
[68] *Ankur Chawla v. CBI*, MANU/DE/2923/2014

clearly gets proved that without the certificate any electronic media is not admissible by the Hon'ble court.

In the recent judgment pronounced by Hon'ble High Court of Delhi, while dealing with the admissibility of intercepted telephone call in a CD and CDR which were without a certificate u/s 65B Evidence Act, the court observed that the secondary electronic evidence without certificate u/s 65B Evidence Act is inadmissible and cannot be looked into by the court for any purpose whatsoever[69].

The admissibility of the secondary electronic evidence has to be adjudged within the parameters of Section 65B of Evidence Act and the proposition of the law settled in the recent judgment of the Apex Court and various other High Courts. The proposition is clear and explicit that if the secondary electronic evidence is without a certificate u/s 65B of Evidence Act, it is not admissible and any opinion of the forensic expert and the deposition of the witness in the court of law cannot be looked into by the court.

As its it is mention in the statement of facts by the learned trial judge directed the sentence under rape criminal conspiracy, etc. but he didn't include the CCTV footage this clearly states that what all the evidence that is brought by the respondent in the Hon'ble court is vague neither the hon'ble high court has upheld this evidence nor the trial court considering this was it has become clear that there was no insertion of rod in rectum and vagina after rape. Hence the court should accept this accordingly.

[69] *Jagdeo Singh v. The State and Ors*., MANU/DE/0376/2015

CONTENTION 6: WHETHER THE PROPER PROCEDURE IS FOLLOWED DURING THE PROCESS OF RECOVERY OR NOT.

It is humbly submitted before the court that the ***Section 25 of the Indian Evidence Act***[70] speaks of a confession made to a police officer, which shall not be proved as against a person accused of an offence**.** ***Section 26*** of the Evidence Act also speaks that no confession made by the person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. ***Sections 25 and 26*** of the Evidence Act put a complete bar on the admissibility of a confessional statement made to a police officer or a confession made in absentia of a Magistrate, while in custody.

As, it is clearly stated in facts that all the accused were in the custody of the police and the police recorded statement and under **Section 25 and 26 of the Evidence Act** these statements are not valid until and unless there is a presence of magistrate but from the facts it is clearly stated that the magistrate was not present there.

6.1 Recovery of items

The police had recovered Prosecutorix and Suneel **mobile phone** along with the **lady wrist watch make Sonata**, **her stained clothes** and **Rs.1000/- robbed** from PW-1.

It is clearly mentioned in the facts that **firstly,** the police had recovered wrist watch of lady but there is nothing mention that the watch belongs to the prosecutorix and **secondly,** the police recovered Rs.1000/- from the accused how it can be proved that the Rs.1000/- notes belongs to the Suneel.

Appending a note of caution to prevent the misuse of the provision of Section 27 of the Evidence Act, this Court in ***Geejaganda Somaiah v. State of Karnataka***[71] (2007) 9 SCC 315, observed that the courts need to be vigilant about application of ***Section 27 of the Evidence Act***. Relevant extract from the judgment is as under:

> "***22. As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse."***

[70] *Indian Evidence Act*, 1872
[71] *Geejaganda Somaiah v. State of Karnataka*, (2007) 9 SCC 315

As, from the above case it is clear that the police are misusing the provisions under ***Section 27 of the Evidence Act*** because there is a delayed in lodging FIR by the PW-1 so that the police can plant the things easily.

The appellants with regard to the recoveries and the disclosure statements that led to the discoveries. Assailing the acceptability of the arrest and the disclosure statements leading to the recoveries, it is contended that the materials brought on record cannot be taken aid of for any purpose since the items seized have been planted at the places of recovery and a contrived version has been projected in court. That apart, it is submitted that the recoveries are gravely doubtful inasmuch as the prosecution has not seized all the articles from one accused on one occasion but on various dates.

6.2 Recovery of CCTV Footage

The electronic evidence under section 65B of Indian Evidence Act 1872 which says information which is printed on a paper, stored, recorded are admissible to the court.[72] But in section 65B (4) it's clearly states that before presenting any type of electronic evidence in the court it which require certificate of proof which says that all the evidence which is recorded are original and has no tampering, alteration.

As in the case of ***Anvar P.V. Versus, P.K. Basheer And Others***[73] it is mention that he Supreme Court has settled the controversies arising from the various conflicting judgments as well as the practices being followed in the various High Courts and the Trial Courts as to the admissibility of the Electronic Evidences. And held that secondary data in CD/DVD/Pen Drive are not admissible without a certificate U/s 65 B (4) of Evidence Act.

As the respondent has serious implications relies on the electronic data were the evidence are presented without the certificate in front of the court that evidence is not admissible in the court. In the cases related to anticorruption where the reliance is being placed on the audio-video recordings which are being forwarded in the form of CD/DVD to the Court. In all such cases, where the CD/DVD are being forwarded without a certificate U/s 65B Evidence Act, such CD/DVD are not admissible in evidence and further expert opinion as to their genuineness cannot be looked into by the Court as evident from the Supreme Court Judgment.

[72] *Mukesh and Another v. State (NCT OF DELHI) and others,* 2017 SCC ONLINE SC 533
[73] *Anvar P.V. Versus P.K. Basheer And Others*, MANU/SC/0834/2014

Sanjaysinh Ramrao Chavan vs. Dattatray Gulabrao Phalke[74] hon'ble high court said that audio and video CDs in question are clearly inadmissible in evidence therefore trial court has erroneously relied upon them to conclude that a strong suspicion arises regarding petitioners criminally conspiring with co-accused to commit the offence in question. Thus, there is no material on the basis of which, it can be reasonably said that there is strong suspicion of the complicity of the petitioners in commission of the offence in question[75].according to this it clearly gets proved that without the certificate any electronic media is not admissible by the Hon'ble court.

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The admissibility of the secondary electronic evidence has to be adjudged within the parameters of Section 65B of Evidence Act and the proposition of the law settled in the recent judgment of the Apex Court and various other High Courts. The proposition is clear and explicit that if the secondary electronic evidence is without a certificate u/s 65B of Evidence Act, it is not admissible and any opinion of the forensic expert and the deposition of the witness in the court of law cannot be looked into by the court.

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[74] Supra 62
[75] *Ankur Chawla v. CBI* MANU/DE/2923/2014
[76] *Jagdeo Singh v. The State and Ors*., MANU/DE/0376/2015

PRAYER

Wherefore, In the light of the fact stated, issues raised, arguments advanced and authorities cited, may this Hon'ble court be pleased to:

To hold:

1. On the aspect of sentencing, seeking the reduction of death sentence to life imprisonment for the following mitigating circumstances:
   (a) Family circumstances such as poverty and rural background,
   (b) Young age,
   (c) Current family situation including age of parents, ill health of family members and their responsibilities towards their parents and other family members,
   (d) Absence of criminal antecedents,
   (e) Conduct in jail, and
   (f) Likelihood of reformation.

To pass:

1. To quash the order passed by the High Court and the Sessions Court.
2. To upheld the validity of matriculation certificate over ossification test in determining the age of juvenile.

AND /OR

Any other relief which this Hon'ble Court may be pleased to grant in the interest of *Justice, Equity and Good conscience.* All of which is respectfully submitted.

COUNSELS FOR THE APPELLANT