

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
SHRI JUSTICE SUJOY PAUL
&
SHRI JUSTICE PRAKASH CHANDRA GUPTA**

CRIMINAL APPEAL No. 1579 OF 2020

Between :-

SANTOSH MARKAM S/O
BUDDHU SINGH MARKAM,
AGED ABOUT 34 YEARS,
OCCUPATION 6th VHAHINI
S.S.B. JABALPUR KI E
COMPANY KEMP
NARSINGHPUR ME TRED R.
1398 (KUK) AT PRESENT ME
KENDRA JAIL
NARSINGHPUR (M.P.) ME
NIRUDH, PERMANENT R/O
GRAM GHONTA, THANA
BIJADANDI, DISTRICT
MANDLA (MP).

....Appellant

(BY SHRI NARENDRA NIKHARE, ADVOCATE)

AND

THE STATE OF MADHYA
PRADESH THROUGH THE
P.S. NARSINGHPUR (M.P.)

....Respondent

(BY SHRI YOGESH DHANDE, GOVERNMENT ADVOCATE)

CRIMINAL REFERENCE No. 01 OF 2020

Between :-

IN REFERENCE

RECEIVED FROM 5TH
ADDITIONAL SESSIONS JUDGE &
SPECIAL JUDGE NARSINGHPUR
(M.P.)

....Appellant

(BY SHRI AJAY GUPTA, AMICUS CURIAE WITH SHRI RAJEEV
MISHRA, ADVOCATE)

AND

SANTOSH MARKAM S/O
BUDDHU SINGH MARKAM,
AGED ABOUT 34 YEARS,
OCCUPATION 6TH VHAHINI
S.S.B. JABALPUR KI E
COMPANY KEMP
NARSINGHPUR ME TRED R.
1398 (KUK) AT PRESENT ME
KENDRA JAIL
NARSINGHPUR (M.P.) ME
NIRUDH, PERMANENT R/O
GRAM GHONTA, THANA
BIJADANDI, DISTRICT
MANDLA (MP).

....Respondent

(By SHRI NARENDRA NIKHARE, ADVOCATE)

Reserved on	:	01/09/2022
Delivered on	:	05/09/2022

JUDGMENT

Sujoy Paul, J. :

The validity of judgment dated 24/01/2020 passed in
S.T.No.22/2019 is under question in this reference and in the criminal

appeal filed by the appellant whereby the Court below held the appellant guilty for committing offences under Section 376(AB) of Indian Penal Code and directed to impose death sentence. The appellant was also held guilty for committing offence under Sections 366 and 324 of Indian Penal Code for which he was directed to undergo sentence of 10 years R.I. and 3 years R.I. respectively with default stipulations.

FACTUAL BACKDROP :

2. The parents of the prosecutrix/victim are beggars. They were residing in a vacant place/jail ground near Bus Stand Narsinghpur. The incident had taken place in the intervening night of 24/06/2019 and 25/06/2019. Four days before the incident, certain other relatives of victim also reached the ground where victim and her parents were staying. They were also staying with the family of the victim.

3. As per the prosecution story, on 24/06/2019 at around 10:00 P.M. the parents of victim, the victim and her younger sister went to sleep. At around 2:30 A.M., the mother of victim (PW-3) found that victim is sleeping in her bed. However, again when she awake at around 3:00 A.M. she found that victim is missing from her bed. She raised an alarm and her husband (PW-1) and brother-in-law (PW-26) also came out of their slumber. The parents and relatives searched nearby places but could not find the victim.

4. On 25/06/2019 at about 7:00 A.M., a man on a bicycle approached them and informed that a small girl is lying under a tamarind (*Imli*) tree. The parents of victim, brother-in-law (PW-26) and other relatives and neighbour Sarita reached the place and found that under the said tree, the victim (PW-2) is lying. There were marks of bruises on her face and lips.

There was bleeding from her private parts. In 108 ambulance, the victim was taken to District Hospital Narsinghpur where she informed that a man had forcibly taken her, put a piece of cloth in her mouth and sexually assaulted her.

5. In turn, Assistant Sub-Inspector J.N. Gyarsiya (PW-4) received an information from District Hospital Narsinghpur about the said incident and accordingly, *Dehati Nalisi* (Ex.P/11) was recorded. On the basis of said *Dehati Nalisi*, offences under Sections 363, 366(A), 376(3), 376(AB), 323 and 324 of Indian Penal Code read with Sections 3(a), 4, 5(i), 5(m), and 6 of Protection of Children from Sexual Offences (POCSO) Act, 2012 were registered against the appellant vide Crime No.448/2019.

6. During the investigation, a site map was prepared. From the scene of crime, a blood stained stone, empty water bottle, five half burnt pieces of 'bidi', half burnt match sticks were recovered. On 25/06/2019 itself during the treatment of victim, her frock was recovered and vaginal slide was prepared and handed over to Sub-Inspector J.N. Gyarsiya.

7. Considering the serious condition of victim, she was referred to Netaji Subhash Chandra Bose Medical College Hospital, Jabalpur. The statement of witnesses were recorded. During the investigation, CCTV footage of certain roads near jail crossing were obtained. The footage from Camera F-1, F-2, F-3, F-4/PTZ were recovered. Duration of which was between 1:49 to 1:55 AM, 2:42 to 2:45 AM and 4:39 to 4:44 AM. The relevant photographs were prepared based on CCTV footage. The CCTV footage/photographs were shown to various persons. In turn, two cops namely Rajkumar, Constable Driver No.107 and Vikrant Jatt,

Gunman SAF Constable No.486 identified the person who was carrying the victim as Santosh Markam, Cook Trade Constable No.1398.

8. On the basis of suspicion, appellant was asked to join investigation and on 27/06/2019, his one full check shirt, Blue full pant, Maroon belt, Blue underwear, White socks and Black shoes were recovered. The appellant was sent for medical examination to District Hospital Narsinghpur. Appellant's semen slide was prepared and his blood samples were obtained for the purpose of DNA examination. All these materials were recovered on the basis of different recovery memos. At the instance of appellant, a '*panchnama*' of spot was prepared. During interrogation, the appellant further informed that he has thrown a Blue underwear and a Saffron *gamchha* near Vipatpura bushes. In turn, the said materials were also collected on 27/06/2019.

9. The Test Identification Parade (TIP) was conducted in Central Jail Narsinghpur. The appellant was identified by the victim. The recovered materials relating to victim and appellant were sent for medical examination to Forensic Science Laboratory (FSL) Sagar. The victim was subjected to Ossification Test. Her statement under Section 164 of Criminal Procedure Code was also recorded. After investigation, *challan* for committing offences under aforesaid sections was filed. The appellant abjured his guilt but did not lead any evidence in defence.

10. The Court below framed 13 questions for its determination. After recording evidence of parties, the Court below found the appellant as guilty and decided to inflict the punishment mentioned herein-above.

11. The Court below first determined the age of the victim. For this purpose, the Ossification Test report of Radiologist and Medical Officer-

Dr. Akhilesh Gupta (PW-9) was considered. On the basis of ossification test and statements of parents of victim, the Court below opined that in August, 2019, the age of victim was about 5 years. Thus, on the date of incident i.e. 25th June, 2019 also her age was about 5 years. Thus, victim is a juvenile.

12. After considering the statements of parents of victim PW-1 (father) and PW-3 (mother), the Court below opined that victim was sleeping with her parents in the intervening night 24-25th June, 2019 and somebody had taken her from the lawful custody of parents which attracts Section 366 of IPC.

13. The statement of Ramlakhan Pathak (PW-19) was considered to show that he found the victim lying under a tree and accordingly informed the ambulance (dial -100).

14. Police Constable Rajkumar Malviya (PW-11) deposed that on 25th June, 2019 victim was found in an unconscious stage under a tree and 108 ambulance reached the scene of crime from where he took the victim to Govt. Hospital Narsinghpur and informed Police Station Narsinghpur about the incident.

15. The Medical Officer Dr. Amit Choukse (PW-7) initially examined the victim at District Hospital, Narsinghpur on 25th June, 2019 at 8:45 A.M. He found following injuries on her body :-

- (i) Swelling on upper lip.
- (ii) Bruises and redness on right eye.
- (ii) Bleeding from private part.

The suggestion was given to take the victim to Gynecologist and Ophthalmologist.

16. At District Hospital, Narsinghpur, Dr. Rashi Rai (PW-8) also examined the victim and found the same injuries mentioned herein-above. In addition, she found an injury on the right leg of victim. The opinion of both the doctors was that the victim was subjected to sexual assault. The bloodstained clothes of victim and vaginal slide was handed over by the doctors to Sub Inspector J.N.Gyarasia.

17. Since, the condition of victim was serious, after preliminary treatment, she was referred to Netaji Subhash Chandra Bose Medical College Hospital Jabalpur. In the said hospital, the Assistant Professor of Gynecology Department Dr. Ranu Jain (PW-6) and senior resident Dr. Jyoti Sharma (PW-5) examined the victim and again collected the blood sample of the victim. Blood sample was handed over to police for DNA examination. Since, victim was in a serious condition, she was admitted in the Intensive Care Unit (ICU) till 3rd July, 2019.

18. The Medical College, Jabalpur constituted a Committee to examine the condition of victim consisting of Professor Geeta Guin, Dr. Vineeta Ghanghoria and Dr. Ranu Jain. They found that victim is in a semiconscious stage. Her entire body is covered by dust.

19. As per the report of aforesaid team, there were injuries on the lips and face of the victim. Abrasion marks were available on her back. On the left palm and right arm bite marks were available. The injury on vagina was very serious in nature. During internal examination, the committee collected as many as 25 samples of different nature from the body of victim which are mentioned by the Court below in para-24 of its judgment.

20. After considering the statement of Dr. Ranu Jain (P.W. 6) and Dr. Jyoti Sharma (P.W. 5), the Court below opined that it is clear that injuries on vaginal part of victim could not have been caused because of any accident. The medical opinion of experts are clear that injuries were caused because of sexual assault.

21. The Court below in the impugned judgment also discussed about the Test Identification Parade (TIP). Thereafter, the Court below considered the expert evidence based on F.S.L./D.N.A. report dated 7.12.2019. The opinion of Court below is that the result of D.N.A. profile leaves no room for any doubt that appellant has sexually assaulted the victim.

22. In the findings, the Court below opined that the defence could not demolish the prosecution story relating to collection of sample of different material and blood etc, its proper custody and examination by the experts. Thus, D.N.A. report cannot be ignored and is sufficient to record conviction. The statement of victim and certain questions asked in cross-examination will also not cause any dent to the prosecution story. The Court below opined that minor discrepancies in description of packets sent to the F.S.L., Sagar is liable to be ignored for the simple reason that description shows that nine seized packets are being sent to F.S.L., Sagar. Although, the number of packets is mentioned as nine. They are marked from 'A to J'. Counting from 'A to J', it comes to ten and not nine. Thus, artificial numerical difference shown by the defence was discarded.

23. The defence took a stand that Additional Superintendent of Police, Narsinghpur (P.W. 22) had an enmity with the appellant and therefore,

with the help of his subordinates namely Vikram Jatt and Raj Kumar, he falsely arraigned him. The reason shown by the defence was that said Additional Superintendent of Police while remain posted elsewhere, directed the present appellant to prepare the food at his house which instruction was declined by the appellant. Thus, Rajesh Tiwari-Additional Superintendent of Police had a grudge against the appellant. The Court below expressed its inability to persuade itself with this line of defense and considered the legal presumption against the appellant created pursuant to Section 29 of the Protection of Children from Sexual Offences Act, 2012.

24. The minor flaws shown in the investigation were not sufficient to disbelieve the prosecution story was another conclusion drawn by the Court below in the impugned judgment. The Court below opined that the scientific evidence of D.N.A. report is trustworthy and sufficient to hold the appellant as guilty. In turn, the appellant was held guilty for committing the offences under Sections 376 AB, 366 and 324 of the I.P.C. After recording conviction, the matter was adjourned for a day to consider the argument on the quantum of punishment.

25. The Court below after hearing the parties on the quantum of punishment, imposed the punishment which are subject matter of challenge before us.

26. The Court below considered the judgments of Supreme Court reported in **(1987) 3 SCC 80, (Mahesh, s/o Ram Narain and others Vs. State of M.P.), (1991) 3 SCC 471, (Sevaka Perusal and another Vs. State of Tamil Nadu) and (2015) 1 SCC 67 (Mofil Khan and another Vs. State of Jharkhand)** and opined that in the factual backdrop of present case, imposition of any insufficient punishment will give wrong

signal. If an adequate punishment is not imposed, the person aggrieved may think to take personal revenge, which will not be proper.

27. The Court below also considered the 'R & R' Test and reduced in writing the aggravating and mitigating circumstances. Thereafter, the Court below opined that the appellant deserves a capital punishment of death sentence. For this purpose, reliance is placed on **(2019) SCC Online, M.P. 200 (Mahendra Singh Gond Vs. State of M.P.)**, **(2018) SCC Online M.P. 338 (In Reference Vs. Bagwani)** and **(2019) SCC Online M.P. 161 (In Reference Vs. Rabbu)**. Since, in these matters, the death sentence imposed by Court below got a stamp of approval from this Court in reference, learned court below opined that the death penalty alone is appropriate for committing offence under Section 376 (AB) of IPC in the facts and circumstances of the present case.

SUBMISSION OF AMICUS CURIAE :-

28. Shri Ajay Gupta, learned Senior Counsel/Amicus Curiae assisted by Shri Rajeev Mishra, Advocate urged that a comparative reading of statements of father and mother of victim shows that they have deposed diametrically opposite to one another regarding the fact that as to who woke up first and found that the victim is missing from her bed. Their statements are therefore, not trustworthy.

29. The statement of Rajesh Tiwari, Additional S.P., (PW-22) was relied upon to bolster the contention that incident of kidnapping and rape of victim had taken place on 25.6.2019. On 26.9.2019, Sanjay Mishra (PW-20) showed some pictures/footage from his mobile to two employees, namely Vikrant Jatt and Raj Kumar. After seeing the picture/footage on more than one occasion, said employees opined that

the person appears to be Cook of SAF namely Santosh Markam. Learned senior counsel referred the pictures taken from the CCTV footage and urged that a plain glance of pictures shows that :-

- (i) The person shown in the footage is alone and is not carrying any child with him,
- (ii) The date, time of his movement and also the direction is totally missing. The pictures/footage shown from mobile falls within the ambit of secondary evidence and unless necessary requirement of Section 63 of Indian Evidence Act is fulfilled, such evidence has no evidenciary value.

30. The recovery of '*gamchha*' and underwear of victim is doubted by contending that Mukesh Singh Thakur (PW-15) urged that the sleeping victim, who was kidnapped by the appellant awoke at the place of incident whereas other witnesses stated that a cloth was put on her mouth immediately after kidnapping her by the appellant. Para-4 of this statement of (PW-15) suggests that on 27.6.2019 also, the appellant was still wearing blood stained clothes, which is totally unbelievable.

31. The underwear of the victim, (Ex.P-36) is recovered from a place which is near to the scene of crime. It is an open place, and, therefore, any recovery from open place does not inspire confidence.

32. Eyebrows are also raised on the methodology and genuineness of the TIP. The statement of victim, (PW-2) is referred wherein she admitted that the appellant was identified by the Police Personnel before the TIP and by the mother in the Court. Apart from this, statement of P.W.-1 (father) and P.W.-3 (mother) is referred wherein both of them stated that before conducting the TIP, both of them were called in the

concerned Police Station and Police had shown them photograph of the appellant and informed that he is the accused person.

33. The Tahsildar, (P.W.-12) in whose presence, the TIP was conducted also urged that parents of the victim were present at the time of TIP. Shri Gupta, learned senior counsel also urged that the victim in her cross-examination categorically deposed that appellant has not done anything with her.

34. The next attack is on the DNA report. It is submitted that the appellant was wearing same clothes on 27.9.2019 is totally unbelievable and, therefore, any report based on such clothes creates doubt. It is the duty of the prosecution to establish that sampling process of DNA was sacrosanct. They must establish as to how the samples were preserved. The statement of witnesses are silent on this aspect. Hence, DNA report deserves to be discarded.

35. Lastly, it is urged that the appellant did not run away after the incident. He has no criminal antecedent. He being a member of a disciplinary force deserves to serve the force with sincerity and devotion. The punishment imposed by the court below is highly disproportionate and unwarranted. The possibility of reform of appellant is not taken care of by the court below. The judgment of this court in **Bhagwani (supra)** considered by the court below is interfered with by the Supreme Court on the capital punishment. In alternatively, it is urged that the punishment deserves to be reduced.

SUBMISSION OF APPELLANT :-

36. Shri Narendra Nikhare, learned counsel for the appellant submits that Shri Ajay Gupta, learned Senior counsel/Amicus Curiae has already

argued the case of appellant for sufficient length and therefore, he does not wish to waste the time by repeating the arguments. Threefold submission advanced by Shri Nikhare are that Dr. Jyoti Sharma (PW-5) in her draft statement stated that sexual assault is 'suggested'. Thus, there is no definite opinion expressed by her about sexual assault. Putting it differently, it cannot be said on the basis of her statement that sexual assault on the victim had actually taken place. Secondly, he placed heavy reliance on the statement of CW-1 and urged that this witness stated that because of typographical error, the blood sample of appellant was wrongly marked as 'G'. He urged that this error has taken place on more than one place and therefore, it cannot be treated to be a typing error.

37. He placed reliance on the judgment of this Court in **CRRFC No.07/2018 (In Reference vs. Raj Kumar Kol)** and urged that the capital punishment imposed by the Court below is harsh and unwarranted. This Court in the said case reduced the capital punishment to R.I. for 20 years.

SUBMISSION OF STATE COUNSEL :-

38. Shri Yogesh Dhande, learned Public Prosecutor appearing for the State supported the impugned judgment. By taking this Court through the chronology of the events, learned Public Prosecutor submits that the victim was found near a tree and her recovery is established with perfection. The parents of the victim deposed the events with clarity which leads to the singular conclusion that victim was found in a helpless condition near a tree. There are minor discrepancies in the statement of parents which are totally immaterial. The said discrepancy does not cause any dent to the prosecution story.

39. It is further urged by Shri Dhande that the victim was promptly taken to Narsinghpur Hospital. Her blood sample and other samples were taken on 25.06.2019. The statement of PW-4 and Ex.P/15 leaves no room for any doubt that the material and samples were indeed seized on 25.06.2019.

40. The samples so obtained from the victim and the accused were duly sealed, kept in proper custody and were promptly sent for examination to FSL. Blood sample and slides etc. were kept in a thermos. Ex.P/38 and Ex.P/39 were referred for this purpose. The blood sample and other samples of accused were taken on 27.06.2019. Ex.P/33 and Ex.P/37 were pointed out and in support thereof, statement of PW-15 was relied upon. The said samples were promptly sent for examination to FSL. The FSL report shows that the same were received in the laboratory on 01.07.2019. Thus, no doubt can be entertained about the manner in which samples were collected, kept and sent for examination.

41. DNA report and statement of Court Witness (CW-1) is relied upon to urge that the report clearly shows that the DNA test report is against the appellant. Typing mistakes pointed out by Court Witness was duly and correctly accepted by Court below. The defence could not point out any flaw in collection procedure of samples and also on the subsequent event of keeping and sending it to FSL.

42. **2014 (2) SCC 576, Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and Another** which was relied upon by Bombay High Court in **2018 SCC online Bom 1793, Salim Ahmed Vs. The State of Maharashtra** is cited to bolster the contention that even if victim and parents have turned hostile, conviction can be recorded on the basis of DNA result. For this purpose, judgment of this Court in **Cr.A.**

No.7544/2019 (Deepak @ Nanhu Kirar Vs. The State of Madhya Pradesh) and judgment passed in **Criminal Reference No.04/2019 (In reference Vs. Ramnath Kewat @ Bhursoo Kewat)** were relied upon.

43. Lastly, Shri Yogesh Dhande, learned Public Prosecutor submits that Sections 29 and 30 of POCSO Act creates a presumption in favour of the prosecution and in the teeth of these provisions, no fault can be found in the impugned judgment.

44. Parties confined their arguments to the extent indicated above.

45. We have heard learned counsel for the parties at length and perused the record.

FINDINGS :-

46. A comparative reading of statement of mother and father of the victim certainly shows that there is a little contradiction in their statements as to who had first noticed that victim is not available on her bed. This discrepancy, in our opinion does not cause any dent on the prosecution story. Such minor discrepancies take place in the case of this nature. In view of the judgment of Supreme Court in **Shyamal Ghosh v. State of West Bengal (2012) 7 SCC 646**, the first argument of learned *Amicus Curiae* deserves to be rejected.

CCTV FOOTAGE :-

47. Learned *Amicus Curiae* rightly raised doubt on CCTV Footage because the said footage was neither proved by satisfying the requirement of Section 65-B of the Indian Evidence Act nor said footage shows that appellant was carrying the victim. The argument has substantial force but para-30 of impugned judgment shows that the Court below has treated

this CCTV Footage only as an aid for conducting the investigation. The Court below has not relied upon the CCTV Footage for holding the appellant as guilty. Thus, this argument fades into insignificance.

RECOVERY FROM OPEN SPACE :-

48. The recovery of underwear of victim through Ex.P/36 from an open space is called in question. The factual matrix of this matter clearly shows that the incident had taken place in the intervening night of 24-25/6/2019. The recovery of underwear was made on the basis of information furnished by the appellant from a place which may be an open space but was not accessible to the public. In other words, the place from where recovery was made was under the bushes and it was only on the appellant's information, the materials i.e. underwear and *Gamchha* were recovered. There is no straight-jacket formula that every recovery from the open space stands vitiated. It is relevant to consider the judgment of Supreme Court on this aspect reported in **State of Himachal Pradesh v. Jeet Singh, (1999) 4 SCC 370**. Para-26 and 27 read thus :-

26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he

discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.

27. It is now well settled that the discovery of fact referred to in Section 27 of the Evidence Act is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it (Pulukuri Kottaya [Pulukuri Kottaya v. Emperor, AIR 1947 PC 67 : 74 IA 65]). The said ratio has received unreserved approval of this Court in successive decisions. (Jaffar Hussain Dastagir v. State of Maharashtra [(1969) 2 SCC 872] , K. Chinnaswamy Reddy v. State of A.P. [AIR 1962 SC 1788] , Earabhadrapa v. State of Karnataka [(1983) 2 SCC 330 : 1983 SCC (Cri) 447] , Shamsul Kanwar v. State of U.P. [(1995) 4 SCC 430 : 1995 SCC (Cri) 753] , State of Rajasthan v. Bhup Singh [(1997) 10 SCC 675 : 1997 SCC (Cri) 1032] .)

(Emphasis Supplied)

49. The next attack was on the TIP. The Court below in para-30 of the impugned judgment clearly opined that the photographs taken from CCTV Footage (Ex.P/70 to P/75) do not reflect that the victim was being taken by the appellant. The Court rightly opined that the said photographs were considered for the purpose of investigation only. Similarly, in para-59 of the impugned judgment, the Court below opined that the irregularities and procedural impropriety in conducting the TIP is outcome of over-enthusiasm of the prosecution. A careful reading of para-59 of the impugned judgment shows that the Court below has not based its finding on the TIP report. Thus, this argument also lost much of its shine.

DNA TEST REPORT :-

50. A minute reading of the impugned judgment shows that the appellant is basically held guilty on the basis of the DNA report (Ex.P/76). It is a common ground taken by learned Amicus Curiae and Shri Narendra Nikhare, learned counsel for the appellant that collection of blood samples, its custody/preservation, safe sending of sample to FSL and ultimate report must be free from any kind of doubt. Moreso, when conviction is recorded mainly on the basis of DNA report. We find substance in the said argument. As noticed, Shri Ajay Gupta, learned Senior counsel urged that the handling of sample must be through a process which is totally sacrosanct. Shri Narendra Nikhare, learned counsel for the appellant submits that the DNA report (Ex.P/76), in its conclusion/opinion part, is pregnant with a typographical error which creates serious doubt about the correctness of the findings. The sample taken from the victim is marked as Article 'G' in the last two points of the 'opinion'. Considering the aforesaid contradictory findings, benefit of doubt should have been given to the appellant.

51. The Court below considered this aspect whether the error in describing the Article as 'G' in place of 'H' in the 'opinion' portion of DNA report is a typographical error or not ? The Court considered the statement of Scientific Officer, Kamlesh Katholiya (C.W.1) and accepted his statement that in the 'opinion' portion of DNA report because of typographical error, the blood sample collected from the source of victim is incorrectly mentioned as 'G' in place of 'H'. In order to reach to the said conclusion, the Court below considered the Column-8 of page-2 of the DNA report. Column-7 of the DNA report shows that blood sample taken from the appellant was marked as 'G' whereas blood sample taken from victim was marked as 'H'. Importantly, the 'opinion' portion of the

DNA report in points 1 to 3 rightly describes the sample of appellant as 'G' and sample taken from the deceased as 'H'. However, in the 'opinion' in last two points, the source of sample of victim is shown as Article 'G'.

52. The Court below believed the statement of Dr. Kamlesh Kaitholiya (C.W.1) as correct and opined in para-47 of the impugned judgment that the said mistake is indeed a 'typographical mistake'.

53. The samples taken from the victim and the appellant were available before the Court below and in a case of this nature where a question was clearly raised regarding the identification of samples in the teeth of contradiction in the 'opinion' portion of DNA report, in our considered opinion, the Court below should have requisitioned the said samples from *Malkhana* and should have examined as to whether the said mistake is merely a typing mistake. The Court below had the advantage of examining the materials/samples available with it and could have easily tallied whether the blood sample of appellant is marked as 'G' or 'H' ? The blood sample of victim could have been verified in the same manner. We find no justifiable reason for not undertaking the aforesaid essential exercise by the Court below. The acceptance of DNA report in a case of this nature has serious impact on the accused person. Therefore, the Court below was required to act with utmost caution and seriousness.

54. Since the aforesaid discrepancy in marking of exhibit on the sample was strenuously contended before us, we thought it proper to requisition the said samples and material from the Court below. This Court on 24.8.2022 passed an order in this regard. Relevant portion of the said order reads as under :-

“Shri Narendra Nikhare, learned counsel for the appellant.

Shri Yogesh Dhande, learned Government Advocate for the respondent/State.

The matters were heard at length.

During the course of argument, one of the argument of learned counsel for the appellant is that the statement of Court witness Dr. Kamlesh Kaitholiya is not trustworthy wherein he stated that in the opinion part (point No. 4 and 5) of the DNA report, the description of Article 'G' is wrongly mentioned as typing error in place of Article 'H'. He argued that this error makes the DNA report doubtful and therefore, benefit should be given to the appellant.

Page No.2 of the DNA report dated 07.12.2019 shows that the blood sample of appellant was marked as 'G'. However, in the opinion (point Nos.4 and 5) portion of the same report, the said Article 'G' was shown to be from the source of the victim. To separate the wheat from chaff, we deem it proper to requisition the original samples from the Court below so that the aforesaid contention of learned counsel for the appellant can be examined.

Accordingly, the Registry of this Court is directed to obtain all the Exhibits/Articles received along with the DNA report from the Forensic Science Laboratory, Sagar by communicating this order to the Principal District Judge, Narsinghpur forthwith.

The said Exhibits/Articles shall be sent by Special Court to the Registry of this Court by a Special Messenger immediately.

*List this matter on **01.9.2022**".*

[Emphasis Supplied]

55. In furtherance of previous order of this Court, the Court below sent the entire material and original samples which were sent to FSL for DNA examination to this Court. On 01.09.2022, in the presence of learned counsel for the parties, the said sealed blood samples were opened. This Court found that the blood sample of appellant Santosh Markam is marked as 'G' whereas blood sample of victim is marked as 'H'.

56. As noticed above, in the 'opinion' portion of DNA report in last two points, the source of victim was mentioned as Exhibit 'G'. The Court Witness in answer to question No.4 stated that because of typing error, the source of victim was mentioned as 'G' in place of 'H'. Since we have tallied the marking of original blood samples with that of DNA report, we record our satisfaction that said mistake is indeed a typographical mistake. Thus, it can be safely held that the blood sample of appellant was marked as 'G' whereas blood sample of victim was 'H'.

57. This is trite that if DNA report fairly establishes the case of prosecution against the accused person, it can be used for recording conviction. In the instant case, in the entire process of obtaining sample, handling, sending and examining the DNA samples, we could not find any illegality which causes any dent on the procedure and the report. Thus, Court below has rightly based its judgment on the DNA report. In our considered opinion, the prosecution has established its case before the Court below beyond reasonable doubt and Court below has taken a plausible decision while passing the impugned judgment.

HANDLING/SAFETY OF SAMPLES :-

58. Learned counsel for the appellant/*Amicus Curiae* have taken pains to submit that the safe custody of blood samples right from the stage of taking sample till preparation of DNA report, the prosecution's case should be beyond any shadow of doubt regarding safe custody of the samples. In the factual background of this case, this point deserves serious consideration.

59. We are not oblivious of the legal position on this aspect. In **AIR 1956 SC 526 (Santa Singh Vs. State of Punjab)**, the Supreme Court

held that if there exists a suspicious delay in sending the sealed parcel to the expert, the result is vitiated.

60. In **Mahmood v. State of U.P., 1976 (1) SCC 542**, the seal put on the sealed box was the seal of an Officer of the prosecution. No signature of witnesses were obtained on the sealed packet. Seal was not handed over by the prosecution to the Sarpanch or any respectable person of the village. Since there was a possibility of tampering with the parcel which was containing the seal of Investigating Officer, the prosecution story was disbelieved by the Supreme Court. The relevant paras reads as under :-

15. Further, the investigator did not take all the necessary precautions which could be taken to eliminate the possibility of fabrication of this evidence, or to dispel suspicion as to its genuineness. Admittedly he sealed the box with his own seal which thereafter remained with him throughout. He did not take the signatures of the witnesses on the parcel containing the gandasa. He did not after sealing the parcel entrust his seal to the Sarpanch or any other respectable person of the village. According to the prosecution the fingerprints found on the gandasa could possibly be bloodprints and that the blade of the gandasa was all smeared with human blood. But this gandasa was never sent to the Chemical Examiner or the serologist. No explanation of the same is forthcoming. This being the case, the contention of Mr R.K. Garg at the Bar, that the gandasa, Ex. 1, or smear of the alleged blood on it was not sent to the Chemical Examiner for fear of the fabrication being detected and exposed, cannot be rejected outright.

17. It is to be noted further that the same constable (Muneshwar Dixit, PW 18) collected the specimen fingerprints, presumably from the Investigating Officer, and the parcel containing the gandasa, Ex. 1, from the Sadar Malkhana, on April 21 and delivered it at the Scientific Section, Lucknow on April 22. There was thus a possibility of

the Investigating Officer having an access to the parcel containing the gandasā on April 21. Such a possibility has not been positively excluded by the prosecution.

[Emphasis Supplied]

61. A Division Bench of this Court considered certain judgments of the Supreme Court in **Vijay Singh vs. State of M.P. 2004 (4) MPLJ 543**. In the said case, there was no explanation regarding the period of ten days during which articles were available with the prosecution. Due to lack of evidence regarding sealing of the articles in a proper manner and its identification, the seizure of material and consequential report regarding the said article/material was disbelieved. The similar view is taken by Himachal Pradesh High Court in **Jagdev Singh vs. State of H.P. 2015 SCC Online H.P. 2520**. The Delhi High Court in **K. vs. State (NCT of Delhi) 2017 SCC Online Del 7198** disbelieved a DNA report because safe custody of underwear could not be established from 2008 to 2010.

62. Another Division Bench of this Court in **Anand Kushwaha vs. State of M.P. 2019 SCC Online M.P. 7013** ruled that in absence of establishing safe custody of articles and blood samples, the DNA report becomes doubtful.

63. In the instant case, the blood samples of appellant and the victim were taken on 25.11.2019 & 30.11.2019 respectively. The samples were duly marked as exhibits. It is important to note that Dr. Shashi Rai (P.W.8) in the DOC Statement categorical deposed that aforesaid packets containing the blood samples of appellant and victim were sealed in the hospital and a seal of Government Hospital Narsinghpur was put on both the samples. Thus, it is clear like noonday that blood samples were sealed by the doctors and seal of the hospital was put on the relevant sealed

packets. The court witness Dr. Kamlesh Katholiya in para-6 of its statement clearly stated that he received the sealed packets which were containing the seal of Narsinghpur Hospital. The specimen of seal was also sent to the FSL. He tallied the seal marks on the packets with the specimen and then opened the packets. This statement of the Scientific Officer was not subjected to any cross-examination on this aspect and we do not find any reason to disbelieve it.

64. The Supreme Court in **Santosh Kumar Singh v. State, (2010) 9 SCC 747** came to hold that defence failed to put a single relevant question to the expert witness regarding the purity of methodology and procedure followed for the DNA Test and hence, the statement of expert witness cannot be marginalized. The relevant portion reads as under :-

“68. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In ***Bhagwan Das v. State of Rajasthan*** [AIR 1957 SC 589 : 1957 Cri LJ 889] it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert.

(Emphasis Supplied)

65. In the same judgment it was further held :-

“65. We now come to the circumstance with regard to the comparison of the semen stains with the blood taken from the appellant. The trial court had found against the prosecution on this aspect. In this connection, **we must emphasise that the court cannot substitute its own opinion for that of an expert, more particularly in a science such as DNA profiling which is a recent development.**

67. The statements of Dr. Lalji Singh and Dr. G.V. Rao reveal that the samples had been tested as per the procedure developed by the laboratory, that the samples were sufficient for the purposes of comparison and that there was no possibility of the samples having been contaminated or tampered with. The two scientists gave very comprehensive statements supported by documents **that DNA of the semen stains on the swabs and slides and the underwear of the deceased and the blood samples of the appellant was from a single source and that source was the appellant.**

71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in *Kamti Devi v. Poshi Ram* [(2001) 5 SCC 311 : 2001 SCC (Cri) 892 : AIR 2001 SC 2226].”

(Emphasis Supplied)

66. In this case, since seal put on the blood samples were of the hospital and not of the prosecution agency, we find no reason to hold that the purity and custody of sample is questionable.

67. The aforesaid blood samples were collected and the same were sent to FSL promptly. Thus, there is no inordinate delay in sending the blood samples to the FSL.

68. In this view of the matter, we do not find any procedural impropriety or illegality in the collection, custody and sending of blood samples and other materials to the FSL. In **Santosh Dhondiram Kende vs. State of Maharashtra 2019 SCC Online Bom 7319**, the Court opined that proof of mathematical precision is not required in cases of collection and sending of material to FSL. In another judgment of **Amol Vs. State of Maharashtra 2022 SCC Online Bom 107**, the Bombay High Court opined that great care is required to be taken in case of DNA analysis. In the fitness of things, Chemical Analyzer who prepared the DNA report required to be examined. In the instant case, the said expert entered the witness box as a court witness and established the procedure with accuracy and a precision. No infirmity in handling and examination process could be established which creates any doubt on the DNA report. Thus, we are inclined to uphold the finding of the Court below based on DNA report. We also find support in our view from **2016 SCC Online Chh 1177 (State of Chhattisgarh vs. Sunil)**.

69. The relevant portion of the DNA report is reproduced thus :-

राज्य न्यायालयिक विज्ञान प्रयोगशाला म.प्र. शासन

सिविल लाइन्स, सागर (म.प्र.)

डीएनए फिंगर प्रिंटिंग यूनिट

(DNA Fingerprinting Unit has passed international Quality Control tests for DNA Examination conducted by Institute of Legal Medicine and Forensic Science, Charite, University of Berlin, Germany & Laboratory of Genetic Identification, University of Granada, Spain)

क्र. : रा.न्या.वि.प्र./डीएनए/2362/19

दिनांक 07.12.19

परीक्षण प्रतिवेदन
(रा.न्या.वि.प्र./डीएनए/2362/19)

उपरोक्त प्रकरण से संबंधित सीलबंद 10 पैकिट (A, B, C, D, E, F, G, H, I, J) आरक्षक क्र. 57 संतोष आरक्षी केन्द्र स्टेशनगंज जिला नरसिंहपुर के द्वारा दिनांक 01.07.2019 को प्राप्त हुये। उपरोक्त प्रदर्श कपड़ा, कागज के आवरण एवं ईडीटीए वायल में प्रदर्श A, B, G, मेडीकल ऑफिसर शासकीय अस्पताल नरसिंहपुर की नमूना सील से, प्रदर्श C, D, E, F पुलिस थाना स्टेशनगंज, नरसिंहपुर की नमूना सील से एवं H, I, J मेडीकल कॉलेज जबलपुर की नमूना सील बंद थे। सील अविकल मिली। **प्रकरण में प्राप्त विभिन्न प्रदर्शों का विवरण** (जिसमें पीड़ित की पहचान का खुलासा निवारित करने के लिये मूल रिपोर्ट में वर्णित उसके नाम के स्थान पर पीड़ित अभियोक्त्री 'एक्स'(अ.सा.-2) प्रतिस्थापित किया गया है) **निम्नानुसार हैं:-**

क्रं.	पैकिट अंकित	अंदर पाए गए प्रदर्श / विवरण	<u>किसका / किससे</u> जप्त	यहां अंकित
1.	A	फ़ॉक	पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2)	C/6516
2.	B	वैजाईनल स्लाइड	पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2)	C/6517
3.	C	सीमेंटेड पत्थर	घटनास्थल	C/6518
4.	D	बीड़ी (05)	घटनास्थल	C/6519
5.	E	पेंट, शर्ट, अंडरवियर	आरोपी संतोष मरकाम	C/6520
6.	F	अंडरवियर	आरोपी संतोष मरकाम के मेमोरंडम (पीड़ित अभियोक्त्री 'एक्स' अ.सा.-2)	C/6521
7.	G	रक्त नमूना	आरोपी संतोष मरकाम	C/6522
8.	H	रक्त नमूना	पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2)	C/6523
9.	I	1. Hair Scarpings 2. Hair Samples 3. Right nail scraping & nail clippings 4. Left nail scraping & nail clippings 5. Left breast smear 6. Right breast smear	पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2)	C/6524

		7. Buccal smear 8. Vaginal Swab-1(smear) Slide 9. Vaginal Swab-2(smear) Slide 10. Posterior Fornix (smear) Slide 11. Rectal Swab (smear) Slide.		
10.	J	12. Left breast swab 13. Right breast swab 14. Vaginal swab-I 15. Vaginal swab-II 16. Vaginal Tear swab 17. Left hand scrapping 18. Vaginal was samples 19. Posterior Fornix swab 20. Rectal Swab 21. Buccal Swab 22. Drainage from inner mouth 23. Blood samples (EDTA) 24. Blood samples (Non-EDTA) 25. Urine sample	पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2)	C/6525

नोट: प्रकरण में परिणाम प्राप्त हो जाने के कारण प्रदर्श I, J को परीक्षण में नहीं लिया गया।

परीक्षण एवं परिणाम :-

उपरोक्त प्रदर्शों में से आर्गेनिक एक्सट्रैक्शन एवं डिफररेंसिअल आर्गेनिक एक्सट्रैक्शन विधि द्वारा डीएनए प्राप्त किया गया। प्राप्त डीएनए से वांछित जेनेटिक मार्कर का एम्प्लीफिकेशन Multiplex PCR प्रक्रिया द्वारा PowerPlex®Y23 एवं PowerPlex®Fusion 6C किट की सहायता से किया गया। इस प्रकार प्राप्त एम्प्लीफाईड डी.एन.ए. की जेनेटिक एनालाइजर 3500 xL द्वारा जीनोटाइपिंग प्रोफाइल प्राप्त की गई। प्राप्त परिणामों का विश्लेषण जीन मेपर सॉफ्टवेयर ID-X 1.4 &1.5 द्वारा किया गया।

तालिका 1 : प्रकरण के विभिन्न प्रदर्शों से प्राप्त Y-Chromosome STR DNA Profile का विवरण निम्नानुसार है।

Y-STR Genetic Markers	प्रदर्श A, B (C/6516 & C/6517) पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2) के फॉक एवं वैजाईनल स्लाइड	प्रदर्श F(C/6521) आरोपी संतोष मरकाम के मेमोरेण्डम पर जप्त अंडरवियर (पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2))	प्रदर्श G (C/6522) आरोपी संतोष मरकाम के स्रोत रक्त नमूना
DYS576	20	उपरोक्त प्रदर्श से Y-Chromosome STR DNA Profile प्राप्त नहीं हुई।	20
DYS389I	13		13
DYS448	18		18
DYS389II	29		29
DYS19	15		15
DYS391	10		10
DYS481	22		22
DYS549	12		12
DYS533	11		11
DYS438	10		10
DYS437	14		14
DYS570	17		17
DYS635	21		21
DYS390	25		25
DYS439	13		13
DYS392	13		13
DYS643	13		13
DYS393	14		14
DYS458	16		16
DYS385	15, 20		15, 20
DYS456	15	15	
YGATAH4	11	11	

उपरोक्त तालिकानुसार :-

- पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2) के स्रोत फॉक प्रदर्श A (C/6516) एवं वैजाईनल स्लाइड प्रदर्श B (C/6517) से एक समान Y-Chromosome STR DNA Profile प्राप्त हुई।

- पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2) के स्रोत फ्रॉक प्रदर्श A (C/6516) एवं वैजाईनल स्लाइड प्रदर्श B (C/6517) से प्राप्त Y-Chromosome STR DNA Profile के प्रत्येक जेनेटिक मार्कर पाये गये एलील एवं आरोपी संतोष मरकाम के स्रोत रक्त नमूना प्रदर्श G (C/6522) से प्राप्त Y-Chromosome STR DNA Profile के प्रत्येक जेनेटिक मार्कर पाये गये एलील एक समान हैं।
- आरोपी संतोष मरकाम के मेमोरेंडम पर जप्त अंडरवियर (पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2) की) प्रदर्श F (C/6521) से Y-Chromosome STR DNA Profile प्राप्त नहीं हुई।

तालिका 2 : प्रकरण के विभिन्न प्रदर्शों से प्राप्त Autosomal STR DNA Profile का विवरण निम्नानुसार है।

Genetic Marker	प्रदर्श G (C/6522) आरोपी संतोष मरकाम के स्रोत रक्त नमूना	प्रदर्श H (C/6523) पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2)के स्रोत रक्त नमूना	प्रदर्श C (C/6518) घटनास्थल से जप्त सीमेंटेड पत्थर	प्रदर्श D (C/6519) घटनास्थल से जप्त बीडी नं. 1	प्रदर्श D (C/6519) घटनास्थल से जप्त बीडी नं. 2 & 4	प्रदर्श D (C/6519) घटनास्थल से जप्त बीडी नं. 3 & 5	प्रदर्श E (C/6522) आरोपी संतोष मरकाम के स्रोत पैट, शर्ट, अंडरवियर
D3S1358	15, 16	15, 18	15, 18	उपरोक्त प्रदर्शों से Autosomal STR DNA Profile प्राप्त नहीं हुई	15, 16	14, 16	15,16,18
D1S1656	16	8, 16	8, 16		16	15, 16.3	8, 16
D2S441	11.3, 14	10, 11	10, 11		11.3, 14	11.3, 12	10, 11, 11.3, 14
D10S1248	14	14	14		14	15, 16	14
D13S317	12	9, 11	9, 11		12	8, 13	9, 11, 12
Penta E	11, 12	12	12		11, 12	14, 16	11, 12
D16S539	11, 12	9, 12	9, 12		11, 12	11, 13	9, 11, 12
D18S51	14	14	14		14	14, 15	14
D2S1338	22, 23	20, 24	20, 24		22, 23	20, 24	20, 22, 23, 24

CSF1PO	10, 12	10	10		10, 12	10	10, 12
PentaD	9, 14	11	11		9, 14	11	9, 11, 14
TH01	9	6,7	6,7		9	6	6, 7, 9
vWA	16	14, 17	14, 17		16	16, 17	14, 16, 17
D21S11	30, 31	31.2, 32.2	31.2, 32.2		30, 31	30, 31.2	30, 31, 31.2, 32.2
D7S820	8, 9	10	10		8, 9	10, 11	8, 9, 10
D5S818	11, 12	11, 12	11, 12		11, 12	11, 13	11, 12
TPOX	9, 11	8, 9	8, 9		9, 11	10, 11	8, 9, 10
D8S1179	11, 15	13	13		11, 15	15, 16	11, 13, 15
D12S391	23	17, 20	17, 20		23	17, 18	17, 20, 23
D19S433	13, 14.2	13	13		13, 14.2	14, 15.2	13, 14.2
SE33	23.2, 24.2	22.2, 31.2	22.2, 31.2		23.2, 24.2	17, 30.2	22.2, 23.2, 24.2, 31.2
D22S1045	17, 19	14, 15	14, 15		17, 19	15, 16	14, 15, 17, 19
FGA	20, 24	23, 24.2	23, 24.2		20, 24	21, 24	20, 23, 24, 24.2
Amelogenin	XY	XX	XX		XY	XY	XY
DYS391	10	-	-		10	10	10
DYS576	20	-	-		20	17	20
DYS570	17	-	-		17	17	17

उपरोक्त तालिकानुसार :-

- घटनास्थल से जप्त सीमेंटेड पत्थर प्रदर्श C (C /6518), से महिला Autosomal STR DNA Profile प्राप्त हुई।
- घटनास्थल से जप्त सीमेंटेड पत्थर प्रदर्श C (C /6518), से प्राप्त महिला Autosomal STR DNA Profile के प्रत्येक जेनेटिक मार्कर पाये गये एलील जोड़े एवं पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2) के स्रोत रक्त नमूना प्रदर्श H (C /6523) से प्राप्त Autosomal STR DNA Profile के प्रत्येक जेनेटिक मार्कर पाये गये एलील जोड़े एक समान हैं।
- आरोपी संतोष मरकाम के स्रोत पेंट, शर्ट, अंडरवियर प्रदर्श E (C /6520), से मिश्रित Autosomal STR DNA Profile प्राप्त हुई।
- आरोपी संतोष मरकाम के स्रोत पेंट, शर्ट, अंडरवियर, प्रदर्श E (C /6520), से प्राप्त मिश्रित Autosomal STR DNA Profile के प्रत्येक जेनेटिक मार्कर पाए गए एलील्स में, आरोपी संतोष मरकाम के स्रोत रक्त नमूना प्रदर्श G (C/6522), से प्राप्त Autosomal STR DNA Profile के प्रत्येक जेनेटिक मार्कर पाये गये एलील जोड़े भी उपस्थित हैं।
- आरोपी संतोष मरकाम के स्रोत पेंट, शर्ट, अंडरवियर प्रदर्श E (C /6520). से प्राप्त मिश्रित Autosomal STR DNA Profile के प्रत्येक जेनेटिक मार्कर पाये गये एलील्स में, पीड़ित अभियोक्त्री 'एक्स' (अ.सा. -2) के स्रोत रक्त नमूना प्रदर्श H (C /6523), से प्राप्त Autosomal STR DNA Profile के प्रत्येक जेनेटिक मार्कर पाये गये एलील जोड़े भी उपस्थित हैं।
- घटनास्थल से जप्त बीडी न. 2 एवं 4 प्रदर्श D (C/6519), से एक समान Autosomal STR DNA Profile प्राप्त हुई।
- घटनास्थल से जप्त बीडी न. 3 एवं 5 प्रदर्श D (C/6519), से एक समान Autosomal STR DNA Profile प्राप्त।
- घटनास्थल से जप्त बीडी न. 2 एवं 4 प्रदर्श D (C/6519), से प्राप्त Autosomal STR DNA Profile के प्रत्येक जेनेटिक मार्कर पाये गए एलील जोड़े एवं आरोपी संतोष मरकाम के स्रोत रक्त नमूना प्रदर्श G (C/6522), से प्राप्त Autosomal STR DNA Profile के प्रत्येक जेनेटिक मार्कर पाये गये एलील जोड़े एक समान हैं।
- घटनास्थल से जप्त बीडी न. 3 एवं 5 प्रदर्श D (C/6519) से प्राप्त Autosomal STR DNA Profile आरोपी संतोष मरकाम के स्रोत रक्त नमूना प्रदर्श G (C/6522) से प्राप्त Autosomal STR DNA Profile से भिन्न हैं।

अभिमत :-

डीएनए प्रोफाइलिंग हेतु प्राप्त प्रदर्शों पर किये गये परीक्षण एवं प्राप्त परिणामों के आधार पर निम्नलिखित निश्चयात्मक परिणाम प्राप्त हुये –

- पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2) के स्रोत फॉक एवं वैजाइनल स्लाइड (प्रदर्श A, B) से प्राप्त Y-Chromosome STR DNA Profile, आरोपी संतोष मरकाम के स्रोत (प्रदर्श G) से प्राप्त Y-Chromosome STR DNA Profile के समान हैं।
- घटनास्थल से जप्त बीडी नं. 2 एवं 4 (प्रदर्श D) से प्राप्त Autosomal STR DNA Profile, आरोपी संतोष मरकाम के स्रोत (प्रदर्श G) की हैं।
- घटनास्थल से जप्त बीडी नं. 3 एवं 5 (प्रदर्श D) से प्राप्त Autosomal STR DNA Profile, आरोपी संतोष मरकाम के स्रोत (प्रदर्श G) की नहीं हैं।
- घटनास्थल से जप्त सीमेंटेड पत्थर (प्रदर्श C) से प्राप्त महिला Autosomal STR DNA Profile, पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2) के स्रोत (प्रदर्श G) की हैं।
- आरोपी संतोष मरकाम के स्रोत पेंट, शर्ट, अंडरवियर (प्रदर्श E) से प्राप्त मिश्रित Autosomal STR DNA Profile में, पीड़ित अभियोक्त्री 'एक्स' (अ.सा.-2) के स्रोत (प्रदर्श G) से प्राप्त Autosomal STR DNA Profile भी उपस्थित है।

परीक्षित प्रदर्शों पर लगाई गई सील
का नमूना

डॉ. कमलेश कैथोलिया
वैज्ञानिक अधिकारी

सहायक रासायनिक परीक्षक म.प्र. शासन
राज्य न्यायालयिक विज्ञान प्रयोगशाला सागर (म.प्र.)

70. In our opinion, the Court below has not committed any error of fact or law in accepting the DNA report. The said scientific report alone can be a reason to record conviction. Thus, the statement of victim to the extent pointed out by the learned counsel for the appellant/Amicus Curiae does not improve the case of the appellant. The Court below rightly opined that the prosecution could establish its case beyond reasonable doubt. We do not find any infirmity and illegality in the finding whereby conviction is recorded by the Court below. We find support in our view

from the judgment of Apex Court in the case of **Kamti Devi (Smt.) and another vs. Poshi Ram (2001) 5 SCC 311.**

SENTENCE :-

71. The question of imposition of adequate punishment is a vexed question. This question bothered the human society from time immemorial. In an old sculpture it is recorded as under :-

अपराधानुरूपं च दण्डं दण्ड्येषु दापयेत् ।
सम्यग्दण्डप्रणयनं कुर्यात् ।

द्वितीयमपराधं न कस्यचित् क्षमेत् ।

(Vishnu pp. 22-23, Dharmakosha p. 571)

Let the king inflict punishments upon the guilty (i) corresponding to the nature (gravity) of the offence, (ii) according to justice and (iii) not pardon anyone who has committed the offence for the second time.

72. The imposition of capital punishment deserves serious scrutiny. The Court below after considering various judgments of Supreme Court came to hold that the capital punishment alone will suffice. The Court below prepared a list of *aggravating circumstance and mitigating circumstance*. A comparative table prepared on that basis read thus :-

Aggravating Circumstances	Mitigating Circumstances
<ol style="list-style-type: none"> 1. The age of victim was five years. 2. The appellant caused multiple grievous bodily injuries on the private parts and other parts of the body. 3. The victim was admitted in Intensive Care Unit (I.C.U) from 25.6.2019 to 30.6.2019. Her treatment continued in the hospital till 03.7.2019. 	<ol style="list-style-type: none"> 1. There is no criminal antecedent of appellant. 2. The age of appellant was below 35 years. 3. The appellant is father of a daughter aged about 10 years and a son aged about 6 years. 4. The appellant being sole bread winner of the family has to take care of wife and parents.

4. The appellant was working as Cook in the disciplined force of SAF and posted at Narsinghpur.	5. The termination from service and loss of livelihood will have adverse impact on the entire family.
---	---

73. Thereafter, the Court considered the ‘R - R test’ and opined that capital punishment is the only punishment which should be imposed in a case of this nature.

74. The conundrum of imposition of capital punishment was best explained with his usual eloquence which became idiomatic signature of Justice V.R. Krishna Iyer. In two important judgments *viz.* **Shiv Mohan Singh Vs. State (Delhi Admn.)** reported in (1977) 2 SCC 238 and **Joseph Peter vs. State of Goa, Daman and Diu** reported in (1977) 3 SCC 280 he expressed his opinion about death sentence. The relevant paragraphs of **Shiv Mohan Singh (supra)** reads thus :-

“11. This prolegomenon to the principles of capital sentence is our alibi for a brief divagation into the basics of infliction of death as a weapon of extinction society uses against its terribly deviant members as beyond deterrence.” Is the death penalty a purposeful punitive strategy or legitimate legal weapon, viewed against the advanced penological goals of reformation, deterrence and social defence? Why is death terrifying and what are the objects of punishment served by its infliction ?”

12. The literature on doing justice at the sentencing stage is profound and proliferating and penological controversy on death penalty has led to a Great Divide among sociologists, jurists and spiritualists. To go egregiously wrong on punishment is to commit the “crime” of sentence and, naturally since taking the life of the prisoner neither prevents him nor reforms him (for he is no more), theories supporting capital

punishment prove self-defeating. (...) the irreversible step of extinguishing the offender's life leaves society with no opportunity to retrieve him if the conviction and punishment be found later to be founded on flawsome evidence or the sentence is discovered to be induced by some phoney aggravation, except the poor consolation of posthumous rehabilitation as has been done in a few other countries for which there is no procedure in our system. Maybe, these are campaign points of abolitionists against capital sentence.

13. Envisioned from another fundamentally different angle, is the dread of death penalty a deterrant? Socrates would not recant, Jesus would not plead, St Joan would not deny — with the cup of poison, bleeding crucifixion and burning stakes staring them in the face as punishment. Why, Higher Truth, acting through its inspired agents, taunts human law; for, then the body gives little purchase over the soul, as Gandhiji demonstrated by defiance of British-Indian “justice”. And, more dramatically yet dimly, psychic, electronic and medical explorations, scientifically conducted, are reportedly revealing through fascinating flashes of research and recording and extraordinary but tested investigations into rebirth, that death is only discarnation, not utter dissolution, that after “death” we survive and act in a demonstrable, subtle dimension of existence. No longer is this thesis projected as faith but sought to be proved as fact. If, in the not distant future, the greatest of allman's fears — fear of death — is dispelled by the finding of noetic science *proving* that you live after “death” and can communicate with the “living”, that the confusion between discarnation and death can be scientifically explored and cleared, a revolution in the penological programmes of society would have dawned.

14. The basic issue “What is death?”, may engage us psycho-crimino-logically, although a wee-bit

digressively for a moment, to assess the social impact of the death penalty. By and large, humankind holds fast to the belief that death is a total extinction of dear life and views its arrival through the executioner's rope or electric chair or firing squad with awesome horror. With poetic pragmatism, Shakespeare expressed this common feeling when he referred, in the context of death, to "that undiscovered country from whose bourn no traveller returns". There are others, however — and among them are ancient seers, modern divines and several psychic researchers in institutes who regard as super-sensory. Reality or scientific verity that there is life after life, that the phenomenon of death may even have a liberating effect, that the grosser existence is in corporeal life and the subtler in the incorporeal state and life-death-life is a continuum."

(Emphasis Supplied)

75. The relevant paragraph of **Joseph Peter (supra)** reads as under :-

"1. A death sentence, with all its dreadful scenario of swinging desperately out of the last breath of mortal life, is an excruciating hour for the Judges called upon to lend signature to this macabre stroke of the executioner's rope. Even so, Judges must enforce the laws, whatever they be, and decide according to the best of their lights; but the laws, are not always just, and the lights are not always luminous. Nor, again, are judicial methods always adequate to secure justice. We are bound by the Penal Code and the Criminal Procedure Code, by the very oath of our office."

(Emphasis Supplied)

76. On the same subject in the case of **Swamy Shraddananda (2) vs. State of Karnataka, (2008) 13 SCC 767** Justice Aftab Alam expressed his view as under :-

"51. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its

communication by the Supreme Court depends a good deal on the personal predilection of the Judges constituting the Bench.”

(Emphasis Supplied)

77. The Apex Court apart from considering the ‘balance sheet’ of aggravating and mitigating circumstances considered other tests namely ‘Crime Test’, ‘Criminal Test’ and ‘R – R Test’. This judgment of Apex Court reported in **2018 SCC Online 2570 (Channulal Verma Vs. State of Chhattisgarh)** became a guiding principle for this Court in **Criminal Appeal No.7544/2019 (Deepak @ Nanhu Kirar vs. State of M.P.)**. It is apposite to quote the relevant paragraphs :-

“62. The sentencing policy was taken note of by Apex Court in large number of cases. In the case of **Bachan Singh Vs. State of Punjab, 1980 (2) SCC 684**, it was held that the normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only when there are special reason. If the offence is of an exceptionally depraved and heinous character and constitute on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose death sentence. While interpreting Section 354 of Cr.P.C., the Apex Court in **Machhi Singh and others Vs. State of Punjab, 1983 (3) SCC 470** opined that a balance sheet of aggravating and mitigating circumstance has to be drawn up and in doing so, the mitigating circumstance has to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances. The question which needs to be posed is whether the crime is such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstance.

63. In a recent judgment, **2018 SCC Online 2570 (Channulal Verma Vs. State of Chhattisgarh)**, the Apex Court took note of its previous judgments on sentencing policy and opined that the test discussed in *Shankar Kishanrao Khade* (supra) needs to be applied while awarding the death sentence. The test for death sentence are (crime test, criminal test and R-R test) and not the “balance test”. To award death sentence, the ‘crime test’ has to be fully satisfied i.e. 100% and ‘criminal test’ 0% i.e. no mitigating circumstance favouring the accused. It was poignantly held that if there is any circumstance favouring the accused like young age of accused, ‘criminal test’ may favour the accused to avoid the capital punishment.”

(Emphasis Supplied)

78. If the capital punishment imposed in the instant case is examined on the anvil of aforesaid principles and the judgment of this Court in **Deepak @ Nanhu Kirar (supra)**, it will be clear that death sentence can be imposed only when there exists no other alternative. Imposition of life imprisonment is the rule. As noticed above, in the case in hand, certain mitigating circumstances were available in favour of the appellant. As per judgment of Apex Court in the case of **Channulal Verma (supra)** even if one circumstance favours the accused which includes his young age, the imposition of capital punishment is not justiciable/proper.

79. A Division Bench of this Court in **Anand Kushwaha vs. State of M.P. ILR [2019] M.P. 1470** considered several judgments of Supreme Court in tabular form and this Court after considering all such judgments in **CRRFC. No.04 of 2019 (Ramnath Kewat vs. State of M.P.)** recently interfered with the capital punishment.

80. In the factual backdrop of the instant case, in our view, the imposition of death penalty is not proper and the same needs to be modified. The interest of justice would be served if appellant is sentenced to undergo imprisonment of 35 years (without remission).

81. We will be failing in our duty if we do not record our appreciation for valuable assistance provided to us by learned counsel for the appellant and by learned Senior Advocate/*Amicus Curiae*.

82. As a consequence, the impugned judgment to the extent death penalty was imposed on the appellant is set aside. While confirming the conviction and other sentences, the appellant shall undergo modified punishment of life imprisonment for an actual period of 35 years (without any remission).

83. Appeal is **partly allowed** and the **reference** is **answered** accordingly.

(SUJOY PAUL)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE