# IN THE HIGH COURT OF MADHYA PRADESH
# AT JABALPUR

**BEFORE**

**HON'BLE SHRI JUSTICE RAVI MALIMATH,**

**CHIEF JUSTICE**

**&**

**HON'BLE SHRI JUSTICE VISHAL MISHRA**

**ON THE 11th OF SEPTEMBER, 2023**

**CRIMINAL REFERENCE No. 6 of 2022**

**BETWEEN:-**

**IN REFERENCE
(RECEIVED FROM SPECIAL JUDGE, POCSO ACT, KHANDWA, DISTRICT KHANDWA (MADHYA PRADESH)**

**.....APPELLANT**

***( MR. S.S. CHAUHAN – PUBLIC PROSECUTOR )***

**AND**

**ANOKHILAL S/O SEETARAM KORKU, AGED ABOUT 31 YEARS, OCCUPATION: LABOUR/ UNEMPLOYED, R/O VILLAGE DABHIYA POLICE THANA KHALWA, DISTRICT KHANDWA PRESENT R/O GRAM SURGAON JOSHI, POLICE STATION CHHAIGAON MAKHAN, DISTRICT KHANDWA (MADHYA PRADESH)**

**.....RESPONDENT**

***( MR. ANIL KHARE – SENIOR ADVOCATE AS AMICUS CURIAE WITH MS. SHREYA RASTOGI, MR. YAGYAVALK SHUKLA, AND MS. SAKSHI JAIN – ADVOCATES )***

**CRIMINAL APPEAL No. 11421 of 2022**

**BETWEEN:-**

**ANOKHILAL S/O SEETARAM KORKU, AGED ABOUT 31 YEARS, OCCUPATION: LABOUR/ UNEMPLOYED, R/O VILLAGE DABHIYA POLICE THANA KHALWA, DISTRICT KHANDWA PRESENT R/O GRAM SURGAON JOSHI, POLICE STATION CHHAIGAON MAKHAN, DISTRICT KHANDWA (MADHYA PRADESH)**

**.....APPELLANT**

***( BY MR. ANIL KHARE – SENIOR ADVOCATE WITH MS. SHREYA RASTOGI, MR. YAGYAVALK SHUKLA AND MS. SAKSHI JAIN – ADVOCATES )***

**AND**

**THE STATE OF MADHYA PRADESH THROUGH POLICE STATION CHHAIGAON MAKHAN KHANDWA, DISTRICT KHANDWA (MADHYA PRADESH)**

**.....RESPONDENT**

***( BY MR. S.S. CHAUHAN – PUBLIC PROSECUTOR)***

……..

*This criminal reference as well as criminal appeal coming on for orders this day,* ***Hon'ble Shri Justice Ravi Malimath, Chief Justice*** *passed the following:*

**ORDER**

This criminal reference as well as the criminal appeal arise out of the impugned judgment of conviction dated 29.08.2022 and order of sentence dated 30.08.2022 passed by the learned Special Judge, POCSO Act, Khandwa, District Khandwa (M.P.) in Sessions Case No.100053 of 2013.

**2**. The case of the prosecution is that on 30.01.2013 a missing report was lodged by one Ramlal stating that his daughter, aged about 9 years, went missing from about 6 p.m. on that day. That the accused, who is the neighbour, had sent the victim to get a '*bidi'* from a shop but the victim never returned. Thereafter, an FIR in Crime No.38 of 2013 was registered on the next day i.e. on 31.01.2013 with the Police Station Chhaigaon Makhan, District Khandwa for the offences punishable under Sections 363 and 366 of the Indian Penal Code, 1860 (for short "the IPC"). During the course of investigation, the body of the victim was found in an open field on 01.02.2013. The accused was arrested on 04.02.2013. On investigation being completed, a charge-sheet was filed on 13.02.2013. Charges were framed against the accused for the offences punishable under Sections 302, 363, 366, 376(2)(f) and 377 of the IPC as well as under Sections 3, 4, 5 and 6 of the Protection of Children from Sexual Offences Act, 2012 (for short "the POCSO Act"). Thereafter, vide judgment of conviction and order of sentence dated 04.03.2013 passed by the Sessions Judge & Special Judge (POCSO), Khandwa in Sessions Case No.53 of 2013, the accused was convicted and sentenced as follows:

| Sr. No. | Offence | Sentence | Fine ( in ₹ ) | Sentence in default of fine |
|---|---|---|---|---|
| 1. | 302 IPC | Death sentence | | |
| 2. | 363 IPC | 7 years' RI | 1,000/- | 1 month's additional RI |
| 3. | 366 IPC | 7 years' RI | 1,000/- | 1 month's additional RI |
| 4. | 377 IPC | 7 years' RI | 1,000/- | 1 month's additional RI |
| 5. | 376(2)(f) IPC | Life Imprisonment | 1,000/- | 1 month's additional RI |

(*all sentences to run concurrently*)

**3**. Thereafter, the case was referred to the High Court under Section 366 of the Code of Criminal Procedure, 1973 (for short "the CrPC") and Criminal Reference No.4 of 2013 was registered before the High Court. The accused also filed Criminal Appeal No.748 of 2013. By the judgment and order dated 27.06.2013 passed by a Division Bench of this Court, the appeal filed by the accused was dismissed and the reference was accepted thereby affirming the sentence passed by the Trial Court. Questioning the same, the accused filed Criminal Appeal Nos.62-63 of 2014 (Anokhilal vs. State of Madhya Pradesh) before the Hon'ble Supreme Court of India. By the order dated 18.12.2019, it was held in para 20 to 24, as follows:-

> *"20. We, therefore, have no hesitation in setting aside the judgments of conviction and orders of sentence passed by the Trial Court and the High Court against the appellant and directing de novo consideration. It shall be open to the learned counsel representing the appellant in the Trial Court to make any submissions touching upon the issues (i) whether the charges framed by the Trial Court are required to be amended or not; (ii) whether any of the prosecution witnesses need to be recalled for further cross-examination; and (iii) whether any expert evidence is required to be led in response to the FSL report and DNA report. The matter shall, thereafter, be considered on the basis of available material on record in accordance with law.*
>
> *21. It must be stated that the discussion by this Court was purely confined to the issue whether, while granting free Legal Aid, the appellant was extended real and meaningful assistance or not. The discussion in the matter shall not be taken to be a*

*reflection on the merits of the matter, which shall be considered and gone into, uninfluenced by any observations made by us.*

*22. Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:-*

*i) In all cases where there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum of 10 years practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.*

*ii) In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.*

*iii) Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard and fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.*

*iv) Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the concerned accused. Such interactions may prove to be helpful as was noticed in Imtiyaz Ramzan Khan vs. State of Maharashtra, (2018) 9 SCC 160.*

*23. In the end, we express our appreciation and gratitude for the assistance given by Mr. Luthra, the learned Amicus Curiae*

*and request him to assist this Court for deciding other issues as noted in the Orders dated 12.12.2018 and 10.12.2019 passed by this Court, for which purpose these matters be listed on 18.02.2020 before the appropriate Bench.*

*24. With the aforesaid observations, the substantive appeals stand disposed of, but the matter be listed on 18.02.2020 as directed."*

**4**. Thereafter, the Trial Court by the judgment of conviction dated 29.08.2022 and the order of sentence dated 30.08.2022 passed in Sessions Case No.100053 of 2013, convicted and sentenced the accused, as follows:

| Sr. No. | Offence | Sentence | Fine ( in ₹ ) | Sentence in default of fine |
|---|---|---|---|---|
| 1. | 302 IPC | Death sentence | | |
| 2. | 363 IPC | 7 years' RI | 2,000/- | 1 month's additional RI |
| 3. | 366 IPC | 7 years' RI | 2,000/- | 1 month's additional RI |
| 4. | 376(2)(f)(j) & (m) IPC | Life Imprisonment | 2,000/- | 1 month's additional RI |
| 5. | 377 IPC | 7 years' RI | 2,000/- | 1 month's additional RI |

(*all sentences to run concurrently*)

**5**. Questioning the same, the accused has filed Criminal Appeal No.11421 of 2022 and the Trial Court made a reference, which is registered as Criminal Reference No.6 of 2022.

**6**. By the order dated 10.07.2023, Shri Anil Khare, learned Senior Counsel was requested to assist the Court as *amicus curiae* in Criminal Reference No.6 of 2022.

**7**. During the pendency of these proceedings, the accused has filed an application (IA No.6640 of 2023) under Section 367 read with Section 391 of the CrPC seeking complete laboratory documents and examination of the expert witness etc. By the instant application it was prayed as follows:

> *"In the light of the aforesaid submissions made hereinabove, it is most humbly prayed that this Hon'ble Court may kindly be pleased to:*
>
> *A. Direct the Respondent to call for complete laboratory documentation in relation to the DNA Report of SFSL Sagar dated 01.03.2013 bearing no. FSL/DNA/122 including but not limited to copies of the following documents in the present case.*
>
> *a. All laboratory documentation including worksheets, bench notes and equipment logbooks related to the tests conducted and methods used for extraction, quantification, amplification, electrophoresis and interpretation for all the articles received;*
>
> *b. Electropherograms for DNA profiles and electronic raw data (.fsa) obtained from all articles received, allelic ladders and control samples used:*
>
> *c. Working procedure manuals for Biology, Serology and DNA Divisions which were used in examination of all exhibits received;*
>
> *d. Details of kits and softwares used in for DNA extraction, quantification, amplification,*

*electrophoresis and interpretation in the case along with manuals of such kits and softwares;*

e. *Complete documentation of chain of custody of all the Articles sent for examination to SFSL Sagar with details of the packaging seals and sample seals used.*

B. *Direct the respondent to call for complete laboratory documentation in relation to the report dated 23.02.2013 bearing no. RFSL/BI/149/13 of RFSL, Indore, including but not limited to copies of the following documents in the present case:*

a. *All laboratory documentation including bench notes and photographs relating to evidence and any reference samples for detection of blood and semen in the articles received;*

b. *Details of tests conducted and techniques used for examination of the articles received as well as the results of these tests;*

c. *Working procedure manuals for Biology, Serology and DNA Divisions which were used in examination of all exhibits received;*

d. *Complete documentation of chain of custody of all the Articles sent for examination to RFSL Indore with details of the packaging seals and sample seals used.*

C. *Direct the Ld. Special Judge (POCSO), Khandwa to summon and allow examination in chief, as well as allow cross examination by counsel for the Appellant, of Dr.*

*Pankaj Shrivastava, Scientific Officer Assistant Chemical Examiner, Govt. of MP, DNA Fingerprinting Unit, State Forensic Science Laboratory, Sagar, and Dr. S K Verma, Assistant Chemical Examiner, Regional Forensic Science Laboratory, Indore.*

*D. Direct the Ld. Special Judge (POCSO), Khandwa to examine the Appellant under Section 313 CrPC in respect of such additional evidence.*

*E. Pass such further and other orders as this Hon'ble Court may deem fit and proper, in the interest of justice."*

**8**. It is contended by the learned counsel for the accused that the Hon'ble Supreme Court in its order dated 18.12.2019, in para 20, have clearly directed that it shall be open to the learned counsel appearing for the accused to make submissions touching upon the issues, which included: whether any of the prosecution witnesses need to be recalled for further cross-examination and whether any expert evidence is required to be led, in response to the FSL report and DNA report etc. That the same having not been done, the application requires to be allowed. That despite the observations made by the Hon'ble Supreme Court, the Trial Court has failed to examine the expert, who conducted the DNA examination and prepared the DNA report. That even though summons were issued to Dr. Pankaj Shrivastava, the Assistant Chemical Examiner, DNA Fingerprinting Unit, FSL, Sagar, who is the author of the DNA report, the same was cancelled by the order dated 04.07.2022. The same should not have been done. Earlier, summons were issued to him on 11.04.2022 and by relying on Section 293 of the CrPC, shifted the burden on the defence to show as to why an expert

should be summoned. The application having been rejected, has led to miscarriage of justice. That the examination of the expert and consideration of the various documents goes to the very root of the case. The DNA report forms an important piece of evidence, which has been relied upon against the accused by the Trial Court. Therefore, non-examining the expert has led to gross miscarriage of justice vitiating the entire trial. That even the relevant questions regarding the same were not put to the accused when his statement was recorded under Section 313 of the CrPC, which has led to failure of justice. That the judgment of conviction and the order of sentence passed by the Trial Court is not in compliance of the directions of the Hon'ble Supreme Court. Hence, it is pleaded that the appeal be allowed and the matter be set down for retrial. In support of his case, he relies on the judgment of the Hon'ble Supreme Court in the case of Rahul etc. etc. vs. State of Delhi, Ministry of Home Affairs and Another, etc. reported in (2023) 1 SCC 83.

**9**. The same is disputed by the learned Public Prosecutor. He submits that there is absolutely no necessity to examine the expert. That the DNA report which has been marked is sufficient to arrive at a just and fair conclusion. That the examination of the expert would only be a mere formality in view of his report being accepted by the Court. Therefore, he pleads that the application be rejected.

**10**. Heard learned counsels.

**11**. In the application filed under Sections 367 and 391 of the CrPC various facts and circumstances have been narrated by the accused. In effect, he has stated that the DNA report and other documents are key

pieces of evidence which go to the root of the case. He has pointed out the various anomalies in the DNA report and other documents which require to be considered appropriately on the evidence being led. That the failure to lead evidence in support of the DNA report and other documents has led to gross miscarriage of justice. On the contrary, the reliance placed by the Trial Court on the DNA report and other documents without the supporting evidence is also bad in law and liable to be set aside.

**12**. Sections 367 and 391 of the CrPC, reads as follows:

> *"367. Power to direct further inquiry to be made or additional evidence to be taken.*
>
> *(1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.*
>
> *(2) Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.*
>
> *(3) When the inquiry or evidence (if any) is not made or taken by the High Court, the result of such inquiry or evidence shall be certified to such Court.*
>
> *** *** ***
>
> *391. Appellate Court may take further evidence or direct it to be taken.*

*(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.*

*(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.*

*(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.*

*(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."*

**13.(a)** The judgment of the Hon'ble Supreme Court in the case of Anokhilal vs. State of Madhya Pradesh rendered in Criminal Appeal No.62-63 of 2014 dated 18.12.2019 clearly indicates the factum as to whether any of the prosecution witnesses need to be recalled for further cross-examination and whether any expert evidence is required to be led, in response to the FSL and the DNA reports. The case of the accused has been consistent with regard to the DNA report. He has stated that no opportunity was given to him to examine the expert witness, since his evidence was not recorded. One of the key issues of evidence is that of the expert witness. That merely marking of a document is not sufficient. The same has to be proved through the evidence of the witness. It is very unfortunate that in the instant case the same has not been done.

**(b)** The Hon'ble Supreme Court in the case of Ramesh Chandra Agrawal vs. Regency Hospital Limited and others reported in (2009) 9 SCC 709 explained the role of expert evidence rendering expert opinion, with reference to para 16, which reads as follows:

> *"16. The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the layperson. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialised and perhaps even esoteric, the central role of an expert cannot be disputed……."*

**(c)** Further, a three-Judge Bench of the Hon'ble Supreme Court in the case of Ghulam Hassan Beigh vs. Mohammad Maqbool Magrey and others, (2022) 12 SCC 657 stressed on the importance of expert evidence in the field of medicine. The Court with reference to para 31 held as follows:

> *"31.....A medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by*

*explaining the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the court."*

**(d)** The Hon'ble Supreme Court in the case of Pattu Rajan vs. State of T.N. and others reported in (2019) 4 SCC 771 considered the probative value attached to DNA report with reference to para 52, which reads as follows:

*"52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on the facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible……."*

Therefore, the credibility of expert evidence in case of a DNA report depends upon the data, material, or the basis on which conclusions were drawn in DNA report.

**(e)** In a case where the prosecution relies on the expert evidence to prove the charge against an accused, then mere production of a DNA report in the Court may not be sufficient. Therefore, where the prosecution relies upon the DNA report of the expert to bring home the guilt against an accused, then merely by relying upon the DNA report it

cannot establish the said medical evidence beyond all reasonable doubt. In such circumstances, it is all the more imperative that not only the report is produced, but the expert witness is also examined before the Court on oath and sufficient opportunity is given to the accused to cross-examine him on the correctness of the report. Reliance is placed on a decision of the Karnataka High Court in the case of Parappa and others vs. Bhimappa and another reported in ILR 2008 KAR 1840 with reference to para 20, wherein, the Court observed as follows:-

> *"20. This provision should not be confused with the general law governing the admissibility of an expert's evidence. In a criminal case when the prosecution relies on the expert's evidence to prove the charges against the accused mere production of the said expert's report into Court is not sufficient. It does not become a part of the Court record on mere production. If the prosecution relies on a report of the expert, not only the report is to be produced, the author of the report is also to be examined in the Court on oath and an opportunity should be given to the accused to cross-examine the said expert on the correctness of the report. It is only then the said evidence becomes admissible and not otherwise……"*

**(f)** Thus, we are of the view that the prosecution would have to prove through its witness the truthfulness of the DNA report and other documents which have been marked. If they do not do so the mere marking of the document is no proof of its authenticity. The defence has every right to cross-examine the expert with regard to the DNA report and other documents.

**14.(a)** In the instant case, pursuant to the directions issued by the Hon'ble Supreme Court, summons were issued to the expert witness on 11.04.2022. The expert failed to receive the summons and was repeatedly absent. By placing reliance on Section 293 of the CrPC, the Trial Court incorrectly shifted the burden on the defence to show why an expert should be summoned. This, we feel, is rather erroneous. Furthermore, by the order dated 04.07.2022, the summons issued to the expert witness was cancelled.

**(b)** The Hon'ble Supreme Court in the case of Zahira Habibulla H. Sheikh vs. State of Gujarat (*Best Bakery case*), reported in (2004) 4 SCC 158 laid great emphasis on the concept of a fair trial and observed that it does not only mean that the accused should be convicted and punished, but it also entails that a just and fair procedure is followed in the trial. It has also been emphasised that the Courts have an overriding duty to maintain public confidence in the administration of justice so that the majesty of law is maintained. The Hon'ble Supreme Court in para 35 thereof, further held as follows:-

> *"35. ……. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves.*

*Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators."*

**(c)** By cancelling the summons issued to the expert witness, not only has the prosecution not established its case beyond all reasonable doubt but the accused has not had the opportunity to cross-examine the witness. Thus, the cancellation of the summons issued to the witness was wholly uncalled for. Not only has it led to gross miscarriage of justice, but is also in violation of the directions issued by the Hon'ble Supreme Court in the case of Anokhilal (supra) decided on 18.12.2019. Therefore, we are of the view that this error committed by the Trial Court becomes fatal.

**(d)** The Hon'ble Supreme Court in the case of Rahul vs. State (NCT of Delhi) reported in (2023) 1 SCC 83 held in para 38 as follows:

*"38. It is true that PW 23 Dr B.K. Mohapatra, Senior Scientific Officer (Biology) of CFSL, New Delhi had stepped into the witness box and his report regarding DNA profiling was exhibited as Ext. PW 23/A, however mere exhibiting a document, would not prove its contents. The record shows that all the samples relating to the accused and relating to the deceased were seized by the investigating officer on 14-2-2012 and 16-2-2012; and they were sent to CFSL for examination on 27-2-2012. During this period, they remained in the malkhana of the police station. Under the circumstances, the possibility of tampering with the samples collected also could not be ruled out. Neither the trial court nor the High Court has examined*

*the underlying basis of the findings in the DNA reports nor have they examined the fact whether the techniques were reliably applied by the expert. In the absence of such evidence on record, all the reports with regard to the DNA profiling become highly vulnerable, more particularly when the collection and sealing of the samples sent for examination were also not free from suspicion."*

Here also the Hon'ble Supreme Court came to the view that in the absence of expert evidence the reports with regard to the DNA profiling become vulnerable affecting the case of the prosecution. Therefore, we are of the considered view that the application requires to be allowed. In the absence of the application being the allowed, the evidence placed by the prosecution may not be sufficient to prove their case beyond all reasonable doubt. Therefore, in the interest of the prosecution also, the examination of the expert witness by the Trial Court becomes imminent.

**15**. At this juncture, the learned Public Prosecutor, by placing reliance on Section 391 of the CrPC, submits that it is not necessary for the Trial Court alone to examine the witness. The Appellate Court is entitled to take further evidence as it deems appropriate in terms of Section 391 of the CrPC. Therefore, he pleads that while allowing the application there is no necessity to remand the matter to the Trial Court for a fresh consideration.

**16**. However, on hearing learned counsels, we are of the view that the ends of justice would not be met by the mere recording of the evidence by this Court. It is only just and necessary that the evidence of

the expert be recorded by the Trial Court and if necessary, relevant questions may also be framed under Section 313 of the CrPC.

**17.(a)** The law regarding Section 313 of the CrPC is no longer *res integra*. It is well established in law that all the incriminating circumstances appearing against the accused in the evidence produced by the prosecution shall be put to him in his statement under Section 313 of the CrPC so that he may have an opportunity to explain such circumstances.

**(b)** The Hon'ble Supreme Court in the case of Tara Singh vs. State reported in 1951 SCC 903 with reference to para 18 observed as follows:

> *"18. ……..if a point in the evidence is considered important against the accused and the conviction is intended to be based upon it, then it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it if he so desires. This is an important and salutary provision and I cannot permit it to be slurred over……."*

**(c)** The aforesaid principle has been reiterated by the Hon'ble Supreme Court in the case of Raj Kumar vs. State (NCT of Delhi) reported in 2023 SCC OnLine SC 609 with reference to para 23 observed as follows:-

> *"23. In many criminal trials, a large number of witnesses are examined, and evidence is voluminous. It is true that the Judicial Officers have to understand the importance of Section 313. But now the Court is empowered to take the help of the prosecutor and the defence counsel in preparing relevant*

*questions. Therefore, when the Trial Judge prepares questions to be put to the accused under Section 313, before putting the questions to the accused, the Judge can always provide copies of the said questions to the learned Public Prosecutor as well as the learned defence Counsel and seek their assistance for ensuring that every relevant material circumstance appearing against the accused is put to him. When the Judge seeks the assistance of the prosecutor and the defence lawyer, the lawyers must act as the officers of the Court and not as mouthpieces of their respective clients. While recording the statement under Section 313 of CrPC in cases involving a large number of prosecution witnesses, the Judicial Officers will be well advised to take benefit of subsection (5) of Section 313 of CrPC, which will ensure that the chances of committing errors and omissions are minimized."*

**18**. Furthermore, the Hon'ble Supreme Court in Anokhilal's case (supra) has already directed for a *de novo* consideration. They have also indicated the procedure to be followed, namely, with regard to the adequacy of the charges and as to whether any of the prosecution witnesses need to be recalled for further examination and whether any expert evidence is required etc. The matter was directed for a *de novo* consideration to the Trial Court but it is the Trial Court which has failed to comply with the direction of the Hon'ble Supreme Court. Therefore, on this ground also, we are of the view that it would not be proper for this Court to answer the said issues in view of the fact that the direction has already been issued by the Hon'ble Supreme Court to the Trial Court to do the necessary.

**19**. In view of the aforesaid discussion, the evidence of the expert requires to be recorded by the Trial Court and if necessary, relevant questions may also be framed under Section 313 of the CrPC. This, we feel, would render complete justice not only to the accused but also to the prosecution. Failure to do so would probably leave a gaping hole in the case of the prosecution. Therefore, we do not find that the judgment of conviction and order of sentence as rendered by the Trial Court would become sustainable. The Trial Court would be expected to record the evidence of the expert witness along with the cross-examination by the accused, if any. Thus, we are of the considered view that the Trial Court can also frame those questions which are relatable to the DNA report but also with regard to the various other documents relatable to the issue pertaining to the DNA.

**20.** We are aware of the repercussions of the instant order. In terms whereof, the matter would be remanded to the Trial Court to comply with the directions of the Hon'ble Supreme Court in Anokhilal's case (supra) as well as the directions in this order. Even though the matter was remanded on the earlier occasion to the Trial Court, we are not able to find any good or reasonable ground to retain the appeal before this Court. It would not be appropriate for the Appellate Court to record the evidence under Section 391 of the CrPC and all other relevant issues that arise for consideration. It is not a simple case of a solitary evidence that is required. If that were to be so, we would have not hesitated in recording the evidence of DNA expert and the statement of the accused under Section 313 of the CrPC before this Court. In fact, the Hon'ble Supreme Court in the case of Ashok Tshering Bhutia vs. State of Sikkim, (2011) 4 SCC 402 have considered the power of the Appellate

Court to take additional evidence under Section 391 of the CrPC. In para-28, it was held as follows:

> *"28. Additional evidence at the appellate stage is permissible, in case of a failure of justice. However, such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the facts and circumstances of an individual case as to whether such permission should be granted having due regard to the concepts of fair play, justice and the well-being of society. ....."*

Therefore, even though the Appellate Court is entitled to take the additional evidence under Section 391 of the CrPC and record the statement of the accused under Section 313 of the CrPC, in the given facts and circumstances of this case, it would be more appropriate and ends of justice would be met, if the said exercise is conducted only by the Trial Court. Furthermore the Hon'ble Supreme Court had directed the matter to be considered by the Trial Court. In case the Hon'ble Supreme Court was of the view that it is for the Appellate Court to do so, then we would have certainly done so. In view of the specific direction to the Trial Court alone to comply with the direction of the Hon'ble Supreme Court, it may appear to be an infraction of the direction of the Hon'ble Supreme Court. Hence, we are of the view that the matter requires to be considered by the Trial Court.

**21**. So far as the evidence of the other witnesses is concerned, we do not find that any change is called for. The evidence has already been recorded and cross-examination, if any, has already been conducted by the accused. Therefore, those evidences will remain undisturbed. The

Trial Court would record the evidence of the expert and the accused will have his right to have a say with regard to the documents to be produced by the prosecution. After this exercise is done, the matter may be listed for final arguments and the judgment be pronounced by the Trial Court. Therefore, directing the Trial Court to hold a *de novo* trial may not be appropriate.

**22**. Hence, for all these reasons, the application (I.A. No.6640 of 2023) is allowed on the following terms:

(i) The Trial Court to summon and examine the expert, namely, Dr. Pankaj Shrivastava, who was the then Scientific Officer Assistant Chemical Examiner, Government of Madhya Pradesh, DNA Fingerprinting Unit, State Forensic Science Laboratory, Sagar (M.P.) and Dr. S.K. Verma, Assistant Chemical Examiner, Regional Forensic Science Laboratory, Indore (M.P.);

(ii) The Trial Court to examine the accused under Section 313 of the CrPC with respect to such additional evidence;

(iii) The Trial Court, thereafter, to consider the new evidence and material and by considering the other evidence already on record, pronounce its judgment.

**23**. Consequently, Criminal Reference (CRRFC No.6 of 2022) is disposed off. Criminal Appeal (CRA No. 11421 of 2022) is allowed. The judgment of conviction dated 29.08.2022 and the order of sentence dated 30.08.2022 passed by the learned Special Judge (POCSO), Khandwa in Sessions Case No.100053 of 2013 are set aside. The matter

is remanded to the Trial Court for consideration, as directed hereinabove. The parties to appear before the Trial Court on 25.09.2023. In view of the long passage of time, the Trial Court is directed to complete the exercise within a period of three months, if necessary, then on a day-to-day basis.

**24**. The reference and the appeal are accordingly disposed off.

**(RAVI MALIMATH)**
**CHIEF JUSTICE**

**(VISHAL MISHRA)**
**JUDGE**

*S/*