
(2010) 07 MP CK 0078

In the Madhya Pradesh High Court

Case No : Criminal Reference No. 2 of 2010

In Reference

Date of Decision : 16-07-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 293, 53 , 53A
Evidence Act, 1872 — Section 112
Penal Code, 1860 (IPC) — Section 302 , 376

Citation : (2010) ILR (MP) 2206

Hon'ble Judges : Rakesh Saxena, J; Gulab Singh Solanki, J

Bench : Division Bench

Advocate : S.K. Rai, G.A, for the Appellant; Surendra Singh and K.S. Rajput, for the Respondent

Judgement

G.S. Solanki, J.—Learned Additional Judge to the Court of First Additional Sessions Judge, Khandwa (MP), has awarded the sentence of death to Respondent/accused and has made reference of the proceedings to this Court for confirmation of the death sentence passed by the impugned judgment.

2. The Appellant Rahul S/o Narendra Singh Tomar has filed the appeal against the conviction and sentence of death and other sentences awarded to him by the trial Court.

3. Since the reference and the appeal arise out of the same impugned judgment, both are being disposed of by this common judgment.

4. The Appellant has challenged the judgment dated 23.2.2010 passed by the Additional Sessions Judge to the Court of First Additional Sessions Judge, Khandwa, in Sessions Trial No. 129 of 2009, convicting him under Sections 376 and 302 of the Indian Penal Code and sentencing him imprisonment for life with fine of Rs. 1,000/-, in default of payment of fine to further undergo rigorous imprisonment of one year and death sentence for committing murder of Arti respectively.

5. In short the prosecution case is that complainant Jagdish Singh (P.W. 1)

lodged a report on 20.2.2009 (Ex. P.1) at police station Chhaigaon Makhan that at about 11.00 a.m., when he was returning with his cattle through the field named "Korku Wala Khet, he saw that his grand daughter Arti was washing clothes with other ladies i.e. wife of Sardar Singh, wife of Jitendra Singh, Rinku Bai (P.W. 10) and Suman Bai (P.W. 3). At the same Well his cattle drank water. At about 1 O'clock he again went to the same Well but no one was found there and clothes and slippers of Arti were lying there. His wife Umabai (P.W. 4) also followed him. Both of them searched near the Well, then they found the dead body of Arti lying in Nallah situated between the field of Kishore Singh and Dinesh Singh. They noticed that face of Arti was crushed by stones. Clothes of Arti were torn and three blood stained stones were lying near the dead body. According to him, when he was returning with his cattle, he had seen accused Rahul going towards the "Korku Wala Khet. This fact was also noticed by Laxmi Bai (P.W. 5). He alleged that 5-6 months before accused/Appellant Rahul had trespassed in his house, therefore, he doubted that offence had been committed by the accused/Appellant.

6. During investigation, Shivsingh Bhadoria (P.W. 18), prepared a spot map (Ex. P/3), inquest Panchnama (Ex. P/2) and seized blood stained stones, sample of blood stained earth and plain earth vide seizure memo (Ex. P/4). Dead body of Arti was sent for postmortem vide requisition (Ex. P/19).

7. Dr. S. Dixit (P.W. 16) and lady doctor Laxmi Dodwe performed the autopsy on 21.2.2009 and found that head and face of deceased were crushed. They also found that her hymen was torn, reddened margin and posterior Fourchette was red and a small contusion was also there. They further observed multiple linear abrasions and contusions of different sizes and pink to dark brown colour on both forearms, front of neck, over right breast, over back and both buttocks, over front of right thigh. They opined that cause of death was cardio respiratory failure due to crushing injury of head, mode of death was Coma and Syncope. The injuries around external genitalia were suggestive of some forceful penetration, slide of vaginal smear was prepared and sent for examination. All injuries were ante-mortem in nature. A packet of clothes of deceased and two slides of vaginal smear were packed and sealed and handed over to Constable No. 428 Satyendra Singh, who brought the dead body for postmortem.

8. Head Constable, Mukesh Yadav (P.W. 17) seized same articles from Constable Satyendra Singh vide seizure memo Ex. P/21.

9. Shivsingh Bhadoria (P.W. 18) arrested accused/Appellant Rahul on 22.2.2009 vide arrest memo (Ex. P/5). He seized blood stained shirt at the instance of the accused/Appellant vide seizure memo (Ex. P/7) and also seized a trouser from the body of the accused/Appellant vide seizure memo (Ex. P/8). He also seized the nail clippings of the hands of accused/Appellant vide seizure memo (Ex. P/17).

10. Accused/Appellant Rahul was sent for medical examination, who was

examined by Dr. Ashutosh Pare (P.W. 15). He found a small linear abrasion 1/4 x 1/4 on the base of his right thumb and opined that accused/Appellant was capable for performing sexual intercourse. He prepared his semen slide and took his underwear and sealed and handed over to the Police Constable No. 306, Kripa Shankar Yadav, who brought the accused to the hospital. Dr. Ashutosh Pare (P.W. 15) expressed inability to collect blood sample for DNA analysis due to lack of facility at Chhaigaon and, therefore, he referred the accused/Appellant for collection of blood for DNA test, to the District Hospital, Khandwa.

11. Ramchandra (P.W. 11), Lab Technician of District Hospital, Khandwa took the blood sample of accused/Appellant on the direction of Pathologist, and sealed with identification form. Sample was seized from Technician Ramchandra vide seizure memo (EX. P/10).

12. Head Constable, Mukesh Yadav (P.W. 17) seized the sealed packet of underwear, semen slide and impression of seal of hospital from Constable Kripa Shankar Yadav vide seizure memo (Ex. P/22).

13. All seized articles like blood sample of accused/Appellant Rahul in EDTA-VIAL Article-A, three blood stained stones Article-B, Blood stained soil Article-C, Control Soil Article-D, cloths packet of deceased Arti Article-E, two vaginal smear slides of deceased Arti Article-F, semen slide of accused Rahul Article-G, underwear of accused/Appellant Rahul Article-H, blood stained T. Shirt of accused/Appellant Article-I, Trouser of accused/Appellant Article-J, Nail parts of hands of accused Rahul Article-K alongwith identification form of accused/Appellant, photocopy of F.I.R., photocopy of Postmortem report, photocopy of Panchayatnama of dead body, photocopy of all seizure memo's, forwarding note and sample of seal were sent for DNA comparison and analysis of blood sample of accused/Appellant Rahul to State Forensic Science Laboratory, Sagar vide Memo No. SP/KWA/FSL/46/09 dated 24.2.2009 (EX. P/23). All eleven sealed articles were received on 26.2.2009 by Assistant Chemical Examiner of Forensic Science Laboratory, Sagar and receipt (Ex. P/25) was issued in that behalf.

14. The Assistant Chemical Examiner of State Forensic Science Laboratory, Sagar found similarity in male DNA profile of blood and nail clippings of accused/Appellant Rahul and vaginal smear of deceased Arti and opined that on the basis of DNA Examination, accused Rahul cannot be excluded from the crime. His DNA report is (Ex. P/26).

15. After completing the investigation, accused/Appellant was charge-sheeted. Learned Sessions Judge framed the charges under Sections 376 and 302 of the Indian Penal Code against the accused/Appellant. Accused denied the charges, and pleaded that he was detained in police station for 5-6 days and falsely implicated.

16. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, held that accused/Appellant was guilty and convicted and sentenced him as mentioned herein above.

17. The Appellant has challenged his conviction and sentence by this appeal, whereas the learned Additional Sessions Judge has referred the proceedings of the case to this Court for confirmation of death sentence awarded to accused/Appellant.

18. We have heard the learned Counsel for the parties and perused the evidence on record.

19. It was not disputed that deceased Arti died of homicidal injuries.

20. Dr. S. Dixit (P.W. 16), Medical Officer of District Hospital Khandwa conducted the postmortem examination along with lady doctor Laxmi Dodwe on 21.2.2009 and found that head of Arti was crushed upto to nose, skull bones were broken and brain matter was coming out of it. They also found multiple linear abrasions and contusions of different sizes on both forearms, front of neck, over right breast, over back and both buttocks, over front of right thigh.

21. On internal examination they found that hymen was torn with reddened margin and posterior Fourchette was red with a small contusion.

22. In the opinion of doctors, death of deceased was caused due to cardio respiratory failure due to crushing injury of head and mode of death was Coma and Syncope. (Postmortem report of deceased Arti is Ex. P/19-A). This statement of Dr. Dixit was not challenged by defence. The trial Court, after considering the injuries found on the body of the deceased, arrived to the conclusion that death was homicidal in nature. On consideration of the injuries found on the dead body, we are also of the view that death of Arti was homicidal.

23. Learned Counsel for the Appellant submitted that there was no eye witness in this case and trial Court erred in relying the circumstantial evidence produced by prosecution. The trial Court wrongly relied on the circumstances that accused/Appellant was going towards the scene of occurrence where the dead body was lying, while it was also admitted fact that near the place of incidence, field of Appellant was also situated.

24. Shri Surendra Singh, learned senior counsel for the Appellant vehemently argued that trial Court has given undue weightage on DNA test report (Ex. P/26) which has been based on the basis of evidence of Ramchandra (P.W. 11), who was not the authorized person to collect the blood sample as well as he was himself unaware about the process as to why and for what purpose the samples were being collected. In such a situation the DNA test report cannot be relied on due to faulty/illegal procedure of collecting the blood sample. He also submitted that seizure of blood stained T. Shirt at the instance of accused also doubtful because discovered article was lying in open place which could be easily noticed by anyone. The seizure of sample of nails is also doubtful. In these circumstances, the evidence produced by prosecution was not sufficient to make out the case against the accused u/s 376 and 302 of the IPC. The charges were not proved beyond reasonable doubt against the Appellant and, therefore, the

judgment passed by the trial Court is erroneous and Appellant is entitled for benefit of doubt.

25. On the other hand, Shri S.K. Rai, learned Government Advocate justified and supported the conviction of the Appellant.

26. We have gone through the entire evidence on record and examined the circumstances which are proved by prosecution, like: accused/Appellant was seen going towards the place of incident. Jagdish Singh (P.W. 1) has categorically stated that at about 11 O'clock when he was returning with cattle, he saw that accused/Appellant Rahul was going towards the field "Korku Wala Khet. He admitted in para-5 of his cross-examination that field of Dinesh was situated in East side of his field and the Well and the field of the accused situated in West of the Well. Field of Laxmibai was situated in North of the Well.

27. Laxmibai (P.W. 5) supported the version of Jagdish Singh and stated that when she was returning after picking the chili from her field at that time Jagdish Singh (P.W. 1) was returning with cattle and at the same time she noticed that accused/Appellant was going towards the field. She also admitted that the field of the accused is also situated near her field. The name of Laxmibai finds place in the FIR.

28. Dinesh Singh (P.W. 13) also supported the version of complainant Jagdish Singh (P.W. 1). According to him, Jagdish Singh had informed him about the incident. Jagdish had also informed him that accused/Appellant Rahul had met him on the way when he was returning with cattle. Dinesh Singh is an independent witness and the fact that Rahul met him on the way, going towards the place of incident, was just narrated to him by Jagdish, who was returning after seeing the dead body of Arti. This fact falls under res gestae and cannot be said to be hearsay evidence.

29. No doubt the field of Rahul was also situated near the place of incident but the time was odd when Rahul was going towards his field/place of incident because it was a time when normally agriculturist would return to their home after finishing the works on field. Such as witness Laxmibai (P.W. 5) was returning to home after picking the chili from her field.

30. We are conscious that this circumstances alone is not sufficient to prove the crime but this circumstances only proved that accused/Appellant Rahul was seen in the vicinity/near the place of incidence, at or about the time of incidence.

31. Prosecution also tried to prove another fact that accused/Appellant was found running away from the place of incident when complainant Jagdish Singh (P.W. 1) and his wife Umabai (P.W. 4) were searching Arti. Umabai and Jagdish both stated this fact in their examination-in-chief but this particular fact did not find place in their police statement recorded u/s 161 Code of Criminal Procedure (Ex. D/1 and Ex. D/2) respectively, as well as this fact was also found missing from the FIR (Ex. P/1). Therefore, we hold that this fact is clearly an improvement and

exaggeration and cannot be said to be proved.

32. One more fact to which the trial Court has given weightage is that accused had an evil-eye on Arti. In this regard, we perused the statement of Joyti Sawhare (P.W. 8) (elder sister of the deceased), who stated that once Arti told to her that she was afraid from Rahul. But Jyoti did not disclose this fact to her grandparents Jagdish Singh (P.W. 1) and Umabai (P.W. 4), in our opinion, this fact cannot be accepted as proved.

33. Now we are examining the process adopted in seizure of T. Shirt, nail clippings, blood sample of accused/Appellant Rahul and vaginal smear of deceased Arti, which are foundation of DNA profile report (Ex. P/26).

34. Learned Counsel for the Appellant argued on the strength of State of Rajasthan Vs. Daulat Ram, that prosecution has failed to examine those person, in whose custody samples, had travelled before, reaching the Forensic Science Laboratory, Sagar, hence DNA profile report (Ex. P/26) cannot be accepted as gospel truth, but facts of Daulat Ram s Case were different, where, at one point of time office of the Superintendent of Police refused to receive the samples, because label on Samples was not in order and that position was admitted in that case. Such situation does not arise in the case in hand. It is true that various persons who handled the samples were not examined but seal impressions on samples were found intact by the Assistant Chemical Examiner of Forensic Science Laboratory, Sagar and it was proved that vide receipt (Ex. P/25) as well as (Ex. P/26) in which it was specifically mentioned that eleven sealed articles were received through Constable No. 311, Dinesh, P.S. Chhaigaon Makhan with sample seal and seals of Medical Officer, M.H. Khandwa, D.H. Khandwa and Police Station Chhaigaon Makhan were found intact.

35. Now we have to examine step by step process in which samples were collected and sealed.

36. Shiv Singh Bhadoria (P.W. 18), Investigating Officer stated in para-5 of his statement that he arrested the accused/Appellant Rahul on 22.2.2009 and prepared arrest memo (Ex. P/5). On interrogation, Appellant informed that he concealed blood stained Shirt, in the Medh of Vikram Singh's field. In presence of Panch witnesses, Investigating Officer seized the T. Shirt from the bushes of Beri situated at the Medh of the field of Vikram Singh and prepared the seizure memo (Ex. P/7). Panch witnesses Sardar Singh (P.W. 6) and Bhagwan Singh (P.W. 9) also corroborated the version of Investigating Officer.

37. We noticed that one more Sardar Singh S/o. Jaswant Singh (P.W. 2), claimed that he was the Panch witness of memorandum (Ex. P/6) and seizure memo (Ex. P/7) but when we went through the record of the trial Court we found that there was one more witness Sardar Singh, who was witness of inquest report and seizure memo of articles found at the scene of incident. This Sardar Singh S/o. Jaswant Singh (P.W. 2) was the father of the deceased. He was examined on 12.10.2009 and just on the next date i.e. 13.10.2009 prosecution realized the

mistake and filed an application. Same was disposed of by trial Court, vide order dated 13.10.2009 and after realizing the mistake, trial Judge called Sardar Singh S/o. Jaswant Singh (P.W. 2) and inquired from him that how he appeared before the Court and deposed, then he explained that he was the father of deceased Arti, therefore, he was present before the Court and when name of Sardar Singh was called he went in and deposed before the Court. Trial Court fairly narrated all these facts in para-2 of the impugned judgment as admitted facts. In this situation statement of Sardar Singh S/o. Jaswant Singh (P.W. 2) cannot be read as version of Panch witness of (Ex. P/6 and Ex. P/7).

38. Panch witness Sardar Singh S/o. Ganpat Singh (P.W. 6) is an independent witness. He categorically stated that police brought Rahul from Chhaigaon Makhan to Bhojkhedi in the police van and he signed the arrest memo (Ex. P/5). He also stated that Appellant Rahul was interrogated by the police and he informed the police that clothes were kept in the bushes of Beri then he proceeded with police party to the field of Vikram Singh, accused produced the blood stained T. Shirt from the bush of Beri, which was seized vide memo (Ex. P/7). He categorically explained in para-5 of his cross-examination that primarily he signed the memo in front of middle school and then he signed another memo in the field of Vikram Singh from where clothes were seized. Another witness Bhagwan Singh (P.W. 9) also corroborated the said facts and specifically stated that Panch witness Sardar Singh S/o. Ganpat Singh (P.W. 6) was with the police party. In cross-examination in para-4, he admitted that there was some previous litigation between his wife Basubai and father of Appellant, Narendra Singh. He also admitted that complainant Jagdish Singh is son of his father's elder brother but after careful examination of his statement, as a whole, in which he admitted the presence of another Panch witness Sardar Singh S/o. Ganpat Singh (P.W. 6), who was an independent witness, despite previous enmity and previous litigation, his statement is found trustworthy.

39. The learned Counsel for the Appellant argued that discovered articles were lying in open place which could be detected even on casual search by investigating officer. He placed reliance on State of Madhya Pradesh Vs. Nisar, and Mani Vs. State of Tamil Nadu, and drew our attention to the cross-examination of Sardar Singh S/o. Jaswant Singh (P.W. 2) in which he admitted that clothes were seized from the place which was about 45 feet away from the place where the dead body was lying, but as we have noticed herein above that this Sardar Singh S/o. Jaswant Singh (P.W. 2) was not the Panch witness of memorandum (Ex. P/6) and seizure memo (Ex. P/7), he was father of deceased Arti and he was a person, who could speak anything, therefore, statement of this witness cannot be relied upon because he appears a complete liar. Panch witness Sardar Singh S/o. Ganpat Singh (P.W. 6) only admitted that bushes of Beri were situated near the way and this way was going towards the field of Kishore Singh i.e. place of incident. This witness was real witness of seizure memo and defence could not dare to ask the distance of place of seizure of T. Shirt from the place of incidence. Such distance was not questioned in the statement of investigating

officer, Shiv Singh Bhadoria (P.W. 18) and another Panch witness Bhagwan Singh (P.W. 9). Cross-examination of para-3 of Sardar Singh S/o. Ganpat Singh (P.W. 6) reveals that field of Vikram Singh is a open field where the small bushes of Beri were situated and Appellant picked up the T. Shirt from those Beri bushes. In this fact situation the authorities relied on by learned Counsel for the Appellant, are clearly distinguishable. In the case of Mani (supra), discovered articles were lying open merely 300 feet away from the body of the deceased and that too were discovered after more than 10 days of incident.

40. In State of Madhya Pradesh Vs. Nisar, facts were different. In that case dead body of one deceased Kandhai was found and thereafter report was lodged and another body of Chherkoo was recovered on the information of accused Nisar which was lying just about 100 paces from the dead body of Kandhai, in that fact situation, the Hon"ble Apex Court observed that the dead body of second deceased Chherkoo could be detected by investigating officer as in casual search.

41. The facts of the case in hand are totally different in which blood stained T. Shirt was seized from the small bushes of Beri. In Pohalya Motya Valvi Vs. State of Maharashtra, it was observed by Apex court that the recovery of blood stained article becomes incriminating not because of its recovery at the instance of accused but the element of criminality tending to connect the accused with the crime lies in the "authorship of concealment".

42. In case in hand, the place where the blood stained T. Shirt was concealed was situated in the way, going towards the village of Bhojkhedi, from the place of incidence. In this situation the small bushes of Beri, were ideal place to conceal the incriminating articles. It appeared natural. Therefore, we are of the opinion that prosecution succeeded in proving the circumstance that blood stained T. Shirt was recovered at the instance of Appellant Rahul.

43. Shivsingh Bhadoria (P.W. 18). Investigating Officer stated that he seized the nail clippings of accused/Appellant Rahul and sealed them vide seizure memo (Ex. P/17). Narayan (P.W. 14) corroborated the version of Shivsingh Bhadoria (P.W. 18) and stated that nail clippings of Appellant were cut in presence of him and the same have been kept in polythene. He is an independent witness and a villager who is unknown to accused and complainant therefore, his testimony is believable. On perusal of Ex. P/17, we find that nail clippings were sent in the packet of polythene, therefore it is proved that nail clippings were seized in presence of independent witness.

Blood sample

44. Dr. Ashutosh Pare (P.W. 15) stated that he was posted as Medical Officer at Community Health Centre, Chhaigaon Makhan. On 23.2.2009 accused/Appellant Rahul was brought by Constable No. 306, Kripa Shankar Yadav with requisition memo (Ex. P/18). He examined the Appellant and found that a small linear abrasion of 1/4 x 1/4 inch on the base of his right thumb, which may be caused by hard and blunt object. Duration was approximately 48 to 72 hours. He also

examined the genitalia of accused/Appellant and opined that he was capable of performing the sexual intercourse. He further stated that police requested to take blood sample for DNA profile but due to lack of facility of investigation at Community Health Centre, Chhaigaon Makhan, he referred the Appellant for blood sample to District Hospital, Khandwa. His statement is duly corroborated by his report (Ex. P/18-A).

45. Ramchandra (P.W. 11) stated that he was working since 15 years as Lab Technician in the District Hospital, Khandwa. The blood sample of Appellant Rahul was taken by him. He has specifically stated that the sample of blood as well as identification form of accused/Appellant were filled by him and sealed vide memo (Ex. P/10). This fact is corroborated by Investigating Officer, Shivsingh Bhadoria (P.W. 18) in para-7 of his statement.

46. Learned Counsel for the Appellant submitted that blood sample was not taken by medical practitioner. In this way it violated the provisions of Section 53 and 53-A of Code of Criminal Procedure but in our opinion it is not the violation of above mentioned provision, because Ramchandra (P.W. 11) specifically stated that Pathologist directed him to collect the blood sample of Appellant. He also admitted that Pathologist told him that samples were to be given to police. He also admitted that the name and address of accused were filled in the identification form. Although he said that, he did not know, for what purpose the sample was taken. In this situation where Lab Technician of 15 years experience, who collected the blood on the direction of pathologist of District Hospital, Khandwa, it cannot be said that sample was not taken by medical practitioner because it is a matter of common experience that normally samples are collected by Lab Technicians under the direction of registered practitioner/pathologist. Further more the actual examination of blood was conducted by Assistant Chemical Examiner of Forensic Science Laboratory, Sagar, therefore, in our opinion there was no illegality in collecting the blood sample by witness Ramchandra (P.W. 11).

Vaginal Smear

47. Dr. S. Dixit (P.W. 16) stated that after performing the autopsy on the dead body of Arti, he prepared the two slides of vaginal smear and gave for chemical examination and prepared the postmortem report (Ex. P/19-A). This version is duly corroborated by postmortem report (Ex. P/19-A) in which this fact is written in the column, meant for, "opinion about the articles which were sent for former examination by chemical examiner, smear scientist or any other, specialist". It was written in this column "two slides of vaginal smear packed and sealed".

48. Mukesh Yadav (P.W. 17) stated that constable Satyendra brought the sealed packet from District Hospital, Khandwa after postmortem of Arti which was produced before him. He seized them vide seizure memo (Ex. P/21). He admitted in his cross-examination that he only wrote "sealed packet" in seizure memo (Ex. P/21) but he explained that by mistake he did not write the word "sealed

packet" but we already mentioned herein above that Dr. S. Dixit (P.W. 16) wrote in specific column meant for the articles which are preserved for further medical examination that two slides of vaginal smear were packed and sealed. He further found corroboration by receipt (Ex. P/25) issued by Assistant Chemical Examiner as well as report of Assistant Chemical Examination (Ex. P/26) in which 11 sealed articles were received which were sealed by MH Khandwa, DH Khandwa and Police Station Chhaigaon Makhan and all seals are found intact.

49. Shivsingh Bhadoria (P.W. 18) stated that he forwarded all seized articles for medical examination to the State Forensic Science Laboratory, Sagar, vide (Ex. P/23) with the forwarding note of Superintendent of Police vide (Ex. P/24). On 24.2.2009 and 26.2.2009 they were received, by Assistant Chemical Examiner vide receipt (Ex. P/25). He further stated that he received the report of Assistant Chemical Examiner Ex. P/26 which was filed with charge-sheet. He however admitted in his cross examination that in seizure memo Exhibits (P/4, P/7, P/8 and P/17) though there is a column No. 13 for impression of seal but no impression of seal was pasted there.

50. On this fact, learned Counsel for the Appellant submitted that it is doubtful that articles seized vide Exhibits (P/4, P/7, P/8 and P/17) were sealed. On perusal of seizure memos Exhibits (P/4, P/7, P/8 and P/17), we find that in all seizure memos it has been specifically mentioned that articles were sealed. Further Panch witness also stated that articles were sealed before them. In this situation it cannot be held that articles were not sealed at the time of their respective seizures.

DNA Profile

51. Ex.P/26 is the report of Scientific Officer and Assistant Chemical Examiner of DNA Finger Printing Unit, State Forensic Science Laboratory, Sagar. It is admissible u/s 293 of Code of Criminal Procedure. This report reveals that eleven sealed packets were received through constable Dinesh of Police Station Chhaigaon Makhan on 26.2.2009 and all the seals were found intact.

52. Ex.P/23 reveals that blood sample of accused Rahul was sent in EDTA-VIAL which is marked - A, blood stained T. Shirt of Rahul was marked -1, nail clippings of Appellant Rahul was marked - K, two vaginal smear slides of deceased Arti were marked-F. This memo was sent with enclosure of identification form, photocopy of FIR, photocopy of postmortem report, photocopy of panchayatnama, photocopies of seizure memos, forwarding note and sample seal. EX. P/24 is a certificate of authority given by Superintendent of Police for examination of articles sent to Chemical Examiner. In this way provisions of Section 53 and 53-A of Code of Criminal Procedure were duly complied with.

53. On perusal of report Ex. P/26 we find that Assistant Chemical Examiner extracted the DNA by organic extraction process and he amplified 16 genetic marker through Multiplex PCR procedure and obtained genotyping profile through AmpF/STR identifier Kit and AmpF/STR Y Filer Kit and analysed the results by

Genemaper Software V3.5 and opined that

- (i) A mixed DNA profile was found in blood stained T. Shirt (Ex. P/1), i.e. of more than one person.
- (ii) there was similar male DNA profile in the blood sample of Rahul Article-A, nail clippings of Rahul, Article-K and vaginal smear slide of deceased Arti, Article-F,
- (iii) on the basis of DNA examination accused Rahul cannot be excluded from the crime.

54. On the basis of third opinion that "accused Rahul cannot be excluded from the crime", the learned Counsel for the Appellant submitted that DNA profiling is mainly used for exclusion of a person and this procedure cannot be said to be accurate and it depends on the adequacy of laboratory procedures and the competence of experts who performed the tests. For this purpose, he referred Modi's Medical Jurisprudence and Toxicology (Twenty Third Edition), page 542 in which learned author discussed the problems with DNA profiling and observed that the adequacy of laboratory procedures and the competence of the experts who testify, should remain open to inquiry. Learned Counsel also cited Smt. Kanti Devi and Another Vs. Poshu Ram, in which it has been observed that result of DNA test is said to be scientifically accurate but that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act. In that case ultimately Hon'ble Apex Court maintained the judgment of first Appellate Court that the husband had no access or opportunity for sexual intercourse with Defendant No. 1 for more than 280 days before Roshan Lal (Defendant No. 2) was begotten by the Plaintiff. Facts of above case were different therefore, above authority is not helpful to the Appellant.

55. As far as laboratory procedure, and the competence of the expert is concerned, it is true that Expert Dr. Pankaj Shrivastava, Scientific Officer and Assistant Chemical Examiner has not been examined in this case, but his report (Ex. P/26) is admissible in evidence u/s 293 Code of Criminal Procedure. In case prosecution did not think necessary to produce this Assistant Chemical Examiner, then it was open to accused/Appellant to call him for the purpose of testing his competence of performing the DNA profile, if he thought it necessary. In (Ex. P/26) it is specifically mentioned that (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 and Laboratory of Genetic Identification, University of Granada, Spain). It shows that Scientific Officer and Assistant Chemical Examiner of State Forensic Science Laboratory, Sagar were highly qualified persons and DNA Fingerprinting Unit had passed International Quality Control test of DNA Examination.

56. In our country, DNA profile test found reliable, in 1991, in Rajiv Gandhi assassination case, the human-bomb Dhanu's dismembered body parts were established to belong to the same individual by using DNA profiling. Similarly, Shivarasan, the master mind behind the assassination was identified by DNA

profiles. The DNA profiling was also recognized in that sensational Naina Shani murder case in July 1995.

57. In India, at present DNA profiling is done at Centre of DNA Fingerprinting and Diagnostics Unit and in some State Forensic Science Laboratory (FS Ls). CDFD claims that this technology provides exclusion as well as positive identification with virtually 100% precision. The above mentioned facts find place at page 541 of the same Modi's Medical Jurisprudence and Toxicology. The same author commented at page 523 that:

In case of sexual offences, it is a common practice on the part of the medical personnel to collect swabs or smears from the vagina of the victim and the urethra of the accused. The finding of the spermatozoa in the vaginal swabs or smears provides a substantial evidence of recent intercourse. The same may be considered true to a lesser extent in the case of urethral smears or swabs. The detection of X and Y chromatin bodies by fluorescence microscopy of the female leucocytes (in case bleeding occurred) or vaginal epithelial cells and spermatozoa (or their heads) in urethral and vaginal swabs or smears respectively, can considerably extend the scope of providing reliable physical evidence in sexual offences. The detection of the vaginal fluid in stains on the garments or other personal cloth articles of the accused does not seem to have been given the importance it deserves in sexual offence cases. The routine application of specific and highly sensitive methods like electrophoretic isoenzyme methods and fluorescence microscopy is likely to lead to a greater utilisation of stains of vaginal fluid on articles seized for the investigation of sexual crimes.

58. After sincerely scanning and scrutinizing the evidence on record and other circumstances viz:

(i) accused/Appellant Rahul was seen going towards the place of incident, in other word "his presence was established in the vicinity, found proved",

(ii) The blood stained T. Shirt belonging to accused/Appellant was recovered at his instance.

(iii) DNA profile of blood sample of Rahul, Article-A and his nail clippings Article-K were found similar to the male DNA profile found in vaginal smear slide Article-F of deceased Arti.

59. As far as other DNA profile found in the DNA profile of blood stained T. Shirt of Rahul, we are of the opinion that Appellant Rahul was also injured and an abrasion on the base of his right thumb was found by Dr. Ashutosh Pare (P.W. 15). His report is (Ex. P/18-A). In this situation, T. Shirt might have contained blood stains of Rahul and other blood stains of deceased Arti.

60. Therefore, we are of the considered opinion that it has been established beyond reasonable doubt that it was the Appellant who only and none else committed murder of Arti as well as raped her. The trial Court was fully justified in convicting the Appellant for the offence under Sections 376 and 302 of IPC.

The finding of conviction is therefore affirmed.

61. On the question of sentence, learned Counsel for the Appellant submitted that the Appellant was 19 years of age and there is nothing on the record to show that he was having any criminal record and he was a grave danger to the society at large and required to be condemned; it cannot be said to be the rarest of rare case. He relied on *Bantu @ Naresh Giri Vs. State of M.P.*,) and (2001) 2 SCC 28 (*Mohd. Chaman v. State (NCT of Delhi)*).

62. In the present case, there is nothing on record to indicate that the Appellant was having any criminal record nor it can be said that he will be a grave danger to the society at large. It is true that his act is heinous and requires to be condemned but at the same time it cannot be said that it is rarest of the rare case where accused requires to be eliminated from the society. Therefore, looking to the age (about 19 years) of the accused and antecedents, there appears no justifiable reason to impose the death sentence on him.

63. Accordingly, we confirm the conviction of Appellant u/s 302 IPC but modify the sentence by commuting the sentence of death to the imprisonment for life. For the offence u/s 376 IPC, the sentence of rigorous imprisonment for life and fine of Rs. 1,000/- as awarded by the trial Court is affirmed. Both the sentences to run concurrently.

64. In the result, the reference made by the trial Court is accordingly answered. Subject to above modification, for the aforesaid reasons, Criminal appeal No. 515/2010 is partly allowed.