

(2023) 05 MP CK 0111

In the Madhya Pradesh High Court

Case No : Criminal Appeal No.2810 Of 2019, Criminal Reference No.03 Of 2019

Ribu @ Akbar Khan And Others

APPELLANT

Vs

State Of Madhya Pradesh

RESPONDENT

Date of Decision : 03-05-2023

Acts Referred:

Indian Penal Code, 1860 — Section 302, 376, 376(1), 457, 540
Code Of Criminal Procedure, 1973 — Section 161, 164, 174, 293, 313
Evidence Act, 1872 — Section 25, 26, 65B

Citation : (2023) 05 MP CK 0111

Hon'ble Judges : Sujoy Paul, J; Amar Nath (Kesharwani), J

Bench : Division Bench

Advocate : Aditya Khare, Yogesh Dhande, Manish Datt, Nishank Pal Verma

Final Decision : Partly Allowed

Judgement

Sujoy Pau, J

1. This Criminal Appeal and Reference is related to the legality and validity of judgment dated 06.02.2019 passed by learned IVth Additional Sessions Judge, Chhatarpur (M.P.) in Sessions Case No.120/2017 whereby the Court below convicted and sentenced the appellant as under :

Convicted under Sections

Sentenced to undergo

302 of IPC

Death sentence

376(1) of IPC

Imprisonment for Life with fine of Rs.5000/- and in default R.I. for three years.

450 of IPC

R.I. for 10 years with fine of Rs.2000/- and in default additional

R.I. for two years.

With the direction that all sentences shall run concurrently

Prosecution story :-

2. The complainant Badibai lodged 'Dehati Nalishi' (Ex. P/11) on 22.02.2017. She was working as domestic help of Begum @ Munshiyar @ Jahida Begum (hereinafter called as Begum). At around 8:00 PM on 21.02.2017, she served dinner to Begum and thereafter retired in her own room. On 22.02.2017 at around 5:00 AM when she woke up, she found that her door is locked from outside. Her son Arif (12 years) could manage to open the door by inserting his hand in the slit between the two doors. Complainant-Badibai found that the room of Begum was totally opened and the entire room is badly disturbed. The luggage and material of the room were scattered. Begum was lying and there were several injuries on her body. Blood was oozing from the private part of Begum. She could notice that somebody has entered the room of Begum and sexually assaulted her. Begum was so frightened that she was unable to speak properly. The complainant took Begum to Chhatarpur Hospital for treatment. 'Dehati Nalishi' (Ex.P/11) was reduced in writing and FIR (Ex.P/9) in Crime No.66/17 was registered for committing offences under Sections 457, 376 and 323 of IPC.

3. During the course of investigation, Begum was medically examined in District Hospital, Chhatarpur and report (Ex.P/23) was prepared. The dying declaration of Begum was recorded by Executive Magistrate (Ex.P/24). The case diary statement of victim under Section 161 Cr.P.C. (Ex.P/25) was recorded. The necessary samples of Begum including vaginal slides etc. were obtained through Property Seizure Memo (Ex.P/10).

4. Considering the serious condition of Begum, she was transferred to Government Medical College, Gwalior. During treatment, she died on 28.02.2017 at Gwalior. The 'Marg' Intimation (Ex.P/17) was recorded in Police Station Kampu, Gwalior. Because of unnatural death of victim, Ex.P/7 under Section 174 of Cr.P.C. was registered.

5. The Investigating Officer prepared site map (Ex.P/18). The statement of complainant Badibai (Ex.P/9) and Haidar (Ex.P/8) were recorded under Section 164 of Cr.P.C. which were marked as Ex.P/36 and Ex.P/37. From the scene of crime, victim's salwar, bedsheet and 'Kathri' were seized. In addition, sunglasses and button were seized through Ex.P/19. The photographs of scene of crime Article A-1 to Article A-12 were taken.

6. The postmortem of victim was conducted and report (Ex.P/20) was obtained. After completing the formalities, dead body was handed over to the grandson of victim i.e. Nafis Khan.

7. The appellant was arrested through Arrest Memo (Ex.P/6). The appellant's

shirt through Seizure Memo (Ex.P/5) was recovered. The appellant was subjected to medical examination and report (Ex.P/30) was prepared. The appellant's samples through (Ex.P/11) were obtained. His semen slide, underwear, pubic hair and seal of Hospital were seized through Ex.P/11. For DNA test of appellant, Identification Form (Ex.P/12) was prepared and after obtaining his blood sample and seal of the Hospital, the Seizure Memo (Ex.P/13) was prepared.

Patwari prepared site map (Ex.P/22). The seized material was sent to Forensic Science Laboratory (FSL), Sagar through Ex.P/31 to Ex.P/32. In turn, the report of FSL Ex.P/33, Ex.P/34 and Ex.P/35 were received. After completion of investigation, challan was filed. After committal, the matter came up for trial before Sessions Court. The appellant abjured the guilt and accordingly full-fledged trial was conducted.

8. The Court below prepared four points for its determination and opined that in absence of any eye-witness, broadly the case of prosecution is based on five main circumstances namely - (i) the identification of dead body of Begum, (ii) the material collected from the scene of crime, (iii) dying declarations of Begum, (iv) memorandum of appellant and seizure on the basis of such memorandum and (v) DNA report.

Contention of appellant :-

9. Shri Manish Datt, learned Senior counsel/Amicus Curiae submits that there are two dying declarations in the present matter. The first dying declaration is a case diary statement of Begum which was marked as Ex. P/25. Likewise, another dying declaration is Ex.P/29 which was recorded by Shri Abhinav Sharma, Executive Magistrate. By placing reliance on both the dying declarations, learned Senior Counsel submits that the victim clearly mentioned that she was alone in the house. An unknown person entered the house assaulted raped her. In Ex.P/25, she stated that the unknown person was a young man and not an old man.

10. The statement of Sagir Khan (P.W.1) is relied upon to submit that this witness deposed that when he reached the place of incident, Begum was lying naked in an unconscious state. The woman of neighbourhood came there and took her to the Hospital. This witness found that in the room of Begum blood stains were there. The gents sunglasses were lying there. He further deposed that he will be in a position to identify the said sunglasses. In second breath, he stated that Begum informed him that son of Badibai i.e. Ribu/appellant assaulted and raped her. However, in para-9 of cross-examination, he deposed that he came to know from somebody that goggles found at the scene of crime belongs to Ribu. He could not narrate as to from whom he could gather this information. He further deposed that he is not an eye-witness to the incident. In para-7 of cross-examination, he admitted that in his case diary statement he did not inform the Police about information received that Ribu assaulted and raped Begum. Shri Manish Datt, learned Senior Counsel submits that this omission is

fatal to the case of prosecution and creates serious doubt on the alleged oral dying declaration.

11. The statement of PW-1 was relied upon for another purpose. It is submitted that as per this witness, the appellant used to visit the house of Badibai occasionally. For the same purpose, statement of Nafis Khan (P.W.2) was relied upon. This witness also deposed that Badibai was a tenant in the house of Begum. The appellant used to visit Badibai's house. In para-2 of his statement, the witness stated that the victim was lying in a naked condition and the bed and bedsheet were having blood and semen marks. The goggles were found on the scene of crime. He further deposed that he came to know that the goggles found on the scene of crime was of Haidar Khan. Haidar Khan informed him that on 21.02.2017, he had given these goggles to present appellant. In para-5 of his statement, he identified the seized goggles and the same was marked as Article-A. The 'Kathri' was marked as Article-B whereas bedsheet was marked as Article-C. During cross-examination, it was stated that the neighbours informed him that Haidar Khan handed over the goggles to Ribu. He admitted that in his statement recorded under Section 161 of Cr.P.C. (Ex.D/2), if this fact is not mentioned, he cannot assign the reason. He admitted his signatures on dead body Punchnama (Ex.P/2) but pleaded ignorance about the opinion mentioned therein.

12. The statement of Shakil Ahmad (P.W.3) was relied upon only to show that this witness is step son of Begum. Husband of Begum died in the year 1977. Shakil Ahmad (P.W.3) came to know about the incident from Sagir who telephoned him about the incident. He visited the Hospital where Begum was admitted and he found various injuries on the person of Begum. He also came to know that there were injuries found on the private part of the victim.

13. The next witness is Devendra Omre (P.W.4). It is pointed out that he is a witness to the memorandum (Ex.P/4). Learned Amicus Curiae has raised serious objection on the portion of his statement wherein he deposed that in his presence in the Police Station the accused informed the Police that he had committed rape with an old woman and during that course a button of his shirt had broken and fell down. Apart from this, he left her goggles also at the scene of crime. The objection of learned Senior counsel is that certain portion of this statement is not admissible in the light of Sections 25 and 26 of Evidence Act. He placed reliance on the judgment of the Supreme Court reported in Suo Moto Writ (CRL) No(s). 1/2017. It is submitted that learned Court below should not have recorded this piece of statement which is inadmissible in the teeth of aforesaid provisions of Evidence Act.

14. The Seizure Memo (Ex.P/5) was referred to show that the same are signed by two witnesses namely Sachin Sen (P.W.5) and Devendra Omre (PW-4). It was also signed by Arvind Kujur, Inspector, Police Station Civil Lines.

15. The statement of Sachin Sen (P.W.5) was referred to show that his narration is based on the information given by the Police. In the cross-examination, he

admitted that he put his signatures on Memorandum (Ex. P/4), Seizure Memo (Ex.P/5) and Arrest Memo (Ex.P/6) on the dictate of Police. It is canvased that Devendra Omre (P.W.4) and Sachin Sen (P.W.5) both stated that they reached Police Station in order to lodge report about a mobile theft and during their presence, the appellant allegedly admitted about sexual assault etc. The common objection is that this part of evidence was clearly inadmissible. Para-4 of cross-examination was highlighted to show that the information gathered by him is founded upon the information given by the police, thus, it has no evidentiary value.

16. Saurabh Tiwari (P.W.6) is witness to the 'Lash Punchnama' and does not have much significance. Bhagwandas Rai (P.W.7) is the constable who reached the scene of crime with Anjana Patil (S.I.). He stated that from District Hospital, Chhatarpur he received the vaginal slide and seal of the Hospital in a sealed packet on 22.02.2017. He handed over this sealed sample to Head Constable Writer Ramswaroop Rajput. The seizure document is marked as Property Seizure Memo (Ex. P/10). As per this statement, he took appellant to District Hospital, Chhatarpur for his medical examination on 23.02.2017. After conducting the medical examination, semen slide, underwear, pubic hair of appellant were sealed alongwith seal of hospital. The sealed packet was handed over by him to Police Station, Civil Lines which were obtained by Head Constable Writer Ramswaroop Rajput through Property Seizure Memo (Ex. P/11).

17. During cross-examination, he deposed that the samples of appellant were received by him in a sealed condition through Property Seizure Memo (Ex. P/11). He was not aware about the contents of the sealed packet, however, on his own, he further stated that the contents of packet were mentioned on the packet itself. The Seizure Memo (Ex. P/11) shows that Duvesh Kumar (P.W.25) and Ramswaroop Rajput (P.W.23) have signed it in the capacity of witness whereas Ramswaroop Rajput (Head Constable) signed it as Investigating Officer.

18. The statement of Haidar (P.W.8) is relied upon to show that in his brief statement, he made it clear that his goggles were taken by appellant and he will be in a position to identify his goggles. In the second breath, he identified the goggles (Article-A) and clearly deposed that these were taken by Ribu from him a day before the date of incident at around 8-9 PM.

19. Badibai (P.W.9) is an important witness submits learned Senior Counsel. It is submitted that this witness did not support the prosecution story relating to sexual assault. She was declared as hostile. She did not depose that there was any bleeding from the private part of the victim. She also stated that victim in her and Sagir Khan's presence never stated that Ribu has assaulted her. She did not support the prosecution story about recovery of 'Kathri', bedsheet, goggles, salwar and button etc. from the scene of crime. Appellant never used to visit her house and he did not maintain any relation with her.

20. As per prosecution story, Lab Technician R.K. Pateria (P.W.10) had taken the

blood sample of appellant for the purpose of DNA test. Ex.P/12 was prepared in which Dr. M.K. Barsana put his signature. The thumb impressions of appellant are also mentioned in Ex.P/12. This witness also signed on Ex.P/12. In the cross-examination, he stated that he had taken the blood sample but semen sample of appellant was not collected by him.

21. Dr. Paribhashita, Assistant Officer of Medical College, Gwalior entered the witness box and deposed that Begum was admitted in the Hospital on 23.02.2017. She was referred from Chhatarpur District Hospital for treatment. During her treatment, she was on ventilator and was in a very critical condition. She narrated about the injuries on the body of the victim. In the span of five days when she was admitted in the Hospital, she was on ventilator and it was difficult to measure her blood pressure. She died on 28.02.2017.

22. Dr. Preeti Sharma (P.W.12) is the doctor who certified and informed about the death of victim. Mohan Prasad (P.W.13) is the witness who prepared the Marg Intimation. Yagya Prasad (P.W.14) is a Head Constable. As per the testimony of this witness, he visited the scene of crime on 22.02.2017 at 10:50 AM alongwith S.I. Anjana Patil. The site map was prepared in the presence of Baddi @ Badi which was marked as Ex.P/18. In the presence of other witnesses, the blood stains 'Kathri', Salwar, bedsheet and goggles having golden frame were recovered. In addition, blue button of a shirt which had yellow thread in it was also recovered.

23. Learned Senior counsel submits that this witness was not confronted with the goggles during his examination in the Court. Thus, it could not be established that the goggles so recovered by him is the same one which was marked as Article-A. In both the dying declarations, the victim has not taken the name of present appellant.

24. R.K. Pateriya (P.W.10) Lab Technician deposed that blood sample of appellant for DNA examination was taken through Ex.P/12. Arvind Kujur (P.W.30) is the witness to the incident.

25. Dr. Paribhasita (P.W.11) examined the victim and deposed about her health condition and nature of injuries sustained by her. Dr. Preeti Sharma (P.W.12) examined the dead body of the victim. She certified that victim died around 3:10 PM and she promptly informed about the death to Police Station Kampu, Gwalior. She certified the signatures of other officers of the medical department on Ex.P/14 (Bed Head Ticket). The marg intimation was received by Mohan Prasad (PW/13) who was deputed as Head Constable Writer in Police Station Kampu, Gwalior on 28.02.2017. He admitted that cause of death was not mentioned in the 'Marg' Intimation (Ex.P/17).

26. Next witness is Yagya Prasad (PW14) who is a Head Constable. As per this witness, he reached the scene of crime on 22.02.2017 at 10:15 AM. In his presence S.I. Anjana Patil examined the area and scene of crime and a site map was prepared in the presence of Badi @ Azim Bano (PW-9). From the scene of

crime and in the presence of Badi Bai and other witnesses, Anjana Patil recovered a red 'Kathri'. In which there were blood stains. Victim's salwar was recovered which was also full of blood stains. Yellow-black-brown bedsheet was also recovered on which blood stains were there. Male sunglasses having golden frame was also recovered. Apart from this, blue button having yellow thread was recovered. These items were sealed at the spot through Ex.P/19 and Yagya Prasad put his signatures from 'A to A'.

27. Shri Manish Datt, learned Senior Counsel placed reliance on Ex.P/19 and submits that it is a crucial document. Through this document, the recovered bedsheet, clothes, goggle, button etc. were seized. It is submitted that entry against column-5 appears to have been inserted subsequently because writing and size of letters in entry-5 is different. Dr. Nikhil Agrawal (P.W.15) is the Autopsy Surgeon. He described the injuries found on the person of deceased. The cause of death as per this witness is injuries caused on chest, stomach and complications arising thereto. The injuries might have been caused by hard and blunt object. He further deposed that the possibility cannot be ruled out that an aged person like victim is thrown to hard and blunt object and such injuries could be caused.

28. Dr. Sarthak Juglan (P.W.16) was a member of Autopsy Team. He also described the nature of injuries found on the person of deceased. He submits that after autopsy, slide samples were seized and handed over to Saurabh Tiwari (P.W.6).

29. Dr. Arpita Shukla (P.W.18) examined the victim at Chhatarpur and clearly deposed that no definite opinion can be given whether victim was subjected to sexual assault. Bhagwandas (P.W.7) states that upon submission of Dehati Nalishi in Crime No.66/17, the Head Constable Writer lodged F.I.R. (Ex.P/9). District Hospital, Chhatarpur provided sealed packet containing vaginal slide and sample seal of victim to him on 22.2.2017 which was handed over to Constable Writer Ramswaroop Rajput through Ex.P/10. Shri Manish Datt, learned Senior Counsel submits that Ramswaroop Rajput (P.W.23) nowhere states that he did receive any such sample from Bhagwandas (P.W.7). Thus chain of custody of samples could not be established with sufficient clarity.

30. It is pointed out that two sets of slides of victim were prepared. One set was prepared on 22.2.2017 at Chhatarpur by Dr. Arpita Shukla (P.W.18) when victim was under treatment at Chhatarpur whereas two sets of slides were prepared at Gwalior on 01.3.2017 during autopsy of the victim. Patwari (P.W.19) prepared the site map Ex.P/22 on 18.3.2017. Anjana Patil (P.W.20) is signatory to the said site map. The neighbours of the scene of crime were not made witnesses. Anjana Patil (P.W.20) deposed that victim did not take the name of appellant Ribu. This witness is also silent about recovery of slides from Dr. Arpita Shukla (P.W.18).

31. Malkhan Singh who is a Constable Photographer, is a formal witness. Jitendra Singh (P.W.22) is the witness to blood sample process. He was not confronted

with Ex.P/22. Although, he was confronted with Ex.P/13. This witness (P.W.22) informs that Constable Saurabh Tiwari (P.W.6) produced a sealed packet containing Salwar Kurta and two more sealed packets containing her viscera. These were seized through Ex.P/8. Since, the packets were already sealed, no additional seal was affixed in the police station. He further admitted that in column-7 of the 'Marg' Intimation, there is no mention about the injuries on the private part of the deceased. The statement of Jitendra Singh (P.W.22) is relied upon to submit that this witness Jitendra Singh deposed that when he reached blood bank of District Hospital, Chhatarpur, police in-front of R.K. Pateriya, Lab Technician sealed the blood samples and sealed packets were prepared in his presence. In cross-examination, he clearly deposed that in Ex.P/13 whose blood was seized, he cannot depose at all. Thus, the bone of contention of Shri Manish Datt, learned Senior Counsel is that in the entire sample taking and sealing procedure, the prosecution could not establish with clarity that blood sample so taken was of present appellant. In absence thereof, finding of such blood sample cannot be used against the present appellant.

32. Ramswaroop Rajput (P.W.23) was the Malkhana In-charge. Samples were received on 22.2.2017. Saurabh Tiwari (P.W.6) did not mention about safe custody of samples between 22.2.2017 to 24.2.2017. Malkhana Inward Outward Register was not produced to establish safe custody of the samples. Sandeep Singh, a Constable of Cyber Cell entered the witness box but since no mobile was seized, this witness is of no significance. Duvesh Kumar (P.W.25) is the seizure witness of goggles (Article A) (Ex.P/11). Ajay Gupta (P.W.26) stated that on 22.2.2017, he received a sealed packet containing vaginal slide of Begum from Constable Bhagwandas and the same was seized by him in presence of Ramswaroop Rajput and Constable Rajjan. The Panchanama is Ex.P/10. Similarly, on 23.2.2017, samples of appellant obtained from District Hospital, Chhatarpur were received in sealed condition by Constable Ramswaroop Rajput through Ex.P/11. Shri Manish Datt, learned Senior Counsel submits that between 22.2.2017 and 24.2.2017 where samples were kept is not established. The prosecution was obliged to establish that during this period the samples were in safe custody.

33. Prakash Kathya (P.W.27) deposed that he is an independent witness. He runs a tea shop at the gate of District Hospital, Chhatarpur. Police called him and obtained his signatures on the sealed envelopes in the Blood Bank. In the cross-examination, he clearly stated that he does not remember whether appellant was present in the hospital.

34. Sandeep Tiwari (P.W.28) prepared certificates under Section 65-B of Evidence Act. Abhinav Sharma (P.W.29) is an Executive Magistrate who recorded the dying declaration. In the cross-examination, he admitted that the victim did not depose about the appellant that he has caused any wrong with her or even assaulted her. Constable Arvind Kujur (P.W.30) stated that Ribu was summoned during investigation by Police Station Civil Lines, Chhatarpur. He was wearing a yellow

shirt and same was handed over to police and it was seized through Ex.P/4. Under the collar the word 'ALLISTER' was mentioned on the shirt. Two buttons below the collar were broken and missing. There were blood stains on the shirt and shirt was having blue button. The shirt was seized as Article F. This witness further submits that for DNA profiling of appellant, his blood samples were taken by R.K. Pateria, Lab Technician. He prepared a seizure memo in which Arvind Kujur put his signatures. Ex.P/12 is that proforma. The other material collected from scene of crime i.e. Bedsheet, Kathri, Salwar and Buttons were seized through Ex.P/31 and sent to FSL, Sagar.

35. It is pointed out that Arvind Kujur is signatory to Ex.P/12 but did not depose that blood sample of Ribu was taken in his presence. Kujur witness to the seizure process nowhere said that blood sample of appellant was taken in his presence. Thus, a crucial elementary fact of recovery of blood sample from appellant is totally missing which makes the prosecution story unreliable. In other words, it is submitted that 'sample taking procedure' and 'sample sealing procedure' are two different things. Both needs to be established with accuracy and precision. The witnesses in the instant case have nowhere deposed that blood sample for DNA was so taken from appellant. They are witnesses to the sealing procedure. At the cost of repetition, it is urged that when on 22.2.2017 the samples were deposited, how it remained in safe custody till 24.2.2017 is not established. Dr. Himanshi Batham (P.W.31) deposed that examination of appellant shows that there were no injuries on his body. In para-3 of his cross-examination, he accepted that name of appellant is mentioned as 'Biru' in place of 'Ribu'. Question No.60 of statement of Section 313 of Cr.P.C. of appellant is heavily relied upon to submit that appellant has categorically denied that any blood sample was taken from him for the purpose of DNA examination.

36. Shri Manish Datt, learned Senior Counsel / Amicus Curiae further urged that there are basically three incriminating materials on the strength of which appellant was held guilty. Firstly, sunglasses of Haidar which were in the possession of present appellant from a day before the date of incident was recovered from the scene of crime. Secondly, a button of shirt allegedly recovered from same place which belongs to appellant and thirdly, the DNA report.

37. FSL draft dated 24.02.2017 (Ex.P/31) was referred to show that kathri (Article-A), salwar (Article-B) and chadar (Article-C) were sent for FSL which were recovered by ASI Anjana Patil whereas vaginal slide of victim (Article-D) were prepared by Dr. Arpita Shukla (PW- 18). As per Dr. Arpita Shukla, these slides were handed over to ASI Anjana Patil. All these materials were collected on 22.02.2017 and were sent for FSL examination on 24.02.2017. The blood sample of Ribu was taken by Technician Pateria (PW-10). He in his deposition does not say that it was handed over to Constable Kujur.

38. The Identification Form (Ex.P/12) is highly relied upon to submit that Jitendra Singh (PW-22), an independent witness and Arvind Kujur (PW-30) are signatory

to this document. Both of them do not state that blood sample of appellant was taken in their presence.

39. The statement of Lab Technician R.K. Pateria (PW-10) was pointed out to show that blood sample was taken on the request of Station House Officer and on the guidance of Dr. M.K. Barsana. However, Dr. Barsana was not examined. It is strenuously contended by learned Amicus Curiae that this lab technician who has taken blood sample of appellant does not identify the accused in the Court and does not say that blood sample was indeed taken from the accused present in the Court. Thus, chain of events are incomplete and create serious doubt on the prosecution story. Similarly, independent witness Jitendra Singh (PW-22) does not state that he identifies the appellant. Indeed, he submits that he does not know the appellant. Reliance is placed on Para-2 of cross-examination wherein he candidly admitted that he is unable to say anything about the person whose blood sample was taken through Ex.P/13. Arvind Kujur (PW-30) does not state that in his presence blood was taken.

40. The statement of ASI Anjana Patil (PW-20) nowhere shows that she deposited the kathri, salwar, bedsheet in Malkhana of Police Station. No Malkhana Register was produced before the Court below. No Officer in-Charge of Malkhana entered the witness box to talk about the safe custody of the incriminating materials/samples collected on 22.02.2017 and sent for FSL examination on 24.02.2017. Putting it differently, the safe custody of the samples between 22.02.2017 to 24.02.2017 could not be established with necessary clarity.

41. On 24.02.2017, the materials/samples were sent for examination to FSL. After 24.02.2017, no further letter or samples were sent. It is pointed out that there are two sets of samples taken from Begum; one set of samples were collected from the scene of crime on 22.02.2017 and from Chhatarpur Hospital when victim was under treatment whereas another set of samples were collected at Gwalior after the death of the victim.

42. AIR 1980 SC 1314 (State of Rajasthan vs. Daulat Ram) is pressed into service wherein it was held that when sample changed several hands, the entire chain needs to be established with utmost clarity. The possibility of tampering cannot be ruled out. Valsala vs. State of Kerala [1993 Supp (3) SCC 665] is relied upon to show that prosecution was required to establish that during the entire period when samples were lying with the prosecution, it were lying with whom and whether it were in safe custody. The Officer in-Charge was required to be examined. The safe custody of samples for the entire duration was required to be established.

43. The statement of ASI Anjana Patil was referred to show that she recovered certain articles marked from Article-A to Article-E through Ex.P/19. This witness does not state that she handed over the sealed material to any particular Officer/ Constable in the concerned Police Station. In this backdrop, the chain of custody

of the sealed material could not be established by the prosecution.

44. The receipt of FSL, Sagar dated 25.02.2017 was referred to show that sealed articles aforesaid marked as articles 'A to H' were handed over to FSL laboratory by Constable No. 1091 Ghappu Lal. However, Ghappu Lal has not been examined which creates doubt on the chain of custody.

45. The FSL report dated 27.09.2017 (Ex.P-33) was shown to bolster the submission that the shirt of appellant was allegedly sent to FSL by communication dated 24.02.2017. However, the description, thickness and diameter of button allegedly fell down at the scene of crime does not exactly match with the description of other buttons as per this report. The prosecution could not establish with accuracy that the button left out at the scene of crime was the same button which was sent for FSL examination. Reliance is placed on the decision of this Court in Cr.A. No. 839 / 2003 (Anil and Anr. Vs. State of M.P.) to show that the FSL report does not support the story of prosecution, if examined minutely. (2019) 4 SCC 522 (Digamber Vaishnav v. State of Chhattisgarh) was cited to show that the uniqueness of shirt allegedly recovered from the appellant was not established. Similar shirt and buttons are available in the market. Thus, button does not establish any link for commission of crime. 2015 SCC Online MP 357 (Prakash Singh v. State of M.P.) is referred to show that since button was not shown to any witness in the Court, it cannot be said that it is the same missing button which became subject matter of examination by FSL.

46. Furthermore, sunglasses were allegedly seized from the scene of crime on 22.02.2017 by Anjana Patil (PW-20) in the presence of Badibai (PW-9) and Yagya Prasad (PW-14). However, the sunglasses were not shown to these witnesses in the Court in order to establish the identity of the same sunglasses. Nafis Khan (PW-2) although identified the goggles but his name does not find place in the seizure memo of the article. Thus, statement of this witness does not help the prosecution.

47. Criticizing the DNA report and process on the strength of which report was obtained, it is urged that Bhagwan Das (PW-7) submits that he has given the samples to Ramswaroop Rajput (PW-23). However, Ramswaroop Rajput (PW-23) does not say that he received any sample from Bhagwan Das. Arvind Kujur (PW-30) nowhere mentions where blood vile were kept after obtaining the sample from R.K. Pateria (PW-10). The statement of Bhagwan Das (PW-7) was relied upon to show that he received samples of appellant relating to semen, underwear and pubic hairs but no blood samples were received by him. For the same purpose, statement of Duvesh (PW-25) and Ajay (PW-26) were relied upon. Thus, it is strenuously contended by Shri Manish Datt, learned amicus curiae that blood sample of appellant did not reach or kept in the police station.

48. The Supreme Court way back in (1984) 4 SCC 116 (Sharad Birdhichand Sarda v. State of Maharashtra) laid down the 'Panchsheel' principles in cases of circumstantial evidence. The circumstance must be clear, specific and indicate

that appellant and appellant alone 'must have' committed the crime and not 'may have' committed the crime. Recent judgment 2022 SCC Online SC 1007 (Ram Niwas v. State of Haryana) for the same purpose is relied upon. For the purpose of collecting, handling and examination of sample, the judgment of Gujarat High Court in 2009 CriLJ 2888 (Premjibhai Bachubhai Khasiya Vs. State of Gujarat and Anr.), the judgment of Bombay High Court in 2023 SCC OnLine Bom 641 (Suresh v. State of Maharashtra) and recent judgments of Supreme Court reported in (2023) 1 SCC 83 (Rahul v. State (NCT of Delhi) and (2023) 2 SCC 353 (Manoj and Ors. Vs. State of M.P.) were relied upon. It is submitted that collection, custody and examination process in the instant case does not establish the entire chain and therefore, DNA examination report is of no assistance to the prosecution.

Contention of Government Counsel :-

49. Per Contra, Shri Yogesh Dhande, learned Govt. counsel placed reliance on the statements of independent witnesses Devendra Umre (PW-4) and Sachin Sen (PW-5). Both the witnesses deposed that the shirt which appellant was wearing at the time of commission of crime was seized from him in police station itself and one button of the shirt was missing. The shirt was seized through (Ex.P-5) and button was recovered from the scene of crime on 22.02.2017 and sent for FSL examination on 24.02.2017. The report regarding button is dated 27.03.2017. The blood sample of appellant was obtained on 23.02.2017 and it was sent for medical examination on the very next date day i.e 24.02.2017. Thus, there is no delay in sending the blood sample of appellant to the laboratory. The blood sample was taken by R.K. Pateriya (PW-10) who handed over the sample to Arvind Kujur (PW-30). Thus, no doubt can be entertained regarding collection, sealing and sending of the blood sample to FSL. The defence could not establish any kind of animosity of any officer of police department with the appellant and therefore, in absence of any animosity, the case relating to collection of sample and sending it to DNA cannot be doubted. Reliance is placed on (2013) 1 SCC 395 (Sumit Tomar v. State of Punjab), (1995) 5 SCC 518 (Karnel Singh v. State of M.P.) and (1996) 8 SCC 217 (State of Rajasthan v. Kishore).

50. Dr. H. Batham (PW-31) has taken the semen sample etc. and it was handed over to the concerned Constable. Dr. Arpita Shukla prepared two vaginal slides of Begum and handed over the sample to S.I. Anjana Patil. These samples were, in turn, sent to DNA examination. Thus chain of custody is very clear, submits the learned Govt. Advocate. Statement of Nafis Khan (PW-2) is relied upon to show that so far goggles found at the scene of crime is concerned, if his Court statement is examined in juxtaposition to his case diary statement Ex.D-2, it will be clear like noon day that there is no omission / contradiction about availability of goggles at the scene of crime which was identified by him in the Court.

51. Shri Dhande, learned Govt. Advocate also placed reliance on (2009) 17 SCC 208 Abuthagir v. State and urged that the probative value of evidence needs to

be examined by this Court. The defence has not put the concerned prosecution witnesses to cross-examination relating to safe custody of the samples and in absence thereto, their testimony cannot be doubted.

52. The judgment of this Court in ILR [2020] M.P. 495 (DB) (Deepak @ Nanhu Kirar Vs. State of M.P.) was relied upon for the purpose of sentencing policy. 2022 SCC OnLine 480 (Mohd. Firoz Vs. State of Madhya Pradesh) is relied upon to submit that it was also a case of rape. The rape of a 4 year small girl and the Supreme Court considering the heinous nature of crime, confirmed the conviction and modified the sentence.

Rejoinder submission :-

53. Shri Manish Datt, learned Sr. counsel / amicus curiae in his rejoinder submission submits that Devendra Umre (PW-4) did not depose that button of shirt recovered from appellant was missing / broken. Same is the deposition of Sachin Sen (PW-5) In absence of establishing clear chain of circumstances, appellant deserves to be acquitted.

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

55. We have heard the parties at length and perused the record.

Findings :-

56. Dehati Nalishi was recorded by Badibai (PW-9), mother of appellant. She was working as domestic helper in the house of Begum. As per Dehati Nalishi recorded by Badibai (PW-9), the victim was subjected to sexual assault and there was bleeding from her private parts. However, this part of statement was not supported by Badibai (PW-9) in her court statement.

57. The statement (Ex.P/25) under Section 161 of Cr.P.C. of Begum was recorded which may be treated as her first dying declaration whereas second dying declaration (Ex.P/29-A) was recorded by the Executive Magistrate. A comparative reading of both the statements leaves no room for any doubt that they are in tune with each other. The victim stated that she was sleeping on the date of incident and a young person entered her room, physically assaulted her and when victim tried to protect herself, he further abused and assaulted her. She was sexually assaulted/raped because of which she became unconscious and gained consciousness in the hospital. A conjoint reading of Dehati Nalishi and both the dying declarations leave no room for any doubt that incident of assault and rape with the victim had indeed taken place at her residence because of which she sustained several injuries.

58. As per the Autopsy report, following injuries were found on the person of deceased Jahida Begum :-

(1) Contusion present on left side lateral part of left eye with swelling size 3 cm x 1.5 cm.

- (2) Contusion present on floor of chin mid to left side placed obliquely size 6 cm x 2.5 cm with an abrasion present on left side of chin size 1.2 cm x 0.5 cm.
- (3) Contusion with swelling present on left side mastoid region behind ear pinna size 4.5 cm x 3 cm.
- (4) Contused area present diffusely on upper half of chest.
- (5) Contusion present on left side shoulder size 8 cm x 5 cm.
- (6) Infected wound present on proximal right forearm size 3.5 cm x 2.8 cm.
- (7) Contusion with swelling present on right forearm from distal half of hand dorsum size 12.5 cm x 6 cm.
- (8) Infected wound present in vaginal opening at posterior junction of labia majora on inner side extending towards posterior vaginal wall at 6 O'clock position diffusely extending towards left side size 1.2 cm x 0.8 cm.
- (9) Abrasion present on left leg upper half size 2 cm x 1.5 cm.
- (10) Contusion present on left side postero-laterally at part of trunk at chest & upper abdomen size 24 cm x 12 cm.

59. As per the post-mortem report, the death is homicidal in nature and pertinently learned Senior Advocate/Amicus Curiae and Shri Khare, learned counsel for the appellant did not dispute that death of Begum is homicidal in nature.

60. The ancillary question is whether appellant has assaulted the victim and committed sexual assault with her. As noticed above, the case of prosecution hinges around certain circumstantial evidence. The court below based its findings on the following circumstances :- (i) the material collected from scene of crime (ii) the cause of death of Begum (iii) her dying declarations (iv) the memorandum of appellant and seizure based there upon and (v) DNA report.

61. There is no quarrel between the parties that conviction of appellant is based on circumstantial evidence and there is no eye-witness to the incident. The element of oral dying declarations also could not be established. Thus, circumstances on the strength of which appellant was held guilty needs to be examined carefully.

62. By Property Seizure Memo (Ex.P./19) dated 22/07/2017 Ms. Anjana Patil, Sub Inspector in the presence of Badibai (PW-9) and Yagya Prasad seized five articles which were mentioned in the said seizure memo. Shri Datt, learned Senior Advocate suggested that item No.5 which talks about seizure of a blue button has been inserted later-on. However, in the manner this entry is recorded it does not create any doubt nor suggest that item No.5 is an out come of any interpolation. No amount of cross-examination was made by defence in this regard. Thus, we are unable to persuade ourselves with the line of argument that entry No.5 is later-on recorded as an after thought.

63. The blue button is one important material on the strength of which case of prosecution is founded upon. Moreso, when there is a finding in the report (Ex.P/33) dated 27/03/2017 that missing button recovered from the scene of crime is part of the shirt which was recovered from appellant in the police station.

64. Indisputably, this blue button allegedly recovered from scene of crime was not shown to any of the witnesses in the Court. No witness deposed that it was the same blue button which was recovered from scene of crime and which became subject matter of examination by FSL by report dated 27/03/2017.

65. A Division Bench of this Court in CRA No. 839 of 2003 (Anil and another vs. State of Madhya Pradesh) held as under :-

"17. The buttons which were found on the spot were the same button which were missing from the shirt recovered at the instance of appellant Dinesh is also not found to be proved beyond the reasonable doubt as FSL report Ex.P-33 discloses that their radius and thickness were not the same as in comparison with the buttons found on the shirt concerned. In such difference it cannot be inferred that the button found from the spot and the button found missing from the shirt of appellant Dinesh were the same.

18. With regard to aforesaid recovery of the articles one more thing is material. The seized articles have not been produced and got identified before the trial court from any witness of seizure memo including the Investigating Officer. In such circumstance, it cannot be said that the recovered buttons and plastic piece or clothes were the same which were sent for F.S.L and the report of F.S.L is related to the articles which were seized as per the prosecution story."

(Emphasis supplied)

66. In view of judgment of Anil (supra), we find force in the argument of learned Amicus Curiae that said blue button cannot be a reason for upholding the conviction of the appellant.

67. So far goggles is concerned, it was recovered as item No.4 in Property Seizure Memo (Ex.P/19). The said goggle was shown to Nafis Khan (PW-2) who identified the same and stated that it was recovered from the scene of crime. No amount of cross-examination could demolish his statement. Moreso, when his statement is recorded under Section 161 of Cr.P.C. and court statement is in tune. In his case diary statement (Ex.D/2) recorded on 12/04/2017, Nafis Khan (PW-2) in clear terms stated that goggles recovered from Begum's house is owned by Haider Khan who had handed over this goggles to appellant Akber Khan on 21/02/2017. Haider Khan (PW-8) also entered the witness box and stated that said goggles was handed over to appellant by him a day before the date of incident. The cross-examination could not demolish the statement of appellant No.2 and Haider Khan (PW-8). Thus, the prosecution could clearly establish that the golden goggle was given to the appellant by Haider and appellant left the same at the scene of crime which was duly identified by Nafis

Khan. Thus, this circumstance can be used against the appellant.

68. The conviction of appellant is based on DNA examination report. The relevant portion of the report dated 31.03.2017 (Ex. P/34) reads as under :-

Genetic Markers

Article A,B,C and D (A/R6219, 6220, 6221, 6222) Kathri, Salwar,Chadar, V.S.
Spot and Jahida Begam

Article E (A/R-6223) Blood Sample Akbar Khan

Article F

(A/R-6224)

Underwear

Akbar Khan

Article E

(A/R-6225)

Shirt

Akbar Khan

D3S1358

15, 17

16, 16

15, 16, 17

15, 16, 17

TH01

9, 9

7, 9, 3

7, 9, 9.3

7, 9, 9.3

D21S11

28, 31

31.2, 32.2

28, 31, 31.2, 32.2

28, 31, 31.2, 32.2

D18S51

15, 16

13, 14

13, 14, 15, 16

13, 14, 15, 16

Penta E

5, 21

11, 12

5, 11, 12, 21

5, 11, 12, 21

D5S818

11, 13

11, 11

11, 13

11, 13

D13S317

8, 12

9, 13

8, 9, 12, 13

8, 9, 12, 13

D7S820

11, 11

11, 12

11, 12

11, 12

D16S539

9, 12

10, 11

9, 10, 11, 12

9, 10, 11, 12

CSF1PO

11, 12

11, 12

11, 12

11, 12

Penta D

8, 11

11, 14

8, 11, 14

8, 11, 14

vWA

18, 20

17, 18

17, 18, 20

17, 18, 20

D8S1179

10, 12

11, 15

10, 11, 12, 15

10, 11, 12, 15

TPOX

9, 12

8, 11

8, 9, 11, 12

8, 9, 11, 12

FGA

22, 24

25.2, 26

22, 24, 25.2, 26

22, 24, 25.2, 26

AMELOGENIN

XX

XY

XY

XY

69. As noticed above, learned Sr. counsel has strenuously contended that DNA report does not improve the case of prosecution because the sample and custody procedure was faulty in the instant case.

70. In support of his contention he placed reliance on the recent judgment of Supreme Court in the case of Rahul (supra). The judgment of Rahul (supra) is in tune with another recent judgment of Supreme Court in (Manoj and Ors. v. State of M.P.) 2023 2 SCC 353. The collection and preservation of sample is the facet on which argument of learned Sr. counsel is based. For the same purpose, learned Sr. counsel has placed reliance on judgments of High Courts in 2023 SCC Online Bom 641 (Suresh v. State of Maharashtra), 2009 CriLJ 2888 (Premjibhai Bachubhai Khasiya Vs. State of Gujarat and Anr.), State of Gujarat v. Jayantibhai Somabhai Khant, 2015 SCC OnLine Guj 6356.

71. If the factual background of the above judgments cited by learned Sr. counsel are examined it will be clear that in those cases there was sufficient time gap between collection of blood sample and sending the sample to FSL examination. In the instant case, the blood sample of appellant was collected on 23.02.2017 and it was sent to the FSL on the very next day i.e. on 24.02.2017. For example, in the case of Rahul (supra), the samples were collected on 14/02/2012, 16/02/2012 and were sent to FSL on 27/02/2012.

72. So far collection process is concerned, the blood sample of appellant was taken by R.K. Pateria (PW-10). In his deposition, the lab technician (PW-10) clearly deposed that he was posted in blood bank of District Hospital, Chhattarpur on 23.02.2017. On the said date, he took the sample of appellant on the request of SHO, Civil Lines and Dr. M.K. Barsana. The blood sample was taken in EDT test tube and was duly sealed in an envelope. The identification form (Ex. P/12) was prepared which contains his signature. He clearly mentioned that blood sample of appellant was obtained by him and he did not obtain the semen sample of appellant. In view of statement of R.K. Pateria (PW-10) who had taken the sample of appellant and who has proved the Identification Form (Ex.P/12), we do not entertain any doubt regarding collection of blood sample from appellant which was duly sealed by R.K. Pateria (PW-10).

73. Arvind Kujur, Inspector (PW-30) clearly deposed that appellant was sent for medical examination to District Hospital Chhattarpur. His blood sample was preserved for DNA profile. The sealed blood sample was handed over to him by R.K. Pateria, Lab Technician (PW-10) through Ex. P/13. DNA proforma (Ex. P/12)

was also proved by him which contains his signature. In para 3 of his deposition, Arvind Kujur (PW-30) deposed that the blood sample and other materials of appellant No. 3 were sent to FSL laboratory through SP's letter No. 3/17 dated 24.02.2017. Thus, in our considered opinion, the prosecution could establish beyond reasonable doubt that blood sample of appellant was duly collected and sealed by R.K. Pateria (PW-10) through identification form (Ex.P/12) Which was handed over to Shri Arvind Kujur,. Arvind Kujur, informed that said sample was sent for FSL laboratory on very next day i.e. on 24.02.2017. No amount of cross examination was made by the defence to Arvind Kujur regarding the sampling procedure and relating to time gap for sending the sample to FSL laboratory. Since, blood sample was sent for examination on very next day and there exists nothing to suggest that during this period sample was not in safe custody, no doubt can be entertained about safety of the sample.

74. So far statement of Bhagwandas (PW-07), Duvesh Kumar (PW-25) and Ajay Gupta (PW-26) are concerned, suffice it to say that these officers were not involved in the matter of collection of blood sample of appellant. They are related with different set of samples, namely semen, underwear, pubic hair and sample seal and therefore, if they have not deposed about collection of blood sample, it would not cause any dent on the prosecution story. At the cost of repetition, in our opinion, the blood sample was duly proved to be collected by the R.K. Pateria (PW-10) who sealed it in his presence and handed over it to Arvind Kujur (PW-30). Apart from this, no enmity is alleged against R.K. Pateria (PW-10) or Arvind Kujur (PW-30) by the defence. The Apex Court in Sumit Tomar vs. State of Punjab, (2013) 1 SCC 395 held as under :-

"10. In order to substantiate its claim, the prosecution examined Shri Lakhwinder Singh, Head Constable as PW 1; Shri Devinder Kumar, owner of the car as PW 2; Shri Gurdeep Singh, Assistant Sub-Inspector of Police as PW 3; and Shri Mohan Singh, Head Constable as PW 6. The Special Court as well as the High Court, on going through the evidence of the abovementioned official witnesses and the documents, namely, FIR, seizure memo, FSL report, etc. accepted the case of the prosecution. Even before us, the learned Senior Counsel for the appellant took us through the evidence of the abovementioned prosecution witnesses and the connected materials. In a case of this nature, it is better if the prosecution examines at least one independent witness to corroborate its case. However, in the absence of any animosity between the accused and the official witnesses, there is nothing wrong in relying on their testimonies and accepting the documents placed for basing conviction. After taking into account the entire materials relied on by the prosecution, there is no animosity established on the part of the official witnesses by the accused in defence and we also do not find any infirmity in the prosecution case. It is not in dispute that the present appellant (A-2) was driving the car in question which carried the contraband. PW 2, owner of the car was also examined and proved its ownership and deposed that Sumit Tomar demanded the said car for personal use. In view of the above discussion, we hold that though it is desirable to examine an independent

witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statements cannot be faulted with.”

(Emphasis supplied)

75. The blood sample of appellant in a sealed condition reached the Forensic Science Laboratory. The DNA report dated 31.03.2017 contains a finding that sealed packets were received on 25.02.2017 through Constable Ghappu Lal. All the sealed packets were intact.

This report dated 31.03.2017 (Ex.P/33) is admissible in evidence as per Section 293 of Cr.P.C. Thus, right from taking the blood sample of appellant till its receipt in the Forensic Science Laboratory, Sagar, the purity of the process is beyond any pale of doubt. As discussed above, the chain of events/circumstances are dully established by the prosecution before the Court below and hence the judgment cited by learned Amicus Curiae are of no assistance to him.

76. We are constrained to observe that in cases where the time gap between collection of blood sample and sending of blood sample is wide, the prosecution needs to establish that sample was in safe custody during this period. In the instant case, no amount of cross-examination was made to Arvind Kujur (PW-30) or to any other officer relating to safety of the sample. Thus, in our opinion, prosecution could establish its case with certainty that blood sample of the appellant was indeed taken, sealed and was sent to FSL laboratory with quite promptitude within a period of almost 24 hours. The DNA is a scientific report and conviction can be based on said DNA report. See Division Bench judgment of this Court In Reference (Suo Moto) vs. Yogesh Nath) reported in 2021 SCC Online M.P. 1628.

77. In view of foregoing discussion, the prosecution could establish that the black glasses recovered from scene of crime were same glasses which were left by the appellant at the scene of crime and the same were identified in the Court by Nafis Khan (PW-2). Similarly, the prosecution has established that blood sample of appellant was collected, sealed and sent for DNA test and DNA report of laboratory is against him. The appellant in his statement recorded under Section 313 of CR.P.C. baldly denied about collection of blood sample but did not dispute his photograph and signature on identification form (Ex.12). These important circumstantial evidence undoubtedly establish that the appellant has brutally assaulted and raped an old lady aged about 75-80 years.

78. In other words, we are inclined to give our stamp of approval to the conviction of appellant for committing offence under Sections 302, 376(1) and 540 of IPC. The ancillary question is whether the Court below has imposed adequate sentence on the appellant or not.

79. In the instant case, considering the heinous nature of crime, the Court below has directed to impose death sentence on the appellant. The Apex Court way

back in *Bachan Singh Vs. State of Punjab* (1980) 2 SCC 684 and *Machhi Singh and others Vs. State of Punjab* (1983) 3 SCC 470 laid down the principles for the purpose of deciding the quantum of sentence. The mitigating circumstances and aggravating circumstances need to be looked into while deciding the quantum of penalty. The Apex Court also laid down the 'crime test', 'criminal test' and 'R-R test'. This Court considered these aspects in great detail in ILR 2023 MP 353 (In reference *Vs. Ramnath Kewat @ Bhursoo*).

80. In the instant case, the mitigating circumstances against the appellant are - (i) it is not shown that appellant has any criminal record, (ii) the rape was outcome of personal lust, (iii) the sexual assault which resulted into death was not shown to be outcome of any premeditation and it was done by accused in spontaneity. (iv) the crime was not committed to terrorize or harm a particular or larger section of society.

(v) no weapons were used. (vi) the accused is a young person aged about 25 years.

81. The aggravating circumstances are that - (i) victim was an old lady aged about 75-80 years, (ii) victim was in a defenseless and unprotected state. (iii) it was a case of abuse, assault and rape of a helpless old lady.

82. This Court in ILR 2023 MP 353 (In reference *Vs. Ramnath Kewat @ Bhursoo*) prepared a tabular note relating to judgments of Supreme Court in which death sentence are affirmed and also the cases where it is commuted to life imprisonment. The said chart is reproduced for ready reference:-

83. Learned Government counsel relied on a recent judgment of Supreme Court in *Mohd. Firoz (Supra)* in which a small girl of four years was brutally assaulted and raped by appellant therein. While affirming the conviction of appellant for the offences charged against him, the Supreme Court commuted sentence of death to the sentence of imprisonment for remainder of natural life for offence punishable under Section 302 IPC. In the facts and circumstances of this case, we deem it proper to follow the same course and while affirming the conviction, deem it proper to commute the sentence, considering the gravity and seriousness of offence to the sentence of imprisonment for the remainder of appellant's natural life.

84. Consequently, the impugned judgment of conviction is affirmed. The death sentence imposed under Section 302 of IPC stands modified to the sentence of imprisonment for remainder of appellant's natural life.

85. We answer the reference accordingly and the appeal is partly allowed to the aforesaid extent.