IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
JUSTICE SUJOY PAUL
&
JUSTICE ACHAL KUMAR PALIWAL

CRRFC No.05 OF 2019

Between :-

IN REFERENCE
RECEIVED FROM SPECIAL JUDGE (PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012) BURHANPUR (M.P.)

…..APPELLANT

(*BY SHRI AJAY GUPTA, SENIOR ADVOCATE WITH SHRI RAJEEV MISHRA- ADVOCATE AS AMICUS CURIAE*)

AND

VIJAY @ PINTIYA,

….RESPONDENT

(*BY SHRI LAXMI NARAYAN SAKLE – ADVOCATE*)

CRIMINAL APPEAL No.2680 OF 2019

Between :-

VIJAY @ PINTIYA,

….APPELLANT

(*BY SHRI LAXMI NARAYAN SAKLE – ADVOCATE*)

AND

STATE OF MADHYA PRADESH: THROUGH THE POLICE STATION SHAHPUR, DISTRICT BURHANPUR, M.P.

….RESPONDENT

(*BY SHRI AJAY SHUKLA- GOVERNMENT ADVOCATE*)

(*SHRI AJAY GUPTA, SENIOR ADVOCATE WITH SHRI RAJEEV MISHRA- ADVOCATE AS AMICUS CURIAE)*

Reserved on : 16/6/2023

Delivered on : 21/6/2023

This Criminal Appeal and Criminal Reference having been heard and reserved for judgment, coming on for pronouncement this day, ***Justice Sujoy Paul*** *pronounced the following :*

J U D G M E N T

This Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, 1973 and the Criminal Reference assail the judgment dated 08.03.2019 passed by Special Judge (Protection of Children from Sexual Offences Act, 2012), Burhanpur in Special Sessions Case No.30/2018 whereby the appellant was held guilty for committing certain offences and directed to undergo sentences which are mentioned in tabular form as under :-

Serial No.	Conviction under Sections	Sentenced to undergo
1.	363 of the I.P.C.	R.I. for seven years and fine of Rs.2000/-, in default to suffer R.I. for 3 years.
2.	366 of the I.P.C.	R.I. for ten years and fine of Rs.2000/-, in default to suffer R.I. for 3 years.
3.	376(2)(m) of the I.P.C.	Life imprisonment and fine of Rs.2000/-, in default to suffer R.I. for 3 years.

4.	376AB of I.P.C. (Amendment Act 2018)	Capital punishment and fine of Rs.2000/-, in default to suffer R.I. for 3 years.
5.	302 of IPC	Capital punishment and fine of Rs.2000/-, in default to suffer R.I. for 3 years.
6.	201 of I.P.C.	R.I. for seven years and fine of Rs.2000/-, in default to suffer R.I. for 3 years.
7.	5(i)(k)(m)(r) read with 6 of POCSO Act, 2012.	Life imprisonment and fine of Rs.2000/-, in default to suffer R.I. for 3 years.
With the direction that all sentences shall run concurrently.		

Factual Background :-

2. Draped in brevity, the case of prosecution is that father of victim, a resident of village Mohad alongwith his wife went to work in his agricultural field. The victim aged about 3 years went with her grandmother to answer the call of nature in-front of his house. The grandmother while permitting the victim to answer the call of nature came to the house to attend another granddaughter. After about 15 minutes at around 11 AM on 15.8.2018 when she returned back to the place where victim was leftover by her, she could not trace her. She immediately informed the parents of the victim and other neighbours/villagers. A '*Gum insan*' Report was lodged. In turn, police called a dog squad and the trained dogs after sniffing the clothes and slippers of victim, travelled on *kachcha* roads of the village and thereafter stopped at one place. The police searched various places to recover the victim. On 18.8.2018 at Bambhada Road which is at the distance of one kilometer, the dead body of victim was found by passerby Sayed Jalil and Sharif Shah. Another witness Kalyan Singh Rajput informed the villagers about the dead body of the victim near *Chindiya Nala*.

3. In turn, 'Merg' Intimation was recorded. The short post mortem (PM) of victim was followed by a detailed post mortem by a team of doctors. In view of post mortem report, offences under Sections 366A, 376(2)(m), 376AB, 302 and 201 of IPC were added.

4. During the investigation, appellant was found to be of suspicious character and was arrested on 23.8.2018. As per the prosecution story, the appellant used to keep an evil eye on the minor girls of the village. In addition, it is alleged that he had unnatural sex with a buffalo. Appellant married twice but both the marriages became unsuccessful. During interrogation of appellant, certain bruises were found on the forehead and cheeks of the appellant. The defence of appellant was that he sustained such injuries in a vehicle accident. The appellant was examined by the doctor and as per his opinion, the said bruises could have been caused by nails and not because of any motorcycle accident. The prosecution upon receiving this report of doctor, obtained permission from Sub Divisional Officer (SDO), Burhanpur to recover the dead body of victim which was buried few days back so that sample of nail cuttings of victim can be taken and sent for examination. The nails of victim were collected and sent to Forensic Science Laboratory (FSL). As per the case of prosecution, the appellant took the victim with him to his house, sexually assaulted her and murdered her and thereafter, thrown her dead body to the place from where the dead body was recovered.

5. As per the story of prosecution, a diary was recovered from the appellant in which he has recorded certain *tantra mantra* to fulfill his lust. The appellant after committing the said crime, went to village

Bada Bagoda (Maharashtra) and met with one Narmada Das Bairagi Baba. He had long conversation on cell-phone with Narmada Das Bairagi and tried to get some *tantrik* solution of the crime he had committed. About this conversation, a statement was made by Narmada Das Bairagi which was treated to be appellant's extra judicial confession.

6. After the investigation, chalan was filed on 20.9.2018. Appellant abjured the guilt and pleaded innocence. Learned Court below framed seven questions for its determination and recorded statements of 52 prosecution witnesses. None appeared the witness box on behalf of the defence. The DNA report suggests culpability of appellant. After recording the evidence and hearing the parties, the impugned judgment is passed which is called in question in this reference and appeal.

Contention of learned *Amicus Curiae* :-

7. Shri Ajay Gupta, learned Senior Advocate assisted by Shri Rajeev Mishra submitted that two *Dehati Nalishi's* were recorded relating to 'missing person' and kidnapping whereas only one such *Dehati Nalishi* could have been recorded. Since, victim was found missing on independence day (15.8.2018), there was no clue or occasion for the complainant to lodge a report relating to kidnapping. The dead body of victim was found in a decomposed state on 18.8.2018.

8. In nutshell, the argument of learned senior counsel is that actually the evidence of prosecution is based on (i) alleged confession of appellant, (ii) extra-judicial confession to Narmada Das (iii) last

seen theory (iv) conduct of appellant and (v) DNA report dated 16.8.2018. The DNA report does not help the prosecution so far examination of nails of victim are concerned. In other words, it could not be established that the injuries found on the face of appellant were outcome of nail marks of victim. The DNA report is based on the blood stains on the frock of the victim. Shri Gupta submits that he would establish meticulously that prosecution could not establish that the said frock was of the victim.

9. To elaborate, it is submitted that *Naksha Panchayatnama* (Ex.P/8) dated 18.8.2018 is the first written document after recovery of dead body of victim. As per Ex.P/11 i.e. property seizure memo, the frock of victim was found at a distance of 15 feet from her dead body.

10. The DNA report dated 16.10.2018 is relied upon to contend that in the Vaginal Slide (H), Perineal Slide (I) and Anal Slide (J), no male DNA profile could be detected. Thus, it is strenuously contended that there is no iota of evidence to establish that victim was subjected to rape/sexual assault. Moreso, there was only a suspicion expressed about the sexual assault and it was decided to be referred for further examination. Apart from DNA report, there was no other report shown in further examination. Thus, prosecution could not establish that victim was subjected to sexual assault, therefore, relevant sections of IPC and POCSO are clearly inapplicable.

11. Criticizing the last seen theory, it is submitted that father of victim (P.W.1) clearly admitted in his statement that appellant resides opposite to his house. Para-10 of his cross-examination was pressed into service to show the actual reason for taking the name of appellant.

For the same purpose, statement of grandfather of victim (P.W.2) was relied upon and para-12 of his cross-examination was referred.

12. Statement of grandmother of victim (P.W.3) was relied upon to show that within 15 minutes, the victim became non-traceable. The statement of mother of victim (P.W.4) is referred by learned *Amicus Curiae* to contend that it is in the same line in which her husband has deposed.

13. It is submitted that father of victim clearly admitted that appellant himself accompanied them for the purpose of search of victim continuously for three days i.e. 15.8.2018, 16.8.2018 and 17.8.2018. No witness deposed that victim was last seen with the appellant. If appellant resides just opposite to the house of victim, this cannot be a ground to apply the last seen theory.

14. The statement of Kiran (P.W.6) is relied upon to show that at the time of incident there were only three persons namely Kiran, grandmother of victim and the victim on the road. Nobody else was there on the road. This witness also stated that appellant accompanied the search team on 15.8.2018, 16.8.2018 and 17.8.2018.

15. It is argued by learned senior counsel that statement of Manisha (P.W.7) and Kalyan Singh (P.W.8) are not of much significance.

16. The testimony of Vaishali (P.W.9) is relied upon to submit that she pleaded ignorance about the actual incident. Statement of Gopal (P.W.10) is relied upon to show that on 15.8.2018 at around 10:30 AM '*Dhwaj Pranam*' function was going on in which appellant was

present. For the same purpose, statement of Krishna (P.W.11) was relied upon.

17. The statement of Shriram (P.W.12) was criticized by contending that this witness and Subhash (P.W.13) and Sitaram (P.W.16) entered the witness box to depose against the appellant regarding his past conduct. None of these witnesses ever lodged any complaint in the police station about conduct of the appellant. The statement of P.W.16 relating to unnatural sex with buffalo which is a hearsay evidence and is not worthy of credence. Shivram P.W.15's statement is relied upon to submit that in para-10 of his cross-examination, he admitted that he deposed his statement on the instruction of police. The statement of Narmada Das Bairagi (P.W.21) is referred to show that statement of this witness cannot be treated as extra-judicial confession by the appellant before him. He candidly admitted that if police would not have approached him, he would not have informed police about the conversation took place between him and the appellant.

18. The statement of Dr. Abhishek Jain (P.W.22), Dr. Gaurav Thavani (P.W.24) and Dr. Vandana Chouksey (P.W.25) who were members of the post mortem team were relied upon to contend that no definite finding about commission of rape/sexual assault could be given by the team members.

19. Dr. Ambar Joshi (P.W.27) examined the appellant and as per examination of injury, he submitted that injury might have been caused on 14.8.2018 whereas incident has taken place on 15.8.2018. For the same purpose, statement of Dr. Y.B. Shashtri (P.W.28) was relied upon.

20. Heavy reliance is placed on the statement of Dharmendra (P.W.33), a police photographer, who deposed that in the photograph of frock of victim (Article-7) there exists no marks of black stains or black circles or black design. Statement of Investigating Officer Girvar Singh (P.W.47) was relied upon to submit that as per para-16 of his deposition, the story is based upon statement of appellant recorded under Section 27 of Indian Evidence Act. The said statement of appellant is not admissible. Reliance is also placed on para-41 of his cross-examination wherein this witness candidly admitted that appellant had no criminal record. The Spot Map (Ex.P/19) is referred to show that the place from where victim went missing is surrounded by various houses and huts. In broad day light it was not possible to commit such offence. Nobody has seen the appellant with victim. In para-47 of this statement, IO admitted that in the spot map prepared by FSL Officer, it is mentioned that white frock was found at a distance of 45 feet from the dead body whereas it was not found at that distance and FSL Officer without actually measuring the distance recorded the distance on the basis of his assumption. In para-47, this witness deposed that in the report prepared by him, he did not mention that white frock had black stains, black circles and black design on it. He also admitted that no blood stains could be traced by him on the frock.

21. Learned senior counsel has taken pains to contend that there exists no photograph of seized frock of victim. He prayed that 'Article A-11' may be examined by this Court to examine the correctness of his contention. Article-26 is photograph of the victim when she was alive wearing a frock which has blue dots on it.

22. Furthermore, learned Amicus Curiae submits that in the teeth of Section 54 of Evidence Act, the previous conduct is of no relevance. The character of appellant was not an issue and therefore, any evidence led on this aspect is of no assistance.

23. Shri Ajay Gupta, learned Senior Advocate further urged that there are three places which are important for deciding the culpability of the appellant. The first place is where victim went to answer nature's call in front of her house. Second is the '*Bada*' of appellant where sexual assault and murder had allegedly taken place and third is '*Nala'* where dead body of victim was found. It is submitted that appellant was not last seen with the victim by anybody. Since, appellant resides in front of victim's house, his presence (if any) in the house or in front of house does not bring it within the ambit of 'last seen theory'.

24. So far *'Bada'* is concerned, it is strenuously contended that no amount of investigation had taken place in relation to said *Bada*. No incriminating material or suspicious circumstances relating to *Bada* is established. Near *Nala* body of victim was recovered but same does not connect the appellant with that of commission of crime.

25. Extra judicial confession is a weak piece of evidence is the next contention of learned Amicus Curiae. It is submitted that Narmada Das Bairagi (PW-21)'s statement was recorded on 27/08/2018 under Section 164 of Cr.P.C. The same was followed with his court statement recorded on 22/10/2018. By taking this court to both the statements, it is urged that both the statements by no stretch of imagination show involvement of appellant in sexual assault and murder of the victim. It is not safe to rely on this extra judicial confession at all. Reliance is placed on **(2012) 11 SCC 768 Tarakant Singh vs. State of Bihar and**

another and **(2012) 6 SCC 403 Sahadevan and another vs. State of Tamil Nadu** to bolster the submissions that this weak piece of evidence without there being any corroboration must be discarded. Narmada Das Bairagi (PW-21) is a planted witness submits learned senior counsel.

26. (2002) 1 SCC 679, Sudama Pandey and others vs. State of Bihar is relied upon to submit that the chain of circumstances must be clearly established. Conviction can be recorded, if no other conclusion is possible. Suspicion and conjectures cannot take the place of proof. There is a reasonable likelihood of innocence of the appellant.

27. Criticizing the DNA report, it is submitted that it is highly doubtful whether frock examined by scientist is the same which was allegedly recovered from the scene of crime. To conclude, learned Amicus Curiae submits that commission of rape is not established. Dr. Gaurav (PW-24) admitted that strangulation and death can take place if a small girl like victim gets suffocated in any stem/bush. Lastly, it is submitted that the factors/pointers available in the instant case are more in favour of acquittal than culpability of appellant. Capital punishment cannot be imposed in a cases like present one where a bad investigation led to a bad conviction.

<u>Contention of Appellant Counsel</u> :-

28. Shri Sakle, learned counsel for the appellant borrowed the aforesaid arguments of learned Amicus Curiae and, in addition submitted that appellant being a RSS worker was falsely implicated. For this purpose, statement of Kailash (PW-1) (para-10) and Deval Singh (PW-2) (para-12) were relied upon.

29. Shri Sakle, learned counsel for the appellant further submits that the frock of victim was allegedly recovered on 18.8.2018 through Ex.P/64. Two slides relating to private part of the victim were sent to FSL promptly on 16.10.2018, whereas frock was sent on 24.8.2018. No explanation came forward on the part of the prosecution as to why the frock was not sent between 18.8.2018 and 24.8.2018.

30. The DNA report can not be used against the appellant, is the next contention based on the statement of the appellant recorded under Section 313 of Cr.P.C. It is submitted that no question at all was asked to the appellant relating to DNA report or incriminating part thereof. In absence thereof, the FSL report is of no assistance to the prosecution.

31. The DNA report is based on a frock of victim allegedly recovered from the spot. Deval Singh (PW-2) (father of the deceased) deposed that the victim was wearing a blue frock whereas the frock allegedly recovered was white frock having black spots on it. Thus, it is highly doubtful whether the frock examined by the Scientist is the same frock which the victim was wearing.

32. Ex.P/8 is relied upon to show that it relates to identification of dead body of victim which was not wearing any clothes. Thus, victim's frock was not admittedly recovered from her dead body.

33. Shri Sakle, learned counsel for the appellant referred PW-3's statement to show that the appellant was allegedly standing beneath a *neem* tree. In Paras-5 and 6 of his deposition, this witness admitted that in the case diary statement, he did not depose that the appellant was standing beneath the said tree. This important omission/contradiction creates serious dent on his statement.

<u>Stand of Prosecution</u> :-

34. *Per contra,* Shri Ajay Shukla, learned Government Advocate for the State submits that Exhibit P/19 is the spot map prepared by Ranjeeta Patwari (PW-23). The spot map contains description of three places. The place from where deceased went missing, the place/'bada' where incident of rape/murder had taken place and the place from where the body was recovered. The spot map clearly describes about all the three places.

35. The reliance is placed on Section 27 memorandum of appellant and the findings given by the Court below in Para-88 of the impugned judgment wherein on the basis of admission/declaration of the appellant, the Court below opined that the admission so made under Section 27 of the Evidence Act, is admissible. He supported the impugned judgment based on same reasoning.

36. The cause of death as per stand of Dr. Gaurav Thavani (P.W.24), Dr. Vandana Chouksey (P.W.25), Dr. Darpan Dhoke (P.W.26) is asphyxia and all the above doctors clearly stated that the possibility of sexual assault cannot be ruled out. It is more relevant because statement of (PW-27) who examined the appellant is clear which shows that there were injury marks/bruises on the face of the appellant. Such bruises must have arised because of the struggle made by the deceased when she was sexually assaulted and murdered by the appellant.

37. The statement of (PW-1) is relied upon to submit that the appellant used to sit on the *"*Otla*"* in front of the place of incident. (PW-3) deposed that he was found standing beneath the '*Neem Tree'* on the date of incident. Similarly, statement of (PW-13) is relied upon to submit that appellant was standing in-front of Kailash's house. By

cumulatively reading these statements, learned counsel for the State supported the finding of Court below, wherein Court below applied the last seen theory.

38. The next contention of Shri Ajay Shukla, learned Government Advocate is based on extra-judicial confession made by appellant to Narmada Das (PW-21). By reading the entire statement of Narmada Das, coupled with the statement of Shri Shivram (PW-15), Shri Shukla urged that the statement of Narmada Das was in-fact corroborated by statement of Shivram. Since Narmada Das had no enmity with appellant and he voluntarily gave the statement to Narmada Das, there is no reason for not believing the said statement/extra-judicial confession. Moreso, when call details mentioned in Article 61 clearly shows that on 18.08.2018 at 9:40 a.m., the appellant had a conversation with Narmada Das (PW-21) for 217 seconds. This is further corroborated by Aman Deep Gupta (PW-52).

39. Learned Government Advocate also placed reliance on the DNA report because Court below held the appellant guilty because of said DNA report. It is urged that DNA report conclusively shows that in the frock of deceased, the samples of appellant were found. In order to show that the frock of appellant was clearly identified, he placed reliance on Ex.P/11 whereby the frock was recovered. The frock was sent by S.P. to FSL on 24/08/2018. In turn, the DNA report dated 16/10/2018 was received and this scientific report makes it clear that in the frock which is marked as ‘K’, the allele of appellant were found similar. Heavy reliance is placed on the ‘opinion’ part of the DNA report.

40. In order to support his contention, learned Government Advocate also placed reliance on the statement of grandfather of deceased (PW-2) who gave description of the frock. For the same purpose, statement of Dharmendra (PW-33), Investigating Officer Girdhar Singh (PW-47) and statement of police Photographer Dharmendra (PW-33) were relied upon. Shri Ajay Shukla, Government Advocate has physically perused the photographs from original record which were marked as different articles. The photographs were taken and proved by Dharmendra (PW-33).

41. Lastly, Shri Ajay Shukla placed reliance on various paragraphs of the judgment and submits that Court below has not committed any error of fact or law in applying the last seen theory, in taking into account the past conduct of the appellant, by accepting his memorandum statement (Ex.-P/34) as confession (recorded under Section 27 of the Evidence Act). Since, it is a case of gruesome murder and sexual assault on a small child aged about three years, Court below has rightly inflicted the capital punishment and no fault can be found in the impugned judgment. Shri Shukla filed 'synopsis' and judgment of this Court in **Criminal Reference No. 5 of 2015 (In Reference Vs. Sachin Kumar Singhraha** decided on **03.03.2016**).

<u>Rejoinder submission</u> :-

42. Shri Sakle, Advocate in his rejoinder submission placed reliance on **2015(4) Crimes 366 (SC) (Ram Sunder Sen and another vs. Narender @ Bode Singh Patel)** to submit that in the light of Sections 53 & 54 of Evidence Act coupled with the fact that accused made no effort to prove his previous good character nor the same was in

question, the reliance on past conduct is insignificant and cannot be taken into account.

43. On extra judicial confession, he placed reliance on **AIR 2015 SC 3686 Vijay Shankar vs. State of Haryana.** At the end, Shri Sakle by placing reliance on **AIR 2013 SC 3817 Sujit Biswas vs. State of Assam** urged that when a very important incriminating material i.e. DNA report was not confronted with the appellant during questioning under Section 313 of Cr.P.C., the said material cannot be used against the appellant.

44. The parties confined their arguments to the extent indicated above.

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

Findings :-

Prosecution's case is based on circumstantial evidence :-

46. Indisputably, in the instant case, there is no eye-witness to the incident. As noticed above, the victim, a child aged about three years went in front of her house to answer the call of nature with her grand-mother. The grand-mother left her at that place for about fifteen minutes. When she came back, the victim was not there. The dead body of victim was found on 18.8.2018, whereas she was found missing on 15.8.2018.

47. The case of prosecution is that the victim was allured by the appellant by showing her chocolate and was taken to his *'Bada'*. In the *'Bada'*, the appellant sexually assaulted and murdered her. In the late night, he had thrown the dead body of deceased near *Chindiya Nala,* where it was found on 18.8.2018. To establish this story, the case of prosecution is based on last seen theory, memorandum statement of

appellant recorded under Section 27 of Evidence Act, extra judicial confession of appellant before Narmada Das Bairagi (PW-21), DNA report and past conduct of the appellant. Thus, we deem it proper to deal with these aspects one by one.

Last Seen Theory :-

48. The Last Seen Theory can be pressed into service, if the accused was last seen with the victim. In the present case, no eye-witness has deposed that they had seen the appellant with the victim at any point of time. Had it been a case where any witness had seen the appellant with the accused or taking her by him, the said theory could have been relevant.

49. The appellant resides in front of the house of the victim. Certain witnesses deposed that he was found standing under a *Neem* tree at the time of incident or appellant was found sitting in the '*Otala*' of his house will not strengthen the case of the prosecution relating to last seen theory. PW-1 deposed that appellant was sitting in the *'Otala'* of his house whereas PW-3 stated that he was standing under a *Neem* tree. PW-13 stated that the appellant was standing in front of house of Kailash.

50. Shri Sakle, learned counsel for the appellant drew our attention on Ex.D/3, case diary statement of Meena Bai PW-3, where she did not depose that the appellant was standing at the time of incident under a *Neem* tree. Attention of this witness was drawn on his statement, Ex.D/3 and she could not give any plausible explanation about the said omission/contradiction. We find force in the argument of Shri Sakle, learned counsel for the appellant that the statement of PW-3 does not attract the theory of last seen.

51. The Court below in Para-85 of the impugned judgment placed reliance on certain Supreme Court judgments and opined that if the accused was last seen with/near deceased, this circumstance will indicate that the accused alone had committed the offence.

52. In the case at hand, no witness has deposed that the appellant was found near/with the deceased. Thus, the Court below has committed an error of fact and law in applying the last seen theory. Synopsis filed by the State nowhere points out that appellant was last seen with the victim.

Memorandum Statement of Appellant under Section 27 of the Evidence Act:-

53. Another reason to convict the appellant is based on his alleged confession statement recorded under Section 27 of the Evidence Act. The Court below in Para-86 and 88 of the impugned judgment opined that his confession statement recorded under Section 27 of the Evidence Act is relevant and admissible. To draw this conclusion, reference is made to **AIR 2017 SC 1761 (Charandas Swami Vs. State of Gujrat) and AIR 2002 SC 3272 (State of Karnataka Vs. David Rozario and another)**.

54. Before dealing with this aspect, it is apposite to reproduce certain relevant Sections of Evidence Act.

> **"3. Interpretation clause** – In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :-
>
> **"Fact"**.- Fact means and includes -
> (1) any thing, state of things, or relation of things, capable of being perceived by the senses;
> (2) any mental condition of which any person is conscious.

> **"25. Confession to police officer not to be proved**.- No confession made to a police officer, shall be proved as against a person accused of any offence.
>
> **26. Confession by accused while in custody of police not to be proved against him.**-No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate shall be proved as against such person.
>
> **27. How much of information received from accused may be proved.**-Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."
>
> **(Emphasis Supplied)**

55. The prosecution apart from clothes of appellant from his own house could not recover any other incriminating material at the instance of appellant. The dead body, the clothes of victim etc. were not recovered either at his instance or from him.

56. A bare perusal of Section 25 and 26 of Evidence Act leaves no room for any doubt that no confession about commission of crime made by accused to Police Officer in the memorandum under Section 27 of Evidence Act can be treated to be proved against a person accused of any offence. In the light of this statutory mandate, we have no scintilla of doubt that the Court below has committed an error of law in treating the entire memorandum statement (Ex.P-34) of appellant recorded under Section 27 of Evidence Act as his confessional statement about commission of crime. The judgments of

Supreme Court mentioned in para-88 of the impugned judgment do not lay down the law in the manner it is understood by the Court below.

57. The Apex Court has drawn the curtains on this issue. In the case of **Aloke Nath Dutta v. State of W.B., (2007) 12 SCC 230**, it was held as under:-

> **"53.** It is, however, disturbing to note that a confession has not been brought on record in a manner contemplated by law. **Law does not envisage taking on record the entire confession by marking it an exhibit incorporating both the admissible and inadmissible part thereof together.** We intend to point out that only that part of confession is admissible, which would be leading to the recovery of dead body and/or recovery of articles of Biswanath; the purported confession proceeded to state even the mode and manner in which Biswanath was allegedly killed. It should not have been done. It may influence the mind of the court. (See *State of Maharashtra* v. *Damu* [(2000) 6 SCC 269."
>
> **(Emphasis Supplied)**

58. It was ruled in the case of **Swamy Shraddananda v. State of Karnataka, (2007) 12 SCC 288** as under:-

> **"36.** We have noticed hereinbefore as to why the investigation was taken over by the Central Crime Branch. As the interrogation of the appellant, while in custody of the police, revealed the possibility of the deceased having been buried in the backyard of her residential house, the investigating officer requested the Sub-Divisional Magistrate to conduct exhumation proceedings, who in turn, authorised the Taluka Executive Magistrate (PW 3) to do so. **Confession of the accused was not admissible in evidence. What was admissible**

> **only was that part of the confession leading to the discovery of fact in terms of Section 27 of the Evidence Act.** The proceedings were conducted in the presence of the accused, which were videographed and marked as MO 18. The learned trial Judge as also the learned Judges of the High Court had the benefit of watching the said videograph. The High Court in its impugned judgment recorded:"
>
> **(Emphasis Supplied)**

59. Reference may be made about the case of **Rahul v. State (NCT of Delhi), (2023) 1 SCC 83**, the Apex Court was of the view as under:-

> **"30.** At this juncture, it may be noted that the trial court had allowed the entire disclosure statements of the three accused to be admitted in evidence by exhibiting the same as Exts. PW 39/B, PW 41/B and PW 41/C. **The said statements were recorded by PW 48, Sandeep Gupta, when they were in police custody. The said statements being in nature of the confessions before the police were hit by Section 25 of the Evidence Act. The law in this regard is very clear that the confession before the police officer by the accused when he is in police custody, cannot be called an extra-judicial confession.** If a confession is made by the accused before the police, and a portion of such confession leads to the recovery of any incriminating material, such portion alone would be admissible under Section 27 of the Evidence Act, **and not the entire confessional statements. In the instant case, therefore the trial court had committed gross error in exhibiting the entire disclosure statements of the accused recorded by PW 48 P-**

> **1 Sandeep Kumar Gupta, for being read in evidence.** Though, the information furnished to the investigating officer leading to the discovery of the place of the offence would be admissible to the extent indicated in Section 27 read with Section 8 of the Evidence Act, but not the entire disclosure statement in the nature of confession recorded by the police officer."
>
> **(Emphasis Supplied)**

60. The confession relating to commission of crime (if any) made in a memorandum under Section 27 of the Evidence Act can not be used against the accused is an elementary principle. We are surprised that a Senior Sessions Judge has taken a diametrically opposite view in the impugned judgment on this fundamental/elementary aspect. Thus, findings in this regard contained in the impugned judgment can not be upheld.

Sexual assault on the victim :-

61. The Court below opined that the victim was raped and murdered by the appellant. This point needs to be examined carefully. As per the Autopsy report dated 18/08/2018 (Ex.P/23), the finding in this regard is as under :- *"There is a sign of sexual assault which confirmation vaginal slides, rectal slides, perineal slides are preserved for further examination. Body in state of early putrefaction."* **(Emphasis supplied)**

62. The above sentence is not happily worded. However, in our view, the finding shows that no definite opinion could be formed by autopsy team regarding commission of sexual assault on the victim and it was thought proper to get a confirmation report on the basis of samples preserved in the shape of slides taken from the private part of the

victim. Para-11 of this report shows that body of victim was in a very bad condition and several internal parts and organs came out from the private part. Thus, reading of P.M. report (Ex.P/23) as such does not lead to any definite conclusion that victim was subjected to sexual assault.

63. The DNA report dated 16/10/2018 shows that aforesaid slides taken from private part were examined and no male DNA profile could be detected on vaginal slide of deceased (marked as 'H'), perineal slide (marked as 'I') and anal slides (as 'J'). The relevant portion of DNA report dated 16/10/2018 reads thus :-

परीक्षण प्रतिवेदन

न्या.वि.प्र. / डीएनए / 1467,1532 and 1593 / 18

उक्त प्रकरण से संबंधित सील बंद 03 पेकेट दिनांक 20.08.2018 को आरक्षक 84, Maji Lal आरक्षी केन्द्र Shahpur द्वारा, सील बंद 08 पेकेट दिनांक 27.08.2018 को आरक्षक 201, Rahul आरक्षी केन्द्र Shahpur द्वारा, सील बंद 02 पेकेट दिनांक 04.09.2018 को आरक्षक 82, Yashwant आरक्षी केन्द्र Shahpur द्वारा प्राप्त हुये। उपरोक्त प्रदर्श चिन्ह H, I, J, K, L, M, N, O, P, Q, R, U and V (Total exhibits – 13) पाए गए जो कि कपड़े के आवरण में Exhibit H, I, J, L, M - District Hospital, Burhanpur की सील से, Exhibit K- PS Shahpur, Exhibit N, O, P, Q, R- CHC Shahpur की सील से सील बंद थे। सील अविकल मिली।

प्रकरण में प्राप्त प्रदर्शो का विवरण निम्नानुसार है।

क्र.	अंकित	अंदर पाये गये प्रदर्श	किसका / किसके जप्त	यहॉ अंकित
1	**H**	**Vaginal Slide**	Deceased Vidya	**B/R 7636**
2	**I**	**Pareneal Slide**	Deceased Vidya	**B/R 7637**
3	**J**	**Anal Slide**	Deceased Vidya	**B/R 7638**
4	K	Frock	Deceased Vidya	B/R 7922
5	L	Nails	Deceased Vidya	B/R 7923
6	M	Nails	Deceased Vidya	B/R 7924
7	**N**	Underwear	Accused Vijay Alias Pintya	B/R 7925
8	O	Semen Slide	Accused Vijay Alias Pintya	B/R 7926
9	P	Pubic Hair	Accused Vijay Alias Pintya	B/R 7927
10	**Q**	Nails	Accused Vijay	B/R 7928

			Alias Pintya	
11	**R**	Blood Sample	Accused Vijay Alias Pintya	B/R 7929
12	U	Clothes	Accused Vijay Alias Pintya	B/R 8184
13	V	Clothes	Accused Vijay Alias Pintya	B/R 8185

<u>परीक्षण परिणाम</u>

उपरोक्त प्रदर्शो में से आर्गेनिक automatic एक्सट्रेक्शन विधि के द्वारा डी.एन.ए. प्राप्त किया गया परीक्षण हेतु प्राप्त डी.एन.ए. में से वांछित जेनेटिक मार्कर का एम्प्लीफिकेशन Multiplex PCR प्रक्रिया द्वारा किया गया। इस प्रकार एम्प्लीफाइड डीएनए की आटोमेटेड डी.एन.ए सिक्वेन्सर एवं GLOBAL FILER and-Promega Powerplex Y 23 किट के साथ जीनोटाइपिंग प्रोफाइल प्राप्त की गई। प्राप्त परिणामों का विश्लेषण जीनमैपर साफ्टवेयर द्वारा किया गया। प्रकरण में विभिन्न प्रदर्शो पर पाये गये एलील का विवरण निम्नानुसार हैः–

Table-1 Promega Powerplex Y 23 male DNA किट से प्राप्त परिणाम

Genetic Markers	**Article H, I, J Exhibit BR 7636, 7637, 7638**	Article K Frock Exhibit BR 7922	**Article L, M Nails** Exhibit **BR** 7923, **7924**	Article N Underwear Exhibit BR 7925	Article Q Nails Exhibit BR 7928	Article R Blood Sample Exhibit BR 7929
DYS576	**No male DNA profile detected**	18	**No male DNA profile detected**	18	18	18
DYS3891		13		13	13	13

(Emphasis supplied)

64. A conjoint reading of P.M. report and DNA report shows that prosecution could not establish that victim was subjected to any sexual assault. Thus, we are unable to countenance the finding relating to commission of rape/sexual assault mentioned in the impugned judgment. The said finding deserves to be jettisoned.

65. The DNA report clearly indicates that in the nails of deceased (Article 'M', B/R 7924), no male profile was found. This was an important piece of evidence. It may be remembered that the dead body of victim was initially buried but when during MLC of appellant certain bruises were found on his face and Doctor opined that such injuries could be caused by nails and not by any motorcycle accident,

prosecution thought it proper to dig out the dead body and take the nail samples of victim for DNA examination. They followed the said course. However, the DNA report of nails is not positive.

66. In the above factual backdrop of this case, in our opinion, nail cuttings of victim ought to have been taken by the prosecution initially itself. Prosecution in a case of this nature should have been more vigilant and should have taken nail samples along with other samples taken from the person of deceased. However, in absence of any connection establish in DNA report between nail cuttings and bruises of appellant, appellant cannot be held guilty solely on the basis of suspicion.

Frock of victim and DNA report :-

67. The appellant was held guilty on the basis of certain findings of DNA report wherein it was found as under :-

- Deceased Vidya के स्त्रोत प्रदर्श K Frock (BR 7922) पर पुरूष डीएनए प्रोफाइल पायी गई।
- आरोपी Vijay Alias Pintya प्रदर्श **N** (BR 7925), प्रदर्श **Q** (BR 7928), प्रदर्श **R** (BR 7929) पुरूष (Y) डीएनए प्रोफाइल में प्रत्येक जेनेटिक मार्कर पर पाये गये एलील, Deceased Vidya के स्त्रोत प्रदर्श **K Frock** (BR 7922) पर से प्राप्त पुरूष (Y) डीएनए प्रोफाइल में प्रत्येक जेनेटिक मार्कर पर पाये गये एलील, के **समान** पाये गये।

68. The opinion of DNA report shows “presence of accused Vijay @ Pintiya DNA profile (Article-R) is detected on the source of deceased Vidya (Article – K)”.

69. As noticed above, learned counsel for the parties were at loggerheads on the identity/description of the frock during the course of the argument. This aspect needs to be examined very carefully. Admittedly, the naked dead body of victim was found on 18/08/2018.

The frock was allegedly found at the distance of 15-45 feet from the said dead body. It is worth noting about the description given by various witnesses regarding the frock of victim.

70. The frock was recovered through Ex.P/11. The description of frock as per this Exhibit is that it was of white colour having black spots (*bindi)*. The grandfather of victim (PW-2) identified the frock and is a signatory to the 'property seizure memo' (Ex.P/11). This witness deposed that the frock was of blue colour having round spots (*tika*) on it. Dharmendra (PW-33) Police photographer stated that on the frock of deceased (Article -7) there were no black spots, rounds or design. Article A-7 is a photograph taken by this police photographer Dharmendra (PW-33). It is worth noting that we have seen this photograph (Article -7) available in the original record and shown it to learned counsel for the parties during the course of hearing. This photograph is not at all the photograph of any frock. During the course of hearing, all the photographs which were marked as articles were examined by this Court and learned counsel for the parties were also permitted to examine the same. Sadly, there is no photograph of frock available on record. There is one photograph of victim available when she was alive (Article 26) wherein she is wearing a frock having blue spots on it.

71. Investigating Officer Girdhar Singh (PW-47) in his cross-examination admitted that in the frock (Article A-11), there were no black spots. He also admitted that in the frock of deceased, he could not notice any blood stains on the frock and therefore, did not mention about availability of blood stains in the 'Panchnama'.

72. In view of aforesaid depositions, it is clear that the witnesses were not consistent regarding description/identity of the frock. The photograph of frock is not placed before the Court below. The court below has not taken pains to give any finding about non-availability of any such photograph. In view of variance/contradiction in the statements of aforesaid witnesses relating to description of frock, we are unable to hold that prosecution could establish the identity of frock of victim with necessary clarity. Thus, it is not clear as to whether it was victim's frock which was subject matter of DNA examination. This is a very serious flaw on the part of investigating agency. The investigation was made in a very casual manner and we deprecate the same.

73. So far DNA report is concerned, no doubt, the above reproduced portion of report shows that DNA report relating to frock is clearly against the appellant showing his culpability, but we are unable to give credence to this DNA report for twins reason. *Firstly*, the prosecution miserably failed to establish the identity of frock and therefore, it is not possible to hold that it was victim's frock which was subjected to DNA examination. *Secondly*, Shri Sakle, learned counsel for the appellant rightly pointed out that the Court below has not confronted this DNA report with the appellant during his examination under Section 313 of Cr.P.C. and thus, this report cannot be used against the appellant. By way of 'synopsis', attention of this Court is drawn on the short postmortem report and testimony of members of postmortem team. We have carefully gone through the same and are of the opinion that no conclusive opinion have been formed by the aforesaid doctors in the report regarding rape being committed on the victim. Indeed, they sought verification of their

suspicion regarding sexual assault by sending sample slides taken from private part of the victim. As noted above, the DNA report does not give any finding in affirmative relating to commission of rape founded upon the said examination of slides.

Section 313 of Cr.P.C.:-

74. This is trite that under Section 313 Cr.P.C., the accused should be given opportunity to explain any of the circumstances appearing in evidence against him. In the case of **Naval Kishore Singh vs. State of Bihar** reported in **(2004) 7 SCC 502**, the Apex Court held as under:-

> **"5.** ……. Under Section 313 CrPC the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case. We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation. The trial Judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence."

(Emphasis Supplied)

75. Similarly, in the case of **State of Punjab v. Swaran Singh,** reported in (**2005) 6 SCC 101**, the Apex Court has held as under:-

> **"10.** The questioning of the accused is done to enable him to give an opportunity to explain any circumstances which have come out in the evidence against him. It may be noticed that the entire evidence is recorded in his presence and he is given full opportunity to cross-examine each and every witness examined on the prosecution side. He is given copies of all documents which are sought to be relied on by the prosecution. Apart from all these, as part of fair trial the accused is given opportunity to give his explanation regarding the evidence adduced by the prosecution. However, it is not necessary that the entire prosecution evidence need be put to him and answers elicited from the accused. **If there were circumstances in the evidence which are adverse to the accused and his explanation would help the court in evaluating the evidence properly, the court should bring the same to the notice of the accused to enable him to give any explanation or answers for such adverse circumstance in the evidence**. Generally, composite questions shall not be asked to the accused bundling so many facts together. Questions must be such that any reasonable person in the position of the accused may be in a position to give rational explanation to the questions as had been asked. There shall not be failure of justice on account of an unfair trial."

(Emphasis Supplied)

76. Same principle was followed in the case of **Asraf Ali v. State of Assam** reported in **(2008) 16 SCC 328**, Hon'ble Apex Court has held in paras 22 and 23 as under:-

"**22. The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice.** This Court also expressed a similar view in *S. Harnam Singh* v. *State (Delhi Admn.)* [(1976) 2 SCC 819 : 1976 SCC (Cri) 324 : AIR 1976 SC 2140] while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facts by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise.

23. "*16.* Contextually we cannot bypass the decision of a three-Judge Bench of this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033] as the Bench has widened the sweep of the provision concerning examination of the accused after closing prosecution evidence. Learned Judges in that case were considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence. The three-Judge Bench made the following observations therein : (SCC p. 806, para 16)

'*16.* … It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every

inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction.'

***

18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is 'for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him'. In *Jai Dev* v. *State of Punjab* [AIR 1963 SC 612] Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus :

'*21*. … The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having

regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.'

19. **Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.**

20. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim *audi alteram partem*. The word 'may' in clause (*a*) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (*b*) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him."

(Emphasis Supplied)

77. Reference may be made about the case of **Sukhjit Singh v. State of Punjab** reported in **(2014) 10 SCC 270**, the Apex Court opined as under:-

"10. On a studied scrutiny of the questions put under Section 313 CrPC in entirety, we find that no incriminating material has been brought to the notice of the accused while putting questions. Mr Talwar has submitted that the requirement as engrafted under Section 313 CrPC is not an empty formality. To buttress the aforesaid submission, he has drawn

inspiration from the authority in *Ranvir Yadav* v. *State of Bihar* [(2009) 6 SCC 595 : (2009) 3 SCC (Cri) 92] . Relying upon the same, he would contend that when the incriminating materials have not been put to the accused under Section 313 CrPC it tantamounts to serious lapse on the part of the trial court making the conviction vitiated in law.

11. In this context, we may profitably refer to a four-Judge Bench decision in *Tara Singh* v. *State* [1951 SCC 903 : AIR 1951 SC 441 : (1951) 52 Cri LJ 1491] wherein, Bose, J. explaining the significance of the faithful and fair compliance with Section 342 of the Code as it stood then, opined thus: (AIR pp. 445-46, para 30)

"*30*. I cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section 342 of the Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the committal court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. **He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to**

be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of Section 342 of the Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice."

12. In ***Hate Singh Bhagat Singh* v. *State of Madhya Bharat*** [1951 SCC 1060 : AIR 1953 SC 468 : 1953 Cri LJ 1933] , Bose, J. speaking for a three-Judge Bench highlighting the importance of recording of the statement of the accused under the Code expressed thus: (AIR pp. 469-70, para 8)

"*8.* Now the statements of an accused person recorded under Sections 208, 209 and 342, Criminal Procedure Code are among the most important matters to be considered at the trial. It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place

of what in England and in America he would be free to state in his own way in the witness box."

13. The aforesaid principle has been reiterated in *Ajay Singh* v. *State of Maharashtra* [(2007) 12 SCC 341 : (2008) 1 SCC (Cri) 371] in following terms: (SCC pp. 347-48, para 14)

"*14*. The word 'generally' in sub-section (1)(*b*) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."

(Emphasis Supplied)

78. In the case of **Samsul Haque v. State of Assam** reported in (**2019) 18 SCC 161**, the Apex Court held as under:-

"22. It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid,

the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in *Asraf Ali* v. *State of Assam* [*Asraf Ali* v. *State of Assam*, (2008) 16 SCC 328 : (2010) 4 SCC (Cri) 278]. The relevant observations are in the following paragraphs : (SCC p. 334, paras 21-22)

"*21*. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in *S. Harnam Singh* v. *State (Delhi Admn.)* [*S. Harnam Singh* v. *State (Delhi Admn.)*, (1976) 2 SCC 819 : 1976 SCC (Cri) 324] while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the

Code). Non-indication of inculpatory material in its relevant facets by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

23. While making the aforesaid observations, this Court also referred to its earlier judgment of the three-Judge Bench in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [*Shivaji Sahabrao Bobade* v. *State of Maharashtra*, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033] , which considered the fallout of the omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognised, that where there is a perfunctory examination under Section 313 CrPC, the matter is capable of being remitted to the trial court, with the direction to retry from the stage at which the prosecution was closed [*Shivaji Sahabrao Bobade* v. *State of Maharashtra*, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033] ."

(Emphasis Supplied)

79. In the case of **Maheshwar Tigga v. State of Jharkhand** reported in (**2020) 10 SCC 108**, the Apex Court opined as under:-

"8. <u>It stands well settled that circumstances not put to an accused under Section 313 CrPC cannot be used against him, and must be excluded from consideration.</u> In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also

> to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt."
>
> **(Emphasis Supplied)**

80. The common thread running through these judgments shows that Section 313 of Cr.P.C. is in fact codification of principles of natural justice in the statutory shape. The basic purpose of insertion of Section 313 in the statute book is to provide fair trial to the accused and to ensure that all the incriminating materials are brought to his notice by the Court so that he can putforth his explanation. The Court is not only obliged to bring all the incriminating material to the notice of the accused, it should bring it in a language understandable to a person of the status of the accused. In **Maheshwar Tigga (supra)**, in no uncertain items, it was made clear that circumstances not put to an accused under Section 313 of Cr.P.C. cannot be used against him and must be excluded from consideration.

81. Pausing here for a moment, in our opinion, the scope, ambit and requirement of Section 313 of Cr.P.C. is well known to judges. However, in certain cases, this Court has noticed that while interacting with the accused, Courts have failed to bring very important and crucial incriminating material/evidence to his notice. No question in this regard are being framed. This certainly benefits the accused, if he is held guilty on the basis of such material which was not brought to his notice by the Court under Section 313 of Cr.P.C.

82. The interaction between accused and Court under Section 313 of Cr.P.C. cannot be marginalised and permitted to be reduced as an

empty formality. The said process, preparation of relevant questions and even recording of answers cannot be permitted to be outsourced. It is not a ministerial function and this important function needs to be meticulously performed by the presiding judge himself. As envisaged in sub-Section 5 of 313 of Cr.P.C., at best, the Court may take help of prosecutor and defence counsel in preparing relevant questions which are to be put to the accused. In the instant case, the Court below has miserably failed to carefully discharge this duty in consonance with Section 313 of Cr.P.C. When we recently noticed similar deviation while deciding **Cr.A. No.859 of 2010 (Sunil vs. State of M.P.)**, we directed the M.P. State Judicial Academy to apprise and sensitize the judges in this regard. We record our serious concern in the manner in the instant case, the relevant question relating to DNA report was left out which caused serious prejudice to the accused. We also deprecate the practice of mechanically preparing the questions and recording answers under Section 313 of Cr.P.C. We may hasten to add that this kind of negligence was not expected from a Judge dealing with a trial which resulted into imposition of capital punishment. We hope and thrust that henceforth sufficient care and caution will be taken by the Courts while interacting with the accused under Section 313 of Cr.P.C. It must be remembered that courts are to dispense justice, not to dispense with justice.

Past conduct of accused :-

83. Sections 53 and 54 of Evidence Act became subject matter of interpretation in catena of judgments. In the case of **Ram Sunder Sen (supra),** the Apex Court opined as under:-

> **"7.** ……. The prosecution also tried to impute bad character upon the accused. The High Court rightly held that such evidence is not relevant. Sections 53 and 54 of the Evidence Act, 1972 were discussed at length by the High Court and it was held that the accused neither tried to prove his previous good character, nor was the said fact in question. An earlier instance of attempt to rape by the accused, as deposed by the mother of the prosecutrix (PW 4), Savitri, aunt of the deceased (PW 5) and Rajendra Kumar Sen, brother of the deceased (PW 6), is not established at any stage of the trial. These witnesses are not only interested witnesses but they themselves stated that their evidence is hearsay. The prosecution neither produced any complaint/FIR nor any record was shown that any such incident occurred. Thus, the prosecution squarely failed to impute bad character upon the accused. Further, the motive is also not firmly established against the accused."
>
> **(Emphasis supplied)**

84. Similar view is taken by the Supreme Court in the cases of **Ram Lakhan Singh v. State of U.P., (1977) 3 SCC 268, Swamy Shraddananda v. State of Karnataka, (2007) 12 SCC 288** and **Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2019) 12 SCC 460**.

85. The past conduct of appellant was not a fact in question. Appellant never tried to prove his previous good character. Thus, past conduct in absence of any other clinching evidence, fades into insignificance. Moreso, when as per statement of Investigating Officer, appellant has no criminal record and other witnesses of prosecution were either hearsay witnesses or they have not lodged any complaint against the appellant. Thus, past conduct of appellant is of no

assistance to the prosecution. The 'synopsis' does not provide any additional strength to the argument of learned counsel for the State. In view of catena of judgments of Supreme Court considered hereinabove, the previous conduct of appellant does not provide any browny point to the prosecution.

Extra Judicial Confession:-

86. The edifice of prosecution is also based on the pillar of extra judicial confession allegedly given by appellant to Narmada Das (PW-21). To corroborate it, statement of Shivram (PW-15) and call details proved by Amandeep Gupta (PW-52) were relied upon. The learned *amicus curie* referred the judgments of Supreme Court in **Tarakant Singh and Sahadevan (supra)** and urged that necessary parameters mentioned in these judgments are not satisfied and therefore, said confession is of no value.

87. The Apex Court in a recent judgment reported in **2022 (6) SCC 525 (Union of India and Ors Vs. Major R. Metri No.8585N)** considered the previous judgments and culled out the principles as under :-

> "**44.** This Court in Sahadevan v. State of T.N. [Sahadevan v. State of T.N., (2012) 6 SCC 403 : (2012) 3 SCC (Cri) 146] , after surveying various judgments on the issue, has laid down the following principles : (SCC pp. 412-13, para 16)
>
> *"The principles*
>
> 16. Upon a proper analysis of the abovereferred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing

with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law."

45. It could, thus, be seen that the extra-judicial confession is a weak piece of evidence. Unless such a confession is found to be voluntary, trustworthy and reliable, the conviction solely on the basis of the same, without corroboration, would not be justified.

46. In the present case, there is no corroboration at all. On the contrary, PW 1 Col. Anil Singh Rathore in his evidence has himself admitted that the respondent officer was part of Team 'B'."

(Emphasis Supplied)

88. We are not oblivious of the legal position that extra judicial confession cannot be simply discarded merely because it is an extra judicial confession. If said confession is of sterling quality and fulfills the other parameters laid down in the judgment of **R. Metri (supra)**, said confession alone can be a ground to record conviction.

89. The statement of Narmada Das was initially recorded under Section 164 of Cr.P.C. which was followed by his Court statement. His statement is sought to be corroborated by producing Shivram (PW-15). In **AIR 1959 SC 18 (Ratan Gond Vs. State of Bihar)** it was held that usually as a matter of caution, the Court requires some material corroboration to an extra judicial confessional statement. The *ratio decidendi* of this judgment was followed in **1973 (4) SCC 17 (Abdul Ghani v. State of U.P.)**, **1971 (3) SCC 778 (Wakil Nayak v. State of Bihar,** and **2010 (8) SCC 233** (**S. Arul Raja v. State of T.N.)**

90. Narmada Das (PW-21) deposed that on 18.08.2018 he received a phone call from appellant who informed him that in his village, a bad incident had taken place. A dead body of missing girl was found. This mistake has been committed by him. Accused asked for help through *Tantra Mantra*. This witness in para-6 of his cross-examination admitted that he has not informed about the incident of 18th August to Shivram and to the police personnel. He candidly admitted that if police would not have approached him, he would not have informed about the said incident to anybody.

91. The Supreme Court in **Lakhanpal Vs. The State of M.P., AIR 1979 SC 1620** did not give credence to an extra judicial confessional statement for twin reasons, one of which was as under:-

> "4. ….. In cross-examination the witness admitted that he did not narrate this story of the murder to anybody. He made the disclosure for the first time when he was called to the police station. The witness met a number of persons on that day but he did not mention the factum of the confession to anyone of them."
>
> **(Emphasis Supplied)**

92. In the instant case also, Narmada Prasad (PW-21) admittedly did not disclose the factum of so called extra judicial confession of appellant to anybody and in candid words stated during cross-examination that if police would not have approached and asked him, he would not have disclosed this fact to anybody. In view of the judgment of **Lakhanpal (supra)**, the similar reason of non-disclosure on the part of Narmada Prasad (PW-21) exists in the instant case because of which it is not safe to treat his statement as gospel truth and base the entire conviction on it.

93. Shivram (PW-15) entered the witness-box and stated that he along with appellant visited Narmada Baba's Ashram on the day of '*Somwati Amawasya*'. He further deposed that subsequently in his presence, Narmada Baba informed the police about telephonic conversation dated 18.08.2018 between appellant and Narmada Das Baba. This is the conversation wherein appellant allegedly confessed about commission of crime. However, during the cross-examination, he admitted that he had no information whether Vijay called anybody including Narmada Das Baba on 18.08.2018 and he is deposing in the court as per the instructions of police. He has no other information about the incident.

94. The extra judicial confession needs to be examined with circumspection. In **R. Metri (supra)** it was held that said confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution witnesses.

95. Other circumstances in the present case, as discussed hereinabove, do not strengthen the case of prosecution. The attempt to corroborate the statement of Narmada Das by introducing (PW-15) went in vain in view of his stand taken in the cross-examination. Mere description of call details is not sufficient to give stamp of approval to the extra judicial confession. In the facts and circumstances of the case, in our opinion, it will not be safe to affirm the conviction solely based on extra judicial confession. Thus, the finding of Court below based on extra judicial confession deserves to be interfered with. In the 'synopsis' filed by the Govt. counsel merely statements of PW-15 and PW-21 have been reproduced. We find no reason to give our seal of confirmation on conviction based on extra judicial confession alone.

96. So far, house/*Bada* of appellant is concerned, the prosecution had recovered clothes of appellant and *Mantra* book etc. No *iota* of material could be collected from the *Bada* relating to the victim. To elaborate, no clothes of victim, soil, piece of hair or any other evidence showing any sign of struggle between appellant and victim etc. could be recovered and established. The prosecution could not establish that victim was taken by appellant to his *Bada* and was sexually assaulted and murdered in the said *Bada* and thereafter, her dead body was thrown by appellant near *Chindiya Nala*.

Circumstantial Evidence :-

97. In a case of this nature based on circumstantial evidence, the prosecution was required to establish the entire chain of circumstances with accuracy and precision. The Apex Court way back in **(1984) 4 SCC 116 (Sharad Birdhichand Sarda v. State of Maharashtra)** has laid down the *Panchsheel* principles in this regard which are as under:

> **153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> *(1)* the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned **"must or should"** and not **"may be"** established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]
>
> **"Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict** and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (*3*) **the circumstances should be of a conclusive nature** and tendency,
>
> (*4*) they should exclude every possible hypothesis except the one to be proved, and
>
> (*5*) **there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.**
>
> **(Emphasis Supplied)**

98. The principle laid down in aforesaid case was followed in the case of **Sudama Pandey (supra)** relied upon by learned Amicus Curiae.

99. The prosecution in the present case could not establish the entire chain of events meticulously. Thus, we are unable to give stamp of

approval to the finding of conviction recorded based on substantial evidence.

100. In view of foregoing analysis, we are constrained to hold that prosecution could not establish its case beyond reasonable doubt. At the cost of repetition, it is observed that the prosecution conducted the investigation in extremely casual and cryptic manner. The nail samples of victim were not collected at the first instance and when the same were collected after few days by digging out her body which was buried, it must have lost much of its evidentiary value. No photographs of frock of victim which was a crucial evidence was placed on record. The description/identity of frock as per statements of different PWs were at variance and it could not be clinchingly established that the frock of victim was sent for DNA test. Hence, remand by this Court for satisfying the requirement of Section 313 of Cr.P.C. about DNA report will be a futile exercise.

101. The Court below also miserably failed to frame and put relevant questions relating to DNA report.

102. It needs to be remembered that the words ‘life’ and ‘file’ contain same letters. Every, ‘file’ has a relation with ‘life’. Thus, every file needs to be handled with utmost care, caution and sensitivity.

103. Shri Ajay Shukla, learned counsel for the respondent during the course of hearing argued that mere technical flaw in the investigation should not be viewed adversely and it should not cause any dent on the overall prosecution story. We do not see any merit in this contention because if flaw in the investigation results into failure of justice, interference is inevitable. Shri Shukla also argued that considering the heinous and gruesome nature of crime coupled with public pressure on

the police, the flaws deserve to be ignored. Suffice it to say that this argument is also devoid of substance. No amount of pressure on police can be a reason to ignore the quality of evidence. We are unable to persuade ourselves with the line of argument that work pressure or any other pressure on the police can be a reason to dilute the requirement of law and to bring clinching evidence against the accused. We are unable to hold that because of public pressure on the Police any such flaw in the investigation can be treated as 'necessary evil'. If we assuage our judicial conscience and treat such serious flaws as 'necessary evil', it will look more and more necessary and less and less evil. The flaws in the investigation and collection of evidence in this case cannot be said to be trivial in character.

104. In the 'synopsis' the State has placed reliance on the judgments of **Bachan Singh vs. State of Punjab, (1980) 2 SCC 684** and **Machhi Singh Vs. State of Punjab, (1994) 2 SCC 220** and the Division Bench judgments of this Court in **Criminal Reference No.5 of 2015 (In Reference vs. Sachin Kumar Singhraha)** and **Criminal Reference No.2/16 (In Reference vs. Ravi Shankar @ Baba Vishwakarma).** These judgments were referred on the aspect of imposition of punishment. Since we are inclined to interfere in the impugned judgment of conviction and sentence, the 'synopsis' relating to quantum of sentence pales into insignificance.

105. The Apex Court way back in **Bachan Singh vs. State of Punjab (1980) 2 SCC 684** held that judges should never be *blood-thirsty*. One cannot be sent to gallows or crucified only on the basis of gravity of offence/nature of crime. One can be held guilty and punished only when charges are proved to the hilt and beyond reasonable doubt. In

the instant case, since the prosecution failed to establish the allegations beyond reasonable doubt, we deem it proper to set aside the impugned judgment.

106. Before parting with the matter, we record our appreciation for the assistance provided by learned counsel for the parties and learned Amicus Curiae.

107. As a consequence, the appellant is entitled to get the benefit of doubt. The impugned judgment passed on 08.03.2019 in Special Sessions Case No.30/2018 is set aside and appellant is acquitted by giving him benefit of doubt. He be released forthwith if his presence is not required in the custody for any other offence. Reference is answered accordingly and the appeal is **allowed** to the extent indicated hereinabove.

(SUJOY PAUL)
JUDGE

(ACHAL KUMAR PALIWAL)
JUDGE

PK