

**AFR**  
**Reserved**

**Court No. - 45**

**Case :- CAPITAL CASES No. - 4 of 2020**

With REFERENCE No.3 of 2020

**Appellant :-** Upendra

**Respondent :-** State of U.P.

**Counsel for Appellant :-** From Jail, Abhay Raj Yadav, Dinesh Kumar, Rakesh Prasad

**Counsel for Respondent :-** A.G.A.

**Hon'ble Manoj Misra, J.**

**Hon'ble Sameer Jain, J.**

**(Delivered By Manoj Misra, J.)**

1. This appeal from jail by appellant questions the judgment and order of conviction and punishment dated 24.01.2020 and 28.01.2020, respectively, passed by Additional District & Sessions Judge/Fast Track Court No.1, Amroha in Sessions Trial No. 196 of 2017, convicting the appellant under Sections 302 and 376 I.P.C. and punishing him with death penalty and fine of Rs. 50,000/- under Section 302 I.P.C. and imprisonment for life and fine of Rs. 50,000/-, coupled with a default sentence of one year additional imprisonment, under Section 376 IPC. As death penalty has been awarded, the court below has sent a reference for confirmation of death penalty which has been registered as Reference No. 3 of 2020.

2. Considering the nature of the offence, the name of the victim, members of her family and witnesses of that village has not been disclosed and therefore, wherever required, they have been described either by an alphabet or witness number.

**INTRODUCTORY FACTS**

3. (i) The prosecution case has its genesis in a written report

dated 24.02.2017 (Exb. Ka-1), lodged by PW-1 (husband of the victim), scribed by PW-2 (nephew of PW-1), which was registered as Case Crime No. 170 of 2017 at P.S. Nawgawa Sadar, District Jyotibaphule Nagar at 17.35 hrs on 24.02.2017 of which the Chik FIR (Exb Ka-7) was proved by PW-7 (Santosh Kumar Singh). In the FIR, PW-1 alleged that his wife (victim), on 24.02.2017, at about 2 pm, went to the field to harvest mustard crop. When she did not return, PW-1 went in search of her. During search for the victim, PW-3 (a lady) informed PW-1 that she saw two men taking the victim into the field of X. On receipt of information when the field of X was scanned, at about 4.00 pm, in between standing sugarcane crop of X, the victim was found lying dead with clothes torn. By alleging that PW-4 (grandson of PW-1) had informed the informant of having seen the appellant with another man running away, FIR was lodged against the appellant and one unknown person.

(ii) By about 9 pm on 24.02.2017, inquest proceedings were completed and an inquest report (Exb. Ka-9) was prepared by Veerpal Singh (PW-8) of which PW-2 and PW-4, amongst others, are witnesses. The inquest report notices that the body was of an old lady aged about 75 years and it had no lower wear.

(iii) On 25.02.2017, at 12:10 pm, autopsy of the body was conducted by Dr. Deepak Verma (PW-6). The autopsy report (Exb. Ka-2), inter alia, notices:-

- (a) Rigor mortis all over the body;
- (b) Ante-mortem injuries:-

(1) Contusion size 10 x 8 cm present on right side of face and temporal region;

- (2) Ligature mark size 26 x 1.5 cm present on both side of neck, 4 cm below from left ear pinna and 2 cm below from right ear pinna, 4 cm below from chin;
- (3) Multiple abraded contusion involving an area 16 x 12 cm both side of neck till both medial ends of clavicle;
- (4) Abrasion size 5 x 4 cm present on left side of mandible;
- (5) Multiple small abrasions present on both side of upper chest in area 22 x 11 cm, largest 1 x .2 cm and smallest .5 x .1 cm;
- (6) Abrasion sized .2 x .1 cm present on dorsal aspect of right thumb; and
- (7) Bleeding from mouth present.

(c) Internal Examination:-

- (1) Hyoid Bone found fracture;
- (2) 500 ml semi-digested food in the stomach;
- (3) Semi-digested food in the small intestine;
- (4) Faecal matter in the large intestine; and
- (5) Genital organ: abrasions present on left inner wall of vagina.

(d) Cause & Manner of death: Asphyxia, due to strangulation.

(e) Estimated time of death: Between one-half and a

day before.

(iv) On 26.02.2017, the appellant was arrested and a *Baniyan* (vest) is stated to be recovered at his instance from below a Tree standing in a vacant field. The recovery is witnessed by PW-5. The recovery memo (Exb. Ka-4) records that the accused pointed towards semen mark on the vest which was encircled by a red pen for forensic examination. It be noted that from the record it appears that the appellant was medically examined on 26.02.2017 which revealed no fresh and external injury but the medical examination report has not been exhibited.

(v) On 27.03.2017, charge-sheet (Exb. Ka-6) prepared by PW-7 is submitted against the appellant under Section 302/376 I.P.C. on which, after cognizance, the case was committed to the Court of Session and, vide order dated 17.03.2018, charge of offences punishable under sections 376 and 302 IPC were framed against the appellant. The appellant pleaded not guilty and claimed for a trial.

(vi) During the course of trial, the prosecution examined as many as eight witnesses: **PW-1** is the informant (husband of the deceased victim); **PW-2** is the nephew of the informant and the scribe of the FIR; **PW-3** is a village lady, who is an eye-witness of the incident; **PW-4** is the grandson of PW-1, who saw the appellant running away from the spot in just a knicker and a vest; **PW-5** is the witness of recovery of *Baniyan* (vest) at the instance of the appellant; **PW-6**, namely, Dr. Deepak Verma, is the doctor who conducted autopsy of the body and prepared the autopsy report; **PW-7**, namely, Santosh Kumar Singh is the Investigating Officer, who proved various stages of the investigation including registration of FIR, recovery of vest and other articles; and **PW-8**, namely, Veer Pal Singh, is a

police witness, who proved the inquest proceeding.

(vii) After the submission of charge-sheet, a forensic report, dated 07th April, 2017, (Exb. Ka-17), prepared by the Joint Director, Forensic Laboratory, U.P, Amroha, was received in respect of following articles:-

- (a) Petticoat recovered from the spot, alleged to be worn by the deceased;
- (b) Kurta (upper-wear) found on the body of the deceased;
- (c) Saree found on the spot;
- (d) Nose pin;
- (e) Key;
- (f) *Baniyan* (Vest) Sando (recovered at the instance of the appellant); and
- (g) Swab obtained from labia majora & pubic area of the deceased.

As per the report, on Articles (a), (c) and (f), human blood was found. Human blood was not found on articles (b), (d), (e) and (g). No spermatozoa seen on (a), (b), (c), (f) and (g).

(viii) The incriminating circumstances appearing in the prosecution evidence were put to the accused to record his statement under Section 313 Cr.P.C. The accused claimed that he has been falsely implicated; that no vest was recovered at his instance; and that he is a resident of Bihar, who works as a Labour. However, no defence evidence was led.

(ix) The trial court by relying on the ocular account and the medical evidence, held the charge proved. Accordingly, it convicted the appellant under Sections 302 and 376 I.P.C. and punished him as above.

(4) We have heard Sri Rakesh Prasad and Sri Abhay Raj Yadav for the appellant; Sri Amit Sinha, learned A.G.A., for the State and have perused the record.

#### **SUBMISSIONS ON BEHALF OF THE APPELLANT**

(5) Learned counsel for the appellant submitted as follows:

(i) That on careful scrutiny of the entire evidence, the FIR appears ante-timed inasmuch as entries in some of the papers prepared during investigation were at variance with the Chik FIR; copy of the FIR was delivered to the informant (PW-1) after several days; the body was dispatched in a private vehicle; and there was inordinate delay in sending the body for autopsy. All of this suggest that the prosecution story was weaved on suspicion and guess-work.

(ii) That except PW-3, there is no eye-witness of the incident. The testimony of PW-3 in respect of culpability of the appellant does not inspire confidence for the following reasons:-

(a) PW-1 (the informant) who was the first to be informed by PW-3 states that PW-3 did not disclose the name of the appellant and had only informed that two men were seen taking the victim into the sugarcane crop in the field of X. This statement of PW-1 is at variance with PW-3, who not only improves upon the disclosure made by her to PW-1 but also states that except PW-3, there was no one else. This improvement/alteration suggests that the prosecution is hiding the truth and has not come with clean hands; (b) PW-1 states that when the deceased did not timely return, he went in search of her, on way, while returning from the fields, PW-3 met PW-1 and informed PW-1 that PW-3 saw two persons taking the victim into the sugarcane crop but, PW-3, in her testimony, states that after seeing the incident she got nervous and went

back home and, thereafter, she came to inform PW-1. If that was so, the FIR would have reflected the information; (c) PW-3 is a chance witness, who does not have her own field next to the field from where the body of the deceased was recovered or from where the deceased was taken therefore, it is not probable that she would have been present at the spot to witness the incident; and (d) that her statement was recorded on 25.2.2017 and, importantly, her presence is not shown in the site plan (Ex. Ka-3) prepared by PW-7 on 24.02.2017.

(iii) That the testimony of PW-4 is not reliable because, firstly, according to PW-1, PW-4 reported to PW-1 having seen two persons running away from the spot but PW-4 states that he saw just the appellant and, secondly, there were tall sugarcane plants in that field which would block his vision. Otherwise also, the testimony of PW-4 is inconclusive and on its own cannot form basis of conviction.

(iv) That recovery of the *Baniyan* from open place, firstly, is bogus, false and planted and, secondly, is inconsequential as it could not be proved that it carried blood of the deceased. Otherwise also, it has not been demonstrated by any evidence that the appellant was wearing the same vest at the time of occurrence.

(v) That the offence of rape could not be established because presence of spermatozoa was neither noticed on the clothes, or swabs taken from private part, of the deceased nor on the vest recovered at the instance of the appellant. Further, the *Baniyan* (vest) though, as per forensic report, carried stain of human blood but, interestingly, the presence of blood is not noticed in the recovery memo. Moreover, there is no DNA profiling of the blood found on vest to connect it with the deceased. Even the blood group was not matched. Thus, there

is no forensic evidence to link the appellant with the crime.

(vi) The appellant is not a domicile/ permanent resident of the village and had no association with the deceased therefore, it is highly improbable as to why he would commit the crime more so, when the victim is a 75 years old lady. Rather, it is a case of blind murder of a sensitive nature therefore, to solve out the case, the police picked the appellant, a resident of Bihar, who had no support, and framed him in the case. The malicious nature of the investigation is apparent from the circumstance that no effort was made to trace out the second accused or to seize the trouser of the suspect which, according to PW-4, was lying at the spot. Because, if the prosecution story is to be believed then the accused-appellant was running in just a knicker and a vest therefore, he must have left the remaining clothes behind. This creates a serious doubt in the prosecution case and throws possibility of the prosecution hiding the truth and this suspicion gets fortified by the circumstance that there is no compliance of the provisions of section 53-A CrPC to enable DNA profiling.

(vii) The presence of ligature mark around the neck of the deceased finds no explanation in the testimony of the eye-witness (PW-3). Even the ligature has not been recovered therefore, it appears, the deceased died in some other manner than alleged by the prosecution.

(viii) Lastly, it is not one of those rarest of rare cases where death penalty could be awarded. More so, when the appellant is not a person with any past criminal record and is of young age.

#### **SUBMISSIONS ON BEHALF OF THE STATE**

6. **Per contra**, learned A.G.A. submitted as follows:

(i) That the FIR could not be demonstrated to be ante-timed. More over, nothing has come on record to suggest that the investigation was tainted with animosity or malice.

(ii) That, admittedly, neither PW-1 nor PW-2 is an eye-witness therefore, their deposition cannot be used to contradict or doubt the statement of PW-3 and PW-4, who are eye-witnesses. Further, PW-3 and PW-4 were consistent and nothing has been suggested to them as to with what motive would they falsely implicate the appellant. Further, nothing has been elicited from them in their cross-examination to render their testimony untrustworthy or unreliable.

(iii) That absence of spermatozoa in the vaginal swab or swab obtained from pubic area or the *Baniyan* (vest) is not conclusive to rule out sexual assault, particularly, when from the testimony of PW-6 it is established that there were signs of sexual assault and the body condition (lower garment missing) as well as the ocular account suggested that the victim was sexually assaulted.

(iv) That non recovery of the ligature by itself would not be fatal to the prosecution case because once PW-3 noticed the appellant over the body of the deceased, the burden was on the appellant to explain as to in what circumstances he was in that position and there being not much time gap between him being noticed with the deceased in that position and the recovery of the body of the deceased from the same spot, in absence of explanation, inference can be drawn that it was the appellant who committed rape as well as murder of the deceased. Otherwise also, it is quite possible that the Saree or the clothes worn by the deceased might have been used as a ligature to strangulate the deceased.

(v) That in respect of non-seizure of the trouser, no suggestion / question was put to I.O. (PW-7) or to PW-8, who conducted inquest and no question was put to the eye witness (PW-3) to elicit whether the accused appellant was wearing trouser or not therefore, on that ground, no adverse inference can be drawn against the prosecution.

(vi) That medical examination of the accused appellant was conducted though its report has not been exhibited.

(vii) That though sentence is at the discretion of the Court, but there are aggravating circumstances which may justify death penalty. The aggravating circumstance is that it is a case of rape and murder of 75 years old woman which is an expression of depravity and exhibition of a conduct that shocks the conscience.

### **PROSECUTION EVIDENCE**

7. Having noticed the rival submissions, before we proceed to weigh and analyse the submissions made, it would be useful to notice in brief the testimony of the witnesses examined by the prosecution. Their testimony is as follows:

8. **PW-1** - the informant. He states that on the date of the incident the deceased had left at about 2.00 pm to harvest mustard crop standing in his field. When the deceased did not timely return, PW-1 went in search of her, on way, PW-1 met PW-3 who informed PW-1 that two persons were seen taking the deceased, by pulling her, into the sugarcane field. On receipt of that information, PW-1 went to the field of X and, at about 4.00 pm, found the deceased lying dead, naked from below. He stated that the appellant and his associate were seen running away from the sugarcane field by PW-4. Whereafter, he got the report lodged at P.S. Nauganwa, after

getting it scribed by PW-2, which was marked Ex. Ka-1. **In the cross-examination**, PW-1 stated that his village is about 100 meters away from his field; the deceased was found lying in the field of X which had standing sugarcane crop taller than a man; that the accused-appellant is a resident of Bihar and had come to the village in the month of November/ December 2017; that at the time when he was searching for his wife there were hundreds of villagers with him; that while leaving to harvest the crop the deceased had taken a *Darati* (harvesting tool) and a *Chaadari* (a cloth spread); that the accused-appellant was not known to the deceased; that the accused Upendra works on the Kolhu (expeller) of one Y, a resident of another mohalla (area); that neither PW-3 nor PW-4 had given him information with regard to the name of that person whom they saw; that when PW-3 met PW-1 and gave the information, it must be about 3.30 pm; that PW-3 met PW-1 while PW-3 was returning from her field; that PW-3 met PW-1 about 150 meters away from the field of X; that field of PW-3 is 100-150 meter south of PW-1's field; that field of PW-4 adjoins PW-1's field; that PW-4 is son of PW-1's son; that PW-1 stayed with the body of his wife for about one hour; that PW-1 and the scribe reached police station between 5 and 6 pm; that the report was written at the police station; that it must have taken an hour to lodge the report; that he received copy of the FIR after few days; that after the FIR, the police visited the spot second time on the next day; and that on the date of the incident police had reached the spot at about 4 pm and conducted the inquest and prepared inquest report at 4 pm. He denied the suggestion that the deceased was murdered by unknown persons; the incident was not witnessed by any one and that the report was lodged after deliberation and in consultation with the police.

9. **P.W.-2, nephew of the informant** is the scribe of the FIR. He states that he scribed whatever was told to him by the informant. In the cross-examination he stated that PW-1 (informant) had reached police station before he could reach. He reached there about 5 minutes later. PW-1 had brought paper before he could reach. He reached there by about 5.30 pm. He denied the suggestion that he had written the report on the suggestion of the I.O.

10. **P.W.-3-** the eye-witness. She states that on the date of the incident it was Shivratri. It must have been around 4 pm. She had gone to collect grass from the fields; there, the deceased was harvesting mustard crop. Upendra (the appellant) came and took the deceased to a nearby sugarcane field. When, PW-3 reached the spot, she saw the appellant committing rape. After committing rape, the appellant killed the deceased. After seeing all of this, PW-3 got scared and came back to her house and disclosed everything to PW-1. **In her cross-examination**, she stated that she is on visiting terms with the informant; that she informed the informant (PW-1) as well as the I.O. about the incident on the date of the incident itself; that she did not inform PW-1 that there were two persons involved; that she informed PW-1 about the incident at about 4 pm or may be 4.30 pm; that the place of the incident is just a field away from her her own field; that in between her own field and the place where the incident occurred there is another field where there is also standing crop, the height of which is not much; that, on a daily basis, she goes to the field to collect grass and there is no fixed time for collecting grass; that on the date of the incident, she must have been there at the field for one and a half hour and that she must have gone to the field on or about 3 pm; that she returned only after witnessing the

incident and she has seen the appellant lying over the victim;  
and that there was nobody other than herself at the spot.  
During her cross-examination, when confronted by her  
statement recorded under Section 161 Cr.P.C., wherein she  
stated that she got afraid after witnessing the incident and  
returned back home and had not disclosed about the incident to  
anyone, she denied having made such statement to the I.O.  
She clarified it by stating that while she was returning, on her way back home, she did not meet anyone but when she had kept the collected grass at her house, she went to the house of PW-1 to tell him about the incident and it was then, that PW-1 went in search of his wife. She denied the suggestion that she is lying because of her relationship with PW-1. She also denied the suggestion that she had not seen the incident.

11. **PW-4-** is the grandson of PW-1. He stated that on 24.02.2017, at about 4 pm, while he was going towards his field, he saw the appellant running out of the sugarcane crop in the field from where the body was recovered. Later, he came to learn that at that spot the appellant had killed his grandmother. In his cross-examination, when confronted that he had not  
disclosed the time (4 pm) to the I.O. as to when he saw the  
accused appellant coming out of that field, he stated that he does not know the reason as to why it was not written by the I.O. He denied the suggestion that the time disclosed by him is on the basis of legal advice. He also stated that he is not aware  
as to who killed his grandmother and that for the first time he is  
stating that the appellant had killed his grandmother. He stated  
that he saw the accused running away from a distance of about  
50 meter; and that he did not come face to face with the  
deceased while he was running away. He stated that at that time, the accused was wearing a knicker and a vest whereas at

the spot trouser (pant) and Jooti (lady shoes) were lying near the body. He could not tell the colour of the clothes worn by the accused and he stated that at that time there was nobody else. He also stated that he did not meet PW-3 on the date of the incident. He stated that his grandfather (PW-1) had come to know about the murder before him and that on the same day he had spoken about the incident to PW-1. He further stated that after coming to know about the murder, he had visited the spot where the body was lying. On being questioned as to when the police had arrived at the spot, he could not remember the time but stated that PW-1 (informant) went to the police station along with the police. He also stated that by the time, after arrival, the police went back it was night. He denied the suggestion that he did not see what he has stated.

12. **PW-5 (witness of recovery of vest).** He proved that at the pointing out of the appellant a vest, kept beneath a brick, underneath a Sheesham tree, standing in an open field, was recovered of which seizure memo (Ex. Ka-4) was prepared. In his cross-examination, he stated that the vest had no stain of any kind on it. The vest was blue coloured and no mark was put on it by the I.O. He admitted that the place from where the recovery was made is about a kilometer away from his village and that he was informed from before that the accused would come there for recovery of vest. He also admitted that he knows the informant from before. He denied the suggestion that nothing was recovered in his presence and that because of his relationship with PW-1 he is telling a lie.

13. **PW-6 - Dr. Deepak Verma**, the doctor who conducted the post-mortem. He proved the post-mortem report and stated that he had also prepared a vaginal smear slide for examination by forensic laboratory. Interestingly, the injury no.1 in his autopsy

report which is noted as contusion, in his oral deposition is disclosed as an abrasion. **In his cross-examination**, he stated that injury nos. 1, 3 and 6 could not be caused from lathi /danda but they could be a result of friction on account of rubbing against the ground and could also be a consequence of falling over gravel. He stated that injury no. 2 could be a consequence of strangulation with the aid of rope or a cloth. He stated that on injury no.2 no impression of finger nails or finger were noticed nor he made effort to find it. But on private parts of the deceased, abrasion was noticed and signs of sexual assault were also noticed and that abrasion could not be a result of scratching. He stated that in the nails or hands of the deceased neither hair nor skin was found. He added that the deceased must have had a meal two hours before her death.

14. **PW-7-Santosh Kumar Singh**, the Investigating Officer (I.O.). He stated that he took over investigation of the case on 24.2.2017; after obtaining Chik report, recording statement of FIR scribe and the person who prepared Chik FIR, inspected the spot and prepared site plan (Exb. Ka-3); that he recorded the statement of the informant (PW-1) and the eye-witnesses (PW-3 and PW-4) on 25.02.2017; that on 26.02.2017, he arrested the accused who confessed about committing the crime and on his pointing out, vest was recovered of which seizure memo is Ex. Ka-4. On 27.2.2017, the accused's medical examination report was received which was entered in the CD. On 01.03.2017, he recorded the statement of witnesses A, B and C (*all of them not examined*), who all supported the prosecution case. He stated that on 08.03.2017 (vide Ex. Ka-5), he sent the recovered articles for forensic examination and on 27.03.2017, he submitted charge-sheet (Ex. Ka-6). He stated that the GD entry No.17 (Ex. Ka-8) in

respect of the Chik FIR (Ex. Ka-7) was made by Constable Clerk Rajveer Singh under his direction, at 17:35 hours on 24.02.2017, whose signature he recognises. **In his cross-examination**, he stated that PW-1, in his statement recorded under Section 161 Cr.P.C., stated that PW-3 had informed PW-1 about the incident after cremation of the deceased. He stated that in the site plan that has been prepared by him he had not shown the area of the fields adjoining the field from where the body was recovered. He stated that the standing crop of sugarcane though tall was not very dense. PW-7 stated that in the site plan, point C is the spot from where witnesses spotted the accused running. He stated that he has not mentioned the distance between A and C. (*Note: A is the spot where deceased was harvesting mustard*). He clarified it by stating that between point A and C there are 6 fields though the distance between them has not been mentioned. He admitted that sugar cane crop between the points A and C were tall but not dense. He further admitted that he did not mention the distance between point D and point C (*Note: Point D is the spot where the accused were noticed running*). He admitted that the field from which body was recovered had standing sugar cane crop. He admitted that near the spot there is a field of one Z (not examined) and of no other person and that surrounding the spot there is jungle and fields but no public rasta (road). He denied the suggestion that he colluded with the informant to frame the accused to solve out the case when in fact it was some unknown person who committed the offence. **On 04.01.2020, he was again examined on recall** to prove the material exhibits that were recovered and sent for forensic examination. On his statement, they were marked exhibits and the forensic report was also exhibited. Notably, the Sando

Baniyan (vest) marked M.Ex. No.6 was white coloured. In his cross-examination, he stated that the place from where the vest/ baniyan was recovered had been a vacant field near the place of incident with no standing crop though it was ploughed. He stated that though it was not mentioned in the seizure memo that the vest carried blood-stained, but, it had blood-stain. He admitted that the forensic report did not disclose presence of spermatozoa on the vest. He denied the suggestion that the recovery of *Baniyan* (vest) is bogus.

17. **PW-8, S. I. Veerpal Singh.** He conducted the inquest proceeding. He proved the inquest report (Ex. Ka-9) and that the condition of the body was described as follows: marks of strangulation on neck, nose - bleeding; *kurta* (top wear) - white coloured - torn; petticoat and saree of blue colour. He proved the papers in respect of inquest proceedings and autopsy. In cross-examination, he stated that in the Chik FIR (Ex. Ka-7) and GD (Ka-16) the distance between spot and the police station is 20 km, whereas in Inquest report it is 22 km. He denied the suggestion that at the time of preparing the inquest report there was no FIR in existence and that the FIR was written after inquest. He stated that at about 9 pm the body was sent for autopsy in a private vehicle. The distance between the spot and the post-mortem house is 30 km. In Form No.13 the distance between police station and police headquarter (district) is 18 km and the distance between the spot and police headquarter is 15 km. As per entry in Form No.13, body reached R.I. (*district police headquarter*) on 25.02.2017 at 9.10 hrs. It reached CMO at 11.50 hrs.. He denied the suggestion that inquest and other papers were not prepared on the date and time mentioned. He also denied the suggestion that the FIR of the case was prepared on 25.02.2017 and only

thereafter inquest was done and, therefore, the body of the deceased reached post-mortem house on 25.02.2017.

18. At this stage, we may observe that initially the FIR was registered only under section 302 IPC on 24.02.2017. It has not come in the testimony of prosecution witnesses as to when charge under Section 376 IPC was added. Moreover, no GD Entry of addition of section 376 IPC has been exhibited. But, we found from the record (Case Diary) that the charge of section 376 IPC was added on 25.02.2017 after the statement of PW-3 was recorded under section 161 CrPC.

19. Having noticed the oral testimony of the witnesses, we shall now have a glimpse at the forensic evidence. In so far as the **forensic evidence** is concerned, as per the autopsy report, internal examination of private parts of the victim, though, notices an abrasion on left inner wall of vagina, but no bleeding. Importantly, author of the autopsy report, namely, PW-6, in his deposition, does not rule out possibility of sexual assault on the victim. Notably, one *Kurta* (upper wear), one *Dhoti*, one *Petticoat* (lower wear), one nose pin (yellow metal) and one key (metallic) were sealed and sent for forensic examination and, it appears, swabs from pubic area and vagina (*labia majora*) were also taken and sent for forensic examination. The forensic report, dated 07.04.2017, sent by Forensic Laboratory, U.P. Moradabad (*refer to paragraph 3 (vii) above*), reports that no spermatozoa was noticed in the vaginal/ pubic area swab or in the articles i.e. clothes of the victim and *Baniyan* (vest) of the accused. The *Baniyan* (vest) of the accused and Petticoat and Saree of the victim disclosed presence of human blood. But neither the DNA profile nor blood group of the blood stain present were matched to connect it either with the deceased or with the accused-appellant. Notably, PW-6, the autopsy doctor,

stated that in the nails and hands of the deceased no skin or hair could be found. Thus, the forensic evidence is not conclusive in respect of commission of rape but does not rule out rape of the victim. Further, it does not connect the appellant with the crime. Consequently, the case depends on ocular evidence to prove both the charge i.e. rape as well as murder.

### **ANALYSIS**

20. As we have already noticed the entire evidence laid by the prosecution, we now proceed to analyse the same in the context of the submissions made. The submissions on behalf of the appellant to assail the conviction can be summarised as follows: (a) that it is a case of blind murder, the FIR is antedated and with a view to solve out the case the appellant, who is a resident of Bihar with no support in the area, has been falsely implicated; (b) the testimony of PW-1 renders the testimony of PW-3 and PW-4 unreliable and unacceptable; (c) that PW-3 is a chance witness whose presence at the spot appears unnatural and her testimony that she narrated everything to PW-1 is at variance with what PW-1 states; (d) that PW-3 though speaks of being a witness of both rape and murder but gives no description of how the victim was murdered; (e) that ligature marks found on the neck, have no explanation in the ocular account and there is no recovery of ligature, either from the spot or from anywhere else; (f) that the recovery of vest is completely bogus and, otherwise also, the vest could not be forensically connected with the crime; (g) that the testimony of PW-4 that he saw the accused - appellant running away from a distance is also unreliable because the standing crops would have blocked his view, even otherwise, PW-3 could not disclose the colour of clothes (vest and knicker) worn by the accused-appellant when PW-3 noticed him running

away; (h) that there is no presence of spermatozoa in the swabs and clothes, hence, the offence of rape cannot be said to be proved; and (i) the prosecution is guilty of hiding the truth by not seizing the trouser and shoes alleged to be noticed by PW-4 near the body of the deceased and by not carrying out DNA profiling of the biological material that could be recovered / noticed, or already recovered, as per the mandate of section 53-A CrPC.

21. First, we shall examine whether the FIR is ante-timed. To ascertain whether an FIR is ante-timed, the court has to carefully scrutinise not only the oral deposition of the witnesses but also the papers that are prepared in connection with the investigation, inquest, autopsy, etc. Ordinarily, papers relating to inquest, autopsy including challan nash, etc bear the details that are reflected in the Chik FIR, if an FIR exists, because, as a matter of course, where an FIR is registered, the I.O. carries with him a copy of the entries in the report, therefore, columns in prescribed forms relating to various informational fields are filled by having a look at it. In the instant case, the Chik FIR discloses the time of occurrence as 16.00 hrs and the distance of police station to the place of occurrence as 20 km. The inquest report (Ex. Ka-9) which, as per the report, was completed at 21.00 hrs on 24.02.2017 discloses the distance as 22 km. But the inquest report bears the case crime number of the case at hand. Therefore, merely because of the discrepancy in the distance mentioned in the inquest report with the Chik report, it would not be appropriate for us to hold that the FIR is ante-timed. Thus, to probe further on the issue, we would have to refer to the deposition of the witnesses. In the testimony of PW-1 (the informant), during cross-examination, it has come that the police arrived at the spot at 4.00 pm and

completed the inquest then. Interestingly, the FIR has been lodged at 17.35 hrs, that is, at 5.35 pm. Importantly, when PW-1 was further questioned as to when he received copy of the FIR, PW-1 stated that he received it after few days. The check report of the FIR (commonly referred to as Chik report) is prepared in triplicate, as per Regulation 97 of UP Police Regulations, and one copy is to be handed over to the informant then and there. If copy was not given to the informant on the day it was lodged, it creates a doubt whether the FIR was lodged at the time it is purported to have been lodged. But, PW-1 is an aged person (aged about 70 years), husband of the deceased (who herself was aged 75 years), therefore, may be in a state of shock he did not collect the copy and may be his statement with regard to inquest being conducted at 4.00 pm was an inadvertent error due to fading memory or confusion. At this stage, we may also notice the statement of PW-4 having a bearing on the issue. PW-4, during cross examination, in vernacular, states as follows: "Ghatna sthal par police bhi aa gayi thi. S. P. saheb baad mein aye thhe. Thana police kitne samay tak ghatna sthal par rahi nahi bata sakta. Ghatna sthal se hum thane chale gaye thhe. Police wale ghatna sthal se mere Dada ji ko apne sath thane le gaye thhe. Samay ka mujhe dhyan nahi hai kis samay le gaye thhe. Ghatna sthal se police jab thane gayi thi us samay raat ho gayi thi." The above-quoted statement would suggest that the police had arrived and the informant (PW-1) had gone with the police to the police station. When this statement of PW-4 is read in conjunction with the statement of PW-1 that the police had arrived at 4 pm and conducted the inquest, possibility of the FIR being ante-timed arises and, therefore, we cannot rule out the possibility of the FIR being ante-timed. More so,

because the constable clerk who prepared Chik report and made GD entry of its lodgement has not been produced by the prosecution.

22. We shall now proceed to test the ocular account. To suitably test the ocular account, we divide it into two parts. The first is eyewitness account of the whole incident rendered by PW-3 and the other is the eye witness account of a circumstance rendered by PW-4. To properly assess the merit and reliability of their deposition, we would have to first examine whether these witnesses are consistent in respect of the time of the incident. According to PW-1, the deceased took to the fields at about 2.00 pm. At 3.30 pm, when the deceased did not return, PW-1 went in search of her and met PW-3 (eyewitness) on way about 150 meters away from the field of X where the body of the deceased was found. At 4.00 pm, he could discover the body. On the other hand, according to PW-3, at about 4.00 pm, while she was collecting grass, she saw the deceased being taken/ pulled by the accused into the standing sugarcane crop. Whereafter, she witnessed the commission of rape as well as murder and got scared. In that shocked state, without telling anyone, she went back home, kept the collected grass at home and returned to inform PW-3 about the whole incident at 4.00 pm or may be 4.30 pm. Importantly, according to PW-3, she left her house to collect grass at about 3 pm and stayed in the field for about an hour and a half. In so far as PW-4 is concerned, he saw the accused-appellant running away at about 4 pm, notably the time i.e. 4 pm was not disclosed by him to the I.O. under section 161 CrPC. Thus, if we could guess the time of occurrence from the testimony of the prosecution witnesses, it would be between 3 pm and 4 pm. Now, what needs to be ascertained is whether accused-appellant was

seen by PW-3 committing the offence and whether PW-3 informed PW-1 about it. In this regard, PW-1 is adamant that PW-3 did not disclose the name of the accused-appellant. Rather, she disclosed presence of two unnamed persons. PW-1, further, in his cross-examination, states that even PW-4 did not disclose the name of the accused. At this stage, what assumes importance is that the FIR, which was lodged at 5.35 pm, does not disclose receipt of information from PW-3 regarding commission of rape and murder by accused-appellant. The FIR only expresses suspicion against the appellant and another because they were seen running away from near the spot by PW-4. Although that, by itself, is not a ground to completely discard the testimony of PW-3, but it does put us on guard to carefully scrutinise and test the testimony of PW-3. More so, because, we do not see a good reason for PW-1, whose wife is killed, to hide such information if it had otherwise been available to him. Another circumstance which creates doubt in our mind about complete information being provided by PW-3 to PW-1 is that it took half an hour for PW-1 to discover the body. Importantly, PW-1 was informed, according to him, at 3.30 p.m. by PW-3; whereas, the body was found at about 4.00 p.m. The distance from the spot and the point where information was given by PW-3 to PW-1 is just about 150 meters, as per the statement of PW-1, this therefore, confirms that PW-1 did not have complete information from PW-3 when he was searching for his wife.

23. Now, we proceed to test the testimony of PW-3. Before that, it would be useful to notice that the statement of PW-1 and PW-3, under section 161 CrPC, was recorded on 25.2.2017 by the I.O. The case diary (CD Parcha No.II) of 25.2.2017 suggests that the statement of PW-1 and PW-3 was recorded

by I.O. after cremation of the deceased as is also clear from the statement of PW-7. PW-7 stated that statements of PW-1 and PW-3 were recorded on 25.2.2017; and that PW-1 stated that PW-3 gave him information about the incident and involvement of the appellant after cremation. Notably, up to 25.2.2017, the case was registered only as a case of murder but, after their statements were recorded on 25.02.2017, under section 161 CrPC, section 376 IPC was added. As regards the time when section 376 IPC was added on 25.2.2017, it is difficult to determine because the GD entry has not been produced by the prosecution. The concerned constable clerk has also not been examined. Once we notice this position, the question that arises in our mind is whether the improvement in prosecution case was a consequence of autopsy report, or it was in usual course. The answer to this question is always difficult, if not impossible. But this question by itself raises a suspicion with regard to the prosecution story being contrived and this suspicion, in absence of blemish free evidence, may become insurmountable and entitle the accused to the benefit of doubt.

24. Be that as it may, we now proceed to assess the testimony of PW-3. PW-3 is a chance witness who, on the date of incident, was collecting grass from her field. In the site plan (Ex. Ka-3), four points are relevant. Points A, B, C and D. Point A is the spot from where the deceased was brought to point B and eventually killed. The distance between Point A and B is 50 meters. Point A is located on a mustard field of PW-1. Just south of that mustard field there is sugarcane crop of PW-1 and further south of sugarcane crop of PW-1, there is field of Z where there is wheat crop. East of field of Z there is ploughed vacant field of W, adjoining which, there is field of X where sugarcane crop is shown standing and in midst of which point B

is located from where the body of the deceased was recovered. Point D is the spot south of point B where the accused was noticed running away by PW-4 at 4.00 pm. Point C is the spot from where the witnesses saw accused running at point D. Importantly, point C is in midst of wheat field of another tenure holder and in between point C and point D there is a wheat field of yet another tenure holder. But, most importantly, point D falls in sugarcane field of X. The distance between point C and point D is not mentioned in site plan but from the testimony of PW-4 the distance appears to be 50 meters. What is interesting in the site plan is that neither the field of PW-3 nor the location of PW-3 is shown. PW-4 says that he was the only one there and so does PW-3 by claiming that except her there was none. Perhaps none could notice each other because of the height of sugarcane crop which, according to PW-1 and the I.O., were tall and tall enough to cover the height of a man. In this kind of a situation, watching the incident from a distance is highly unlikely. Importantly, no one states to have heard shrieks of the victim, which might have attracted attention. In such a scenario, it could only be a matter of chance that one could witness the incident more so, when the area is away from the village, not near a road or *Rasta*. In that background, we have to assess whether the ocular account of PW-3 and PW-4 is confidence inspiring.

25. PW-3 states that while she was picking grass in her field (*the location of which is not disclosed in the site plan*), the deceased was harvesting mustard in her (PW-1's) field, when, at about 4 pm, appellant came, held the deceased by her hand and pulled her and took her into the sugarcane field. When PW-3 reached the spot she saw accused-appellant committing rape. After committing rape, appellant killed the deceased.

Seeing all of this, PW-3 got scared and went home. She disclosed all of this to PW-1. Notably, in her entire testimony, she does not disclose whether the deceased raised an alarm, whether PW-3 heard shrieks of the deceased and whether the deceased offered resistance. In such circumstances, how could she assume that the accused-appellant committed rape is a mystery. Further, in what manner the accused-appellant killed the deceased is also not disclosed by PW-3. During cross-examination, PW-3 stated that neither she raised an alarm nor she told any body on way back home, but narrated, all of what she saw, to PW-1. Interestingly, PW-1 denies receiving any such information from PW-3 on the day of the incident, which is also reflected by the FIR lodged by PW-1. Importantly, in the course of cross-examination, PW-3 was confronted with her previous statement that she got scared and went home without telling anyone about the incident, upon which, she stated that she did not make any such statement. Another important feature in her deposition is that PW-3 went to collect grass at 3.00 pm and returned in about an hour and half after seeing the deceased dead but this is in conflict with the deposition of PW-1 where he states that PW-3 gave information at about 3.30 pm. Further, if PW-3 had really discovered the spot and had given information to PW-1, as stated by her, then why PW-1 would have taken one-half hour to discover the spot, as we have already noticed above. There is another aspect which renders PW-3 deposition unreliable, which is that, according to her, the I.O. recorded her statement on the day of the incident, which is not correct, as her statement was recorded next day. When we consider her statement as a whole, we find that she is just a chance witness; she does not state that she reached the place of occurrence on hearing shrieks or cries; she gives no

description of resistance being offered by the deceased; she gives no description of how the deceased was murdered; she states that information of the incident was given to the police and PW-1 on the day of the incident, which is incorrect, rather, she gave information next day, after cremation; and her conduct of returning back home and then going again to break the news to PW-1 appears unnatural and, in fact, that part of her conduct is negated by the testimony of PW-1 and the circumstance that the FIR bears no detail of her narration against the appellant except that she saw two unknown persons pulling the deceased into the sugarcane field of X. The sum and substance, of the analysis is that the testimony of PW-3 does not inspire our confidence. Either she just saw what is disclosed in the FIR lodged by PW-1, that is, two unknown men taking the deceased into sugarcane field, or she is spinning a story.

26. In so far as PW-4 is concerned, his testimony does not inspire our confidence for several reasons, namely, he too, is a chance witness; he saw the accused running alone at 4.00 pm from a distance of about 50 meters whereas, PW-1 states that PW-4 informed him that PW-4 saw two persons running away. Importantly, the time (4 pm) of PW-4 spotting the accused is not in his statement before I.O. and, further, it appears improbable, because, according to PW-1, 4 pm is the time when search was complete and the body was discovered. Another aspect which raises a doubt about his deposition is that, according to PW-4, he came to know about the murder after about one hour and that PW-1 came to know about the murder before him. This statement of PW-4 baffles us because, according to PW-1, search was on for the deceased since 3.30 pm and several villagers were there and body was discovered by about 4.00

pm. Therefore, if PW-4 witnessed the accused running away at 4.00 pm, he sure would have noticed people around in search of his grand mother. All of this renders his deposition unworthy of acceptance. In addition to above, there are other reasons also, which renders his deposition unworthy of acceptance. These are - PW-4 did not come face to face with the accused; PW-4 could not remember the colour of the clothes worn by the accused; and, most importantly, between the place (point C), from where he saw accused running, and point D, where the accused was seen running, there was sugarcane crop of considerable height (see deposition of PW-1 and PW-7), which might block the vision. All of this suggests that it is a case of blind murder and the prosecution case is built on guess-work or suspicion or to work out the case at the suggestion of the police.

27. At this stage, we may notice only to reject the submission of the learned A.G.A. that why would the prosecution witnesses of fact implicate the accused-appellant with whom they have no proven enmity, more so, when nothing could be elicited from the prosecution witnesses as regards the reason for his false implication. The answer to this lies in the oft-quoted observation of the Apex Court in the case **Shankarlal Gyarasilal Dixit vs State Of Maharashtra**, 1981 (2) SCC 35, where, in paragraph 33, it was observed :

*"Our judgment will raise a legitimate query: If the appellant was not present in his house at the material time, why then did so many people conspire to involve him falsely ? The answer to such questions is not always easy to give in criminal cases. Different motives operate on the minds of different persons in the making of*

*unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions"*

In that context we may add by observing that the accused is presumed innocent unless proven guilty. Therefore, the prosecution evidence has to be tested before it is accepted. Conviction is to be recorded only when the evidence is found reliable, truthful and trustworthy. Where doubts arise in respect thereof, the benefit of doubt would go to the accused. As regards the appellant not being able to elicit good reason for his false implication through the cross-examination of prosecution witnesses, it be noticed that the accused was a resident of Bihar, a labour, who was not even represented by a private counsel but by an Amicus Curaie at the time when statement of PW-1 was recorded. Expecting such a person to have the means to find out/discover motives for his implication is difficult to imagine. It might be a case where he could be a soft target to solve out an otherwise complex case. Be that as it may, we need not speculate on that, the upshot of the discussion made above is that the testimony of the eye-witnesses does not inspire our confidence.

28. In so far as the recovery of vest is concerned, firstly, it is not incriminating because no semen stain is found on it, as was alleged at the time of preparing the memo of recovery, and, secondly, the blood found on it, which was not even noticed at the time of recovery, was not connected either with the deceased or the accused by DNA profiling or serologist report. In addition to that, the recovery witness PW-5 is an acquaintance of PW-1 and, in his cross-examination, PW-5 states that his place of village is about a kilometer away and

that he was informed in advance to be present at the spot as the accused were to arrive for the recovery. This suggests that the recovered item was planted. Moreover, recovery is not from a concealed place. Rather, it is from an open field which had no standing crop. Another interesting feature of the recovery is that in the seizure memo (Ex. Ka-4), there is no indication about the presence of blood on the *Baniyan* (vest) though, it is there in respect of semen stain. But, the forensic report rules out presence of spermatozoa. Rather, it discloses presence of human blood, which is contrary to the seizure memo. To explain this aspect, the I.O. (PW-7) states that though blood-stain was noticed but, by mistake, he failed to mention the same in the seizure memo. This statement of PW-7 is not acceptable for the reason that PW-5, who is a witness of the recovery, during cross-examination, specifically stated that neither blood nor semen stain was present and that no mark was made on the vest at the time of recovery as mentioned in the seizure memo. Thus, for all the above reasons, we are of the view that the recovery of vest is inconsequential.

29. At this stage, we may observe that the investigation has not been up to the mark. Notably, from the statement of PW-4, it appears, a trouser and shoes were noticed near the body at the spot. But, surprisingly, there is no seizure of them. Most importantly, blood and other biological material was not collected from the accused for DNA profiling as per the requirement of section 53-A CrPC. It is difficult to accept that if the accused appellant had committed rape and had left his trouser on the spot, there would be no material available for DNA profiling. This raises a question regarding the bona fides of the investigation. More so, when the initial report was with regard to the involvement of two persons. Further, rape of an

aged woman, who is a stranger to the accused, baffles us. It was therefore a case where the investigating agency ought to have been diligent and circumspect because of the fundamental principle of criminal jurisprudence that fouler the crime stricter the proof. But, here, in the age of scientific advancement, the investigation was anything but scientific.

30. For all the reasons recorded above, as we have found the ocular account rendered by PW-3 and PW-4 not worthy of acceptance to hold the appellant guilty and there is no forensic evidence to link the appellant with the crime, we have no hesitation in holding that the prosecution has failed to prove the charges against the appellant beyond reasonable doubt. Therefore, the benefit of doubt must go to the accused. Consequently, the **appeal is allowed**. The impugned judgment and order of the trial court is set aside. **The reference to confirm the death penalty is answered in the negative and the prayer to confirm the death penalty is rejected**. The appellant is acquitted of all the charges for which he has been tried. The appellant is in jail and shall be released forthwith unless wanted in any other case subject to compliance of the provisions of section 437-A CrPC to the satisfaction of the court below.

31. Let the record of the lower court along with certified copy of this order be sent forthwith to the court below for information and compliance.

**Order Date :- 16.03.2022**

Sunil Kr Tiwari