

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

Cri. CONFIRMATION CASE NO.2 OF 2014

The State of Maharashtra ... PETITIONER

VERSUS

Anil Jagannath Pawar ... RESPONDENT

.....
Shri M.M. Nerlikar, A.P.P. for petitioner
Shri K.B. Autade, Advocate for respondent.
.....

WITH

CRIMINAL APPEAL NO.77 OF 2015

Anil Jagannath Pawar
Age 48 years, Occ. Labour,
R/o Brahmangaon, Tq. Shrirampur,
District Ahmednagar. ... APPELLANT

VERSUS

The State of Maharashtra,
through Police Inspector,
Shirdi Police Station, Tq. Rahata,
District Ahmednagar
(Copy to be served on
Public Prosecutor, High Court of
Judicature of Bombay,
Bench at Aurangabad) ... RESPONDENT

.....
Shri K.B. Autade, Advocate for appellant
Shri M.M. Nerlikar, A.P.P. for respondent
.....

CORAM: S.S. SHINDE AND
 A.I.S. CHEEMA, JJ.

DATED: 30th July, 2015.

Date of reserving judgment : 22/6/2015

Date of pronouncing judgment : 30/7/2015

JUDGMENT (PER A.I.S. CHEEMA, J.) :

1. District Judge-2 & Additional Sessions Judge, Kopargaon, District Ahmednagar has referred this matter for confirmation of death sentence awarded to respondent – original accused Anil Jagannath Pawar in Sessions Case No.43/2011, vide judgment dated 16.10.2014. The Criminal Appeal has been filed by Anil Jagannath Pawar against death sentence awarded to him. The other accused No.2 Anil @ Piraji Sukhdeo Pawar was acquitted by the trial Court.

2. In brief, the case of prosecution is as under :-

On 13.8.2011, at about 10.30 a.m., daughter of P.W.1 Eknath (hereinafter referred as victim) was passing on bicycle from near Gat No.415 at Dorhale, Taluka Rahata, District Ahmednagar, belonging to one Nanasaheb Dange (P.W.3), and accused No.1 Anil Jagannath Pawar (hereinafter

referred to as accused) dragged the victim girl, aged about 13 years, inside the field. She was taken inside portion of standing sugarcane crop and she was raped and murdered. The accused had come near the spot using motorcycle of accused No.2. After committing the offence, the accused escaped from the spot. The complainant Eknath, when he was proceeding towards his field, met with son on the way, who informed that victim had not come to the field. Eknath searched for his daughter and noticed her bicycle lying near the field of P.W.3 Nanasaheb. Footprints from the spot were going from field of Nanasaheb where bicycle was lying near portion of pomegranate into the field portion where sugarcane crop was standing. They followed and the complainant and the other villagers found dead body of the victim in naked condition in the crop. The clothes of the victim were lying nearby. She had injuries on various parts of her body including vagina. The complainant Eknath, father of the victim, could not see her naked and put the clothes on her body. The spot was field near village Dorhale, Taluka Rahata, District Ahmednagar. The police was informed on phone about finding the dead body and P.I. Dattatraya Pawar (P.W.14) reached the spot where he recorded the F.I.R. (Exh.56), which was given by P.W.1 Eknath. The offence was

registered. The inquest panchanama was carried out on the spot and the body was sent for post mortem. The police carried out spot panchanama. A dog from dog squad was called, who led the police towards north from the spot. However, the dog did not lead to the accused who was absconding. On 14.8.2011, P.W.3 Nanasaheb, in his statement, referred to the presence of dark complexion person seen by him near the field when he was going home on 13.8.2011 before the incident took place, who was on motorcycle. On the basis of description and information regarding cloths worn by the accused, given by P.W.3, police arrested the accused on 22.8.2011. The accused who had been earlier convicted in Sessions Case No.185/1996 and who was released on furlough on 22.9.2013 for 14 days, had jumped furlough and the present crime had been committed. On arrest, P.W.3 Nanasaheb Dange identified the accused at Police Station as the person whom he had seen near his field before the incident took place. Police found blood stained clothes of the accused. The accused gave discovery of the knife used in the incident and the motorcycle found from Wahegaon from a house of his father-in-law. Police forwarded seized articles like blood stained earth from the spot, the clothes of the victim, clothes of accused and other material to

Chemical Analyser at Nasik as well as Mumbai and reports were obtained. The post mortem had revealed death due to asphyxia due to compression of neck associated with genital injuries. The police collected evidence of earlier similar offences committed by the accused and filed the charge sheet. Matter was committed to the Court of Sessions. The Sessions Court framed charge under Section 376 and Section 302 of the Indian Penal Code, 1860. The accused pleaded not guilty. His defence is of denial. According to him, he was arrested merely on suspicion. The girl had suffered injury to her vagina due to pedal of bicycle and to her head due to handle of bicycle when she fell.

3. The prosecution brought on record evidence of 14 witnesses. The trial Court considered the evidence brought on record by the prosecution and convicted the accused for the rape and murder of the victim and interalia took note of the earlier convictions and imposed death sentence on the accused for offence under Section 302 of the IPC and sentenced him to suffer rigorous imprisonment for ten years and fine under Section 376 of the Indian Penal Code. Accused No.2 Anil @ Piraji, against whom prosecution brought evidence that he had lent his motorcycle to the accused No.1,

using which motorcycle the accused No.1 had gone to the spot and committed the offence, came to be acquitted. The motorcycle was standing on the name of mother of accused No.2 Anil @ Piraji. The investigating officer deposed that, accused No.1 was brother-in-law of accused No.2.

4. The present Confirmation Case and the Criminal Appeal came up before us for arguments. The appeal of the accused raised various questions regarding the conviction.

ARGUMENTS

5. The learned A.P.P. argued that the prosecution has duly proved on record the circumstances that just before the incident took place, accused No.1 was seen near the spot; that subsequently the knife used in the offence and the motorcycle were discovered at the instance of the accused; the blood stained clothes of the accused were seized from his person; and that the accused had been convicted earlier for committing offences using similar modus-operandi of grabbing a girl or woman in isolated place and committing rape and murder. The A.P.P. referred to the oral evidence of various witnesses and the documents proved including forensic evidence brought on record by the prosecution in the form of

C.A. reports. The A.P.P. submitted that, P.W.3 Nanasaheb had seen the accused near the spot and had given description of the accused to the police on 14.8.2011 and looking to the modus-operandi of the accused, the police arrested the accused and P.W.3 Nanasaheb had identified the accused before police. According to him, the necessary circumstances had been proved, which shows that, none else except the accused committed the offence. The knife recovered from the accused had human blood stains on it, which can be seen from the C.A. report. The accused was arrested. Even his clothes had blood stains. Thus, the learned A.P.P. submitted that, the conviction needs to be maintained. According to him, it is rarest of rare case and the death sentence should be upheld.

6. Per contra, the learned counsel for the accused submitted that the evidence of P.W.3 Nanasaheb shows that he had seen the person concerned only from a long distance and there were no special identity marks stated by the witness. The witness was unable to tell the colour or make of the motorcycle. The record shows one version that the clothes of accused were seized on 22.8.2011 and another version that the same was seized on 29.8.2011. There was no evidence that before or after the incident the accused had

been seen at or near the village. The C.A. reports showed that the results are inconclusive. When the knife was recovered, the panchanama did not note that it had blood stains. Still, the C.A. report shows that, it had blood stains. The learned counsel submitted that, looking to the facts of the matter, the holding of test identification parade was necessary. The prosecution did not take any steps in that regard and the identity of the accused is not established.

7. Prosecution brought on record evidence of 14 witnesses. Out of these witnesses, P.W.4 Umesh Jundare is Jail Officer, who was examined regarding other earlier offences. At present we proceed to discuss the evidence on record regarding the present offence, without keeping in view the earlier incidents or offences.

VICTIM FOUND RAPED AND MURDERED

8. The evidence of the complainant P.W.1 Eknath Dange and P.W.3 Nanasaheb Dange is material. The evidence of these witnesses shows that the incident took place on 13.8.2011. P.W.1 Eknath on that day had gone in the early morning to village Dorhale with his uncle to buy bullocks and returned home at about 10.00 – 10.30 a.m. He enquired from

his parents about his children. It appears, he had two daughters, one was Bhagirath and the other, the victim. He also has a son Sagar. The evidence shows that, after coming back from Dorhale, P.W.1 enquired about his children and he was told that they had gone to the field. He had his lunch and started going towards his field. On the way, his son Sagar met him and informed that the victim had not come to the field and they had waited for her. P.W.1 Eknath deposed that he then started searching for his daughter. In the course of the search, he noticed the bicycle of the victim lying at the corner of the field of P.W.3 Nanasaheb. P.W.1 Eknath called out to his daughter but he did not get any reply. He contacted his uncle Vishwanath and a couple of persons from brotherhood were called.

9. The evidence of P.W.3 Nanasaheb shows that, he had gone to his field Gat No.415 at Dorhale in the morning at about 7.00 – 8.00 a.m. to water the pomegranate trees by drip irrigation. The electric supply stopped at about 9.30 a.m. He started going back at about 9.45 a.m. He proceeded from his common brotherhood private road. He noticed one unknown person with yellow colour shirt and Khaki trouser who was on motorcycle. The person was of semi-dark

complexion of the age group 40 – 45 years. According to P.W.3 Nanasaheb, he returned to village, had Darshana of God and reached home at 12.00 – 12.45 when he got message from some boys that bicycle of daughter of Eknath was in his pomegranate field. P.W.3 claims that he also went to the field. Evidence of P.W.1 and P.W.3 shows that some people thus gathered at the field of Nanasaheb where bicycle of the victim was lying.

It appears from the evidence of above witnesses as well as P.W.5 Sitaram Hengde, in whose presence spot panchanama (Exh. 32) was recorded, that the field of Nanasaheb had on the eastern side an orchard of pomegranate trees and there was sugarcane crop on the western side. It appears from the evidence of P.W.1 and P.W.3 that the persons gathered at the field noticed foot prints of the victim as the field was wet. Foot prints led these persons to the portion of field where sugarcane crop was standing and the body of victim was discovered. P.W.1 has deposed that he saw the victim was lying between the crop of sugarcane. The victim had injury near her right eye and there was bleeding from her private part. There was no cloth on her person. She was already dead. The complainant Eknath

concluded from the situation on the spot that the victim had been raped and had been killed. Her clothes were lying nearby. He stated that he then put on clothes on the body of his daughter. The clothes had blood stains. The evidence shows that a phone call was made to the police at Shirdi Police Station, which is about 6 to 7 Kms. from Dorhale and the police arrived almost immediately. The police recorded the report of P.W.1 Eknath and F.I.R. Exh.56 was registered on 13.8.2011 at 2.30 p.m.

10. The police carried out panchanama. P.W.2 Shivaji Jape, a villager from Dorhale was panch. The panchanama Exh.24 was prepared on spot. In the panchanama the injuries were noted. After the inquest panchanama which was carried on 13.8.2011, between 2.45 – 3.50 p.m., P.W.14 P.I. Pawar prepared spot panchanama Exh.32 between 4.00 – 4.40 p.m. The panch for spot panchanma was P.W.5 Sitaram Hengde.

SPOT

11. Before discussing further, it would be appropriate to take note of the spot. From the evidence of P.W.1 to P.W.3, P.W.5 as well as the investigating officer in examination-in-chief and cross-examinations, various details

about the spot have come on record. What can be seen is that, Gat No.415 is on the name of wife of P.W.3 Nanasaheb. He appears to have been cultivating the field. It appears that, there is Pohegaon-Dorhale Road on the south. To the north of this road, first there is field of one Madhav Mohan, then towards north of that field there is field of P.W.3 Nanasaheb. After the field of Nanasaheb, further north there is field of Kondaji Dange. Then further north, there is Ranjangaon Savali Vihir Road. Thus, the field of Nanasaheb is sandwiched between other fields and one road Pohegaon-Dorhale to the south and another road Ranjangaon Savali Vihir on the north. It appears, there is Kaccha i.e. unbuilt road on the east of the field of Nanasaheb and there is another field of one Jagan Ananda Dangae on the west.

12. Although in the spot panchanama Exh.32, Shiv Wahini – the Kaccha Road shown to the east in map is shown leading from Pohegaon – Dorhale Road, the Ranjangaon Savali Vihir Road on the north, there are admissions of the witnesses as well as the investigating officer P.W.14 (in para 4 of his evidence) that the private road of Nanasaheb on the eastern side of the land does not join to Savali Vihir – Ranjangaon Road which is to the north. The evidence of witnesses has

brought on record that Dorhale village to the spot is a distance of about 2 Kms. (See P.W.1 and P.W.3). It also appears, there is some hut of Lord Janardhan Swami with family of Kisan Dinkar residing nearby. The said Kuti appears to be about 1000 ft. away from the spot (See evidence of P.W.1 and P.W.2). It also appears that, field of P.W.1 Eknath was about 1000 ft. away from the spot concerned. From the field of P.W.3 Nanasaheb, Dorhale – Ranjangaon road on the south is about 2000 – 2500 ft. away. As per P.W.3 Nanasaheb, Ranjangaon – Savali Vihir Road on the north is about 1000 – 1200 ft. away from pomegranate field. The evidence brought on record shows that the Pohegaon – Dorhale Road was being used by people. However, what appears is that, the spot of the field of P.W.3 Nanasaheb was not visible from the road. Going through the evidence of P.W.1 and P.W.3 as well as inquest panchanama, P.W.2 although these witnesses have been extensively cross-examined, the fact is still clearly established that the bicycle of the victim was found at the edge of the field of P.W.3 in the portion of pomegranate trees to the west of the Shiv Wahini Kaccha Road. The witnesses noticed that the victim had been dragged to the portion of field where sugarcane was standing. The evidence of witnesses brought on record that the

sugarcane standing was aged about six months and was higher than the shoulder. Although the accused tried to show that there were people trafficking on the Pohegaon – Dorhale road, which was to the south, the spot itself was clearly isolated which could be accessed only from the Shiv Wahini Kaccha way on the east going south-north to the field of P.W.3 Nanasaheb. We find no reason to disbelieve the evidence of P.W.1 and P.W.3 about finding the victim dead at such an isolated spot. The evidence of P.W.3 shows that he had left his field at about 9.45 a.m. and by about 12.15 Hrs. he received message about bicycle of the victim lying in his pomegranate field and he going to the field and along with other villagers discovering the dead body of the victim. The evidence of P.W.3 makes it clear that the incident occurred some time between 9.45 a.m. when he left his field and 12.00 noon when information was received about the bicycle lying in the pomegranate part of the field and information that the victim was missing.

IDENTITY OF ACCUSED

13. Admittedly, there was no eye witness of the incident. On spot no footprints of accused were either seen or picked up. No marks of motorcycle tyre were also noticed or

picked up. As such, the circumstance tried to be proved by the prosecution of seeing the accused near the spot is material. In this regard, there is sole testimony of P.W.3 Nanasaheb. It would be necessary to scan his evidence carefully. P.W.3 Nanasaheb claimed that he had gone for watering his pomegranate trees by drip. As the electricity supply was stopped at 9.30 a.m., he washed his hands and legs and started his motorcycle to go home. He deposed that the time was about 9.45 a.m. According to him, he started going from his common brotherhood private road. He deposed that he saw one unknown person with yellow colour shirt and Khaki colour trouser. The said unknown person was on motorcycle. Nanasaheb deposed that, such person was semi-dark complexion and within age group of 40-45. According to Nanasaheb, he, after seeing such person, came home. There is no material that such person had been seen earlier also lurking or passing from there.

Now, if the further evidence of P.W.3 Nanasaheb is seen, we have already referred that, coming to know about bicycle in his pomegranate field, he went back to his field and the body was discovered. There is evidence of P.W.1 Eknath about police coming to the spot and he giving his F.I.R.

Exh.56. P.W.14 P.I. Dattatraya claims that he recorded the F.I.R. Exh.56. The F.I.R. Exh.56 has endorsement of registration of Crime No.175/2011 at Shirdi Police Station on 13.8.2011 at 14.30 Hrs. Of course, Dorhale is about 6-7 Kms. from Shirdi Police Station, but the timings of inquest panchanama recorded by P.W.14 with P.W.2 Shivaji as panch on spot is too close at 2.45 p.m. We may not be too technical about time. May be investigating officer sent off complaint taken from P.W.1 to Police Station and once offence was registered, took number of offence on phone and proceeded to record inquest panchanama on spot. However, fact remains that although P.W.3 Nanasaheb did gather at the spot before police was called, he does not appear to have expressed his doubt of seeing unknown person to P.W.1 Eknath or the police on 13.8.2011. In this regard, he gave his statement only on 14.8.2011. P.W.3 Nanasaheb deposed that later on P.W.14 P.I. Pawar called him on 26.8.2011 and showed him an apprehended person who was the present accused. Nanasaheb deposed that he identified the accused on the basis of his clothes which were yellow colour shirt and Khaki colour pant. The witnesses clarified that the accused was identified from his clothes and description. P.W.3 Nanasaheb admitted in his cross-examination that when P.I. Pawar

showed him the accused, other persons were not shown. Nanasaheb deposed that he had told about seeing the man because of doubts. Question is whether identity of accused connecting him to the incident could be said to be established. P.W.3 Nanasaheb has admitted that he identified the accused only on the basis of clothes which he was wearing and the description. We will discuss the evidence regarding recovery of clothes later. At present, it needs to be mentioned that, such identification would be quite unsafe, unless it was to pass the test of identification parade. The poor quality of this identification becomes more obvious from the cross-examination of Nanasaheb where he deposed (in para 4) that he could not tell the Company of the motorcycle or its number, "As I have seen him at far distance". It is clear that, the witness was unable to give the make or particulars of the motorcycle, the number of vehicle or even its passing (as later it is stated to be Gujarat passing). Admittedly, he had seen the person he was referring to only from "far distance". The other material thing is that, although Nanasaheb claimed that he had seen unknown person on motorcycle, his evidence did not bring on record as to the exact place where this P.W.3 Nanasaheb was and where exactly the said unknown person was on motorcycle. It is not clear if the said unknown person

was standing besides the motorcycle or was sitting on the motorcycle which was in idle condition or was going on a moving motorcycle. He was on or near the Shiv-Wahini Kachha way or on Pohegaon-Dorhale Road or what, no particulars are stated. P.W.3 claimed that he was himself going on motorcycle. It is not even claimed that they crossed each other. Even if it was so, it would be a passing glimpse of the said unknown person. Without having any other point noted for identifying, the description that the unknown person was dark complexion and in the age group of 40-45 would be too vague specially when it appears that Pohegaon-Dorhale Road did have some people passing from there. We find it was duty of the investigating officer to have got an identification parade held looking to the facts of the present matter. It is too risky to link the accused to the incident on the basis of the evidence of P.W.3 Nanasaheb, which claims to have identified the accused only on the basis of clothes and description seen from far distance and not on the basis that he had clearly seen the face of the accused and could identify him.

14. There is another aspect which needs to be kept in view. P.W.3 Nanasaheb claimed to have seen the unknown

person while proceeding home to Dorhale. The concerned road is to the south of the spot. The Shiv Wahini Kaccha road going south-north does not connect to the Ranjangaon Savali Vihir road on the north, we have already observed. In such situation, if Nanasaheb had seen the person on motorcycle, it would be on the Pohegaon – Dorhale road on the south. Now if the evidence of P.W.14 is perused, the dog brought from dog squad led the police from the spot towards north. If the Pohegaon – Dorhale road is to the south, and the unknown person came from that side on motorcycle and so could have left from that direction only, it is surprising that the dog led the police to further north from the spot. We are aware that the evidence regarding dog leading the police is not very scientific. However, the prosecution brought on record evidence in this regard and we find that it does not really help the prosecution.

Thus, we are unable to rely on P.W.3 for identifying the accused and linking him to the incident. The circumstance relied on by the prosecution that the accused was seen near the spot before the incident took place cannot be said to be established beyond reasonable doubt.

ARREST OF ACCUSED

15. The prosecution has brought on record evidence of P.W.13 Minanath Hingal (Panch) and P.W.14 P.I. Dattatraya Pawar, which shows that on 22.8.2011 the police laid a trap and arrested the accused at Shirdi Railway Station. The evidence of these witnesses shows that the police had information that the accused would come there and they went and waited for him till the accused came and then seeing the police the accused started running. The police ran after him. The accused fell on the railway track and suffered serious injuries to his knee and other body parts. The accused resisted but was caught and police prepared panchanama Exh.54 on 22.8.2011 at about 4.00 – 4.45 p.m.

DISCOVERY

16. According to the investigating officer, P.W.14 Dattatraya Pawar and evidence of P.W.6 Panch Vishwanath, the accused was in police custody and agreed to give discovery of the knife and motorcycle used and also to show the spot. The evidence of these witnesses is that, on 29.8.2011, the statement of accused was recorded vide memorandum Exh.34, 35. The accused took the police party along with him first and showed the spot at the field of

Nanasaheb and from there he had taken the police party to Wahegaon. There was a house outside the village at about 50 ft. and from such house where there was nobody, the knife was discovered at the instance of the accused. The motorcycle was also found hidden nearby and police seized the same vide panchanama Exh.36.

The prosecution has relied on the above evidence to show that knife which was used in the incident was discovered at the instance of the accused. He had hidden the same at the place of his father-in-law. The motorcycle had Gujarat passing number. Before discussing the evidence regarding discovery of motorcycle and knife, reference needs to be made to the seizure of clothes of the accused.

SEIZURE OF CLOTHES - CONFUSION

17. There is evidence of P.W.12 Vishwanath Bagul, panch supported by the evidence of P.I. Dattatraya Pawar, which is to the effect that the clothes of the accused were seized on 23.8.2014 between 10.05 – 10.40 a.m. vide panchanama Exh.53. Thus, this panchanama Exh.53 claimed that the clothes of the accused were seized from his person on 23.8.2011. Now, firstly the prosecution has not explained

why if the accused was arrested from the Shirdi Railway Station on 22.8.2011, his clothes were also not seized on the same day. Secondly, if the evidence of P.W.6 Vishwanath Dange is perused, he deposed that, the discovery of motorcycle and knife took place on 29.8.2011. In the cross-examination, this witness deposed that the accused had also given his shirt, pant, banian and underwear and police had seized the same and taken his signature. The witness denied suggestion that the clothes were removed from the person of the accused. He insisted that the accused had taken out those clothes from the house. Thus, as per P.W.6 Vishwanath, clothes were recovered from the house from where the knife and motorcycle is supposed to have been discovered. This would be on 29.8.2011 which is contrary to the evidence led by the prosecution that the clothes of accused were seized from his person on 23.8.2011 vide Exh.53. The investigation raises doubts not merely because P.W.6 Vishwanath gave some admissions in his cross-examination regarding discovery of clothes from the house. There is further evidence from the record itself. P.W.14 P.I. Pawar was confronted with muddemal receipt Exh.69 in the cross-examination. This receipt shows deposit of the mobile phone, the knife, motorcycle, as well as clothes of accused

deposited with the Police Station on 29.8.2011. Confronted with such documentary evidence, P.W.14 P.I. Pawar tried to explain in his cross-examination that the muddemal was deposited with Clerk at one time and, therefore, the articles were mentioned in Exh.69 like that. But then, even if such explanation was to be given, it would show that the investigating officer seized clothes of the accused on 23.8.2011 vide Exh.53, but did not deposit the same with the Muddemal Clerk at the police station till 29.8.2011. There is no obvious reason for this. Then to claim the clothes were blood stained would be still questionable. It only shows that, there is room to doubt the manner in which the investigation has been done.

KNIFE TAMPERED

18. We have observed that there is room to doubt the investigation for above reason and there is still more. The evidence of P.W.6 Vishwanath Dange shows that knife was seized at the instance of the accused. Regarding this, the document Exh.36 has been proved which we have already referred. In Exh.36, it is recorded that knife was seized from the roof. Then description is given as a sharp edged knife, its size etc. The panchanama mentions that such knife was

seized and it was sealed. The panchanama does not appear to be mentioning that there were any blood stains on such knife. The knife sent to Chemical Analyser, however, had blood stains. The C.A. report Exh.42 shows that the knife sent to C.A. which was given Exh.1 by the C.A., had human blood on it, the group of which remained inconclusive.

FORENSIC EVIDENCE - NEUTRAL

19. The evidence of P.W.7 Dr. Jane shows that he carried out the post mortem. The unfortunate victim had various injuries which also showed that she had been dragged. The doctor proved post mortem report Exh.39 which concluded that the death of victim was due to asphyxia as a result of compression of neck associated with genital injuries. He saved the vicera for examination. The evidence of P.W.7 Dr. Jame Baseer shows that he collected samples of pubic hair with mud, nail scrapping, blood for grouping, vaginal smears, vaginal wash. He also collected necessary samples for D.N.A. examination. Prosecution has examined P.W.8 to P.W.11 Police Officials who took various samples to the Chemical Analysers at Nasik and Mumbai. The C.A. reports have been proved at Exh.40 to 45. D.N.A. reports have been proved at Exh.71 and 72. Going through the C.A. reports, although human blood was

shown as detected in various samples, the blood group remained inconclusive. On the Kurta and knicker of the victim, blood group noted was "AB". D.N.A. report Exh.72, which examined the scalp hair, vaginal smear, skin swab, lip swab from the victim did not find any male D.N.A. in the same. Thus, going through the C.A. reports and reports regarding D.N.A., it cannot be said that any link has been established between the forensic examination of the body of the victim, her clothes, evidence picked from spot vis-a-vis the clothes, blood etc., taken from the accused.

20. From the above, we find that, if the evidence brought on record by the prosecution as regards the rape and murder of the victim, dated 13.8.2011 is considered, it must be held that the prosecution has failed to link the accused with the incident or prove his guilt.

EARLIER OFFENCES RELEVANT ?

21. Till now, we have not referred to the earlier offences regarding which prosecution led the evidence of P.W.4. P.W.4 is Prison Officer who brought on record the evidence regarding earlier criminal cases which were filed against the accused. It is the case of prosecution that the accused, when released on furlough for 14 days on 22.9.2003, absconded and returned back

to the prison only on 14.9.2011. According to the prosecution, for 2899 days the accused was absconding and during such period he committed different similar offences. The trial Court permitted such evidence to be brought on record and in the judgment para 50, prepared a chart highlighting the different crimes and even the manner in which the offences were committed and the results whether the accused was convicted or acquitted etc. In this regard, it would be appropriate to refer to the concerned provisions of law. Question is, whether while holding trial for the Crime No.175/2011 in present matter the evidence regarding earlier convictions demonstrating general modus operandi of similarity of committing different earlier crimes was relevant.

Sections 53 and 54 of the Indian Evidence Act read as under :

"53. In criminal cases, previous good character relevant :- In criminal proceedings, the fact that the person accused is of a good character, is relevant."

"54. Previous bad character not relevant, except in reply. - In criminal proceedings, the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1.- This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.- A previous conviction is relevant as evidence of bad character."

Thus, it is clear that, in criminal proceedings, the fact that accused has a bad character is irrelevant unless the bad character is itself a fact in issue. When bad character is in issue we will discuss later. In the present matter, it is not a case that the accused tried to lead evidence of good character. Thus, Section 54 would bar leading evidence that the accused had a bad character.

22. Bad character would be in issue in certain matters.

Section 75 of the Penal Code reads as under :

"75. Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction:-

Whoever, having been convicted, –

(a) by a Court in India, of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards,

shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the life term, shall be subject for every such subsequent offence

to imprisonment for life, or to imprisonment of either description for a term which may extend to ten years."

As per this Section, after conviction for offence under Chapter XII (dealing with offences relating to Coin and Government Stamps) or XVII (dealing with offences against property) of the Indian Penal Code with imprisonment of three years or upwards, on subsequent conviction under either of these Chapters, the person would be liable for enhanced punishment. The offence under Section 302 or 376 does not fall in Chapter XII or Chapter XVII.

23. Section 211 of the Code of Criminal Procedure deals with contents of charge. Sub-section (7) reads as under :

"(7) If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed."

24. This sub-section will have to be read along with Section 236 of the Code of Criminal Procedure, which reads as under :

"236. Previous Conviction :- In a case where a previous conviction is charged under the provisions of sub-section (7) of Section 211, and the accused does not admit that he has been previously convicted as alleged in the charge, the judge may, after he has convicted the said accused under Section 229 or Section 235, take evidence in respect of the alleged previous conviction, and shall record a finding thereon:

Provided that no such charge shall be read out by the Judge nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under Section 229 or Section 235."

It is quite apparent that, even in cases where, by reason of previous conviction a person is liable for enhanced punishment, the charge is required to be framed and the same cannot be explained or evidence led unless the conviction in the subsequent matter is recorded. Object of such provision is obvious. Legislative intent is to avoid prejudice. Let the case in hand be first proved beyond reasonable doubts and only then the impact of earlier conviction would be relevant, is the mandate.

25. However, bad character can itself be fact in issue in offences like Sections 400, 401 prescribing punishment for belonging to gang of dacoits or thieves where bad character on that count can be in issue. It could be relevant while dealing with actions under Section 110 of the Code of Criminal procedure or where being part of organized crime is in issue like under the Maharashtra Control of Organised Crime Act, 1999. It would depend on facts and offence concerned. Same cannot be said for Sections 302, 376 of the Indian Penal Code, in the set of facts, with which we are here concerned.

26. Some of the rulings on this count need brief reference.

(A) The Privy Council, in the matter of **Noor Mohamed Vs. The King**, reported in **AIR (36) 1949 P.C. 161**, Privy Council was dealing with the matter of murder of a woman called Ayesha. In that matter, evidence was led that accused had previously murdered another woman, his wife Gooriah under similar circumstances. The Privy Council observed in para 17 as under :

"17. There can be little doubt that the manner of Ayesha's death, even without the evidence as to the death of Gooriah, would arouse suspicion against the appellant in the mind of a reasonable man. The facts proved as to the death of Gooriah

would certainly tend to deepen that suspicion, and might well tilt the balance against the accused in the estimation of a jury. It by no means follows that this evidence ought to be admitted. If an examination of it shows that it is impressive just because it appears to demonstrate, in the words of Lord Herschell in Makin's case: (1894 A.C. 57 : 63 L J. P.C. 41) "that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried", and if it is otherwise of no real substance, then it was certainly wrongly admitted."

(B) In the matter of **In re Kamya**, Accused – Appellant, reported in **AIR 1960 A.P.490**, it was observed :-

"The Sessions Judge in the examination of the accused under S. 342, strange to say, put to the accused his previous conviction. It is an elementary principle of criminal jurisprudence that the previous convictions of an accused are not relevant and can not be proved unless the good character of the accused is relevant under S. 54 of the Evidence Act or unless the prosecution, under S. 75 I.P.C. prays for an enhancement of the sentence."

(C) In the matter of **Shyama Charan Sri Ram Saran Vs. The State**, reported in **AIR 1969 Allahabad 61**, it appears that, the Sessions Judge questioned the appellant regarding his antecedents. The High Court observed as under :

"In criminal proceedings, the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant (See

Section 54 of the Evidence Act). The bad character of the appellant was not itself a fact in issue in the case. Under law, the Sessions Judge could examine the appellant only about the evidence, which was proposed to be used against him. So, this kind of evidence was clearly in-admissible, and we have ignored it completely, while judging the guilt of the appellant."

(D) In the matter of **Murlidhar Yadav Patil Vs. The State of**

Maharashtra reported in 1978 Cri.L.J. 1163, Single Judge of this

Court recorded that :

".... . . . the learned Magistrate disregarding the elementary principle of law that the question of previous conviction could not be considered till a conviction is recorded, evidently by relying on his own information in that he appears to have convicted the very accused for a similar offence on 24.8.1976, questioned the accused in his examination under S. 313 of the Cr.P.C. about that conviction on 24.9.1976. It was thereafter that the learned Magistrate proceeded to write a judgment whereby he convicted the accused and also sentenced him as stated at the outset by a selfsame judgment. It is needless to say that under S. 235 (2) of the Cr.P.C., it is only after the accused is convicted that the Court could hear the accused on the question of sentence. Again, S. 236 provides that even if there is a charge of previous conviction that charge could not be read over to the accused till he has been actually convicted, and that it is only after the accused has been convicted under Sec. 229 or 235 that evidence can be taken in respect of the alleged previous conviction. In any event even according to the proviso to that section till the accused has been actually convicted of the offence with which he is charged he could not be

questioned about his previous conviction.”

(E) Hon’ble Supreme Court, in the matter of **Ram Lakhan Singh & ors. Vs. The State of Uttar Pradesh**, reported in **AIR 1977 SC 1936**, observed in para 23 as under :

“23. Although the judgment of the Sessions Judge is otherwise an exhaustive judgment it cannot be said from the instances which we have set out above that his appreciation is free from legal infirmity of some kind of prejudice against the accused who are described as “law breakers”. In our system of law an accused starts with a presumption of innocence. His bad character is not relevant unless he gives evidence of good character in which case by rebuttal, evidence of bad character may be adduced (Section 54 of the Evidence Act).

27. The provisions of law as referred above and the rulings discussed above make it clear that the prosecution could not have been allowed to lead evidence of bad character as has been done in this matter and which appears to have weighed so heavily with the trial Court for the purposes of holding the offence proved as well as imposing of death penalty. In such a case of rape and murder, the motive is quite obvious that sexual lust was the driving force and the murder was to silence the prosecutrix so that evidence is not found. In such matter, the

evidence led by the prosecution of earlier similar cases against the accused was inadmissible. Modus-operandi for committing a crime may be relevant for the investigating agencies for the purpose of investigation to collect evidence. It does not absolve State from collecting evidence and proving case beyond reasonable doubts in subsequent offence. Modus operandi could be similar in different offences but motives which lie more in mind could be different. Modus operandi and motive are not interchangeable terms. Different persons may adopt similar modus operandi for different motives. General modus operandi of accused would not be relevant in the given matter while motive would be relevant. Thus, each matter needs to stand on its own legs. The prosecution has to prove the offence in the case at hand on the basis of circumstantial or direct evidence as may be, and forensic evidence relevant to present offence. This we have found as not proved and we do not wish to be swayed by earlier convictions.

UNSUSTAINABLE IMPUGNED JUDGMENT

28. When we peruse the judgment of the trial Court, it can be seen that, the trial Court (in para 55) of the judgment recorded reasons for holding the accused guilty and numbered the reasons. In reason (I) it observed that, the C.A. reports

show positive evidence against accused No.1 that he has committed the rape on victim girl and caused her death by asphyxia. The trial Court then made a chart of the findings of the C.A. report, without explaining how the accused was linked. In reason (ii) para 55, trial Court observed that, accused No.1 Anil Jagannath Pawar with intention and knowledge caused bodily injury to victim girl "which are imminently danger in all probabilities caused her death". The trial Court concluded that the direct scientific silent evidence goes against accused No.1 Anil. No reason is given as to how it directly goes against the accused. In reason (iii), the trial Court referred to the condition of the body and injuries of the victim and concluded that there was strong circumstantial evidence "against" the accused. The reason No.(iv) dealt with the identification done by P.W.3 Nanasaheb and discarded the argument that identification parade should have been held. Reason (v) referred to the table/ chart made by the trial Court regarding other offence committed by the accused. In reason (vi), the trial Court is found impressed from the fact that the knife was stained with human blood. It did not refer to the discovery panchanama Exh.36 which was silent on this count. In reason (vii), the trial Court was searching for the explanation from the accused as to where he was on the day concerned. The trial Court invoked Section 106 of the Indian

Evidence Act for this. The trial Court concluded in reason (vii) that there was unbreakable chain of circumstances. In reason (viii), however, the trial Court itself recorded that there was unbreakable chain of circumstances of evidence from probability to possibility of more than 50%. Reason (x) recorded that there was modus-operandi and motive behind commission of similar nature of offence against women and girls in earlier offence and the conduct showed motive, preparation, previous and subsequent conduct and thus, the Court was compelled to draw adverse inference against the accused under Section 8 of the Indian Evidence act. Looking to these reasons recorded by the trial Court for holding the accused guilty and further reasons in para 58 of the judgment, we find that, we are unable to agree with the trial Court. The offence is not at all established and the trial Court could not have allowed itself to be influenced by the earlier crimes of the accused. If such evidence of earlier offence and in this manner was to be allowed, the accused can be convicted for every similar subsequent offences without there being necessity to establish the subsequent offence by any evidence. Section 8 referred to by the trial Court when perused, does not appear to be providing that when the person is tried for the murder and rape of the victim, the fact that he has been earlier held guilty in earlier similar crime showing similar modus-

operandi is relevant.

29. For the above reasons, we find that, the conviction and sentence imposed by the trial Court cannot be maintained. The prosecution failed to establish beyond reasonable doubts that the accused committed rape and murder of the victim.

ORDER

30. For the above reasons, the appeal filed by the accused is allowed. The conviction and sentence imposed on the accused Anil J. Pawar is quashed and set aside. The confirmation sought by the trial Court of the conviction and sentence is declined.

The accused is acquitted of the offence punishable under Sections 302 and 376 of the Indian Penal Code, 1860. He shall be set at liberty forthwith unless his presence is required in any other offence.

(A.I.S. CHEEMA, J.)

(S.S. SHINDE, J.)