

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL CONFIRMATION CASE NO.3 OF 2019**

THE STATE OF MAHARASHTRA	]	Appellant
		(Original Complainant)

Vs.

ASHOK BABAN MUKANE	]	
Aged about 32 years, Occu: Laborer	]	
R at Masvane, Tal. Shahpur,	]	
Dist. Thane	]	
(Accused in Nagpur Jail, Nagpur)	]	Respondent
		(Original Accused)

a/w

CRIMINAL APPEAL NO.586 OF 2019

Ashok Baban Mukane	]	
Aged about 32 years, Occu: Laborer	]	
R/at Masvane, Tal. Shahpur,	]	
Dist. Thane	]	
(Accused in Nagpur Jail, Nagpur)	]	Appellant

Vs.

The State of Maharashtra	]	
(At the instance of Shahpur Police Station)	]	Respondent

.....

Ms. Veera Shinde, A.P.P for Appellant-State in Confirmation Case No.3 of 2019.

Mr. Shashikant Chaudhari, appointed Advocate a/w Ms. Snehal S. Chaudhari, Mr. Pranot Pawar and Mr. Gyanprakash R. Pal, for Respondent in Confirmation Case No.3 of 2019 and for Appellant in Criminal Appeal No.586 of 2019.

Mr. R.S. Kshirsagar, A.P.I Shahapur Police Station.

....

**CORAM : SMT. SADHANA S. JADHAV &
PRITHVIRAJ K. CHAVAN, JJ.**

RESERVED ON : 15th DECEMBER, 2021.

PRONOUNCED ON : 23rd FEBRUARY, 2022.

JUDGMENT: [Per Prithviraj K. Chavan, J.]

1. The learned Additional Sessions Judge, Kalyan had submitted the proceeding to this Court for confirmation of the sentence of death awarded by him in Sessions Case No.47 of 2014 on 6th March, 2019 under section 366 of the Code of Criminal Procedure, *inter alia*, an appeal by the appellant challenging his conviction and sentence of death for having committed murder of the victim and sentence of life imprisonment for committing rape upon her.

2. PW.1 - mother of the victim and the complainant was a resident of Village Saavroli, Taluka - Shahapur, District. Thane. The family comprised her husband, two sons, one daughter-in-law, grandson, two daughters (victim and another daughter). The victim was prosecuting her studies in Tool Mechanic Course in ITI.

3. On 5th September, 2013, as usual, P.W.1- mother of the victim accompanied her at Asangaon Railway Station around 5.45 a.m. The victim was to attend her college, as usual, on that day also. The victim was to catch a local train of 6.10 a.m. After leaving the victim at the station, P.W.1 - mother of the victim returned home and then left for her work at 8.30 a.m. However, instead of attending her work, P.W.1 - mother of the victim had been to her sister and both of them had gone to Kolsheewadi, Kalyan, as they wanted to meet one Appa Shinde. Appa Shinde was known for financially helping poor girls for their admissions in School. However, they could not meet Appa Shinde.

4. Thereafter, both of them went for their work in the Company. Around 10.30 to 10.45 a.m, P.W.1- mother of the victim had called the victim on her mobile number - 9225396130. The victim did not answer the call though the bell was ringing. P.W.1 - mother of the victim returned home around 6.30 p.m. Normally, the victim used to return home around 5.30 p.m. However, on that day, she did not return home and, therefore, several calls were made on her mobile. However, reply was "not reachable". Around 8.00 p.m., P.W.1-mother of the victim asked her son to go to the railway station in search of the victim. He returned home by 9.30 p.m only to inform that he could not see the victim at the Railway station. P.W.1- mother of the victim thought that due to the fear of her father, perhaps the victim might have gone to her friend's house and would go to her College on the next day morning directly from her friend's house. As such, no report was made on that day.

5. On 6th September, 2013, P.W.1- mother of the victim was at home since it was a holiday. Around 10.30 a.m, her son informed her that dead body of the victim was lying beside the railway crossing. The victim was found half naked as her jeans were pulled down and shirt was also found raised upto the breast. Her lips were found swollen and blood was oozing from her nose and mouth. Her face was swollen. Since P.W.1 - mother of the victim was in utter shock, she was not taken to the spot. Her son had noticed that the mobile handset of TATA Company which belonged to the victim was found stolen. It was apparent that she was raped and murdered.

6. A complaint came to be lodged by P.W.1-mother of the victim with Shahapur Police Station, on the basis of which, a crime bearing No.181 of 2013 under sections 302 and 376 (1) of the Indian Penal Code came to be registered on 6th September, 2013 at 16.05 hours (**Exhibit 35**).

7. Before registering an F.I.R, P.W.2-Shivaji Hari Satpute had already informed the Police for having noticed dead body of the victim lying in a half naked condition with blood and froth oozing from the mouth. Her College bag was placed on her stomach. Zip of the bag was found open and articles from the bag viz: water bottle and one red coloured purse was found lying near her body. This information was given on 6th September, 2013 at 9.15 a.m and ADR No.81 of 2013 was registered at 11.35 a.m (**Exhibit 38**).

8. P.W. 24 - Sunil Dattatray Wadke, Police Inspector then attached to Shahapur Police Station visited the scene of occurrence. An inquest as well as spot *panchanama* was drawn in the presence of

pancha witnesses. A rough sketch map of the spot was drawn by Revenue Inspector. Dead body of the victim was sent for autopsy to Sub-District Hospital, Shahapur. Hospital Authorities were asked by the Investigating Officer to collect vaginal swab, nail clipping, pubic hair and skull hair by issuing a requisition. Autopsy was conducted at J.J. Hospital, Mumbai. Biological samples were sent for chemical analysis to the Forensic Science Laboratory. Postmortem was conducted by a Panel of three Doctors. The report indicates that the "principal cause of death was due to Asphyxia due to smothering with compression of neck associated with head injury".

9. Further investigation was carried out by P.W.26 - Dy. S.P. Prashant Vijaykumar Waghunde. The appellant was arrested on 10th September, 2013 when he was found loitering in a suspicious condition beneath Asangaon Fly Over Bridge on the railway track. During interrogation, he alleged to have confessed his guilt before the Police. At the time of his arrest, clothes on his person comprising of a pant and "T" shirt along with green coloured half pant were seized by the Police.

10. While in Police custody, it is contended that he voluntarily made a disclosure statement, pursuant to which, the clothes which were on his person at the time of committing the offence came to be seized. Those clothes comprised one ash coloured full sleeves shirt having label as "*Ruff & Tuff*" and a black coloured pant labeled as '*METIC*'. Those clothes were duly seized and sealed vide *panchanama* (**Exhibit 51**). D.N.A examination of the samples collected from the person of the victim *vis-a-vis* the appellant confirmed that they match and that it was the appellant, who had

committed rape upon the victim. The Investigating Officer had recorded statements of the witnesses. Certain documentary evidence had been collected from the Institution where the victim was prosecuting her studies such as her attendance register in the college on the date of the incident etc. During investigation, it revealed that while returning home from the College, the appellant accosted her on the way and committed forcible rape. He killed her as she had resisted him.

11. The Investigating Officer had collected call detail record of the mobile phone of the victim as well as some other suspects. After investigation, a charge-sheet was filed in the Court of Judicial Magistrate First Class, Shahapur which, in turn, was committed to the Sessions Court, Kalyan.

12. A charge was framed under sections 302 and 376 (1) of the Indian Penal Code against the appellant. It was read over and explained to him. He abjured the guilt and claimed a trial. His defence was of total denial and false implication in this case. No defence evidence has been adduced.

13. To substantiate the charge, prosecution examined 26 witnesses coupled with some documentary evidence in the form of Call details record, autopsy report, D.N.A report, *panchanamas* etc.

14. The learned Additional Sessions Judge heard the appellant as well as the prosecution on the point of sentence. He has placed reliance mainly upon the latest judgment of the Hon'ble Supreme Court in case of **Mukesh and another Vs State (NCT of Delhi)** and

others¹ as well as ratio laid down by the Supreme Court in case of **Bachan Singh Vs. State of Punjab**², **Ramnaresh and others Vs. State of Chattisgarh**³ and **Dhananjay Chatterjee alias Dhana Vs. State of West Bengal**⁴. The learned Additional Sessions Judge discussed as to how the case falls within the rarest of rare category by referring to the evidence on record, especially the medical evidence. He observed that the victim was brutally assaulted by the appellant with the aim to commit rape. He, therefore, awarded death penalty to the appellant.

15. A reference under section 366 of the Criminal Procedure Code has been made by the learned Additional Sessions Judge for confirmation of death penalty.

16. We heard learned A.P.P, Ms. Veera Shinde and Mr. Chaudhari, Counsel for the appellant-accused at length. With the assistance of the Counsel, we have meticulously gone through the entire evidence, postmortem report and the reports of the Forensic Science Laboratory. We also heard the appellant in person as well as considered an affidavit of the appellant as well as an affidavit sworn by P.W.24 - Sunil Wadke, Investigating Officer.

17. The learned Counsel has pressed into service 44 case laws which are as under;

- (1) Bachan Singh Vs. State of Punjab⁵;
- (2) Macchi Singh and others Vs. State of Punjab⁶;

1 (2017) 6 SCC 1

2 (1980) 2 SCC 684,

3 (2012) 4 SCC, 257

4 (1994) 2 SCC 220

5 1980 Cri L.J 636

6 1983 Cri.LJ 1457

- (3) Sharad Biridhichand Sarda Vs. State of Maharashtra⁷;
- (4) State of Punjab Vs Harchet Singh alias Chet Singh ⁸;
- (5) State of T.N Vs. Suresh and another⁹;
- (6) Ronny alias Ronald James Alwaris Vs. State of Maharashtra¹⁰;
- (7) Akhtar Vs. State of U.P¹¹;
- (8) Nirmal Singh and another Vs. State of Haryana¹²;
- (9) Kumudi Lal Vs. State of U.P¹³;
- (10) Mohd. Chaman Vs. State (N.C.T of Delhi)¹⁴;
- (11) Raju Vs. State of Haryana¹⁵;
- (12) Bantu alias Naresh Giri Vs. State of M.P¹⁶;
- (13) State of Maharashtra Vs. Bharat Fakira Dhiwar¹⁷;
- (14) Pandurang Kalu Patil and another Vs. State of Maharashtra¹⁸;
- (15) Golakonda Venkateswara Rao Vs. State of A.P¹⁹;
- (16) Amit alias Ammu Vs. State of Maharashtra²⁰;
- (17) Anter Singh Vs. State of Rajasthan²¹;
- (18) Surendra Pal Shivbalakapal Vs. State of Gujarat²²;
- (19) State of Rajasthan Vs. Ram Niwas and another²³;
- (20) State of U.P Vs. Desh Raj²⁴;
- (21) Amrit Singh V. State of Punjab²⁵;

7 AIR 1984 Supreme Court 1622

8 1994 Cri. L.J 1529

9 1998 CRI. L.J, 1416

10 1998 CRI. L.J 1638

11 1999 Cri. L. J 5007

12 1999 Cri. L.J. 1836

13 1999 Cri. L.J 2523

14 2001 Cri. L. J. 725

15 2001 Cri. L. J 2580

16 2002 Cri. L. J. 211

17 2002 Cri. L.J. 218

18 2002 Cri. L.J 1007

19 AIR 2003 Supreme Court 2846

20 2003 Cri. L. J. 3873

21 2004 Cri. L.J. 1380

22 2004 Cri. L.J. 4642

23 2006 Cri. L.J, 2477

24 2006 Cri. L. J, 2108

25 2007 Cri. L.J, 298

- (22) Bishnu Prasad Sinha and another Vs. State of Assam²⁶;
- (23) State of M.P Vs. Munnibai and another²⁷;
- (24) Santosh Kumar Vs. State through CBI²⁸;
- (25) Rameshbhai Chandubhai Rathod Vs. State of Gujarat²⁹;
- (26) State of Maharashtra Vs. Goraksha Ambaji Adsul;
Goraksha Ambaji Adsul Vs. State of Maharashtra³⁰;
- (27) Haresh Mohandas Rajput Vs. State of Maharashtra³¹;
- (28) Amit Vs. State of U.P³²;
- (29) Ramnaresh and others Vss State of Chattisgarh³³;
- (30) Neel Kumar @ Anil Kumar Vs. State of Haryana³⁴;
- (31) Sandesh alias Sainath Kailash Abhang v. State of
Maharashtra³⁵;
- (32) Mohinder Singh V.. State of Punjab³⁶;
- (33) Ram Deo Prasad V. State of Bihar³⁷;
- (34) Shankar Kisanrao Khade Vs. State of Maharashtra³⁸;
- (35) Lalit Kumar Yadav alias Kuri V. State of Uttar Pradesh³⁹;
- (36) Tattu Lodhi alias Pancham Lodhi Vs State of Madhya Pradesh⁴⁰;
- (37) Prahlad V. State of Rajasthan⁴¹;
- (38) Rajendra Pralhadrao Wasnik Vs. State of Maharashtra⁴²
- (39) Sachin Kumar Singhraha Vs State of Madhya Pradesh⁴³
- (40) State of Jharkhand Vs. Mathura Yadav⁴⁴;

26 AIR 2007 Supreme Court 848

27 2008 Cri. L. J, 4692

28 2011 AIR SCW, 3647

29 2011 Cri. L.J 1458

30 2011 Cri. L.J. 4286

31 2011 Cri. L.J (Supp) 126

32 2012 Cri. L. J 1791

33 2012 Cri. L. J. 1898

34 2012 AIR SCW 3766

35 2013 Cri. L.J, 651

36 2013 Cri. L.J. 1559

37 2013 Cri. L.J. 2369

38 2013 Cri. L.J. 2595

39 2014 AIR SCW 2655

40 AIR 2016 Supreme Court 4295

41 AIR 2018 SC (Supp) 2586

42 AIR 2019 Supreme Court 1

43 AIR 2019 Supreme Court 1416

44 AIR Online 2019 Jha 268

- (41) State of Maharashtra Vs. Imtiyaz Ahmad Mohd Ali Shaikh⁴⁵;
- (42) The State of Maharashtra Vs. Krushna s/o Ramrao Ridde⁴⁶;
- (43) Mofil Khan and another Vs. The State of Jharkhand⁴⁷;
- (44) The State of Maharashtra Vs. Rahimuddin Mohfuz Shaikh @ John Anthony D'souza @ Babu @ Baba, ⁴⁸.

18. Case laws at Sr. No.1, 2, 4, 7, 8, 9, 10, 11, 12, 16, 18, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 are on death sentence and hence, are not applicable.

19. Judgment at Sr. No.5 in case of **State of Tamilnadu Vs. Suresh and another** (supra) is not applicable as it is on the point of evidence of accomplice.

20. The judgment at Sr. No.6 in the case of **Roony alias Ronald James Alwaris Vs. State of Maharashtra** (supra) is on the point of Test Identification Parade and hence, not applicable.

21. In the judgment at Sr. No.13 in case of **State of Maharashtra Vs. Bharat Fakira Dhiwar** (supra), the Hon'ble Supreme Court accepted the circumstantial evidence in the form of recovery of articles stained with blood of the deceased as a clinching and truthful evidence.

22. The judgment at Sr. No.17 in case of **Anter Singh Vs. State of Rajasthan** (supra) deals with section 27 of the Indian Evidence Act

45 AIR Online 2019 Bom 973

46 Confirmation Case No. 3 of 2016

47 Review Petition (Criminal) No.641 of 2015 in Criminal Appeal No.1795 of 2009

48 Confirmation Case No.1 of 2017

which, according to the Supreme Court, is in nature of exception to preceding provisions, particularly, sections 25 and 26. The Supreme Court has laid down conditions necessary for invoking section 27 of the Indian Evidence Act. We have already discussed the said aspect.

23. The judgment at Sr. No.19 in case of **State of Rajasthan Vs. Ram Niwas and another** (supra) is not at all applicable to the present set of facts as it deals with evidence of an approver under section 306 of the Code of Criminal Procedure.

24. Similarly the judgment at Sr. No.20 in case of **State of U.P Vs. Desh Raj** (supra) is on the aspect of "last seen together".

25. The judgment at Sr. No.23 in the case of **State of M.P Vs Munnibai and another** (supra) is on section 34 of the Indian Penal Code and hence, not applicable.

26. We wonder as to why and how these judgments as precedents have been cited by the Counsel for the appellant. It is apparent that simply a bunch of compilation of case laws has been tendered without referring to any single precedent from the list of the judgment noted above.

27. At the outset, we hold that the prosecution has succeeded in establishing homicidal death of the victim, yet the evidence is too short and weak to establish any nexus of the appellant *qua* murder of the victim. Having said so, there is absolutely no point in considering the voluminous case laws comprising 44 judgments tendered on behalf of the appellant on the aspect that the case does not fall

within rarest of rare category. Since we are disinclined to accept the contention of the prosecution that it has proved the charge of murder against the appellant, he needs to be given benefit of doubt on that count. Though such voluminous case laws have been cited by the Counsel, not a single case law is pointed out as to how ratio laid down therein would be applicable to the present set of facts.

28. It has been argued that the prosecution case revolves around circumstantial evidence, however, it has failed in establishing the chain of events, for, there are several discrepancies and doubts in the testimonies of the prosecution witnesses, which according to the Counsel, do not inspire confidence. There is not a single eye witness who is said to have seen the victim returning home on the day of the incident by the side of the railway track. The Counsel would argue that no efforts were taken by PW.1-mother of the victim to ascertain the whereabouts of the victim when she was found missing in the evening of 5th September, 2013. Non examination of the brother of the victim who had noticed her dead body and who was the one to intimate the informant- PW.1-mother of the victim that the victim was not found at the railway station, is fatal to the prosecution case. This, according to the Counsel, is a serious lacuna in the prosecution case and, therefore, the appellant needs to be acquitted.

29. So far as the evidence of PW.2 - Shivaji Hari Satpute is concerned, it is submitted that he is an usual police witness who was in touch with the Police and, therefore, his evidence is not free from doubt. He was already present on the spot before arrival of Police. It is argued that this witness had received a call from one Dilip Chandrakant Sangare but the said Dilip Sangare has not been

examined by the prosecution. There is no call detail record produced *qua* conversation between this witness and Dilip Sangare. As regards inquest *panchanama*, it is submitted that one *panch* is the sister-in-law of the victim and, therefore, she is an interested witness. The Counsel has also questioned the credibility of P.W.8- Gulab Rambabu Agrawal as she was involved in an illegal liquor business. According to him, she was a planted witness by the Police, who had no occasion to see the so-called TATA Mobile handset, which the appellant purportedly wanted to sell her.

30. Similar is the argument in so far as the evidence of P.W.9 - Mangesh Hari Hirankar is concerned. According to the Counsel, he cannot be said to be a reliable and trustworthy witness who was under the influence of liquor at the relevant time. The next argument of the Counsel is that seizure of the clothes of the appellant as well as the articles from the scene of occurrence is not free from doubt as the correct procedure of seizure had not been followed by the Investigating Officer.

31. As far as the evidence of P.W.18 - Dr. Dattaram Bhore, who had conducted autopsy, it is submitted that age of the victim had not been proved by the prosecution, so also the time of her death. It is submitted that postmortem report in itself is insufficient to establish any link between the appellant and the alleged offence of murder and rape.

32. The Counsel would argue that the Investigating Officer as well as Chemical Analyzer Mr. Siddharth More and Avinash Surve had not followed the procedure. The chemical analyzer and his assistant had

not been examined by the prosecution. They had called local *panchas*, especially the relative of the complainant and, therefore, that evidence is also untrustworthy. The Counsel, therefore, has prayed for acquittal of the appellant.

33. On the other hand, the learned A.PP has supported the impugned judgment and order of conviction by stating that it is a fit case of maintaining the conviction for the offence of not only committing rape upon the victim but also eliminating her brutally by strangulating as well as forcibly hitting on her head with some hard and blunt object. The learned A.PP would argue that the trial Court has rightly awarded death penalty since it is a case which falls under the rarest of rare category in view of the principles laid down by the Supreme Court in the case of **Bachan Singh** (supra) and **Machhi Singh** (supra) and other precedents.

34. This case, indeed revolves around circumstantial evidence. Before advertng to the circumstances brought on record by the prosecution, it would be essential to note that indubitably the victim died a homicidal death who was also subjected to rape. The defence has not seriously disputed the fact of homicidal death of the victim as well as the fact that she was subjected to rape. The evidence needs to be scrutinized so as to see whether the prosecution has been successful in showing a nexus between the crime and the criminal i.e the appellant keeping in mind the well-known principles enunciated in the case of **Sharad Sarada** (supra) and many others on circumstantial evidence.

35. Broadly speaking following few circumstances emerged from the overall evidence of the prosecution.

- (a) The appellant was residing in a hut which was not far away from the scene of occurrence;
- (b) The appellant and his wife knew that it was the usual foot way being used by the victim;
- (c) The appellant had consumed liquor on the day of the incident and also on the following day;
- (d) The appellant had been to the liquor shop of P.W.8-Gulab Agrawal on 5th September, 2013 during evening hours;
- (e) The appellant had offered to sell a TATA DOCOMO mobile handset to P.W.8-Gulab Agrawal in the presence of P.W.9 - Mangesh Hirankar;
- (f) Discovery of clothes of the appellant on his person at his instance from the hut with semen stain and pubic hair on the pant;
- (g) The DNA report of the appellant and the victim.

36. The defence has not disputed the factum of homicidal death of the victim as well as the fact that there was rape. Nevertheless, it would be expedient to go through the evidence of P.W.18 - Dr. Dattatray Bhore.

37. P.W.18 - Dr. Dattatray Vitthal Bhore who was then Assistant Professor in J.J Hospital, Mumbai conducted autopsy over the dead body of the victim along with Dr. S.S. Bhise and Dr. G.D. Niturkar. Dr. Bhise and Dr. Niturkar were Assistant Professors in the Department of Forensic of Grant Medical College, Mumbai at the relevant time.

38. Evidence of P.W.18 - Dr. Bhore reveals that dead body of the victim aged about 17 years was brought to the Hospital by an Assistant Police Inspector - Patil of Shahapur Police Station on 6th September, 2013 at 8.00 p.m. Autopsy was conducted between 9.00 p.m and 11.00 p.m on that day. On examination of the body which was wrapped in red coloured bed sheet and was nude, following external injuries were noticed;

(a) Contusion of size 4 c.m x .5 c.m. Muscle deep present over left cheek 2 c.m away from left angle of mouth dark red in colour;

(b) Abrasion contusion of size 2 c.m x .5 c.m. Muscle deep present over left sub mandibula region and 2.5 lateral to injury No.1 dark red in colour;

(c) Abrasion of size 3 c.m x 1.5 c.m present below left eye lid over left maxillary region dark red in colour;

(d) Abrasion of size .2 c.m x .2 c.m present below left nostril laterally dark red in colour;

(e) Linear nail mark abrasion of size 2 c.m x .5 c.m present behind right ear oblique in direction dark red in colour;

(f) Abrasion of size 5 c.m x 1 c.m present over the back side over right scapular region dark red in colour;

(g) Contusion of size 5 c.m x 4 c.m muscle deep present over left arm posterio medially dark red in colour;

(h) Contusion of size 3 c.m x 2 c.m muscle deep present behind right elbow joint posterio medially dark red in colour;

(i) Abrasion of size 4 c.m x 2 c.m present behind right elbow posterio laterally dark red colour;

(j) Abrasion of size 4x.5 c.m present over right leg laterally just above right lateral malleolus;

(k) Abrasion contusion over inner aspect of lower lip, on left side of size 2x.5 c.m dark red in colour.

All the injuries were stated to be fresh and were caused within 24 hours. Those injuries were probably caused by hard and blunt object. Abrasions were due to rough surface and nagging.

39. When there is no direct evidence and the decision has to be based on circumstantial evidence, a few guidelines and salient features have been enunciated by various judgments including the well-known decision in the case of **Sharad Sarda** (supra) Broadly speaking, the evidence must satisfy following tests;

(a) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

(b) Those circumstances should be of definite tendency unerringly pointing towards the guilt of the accused;

(c) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else;

(d) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

40. PW.3- Sachin Kondiram Bhoir acted as a *panch* in respect of scene of offence **Exhibit 113** as well as inquest *panchanama* **Exhibit 40**. The sum and substance of his evidence is that he was summoned by the Police on the spot at 10.00 a.m on 6th September, 2013 along with sister-in-law of the victim. Body of the victim was found lying beside the railway track. Blood was oozing from her nose and mouth. There was an injury over her cheek. A bag was lying on her stomach. A Chocolate coloured purse was lying beside her. There was one SIM Card of TATA DOCOMO. A black coloured bag contained some text books of the Institute where the victim was prosecuting her study. There was a water bottle, tiffin box, lipstick, identity card issued by the Railway Department etc. All the articles were seized by the Police under a *panchanama* which is proved at **Exhibit 42**. PW.3 - Sachin Kondiram Bhoir identified all the articles during trial. The defence declined to cross-examine this witness. Thus, seizure of the articles lying near the victim have been duly proved by the prosecution.

41. A team of Doctors had noticed following injuries on genital region;

"Labia majora and minora - contusion is seen over inside surface of labia majora and minora on both sides. Dark red in colour. Tearing of the hymen is seen on 7 O' clock position on right side with infiltration of blood is seen in margins of remaining tags of hymen. The injuries probably caused by forceful intercourse".

42. On internal examination, the team of Doctors found following ante mortem injuries;

"(a) Head injury - Under scalp contusion of size 8 c.m x 10 c.m bone deep present over right fronto temporal parietal region dark red colour;

(b) Under scalp contusion of size 3 c.m x 2 c.m bone deep present over vertex. Red in colour .

(c) Brain tissue -

(i) Subdural hematoma of size 10 c.m x 8 c.m present over right parieto occipital region extends to left parietal region of cerebral hemisphere, dark red colour;

(ii) Subdural hemorrhage of size 5 c.m x 4 c.m over left occipital region, dark red in colour;

(iii) Subarachnoid hemorrhage of size 6 c.m x 4 c.m over right parieto occipital region, dark red in colour;

(iv) Subarachnoid hemorrhage over left occipital region 2 c.m x 1 c.m, red in colour".

Said hemorrhage due to hard and blunt object.

(4) Neck injury - on dissection of the skin of neck underlying muscle hemorrhage is seen, from mentum of chin to left sub-mandibular region. Caused by due to pressure on neck and muscles of both sides of neck.

43. Five samples of viscera were preserved which are as under;
"Viscera for CA - 3 bottles, blood for grouping and DNA - 2 bottles - Nail clipping for C.A - one bottle, scalp hair and pubic hairs for C.A 2 bottles, vaginal swab for C.A one bottle".

44. **Postmortem report:**

11.	<i>Regard mortis - well marked, slight or absent, whether present in the whole body or part only</i>	<i>Rigor mortis - passed away in upper limbs and present in lower limbs</i>
12.	<i>Extent, and signs of decomposition, presence postmortem</i>	<i>signs of decomposition seen. Body was in state of early decomposition with maggots, with length 0.5 cm, present all over body, dense over face, and external genitalia</i>

	<i>lividity of buttocks, loins, back and thighs or any other part. Whether bullae present and the nature of their contained fluid. Condition of the cuticle</i>	<i>region, evidence of marbling of skin over chest on upper region and shoulder region, foul smelling gases. Postmortem lividity - developed, fixed faint purple colour all over back, except bony prominences. Right side of face shows postmortem lividity staining which is reddish purple colour and fixed.</i>
13.	<i>Features - Whether natural or swollen state of eyes, position of tongue, nature of fluid (if any) oozing from mouth or ears</i>	<i>Eyes closed, maggots seen, on opening both pupils dilated and fixed, right eyes shows sub conjunctival hemorrhages. Mouth partly open, maggots are seen inside the oral cavity, Lip cyanosed, teeth intact, tongue inside mouth cavity. Nose - oozing of blood tinged fluid with mucus from both the nostrils.</i>
14	<i>Condition of skin - Marks of blood, etc in suspected drowning the presence or absence of cutes anserina to be noted</i>	-----
15.	<i>Injuries to external genitals. Indication of</i>	<i>external genitalia - maggots are present around external genitalia, labia majora and minora. Contusion is seen over inside</i>

	<i>purging</i>	<i>surface of labia majora and minora on both sides, dark red colour. Tearing of the hymen is seen on 7' O clock position. On rich side with infiltration of blood of hymen Anus - No evidence of purging, excoriation of skin seen at places on inner side of thigh produced by maggots.</i>
16.	<i>Position of limbs- Especially of arms and of fingers in suspected drowning the presence or absence of sand or earth within the nails or on the skin of hands and feet</i>	<i>In anatomical position. Black colour ink stains present over palmer aspect and finger of both hands, chest and abdomen.</i>
17.	<i>Surface wounds and injuries. Their nature, position, dimensions (measured) and directions to be accurately stated If bruises be present what is</i>	<i>1)Contusion of size 4 c.m x 05 c.m x muscle deep present over the left cheek 2 c.m away from left angle of mouth dark red colour; (2)Abraded contusion of size 2 c.m x 0.5 cm muscle deep present over left submandibula region 2.5 cm lateral to injury No.1, dark red in colour; (3)Abrasion of size 3 c.m x 1.5 c.m present below left eyelid, over left maxillary region, dark red colour; (4) Abrasion of size 0.2 c.m x 0.2 cm,</i>

	<i>the condition of the subcutaneous tissues?</i> <i>(N.B.- When injuries are numerous and cannot be mentioned within the space available they should be mentioned on a separate paper which should be signed</i>	<i>present below left nostril laterally dark red colour;</i> <i>(5)Linear nail mark abrasion of size 2 cm x 0.1 c.m, present behind right ear, oblique in direction, dark red colour;</i> <i>(6)Abrasion of size 5 c.m x 1 c.m, present over the back side over right scapular region, dark red colour;</i> <i>(7)contusion of size 5 c.m. x 4 cm X muscle deep, present over the left arm posteromdially dark red colour;</i> <i>(8)contusion of size 3 c.m x 2 c.m x muscle deep present behind right elbow joint posteromedially, dark red colour;</i> <i>(9)Abrasion of size 4 c.m x 2 c.m, present behind right elbow posterolateraly dark red colour;</i> <i>(10)Abrasion of size 4 cm x 0.5 cm present over right leg, laterally, just above right lateral malleolus;</i> <i>(11)Abraded contusion over inner aspect of lower lip, left side of size 2 c.m x 0.5 c.m, dark red colour.</i>
18.	<i>Other injuries discovered by external examination or palpation as fractures etc</i>	<i>No palpable fracture</i>

	<i>(a)Can you say definitely that the injuries shown against serial Nos 17 and 18 are antemortem injuries</i>	<i>Yes, antemortem</i>
19.	<i>Head -</i> <i>(i)Injuries under the scalp, their nature;</i> <i>(ii)Skull - vault and base describe fractures, their sites, dimensions, directions etc;</i> <i>(iii)Brain - The appearance of its covering, size, weight and general condition of the organ itself and any abnormality found in its examination to be carefully noted (Weight M 3</i>	<i>Under scalp contusion of size 8 c.m x 10 c.m, bone deep present over right frontotemporo - Parietal region dark red colour'</i> <i>Intact, No fracture</i> <i>Meninges - Intact, vessels - congested</i> <i>(1)Subdural hematoma of size 10 c.m x 8 c.m present over right parietoccipital region extend to left parietal region of cerebral hemisphere dark red colour;</i> <i>(2)Subdural hemorrhage of size 5 c.m x 4 c.m over left occipital region, dark red;</i> <i>(3)Subarachchomoid hemorrhage of size 6 c.m x 4 c.m over right perietoccipital region,</i>

	gram F. 2.75 grams)	dark red colour; (4)Subarachnoid hemorrhage over left occipital region, 2 c.m x 1 c.m, dark red;
20.	Thorax	On dissection of the skin of neck, underlying muscle hemorrhage is seen from mentum of chin to left sub mandibular region and muscle of both sides of neck - dark red colour
	(a) walls,ribs cartilages	Intact, No rib fracture
	(b) Pleura	Intact
	(c)Larynx, Trachea and Bronchi	Intact, trachea - congested, no foreign body
	(d)Right Lung } }	
	(e)Left Lung }	Both lung intact, congested
	(f)Pericardium	Intact
	(g) Heart with weight	Intact, normal size and shape congested, valves intact, chambers empty
	(h)Large vessels	
	(i)Additional remarks	----

21	<i>Abdomen }</i>	
	<i>Walls }</i>	<i>Intact</i>
	<i>Peritonium }</i>	<i>Intact</i>
	<i>Cavity</i>	<i>No free fluid or blood fluid in peritoneal cavity</i>
	<i>Bucal Cavity</i>	
	<i>teeth tongue and</i>	
	<i>pharynx</i>	<i>Intact - congested</i>
	<i>Desophagus</i>	<i>Intact, pale-MUCOSA</i>
	<i>Stomach and its</i>	<i>Intact, content 150 CC semisolid, undigested</i>
	<i>contents</i>	<i>Food material, No specific odour, muscle</i>
	<i>small intestine</i>	<i>pale</i>
	<i>and</i>	
	<i>its contents</i>	<i>Both intestines intact, partly loaded with</i>
	<i>Large intestine</i>	<i>gases</i>
	<i>and</i>	
	<i>its contents</i>	
	<i>Liver with weight</i>	
	<i>and gall bladder</i>	<i>Intact, congested</i>
	<i>Pancreas and</i>	<i>Intact, unremarkable</i>
	<i>Suprarenals</i>	
	<i>Spleen with</i>	<i>Intact, congested</i>
	<i>weight Kidneys</i>	<i>Intact, congested</i>
	<i>with weight</i>	

<i>Bladder</i> <i>Organs of generation</i> <i>Additional remarks with where possible, Medical Officer's deduction from the state of the contents of the stomach as to time of death and last meal</i> <i>State which viscera (if any) have been retained for chemical examination and also quote the numbers on the bottles containing the same</i>	<i>Intact, almost empty</i> <i>Uterus - Intact with size 8 c.m long, 5 c.m wide at Fundus and 1.25 c.m in thick normal, in size and shape; Uterine cavity - empty. Cyst is present in right ovary. Endometrium pale</i> <i>(1) Viscera for C.A (03 bottle)</i> <i>(2) Blood for group and DNA (02 bottle);</i> <i>(3) Nail Clipping for C.A (01 bottle)</i> <i>(4) Scalp hair and pubic hairs for C.A (02 bottle)</i> <i>(5)Vaginal swab for C.A (01 bottle)</i> <i>Total : 9 bottles</i>
---	---

45. According to PW.18 - Dr. Dattatray Bhore cause of death of the victim was due to Asphyxia due to smothering with compression of neck associated with head injury. Even the final cause of death certificate (**Exhibit 92**) confirms that it was death due to Asphyxia due to smothering and throttling with head injury (unnatural).

46. The viscera and other biological samples in the form of nail clipping, scalp hair, pubic hair, vaginal swab, blood of the victim as well as the blood sample, semen, nail clipping, pubic hair of the appellant were sent for chemical analysis in order to ascertain whether they match, in the sense, whether D.N.A profile of both the victim and the appellant matches. It is testified by PW.18-Dr. Bhore that D.N.A report reveals that vaginal swab of the victim *vis-a-vis* blood sample of the appellant matched. He testified that an inference can be drawn that there was a sexual intercourse between the victim and the appellant.

47. PW.18- Dr. Dattatray Bhore testified that dead body of the victim was brought to J.J. Hospital by A.PI Patil from Shahapur Police Station on 6th September, 2013 at 8.00 p.m. Autopsy commenced at 9.00 p.m and was completed at 11.00 p.m. He testified that all the injuries on the dead body were within 24 hours caused probably by hard and blunt object. Apart from this, he finally opined that it was "Death due to asphyxia due to smothering and throttling with head injury (unnatural)". The victim was missing from the evening hours of 5th September, 2013 and, therefore, the incident occurred during evening hours of 5th September, 2013 which corroborates other evidence on record.

48. During a short cross-examination, defence had suggested that the injuries in columns No.17 and 19 of the autopsy report are possible by fall from hilly area. The expert had denied. The expert had also denied the suggestion that they could not get semen from the vagina of the victim as the body was in a state of early decomposition. The medical expert had even candidly testified that since internal cavity of the vagina was empty and hence there were no symptoms of menstrual cycle. He further admits that during forcible rape contusions are seen on labia majora and minora on both inside and outside. We do not find any reason to disbelieve the evidence of this witness which is based on cumulative findings of three experts who had no axe to grind against the appellant.

49. We shall now deal with the evidence of the prosecution witnesses with regard to the complicity and nexus of the appellant *qua* the offences with which he has been charged. Suffice it to say that the victim was subjected to rape and was killed by her tormentor.

50. PW.1- mother of the victim testified that on 5th September, 2013 at 5.45 a.m, she accompanied the victim to drop her at Asangaon Railway Station, as usual, where the victim had boarded 6.10 a.m. local. PW.1-mother of the victim returned home. Thereafter, she went to the house of one Appa Shinde at Kolshewadi, Kalyan with her sister. After some time, she gave a call to the victim on her mobile number bearing No.9225396130 at about 10.45 a.m. The victim's mobile rang but she did not pick it up. PW.1 - mother of the victim thereafter went for her work in the company and returned home by 6.30 p.m only to witness that the victim had not returned

home till then. She made an inquiry with the family members and again at 8.00 p.m sent her son to Asangaon Railway station in search of the victim. Her son went to Asangaon Railway Station in search of the victim. He returned home by 9.30 p.m with no clues of the victim. The family thought that the victim might have stayed back with her friend and, therefore, did not make any grievance.

51. On 6th September, 2013 around 10.30 a.m, brother of the victim came to know that dead body of the victim was lying near railway track. P.W.1 - mother of the victim obviously was shocked after hearing the said news. However, she went to the Police station and lodged a complaint (**Exhibit 35**).

52. During the course of her evidence, she had identified the pair of jeans, reddish shirt and other articles namely pink brassier, black nicker, white sanitary napkin, Adidas bag, compass box, Breeze soap, one chocolate coloured purse, red tiffin box and water bottle which belonged to the victim. The said *muddemal* was marked as **Articles A to K**. P.W.1- mother of the victim did not suspect anyone till then. Admittedly, the victim was prosecuting her studies at ITI. It was suggested to the witness that the victim was in a habit of speaking on mobile phone and on that count, she used to scold her, which the witness has denied. Except this, there is nothing in her cross-examination.

53. As a matter of fact, it was P.W.2 - Shivaji Satpute who had first informed the Police in the morning of 6th September, 2013 that dead body of the victim was lying near the railway track. It was found lying on a foot way running parallel to the railway track between

Asangaon and Saavroli. He, therefore, called P.W.24- Police Inspector - Sunil Dattatray Wadke attached to Shahapur Police Station. This witness had also noticed a purse, sim card, bag and water bottle lying near the victim. The First Information Report is at **Exhibit 35**. The investigating officer had recorded his supplementary statement on 15th September, 2013. He testified that while the victim was going home, the appellant attempted to commit rape and when she resisted, he killed her by assaulting and pressing the bag on her mouth. P.W.2 - Shivaji Satpute is not an eye witness. What he testified is only what he might have thought or what might have come to his mind after noticing the scene. The important aspect is whether there is acceptable and believable circumstantial evidence brought by the prosecution to show the nexus of the appellant with the crimes in question.

54. P.W.11 - Dr. Guruprasad Murlidhar Wagh was attached to Sub-District Hospital, Shahapur. According to him, on 6th September, 2013 around 9.00 a.m, he received a requisition of Shahapur Police Station for performing autopsy on the dead body of the victim and also to collect the samples. Requisition is at **Exhibit 68**. He had collected scalp hair, pubic hair and nail clippings of the victim. He handed over the said samples to the concerned Policemen and referred the body to J.J Hospital for autopsy after consulting his superior. In cross by the defence, it has been reiterated that he had collected around 10 to 15 strands of scalp and pubic hair of the victim. Thus, there was due collection of the biological samples of the victim by this witness and further he had also referred the body to the J.J. Hospital, Mumbai for autopsy.

55. **Exhibit 157** is the result of analysis of full pant of the appellant and hair detected in its zip. The result of analysis indicates that over the full pant of the appellant which was discovered under section 27 of the Evidence Act, the chemical analyzer noticed human semen stain admeasuring 3 c.m in diameter on left front upper portion and two semen stains each of about 2 c.m in diameter on right front upper portion. The evidence in the form of DNA report is clinching in nature.

56. Apart from what has been discussed hereinabove, a few important aspects have also been surfaced, which further strengthen the fact of commission of rape on the victim by the appellant. The clothes of the victim viz: shirt, bracier, nicker or jeans had no signs of resistance. All the clothes on the person of the victim were found intact including underwear and even sanitary napkin which was found inside the underwear which suggests that the victim was not conscious or alive at the time of commission of rape. Pair of jeans were so tight that at the time of postmortem, it had to be removed by cutting it's lower portion as it was quite slender or tapering towards bottom which is also evident from the seizure *panchanama* **Exhibit 49**. It is obvious that the appellant might have pulled her jeans up to the knees and then by raising her waist committed rape. It is also quite obvious that in a hurry his pubic hairs might have got stuck in the zip of his pant. Even there were no marks of resistance on his clothes, which in normal circumstances i.e had the victim been conscious would have found torn.

57. The next important circumstance is the hut where the appellant had stayed at the relevant time. It is the case of the

prosecution that the appellant was residing in a hut which belongs to P.W.6 - Kashinath Mahadu Bondre. P.W.6 - Kashinath Mahadu Bondre testified that he is the owner of the land bearing survey No.132 at village Saavroli situate towards western side of the railway track where the victim was found dead. According to this witness, he had given the said land for cultivation to P.W.10 - Navsha Chima Wagh on *batai*. P.W.6 - Kashinath Mahadu Bondre used go to the field during harvesting season. It was a paddy field.

58. Prosecution's case is that P.W.10 - Navsha Chima Wagh had permitted the appellant to reside in a hut in the said field with his family as the appellant had no shelter and that he was also his distant relative. The appellant had been residing in the said hut two months prior to the incident. P.W.6 - Kashinath Bondre, however, resiled from his statement as he has expressed his ignorance about the hut being allotted to the appellant by P.W.10 - Navsha Chima Wagh. However, during the cross-examination, he was confronted with those portions from his statement and consequently the contradictions have been proved through the Investigating Officer P.W.24 - Sunil Wadke then Police Inspector attached to Shahapur Police Station. Those portions are marked as **Exhibit 129** and **Exhibit 130** respectively. The fact that the appellant was residing in a hut of P.W.6 - Kashinath Bondre has also been fortified by disclosure evidence under section 27 of the Indian Evidence Act which we shall discuss in the subsequent paragraphs.

59. P.W. 10 - Navsha Chima Wagh admitted the fact of cultivating the land of P.W.6-Kashinath Bondre as well as erection of the hut but denied that he had ever permitted the appellant to reside in the said

hut with his family. Interestingly, P.W.10 - Navsha Chima Wagh admits that one Balu Pawar is his maternal brother and the appellant is a relative of said Balu Pawar. However, he conveniently denied the fact that the appellant was residing in the said hut. He resiled from his statement before the Police during his cross-examination by the prosecutor. He was confronted with the said fact in his statement before the Police which he denied. However, P.W.24 - Sunil Wadke, Investigating Officer proved it at **Exhibit 131**.

60. Thus, it has been proved that the appellant, in fact, had been residing in the said hut along with his family at the relevant time. There is one more interesting aspect. P.W.10 - Navsha Chima Wagh admits in his cross-examination that the appellant used to sell leaves at Byculla and for that purpose, he used to travel from Asangaon to Byculla regularly. If the appellant was not permitted by P.W.10 - Navsha Chima Wagh to reside in the hut, then how he would know that the appellant goes to Byculla from Asangaon for selling leaves? This clearly indicates that P.W.10 - Navsha Chima Wagh, perhaps wanted to save the appellant being his relative and also probably to avoid further inquiry by the Police. Undisputedly, it was the only hut in that area of the field of P.W.6 - Kashinath Bondre.

61. The next important circumstance brought by the prosecution is the subsequent conduct of the appellant which is also relevant fact in view of section 7 and 8 of the Indian Evidence Act. On 5th September, 2013 itself during evening hours, he had been to the liquor shop of P.W.8 - Smt. Gulab Rambabu Agrawal for consuming liquor. It has come in the evidence of P.W.8 - Gulab Rambabu Agrawal that she has been doing illicit liquor business at Asangaon.

The appellant along with two to three customers had been to her shop on that day. She testified that the appellant had quarreled with P.W.9-Mangesh Hari Hirankar behind her shop after she had served them with liquor. She specifically deposed that the appellant had asked her whether she is interested in purchasing the mobile handset to which, she replied in the negative as, according to her, she is an illiterate lady.

62. During her cross-examination, it has been surfaced that she identified the appellant when he was shown her at the Police Station. She also admits that she had not seen the mobile handset. We do not find any reason to disbelieve the testimony of this witness merely because she had an illicit liquor business at the relevant time and that she had no occasion to see the mobile handset. It is not the contention of the defence that the appellant did not offer to sell mobile handset to this witness. It is not even the defence that the witness had some axe to grind against the appellant. Her evidence cannot be thrown overboard merely because she deals in illicit liquor business.

63. Her evidence has been corroborated in material particulars by P.W.9 - Mangesh Hari Hirankar who is also an independent witness. The sum and substance of his evidence is that he along with one Yogesh and Janu was consuming liquor behind the shop of P.W.8 - Gulab Rambabu Agrawal in the morning of 6th September, 2013 i.e on the following day of the incident. At that time also, the appellant was present over there and asked P.W.8 - Gulab Rambabu Agrawal whether she would purchase a mobile handset, however, she refused. It seems that both P.W.8 - Gulab Agrawal and P.W.9- Mangesh

Hirankar are rustic and illiterate witnesses. It is, therefore, quite probable that there is some error in stating the correct date of happening. The evidence is, therefore, clear, cogent and reliable. He further testified that thereafter he asked for three mugs of liquor for Rs.60/-. The appellant was acquainted with Janu and, therefore, Janu offered a mug of liquor to the appellant, upon which, this witness got angry and slapped the appellant. The reason for slapping the appellant was that he was talking irrelevant under the influence of liquor. He had consumed the liquor of P.W.9-Mangesh and, therefore, P.W.9-Mangesh gave him kick blows due to which the appellant fell down. Thereafter, this witness went away.

64. On 15th September, 2013, when P.W.9 - Mangesh Hari Hirankar was called by the Police at the Police Station, he came to know about arrest of the appellant and also stated before the Police about the happenings of 6th September, 2013 behind the shop of P.W.8- Gulab Agrawal. It is interesting to note that even during the cross-examination by the defence, it has been reiterated that this witness had seen the mobile handset with the appellant which was of TATA make. The fact that he had seen the appellant talking with P.W.8 - Gulab Agrawal when he had been there to purchase the liquor has again been substantiated. A suggestion given to this witness during cross-examination that because he had a quarrel with the appellant and he had slapped and pushed him in the bushes, he had deposed falsely, which he had denied.

65. Testimonies of P.W.8 - Gulab Agrwal and P.W.9 - Mangesh Hari Hirankar inspire confidence in light of the fact that it is the case of the prosecution that the victim had a mobile handset of TATA

Docomo. However, only the SIM card was found lying near her dead body at the time of drawing spot and inquest *panchanama*. It is quite probable that the appellant had thrown out the SIM card from victim's mobile handset and tried to sell the handset to P.W.8 - Gulab Agrawal. Had it been a handset with SIM card belonging to the appellant himself, he would not have offered it for sale along with SIM Card. This is a strong circumstance against the appellant. Testimonies of these two witnesses could not be rebutted by the defence during cross-examination; rather it has been fortified that it was TATA Docomo handset. Unfortunately, the Investigating Officer, despite efforts, could not recover the handset. That does not *ipso facto* mean that there was no such handset of TATA Docomo as the evidence on record reveals continuous use of TATA handset with SIM card by the victim bearing Mobile No. 9225396130.

66. P.W.4-Bharat Mohandas Punjwani was summoned by the Investigating Officer on 7th September, 2013 at Shahapur Police Station. Clothes of the victim were seized in his presence comprising a pair of jeans, shirt, nicker, bra and one white piece of cloth (sanitary napkin). The *panchanama* is proved at **Exhibit 49**.

67. Next important circumstance is the discovery of material objects namely pant and shirt of the appellant which were on his person at the time of the incident recovered by the Investigating Officer pursuant to a voluntarily statement made by the appellant while in the Police custody. P.W.4- Bharat Punjwani was summoned at Shahapur Police Station on 11th September, 2013. The appellant was present at the Police Station. Evidence of P.W.4-Bharat Panjwani indicates that the appellant had confessed his crime. He was ready to

take the Police to a place where he had kept the clothes which were on his person at the time of committing the offence. A memorandum *panchanama* to that effect was recorded by the Police which is proved at **Exhibit 50**. Memorandum *panchanama* was signed by the appellant in the presence of P.W.4 - Bharat Punjwani and Manohar Choudhary.

68. According to this witness, the appellant thereafter, along with the Police team, boarded a Jeep for Village Saavroli. They proceeded as per the directions given by the appellant. The vehicle went up to the farm and thereafter they walked certain distance up to a hut. The appellant produced some clothes which were hanged in the said hut. It was an ash coloured full shirt and black coloured full pant. Those clothes were seized by the appellant under a *panchanama* which is at **Exhibit 51**. A perusal of *panchanama* **Exhibit 51** reveals that they boarded a Police Jeep bearing Registration No. MH-04-EP-56. The appellant had occupied the rear seat behind the Driver namely Tukaram B. Lingale and led the Police to his hut via government godown. They went to Village Saavroli by crossing the railway gate bearing No.67/B-2. Distance between railway line near Asangaon railway station up to the hut was about 240 meters which was situate in a field.

69. *Panchanama* **Exhibit 51** further gives description of the said structure which was a temporary small hut covered with plastic sheet. The hut admeasured 7'x11'x14'. There were two plastic cans containing water and one containing oil. A small tin of chilly powder. Few utensils, bed sheets, mats as well as clothes of small children. There was a hearth made up of three stones in the corner.

This shows that the hut was occupied by a family. The appellant took out two plastic bags containing the clothes. He took out a shirt and pant allegedly worn by him at the time of incident. It was a gray (ash) coloured full sleeves terricot shirt with a pocket and had a label on the collar namely "*Ruff & Tuff*", a black coloured terricot full pant with two pockets on the front side and one on the rear side. Buttons had embossed with word "*METIC*". When the pant was inspected in the sunlight, two hair strands found in the zip and there were few faint stains which were hardened.

70. There is no effective cross-examination of this witness on behalf of the appellant. It transpired that this witness had a electronic shop in the vicinity of the Police station. However, he denied that the Policemen are his usual customers. It has been reiterated that *panchanama* was drawn by the Investigating Officer in the hut itself where they were present for more than one and half hour. It is needless to state that the object of section 27 is to admit evidence which is relevant to the matter under inquiry, i.e the guilt of the accused and not to admit the evidence which is not relevant to the matter. It is equally important that discovery of a material object is of no relevancy to the question whether the accused is guilty of the offence charged against him unless there is a connection with the offence. It is, therefore, the connection of the thing discovered which renders its discovery as a relevant fact. Further evidence would demonstrate the said connection.

71. Next important circumstance is the report of Chemical Analyzer **Exhibit 154**. Following articles were forwarded for chemical examination;

- (1) Blood in vials (two) in a plastic container labeled Ashok Baban Mukane;*
- (2) Blood in a test tube labeled Ashok Baban Mukane;*
- (3) Blood in a test tube labeled Ashok Baban Mukane;*
- (4) Pubic hair in a phial labeled Ashok Baban Mukane;*
- (5) Nails in a phial labeled Ashok Baban Mukane;*
- (6) Semen in phial labeled Ashok Baban Mukane.*

Result of the analysis as per the report can be extracted as under;

REPORT: *The DNA extracted from blood detected on ex3 Bermuda (stated to be half pant) and ex4A hair detected in chain of full pant of Ashok Baban Mukane in F.S.L.M.L Case No DNA - 1118/13 and blood sample of Ashok Baban Mukane was typed at 15 STR LOCI and gender specific Amelogenin locus using PCR Amplification technique.*

No female DNA is detected in ex4 Pubic hair and ex 5 nails of Ashok Baban Mukane

No interpretable DNA profile is obtained from blood detected on ex4 full pant of Ashok Baban Mukane in F.S.L.M.L Case No. DNA - 1118/13, exh 3 brassier and ex4 nicker of the victim in F.S.L.M.L. Case No. DNA 1122/13.

Exhibit 2 blood, exh 3 blood and exh 6 semen are control samples of Ashok Babak Mukane.

Interpretation:-

*1)DNA profiles of blood detected on ex3 Bermuda (stated to be half pant) and ex4A hair detected in chain of full pant of Ashok Baban Mukane in F.S.L.M.L. Case No. DNA - 1118/13 and blood sample of Ashok Baban Mukane is **identical & from one and same source of male origin**. DNA profiles **matched** with the maternal and paternal alleles in the source of blood".*

Pubic hair detected in the chain (zip) of the pant of the appellant could be the result of hurriedly putting on the pant after committing rape upon the victim. Normally, it sounds improbable that two hair strands of pubic hair would get uprooted and entangled in the zip. It may sound insignificant, however, it is pertinent to note that even the medical evidence clearly indicates that there was forceful rape upon the victim and the overall circumstances clearly indicate that the appellant had, after noticing the victim lying near the railway track, unmindful of the fact whether she was conscious or alive, committed rape upon her.

72. There is no cogent and clear evidence brought on record by the prosecution to indicate that it was none other than the appellant who had inflicted serious injuries on the person of the victim including smothering, compression of neck or hitting on her head with hard and blunt object. It is, therefore, difficult to construe that the appellant was responsible for causing homicidal death of the victim.

We say so as in normal circumstances, had the victim been conscious or alive, she would have definitely strongly resisted the appellant resulting into some scratches or bruises on his person. The victim was a young able bodied girl who would not have been easily succumbed to the pressure or the advances of the appellant. In the absence of any such marks on the person of the appellant would lead to drawing an inference or can be deduced that the appellant had committed rape when the victim was either unconscious or was no more.

73. As already discussed hereinabove, P.W.18- Dr. Dattatray Bhore had opined about several injuries, contusions and the probable weapon of the offence used by the assailant in committing the offence. Suffice it so say that the victim was subjected to continuous assault with some hard and blunt object as well as brushing against some rough surface and nagging.

74. The ante mortem injuries noticed on genital region are as under;

"Labia majora and minora-contusion is seen over inside surface of labia majora and minora on both sides. Dark red in colour. Tearing of hymen is seen on 7 O'clock position on right side with infiltration of blood is seen in margins of remaining tags of hymen. The injuries probably caused by forceful intercourse".

75. The most crucial evidence of the Directorate of Forensic Science Laboratory vide **Exhibit 20** in respect of DNA extracted from the blood samples of the victim is as under;

RESULTS OF ANALYSIS

"REPORT:-The DNA extracted from vaginal swab of the victim in F.S.L.M.L Case No. DNA-1090/13 and blood samples of the victim and ex1 Ashok Baban Mukane in F.S.L.M.L Case No. DNA - 1077/13 was typed at 15 STR LOCI and gender specific Amelogenin locus using PCR Amplification technique.

No male DNA is detected in exh2 Pubic hair of the victim in F.S.L.M.L. Case No. DNA-1091/13, ex1 Nail Clippings of the victim in F.S.L.M.L. Case No. DNA - 1092/13, ex2 Pubic hair, ex3 finger nail clipping, ex4 toe nail of the victim in F.S.L.M.L. Case No. DNA - 1093/13,

Interpretation:-

1)One of the mixed DNA profiles of vaginal swab of the victim in F.S.L.M.L. Case No. DNA - 1090/13 and blood sample of the victim is **identical & from one and same source of female origin**. DNA profiles **matched** with the maternal and paternal alleles in the source of blood.

2)One of the mixed DNA profiles of vaginal swab of the victim in F.S.L.M.L Case No. DNA-1090/13 and blood sample of Ashok Baban Mukane in F.S.L.M.L. Case No. DNA - 1077/13 is **identical & from one and same source of male origin**. DNA profiles **matched** with the maternal and paternal alleles in the source of blood.

3) Two Control male DNA profiles are obtained from vaginal swab of the victim in F.S.L.M.L. Case No. DNA - 1090/13".

76. A Single Judge of this Court in case of **Reghuvir Desai Vs. State**⁴⁹ while emphasizing the importance of D.N.A Test and its worth in pinpointing with mathematical accuracy observed thus;

"DNA (Deoxyribonucleic acid) is found specially in cell nuclei which are the foundation of heredity. DNA is the genetic blue print for life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA. DNA testing can make a virtually positive identification when the two samples match. It exonerates the innocent and helps to convict the guilty. (See page 249 of Jhala and Raju's Medical Jurisprudence Sixth Edition). The DNA testing hits the nail on the head of the accused and is the last and clinching piece of evidence which shows that it is the accused and the accused alone who committed the rape on the victim".

Needless to add that the DNA report had hit the nail on the head of the appellant in view of its clinching nature.

77. PW.20 - Dr. Trupti Mukund Rokade had collected the blood sample, pubic hair, nail clippings and semen samples for DNA analysis *qua* the appellant on 13th September, 2013 when she was attached to Civil Hospital Thane as Medical Officer. She testified that

⁴⁹ 2007 (1) AIR Bom R 132

the appellant was found capable of doing sexual intercourse. She had issued a certificate to that effect which is at **Exhibit 107**. In her cross-examination by the defence, it is testified that the samples were given to a Police Officer who had brought the sample collection kit. The appellant in his statement under section 313 of the Code of Criminal Procedure while answering question No.20 had clearly admitted that his blood sample was collected for D.N.A test.

78. PW.12 - Smt. Kamini Patel, Lady Police Constable along with the Police staff had been to the spot on 6th September, 2013 at 10.30 a.m. As per the directions of the Investigating Officer, she assisted him in drawing spot *panchanama* and also accompanied with the dead body when it was shifted to Sub-District Hospital, Shahapur for inquest and thereafter to J.J Hospital. Clothes on the person of the victim were removed and given in her custody. She had testified that the Medical Officer had collected the nail clipping and pubic hair of the dead body and handed it over to this witness.

79. PW.14 - Pandharinath Pandurang Patil who was then Revenue Circle Officer attached to Khardi Revenue Circle, at the request of the Investigating Officer visited the spot of the incident on 7th September, 2013 and had drawn the sketch map which is at **Exhibit 76**. The sketch map **Exhibit 76** gives an idea as to the exact location/spot where dead body of the victim was lying between railway track and the foot way.

80. PW.22 - Vijay Sadashiv Patil was posted as A.PI at Shahapur at the relevant time. He was in the team of the Investigating Officer and had visited the spot. He had drawn a rough sketch map of the

scene of occurrence and had directed the photographer to take photographs. The rough sketch map at **Exhibit 114** also gives more or less topography of scene of occurrence which appears to be abutting to the railway track surrounded with grass. There is no much difference in **Exhibit 76** and **Exhibit 114**.

81. The prosecution has succeeded in establishing a nexus between the appellant and the act of rape upon the victim in view of the discussion made hereinabove as well as conclusive evidence in the form of DNA profile. PW.18- Dr. Dattatray Bhore in his evidence reiterated that while committing forcible sexual intercourse, there are bound to be contusions in labia majora and minora over internal and external surface. He re-affirmed that from the DNA report, it has been confirmed that the appellant had performed forcible sexual intercourse with the deceased victim.

82. We must say that the Investigating Officer had conducted investigation on the aspect of murder of the victim in a most casual and perfunctory manner. PW.24 - Sunil Wadke, the Investigating Officer testified that on 10th September, 2013, at about 8.00 pm, the appellant was found loitering in a suspicious condition beneath Asangaon Fly Over Bridge on the railway track and, therefore, he was nabbed. He disclosed his name as Ashok Baban Mukane. The evidence reveals that during a discreet inquiry, the appellant is stated to have confessed that he committed a crime.

83. Confession to a Police Officer is inadmissible in evidence unless it is made in the immediate presence of a Magistrate, then only, it can be proved against such person. Thus, the said so-called

confession is not admissible, however, investigating officer P.W.24-Sunil Wadke ought to have immediately taken the appellant for medical examination so that it could have been ascertained as to whether there are any resistance marks, bruises or abrasions on his person. We are of the view that perhaps there was no resistance from the victim because even when the appellant was examined on 13th September, 2013 by P.W.20 - Dr. Trupti Rokade, who had obtained the blood, semen, nail clipping and pubic hair of the appellant, did not say that she noticed any external injuries on his person. There is every possibility of committing rape upon the victim when either she was unconscious or there is every possibility of she being brutally assaulted by someone else before she was subjected to rape by the appellant.

84. The learned Additional Sessions Judge erred in holding the appellant guilty of the offence of committing murder of the victim *sans* any convincing and satisfactory evidence on record. No doubt, in normal circumstances, one may be compelled to think or presume that due to resistance from the victim while attempting to commit rape, the appellant might have smothered her face with a bag or throttled her neck resulting into her death. However, as already stated, in the absence of any marks or bruises or abrasions on the person of the appellant, it is difficult to reach such conclusion. Moreover, the Investigating Officer had failed to produce hard and blunt object alleged to have been used in giving blows over the head of the victim.

85. The injuries on the scalp as described in the autopsy report hereinbefore are so grave and severe that those injuries would not

have been possible without the use of a hard and blunt object and with full force. Had the victim been smothered with the bag which was lying beside her as alleged by the prosecution, there would have been some evidence in the form of saliva or other liquid sticking over it. There is no such evidence on record. Under such circumstances, we find it difficult to hold that the prosecution has established any nexus between the death of the victim and the appellant.

86. P.W.25 - Anupkumar Nivruti Shinde was working as a Senior Clerk in the Institution where the victim was prosecuting her studies. His evidence is restricted to the fact that the victim was the student of Mechanic Machine Tools and Mechanic Trade. It was a two years course and the training hours were from 7.30 am to 3.00 pm. This witness had produced muster roll extract for the period from 1st August, 2013 to 6th September, 2013. It has been proved that on 5th September, 2013 i.e on the date of the incident, the victim had attended the College up to 3.00 p.m. This witness was not cross-examined by the defence. The victim's last location as noticed from her mobile and tower location as per the evidence on record was somewhere near the spot as per the evidence of P.W.22- PI. Vijay Sadashiv Patil. The evidence reveals that the SIM card which was seized from the spot of the incident was of TATA Docomo company bearing No.100003557A019 (80D936FF). The mobile number was 9225396130. The evidence also indicates that the said TATA Docomo mobile bearing number 9225396130 was recorded in the name of P.W.1-mother of the victim. ESN number is 80D936FF. The evidence is limited to the aspect of indicating the details of mobile phone and location of the victim on 5th September, 2013 and nothing more.

87. Call detail record indicated that on 5th September, 2013 at about 16:54:34 location of the deceased was at Asangaon Railway Station. This fact is not much in dispute. What is important to note is that apart from the appellant, Investigating Officer had nabbed three suspects namely Shahid Shaikh, Prasad and Balu Pawar. They were interrogated by the Investigating Officer. Their blood samples were collected for the purpose of D.N..A analysis. PW.16 - Dr. Mahendra Kendre had examined suspect Balu Pawar on 4th October, 2013 when he was produced before him by Shahapur Police Station with a requisition for collection of his blood samples for DNA. The said letter is proved at **Exhibit 83**. The blood sample was collected by this witness and handed over to the concerned Police Personnel. A case paper to that effect is proved at **Exhibit 84**. The defence declined to cross-examine this witness.

88. PW.17- Dr. Mamta Alaspurkar examined suspect Shahid and Prasad on 3rd October, 2013. She collected their blood samples for the purpose of DNA profile and handed over it to the Police concerned. Requisition is at **Exhibit 86** and case paper is at **Exhibit 87**. After analyzing the respective blood samples of these three suspects by the Chemical Analyzer of the Forensic Science Laboratory, it yielded no results, in the sense, their DNA profiles did not match with that of the victim. The examination report is proved at **Exhibit 158**.

89. As such, the prosecution has succeeded in establishing that it was none other than the appellant and the appellant only who had committed rape upon the victim. The Investigating Officer had interrogated three suspects. Those three suspects were nabbed by

the Investigating Officer as they were found conversing with the victim through their respective mobile handsets. Except the conversation between those three suspects *qua* the victim on her mobile handset, nothing incriminating was found by the Agency. However, from the aforesaid medical evidence possibility of their complicity has been clearly ruled out and as such they have been allowed to get scot free.

90. As already held in the catena of the decisions whenever a case bases on the circumstantial evidence, it is necessary for the Court to find out whether the circumstances on which the prosecution relies are established by satisfactory, cogent, clear and convincing evidence. It is equally important to ensure that the circumstances are of such a nature as to exclude any other hypothesis, save and except one that the appellant is guilty of the offence with which he is charged. Here, from the overall evidence on record and the discussion, the prosecution has established with clear and cogent evidence which is consistent with the sole hypothesis that it was the appellant who had committed rape upon the victim.

91. While hearing the appellant on the point of sentence, an altogether different story has been put forth in the form of an affidavit dated 8th December, 2021. We have extracted relevant portion from the affidavit of the appellant which reads as under;

"6. I say that I am innocent, and I have been falsely implicated in the above-said offence by the investigation officer, namely Mr P.I. Sunil Vadke. At that time, my wife was detained and arrested by Mr.

Vadke. At that time, my confession statement was forcefully recorded by the Investigation Officer.

A. I say that on 7th September, 2013 at about 3.00 pm I was called to the Shahapur Police Station on the pretext of inquiry. Thereafter at about 7.30 pm I was allowed to go home by the Police Officer and immediately they took my wife Bharati to the Police Station. Thereafter Police released my wife at about 10.00 pm. I say that person namely Shahid was called in the Police Station on the same day. Shahid is a son of Ramzan Shaikh who is well known as 'Ramzan Sheth' .I say that Mr. Ramzan Sheth is a wellknown Contractor and financially very sound. Mr. Ramzan Sheth came to the Police Station and he was there for some time and he took away Shahid with him.

B. That on 8th September, 2013 at 8.00 am when I was on my way to vegetable market near Asangaon Bridge officers from Shahpur Police Station caught me and took me to the Shahapur Police Station. At that time one Police Officer Mr. Ganpatrao Pingle slapped me.

C. When they took me to the Police Station, I was assaulted by 4-5 Police Officers viz. P I Vadke, Prashant Waghunde and others. I say that at that time PI Vadke kept some money on table and offered me to confess offence and the same was denied by me;

D. At that time I was forcefully given liquor to drink, as at that time I was not able to understand the situation as to why Police were offering me the liquor. I say that at that time the Police Officers offered me that if I confess the offence they will give lakhs of rupees and also they assured that they will maintain my wife and children. The said offer was also denied by me.

E. PI Wadke strictly asked me to accept the said offer or else I have to pay them. I informed them that I am having my family and I can maintain them myself and therefore I do not require your any amount.

F. Thereafter, they called my wife Bharati in the Police Station. In front of my wife I was assaulted during entire night of 8th September, 2013. Police also threatened me if I refuse the confess the offence they will implicate my wife in the matter as a accused.

G. I say that on next day i.e 9th September, 2013 I was not in a position to stand due to assault upon my legs. I was given electric shock by PI Vadke and one Desle to confess the statement. My wife treated me by putting her dupatta on my legs in lock-up. I say that it was informed me that my childrens were standing outside the Police Station. When I was in the Police Station forcefully my semen samples were collected.

H. On 11th September, 2013, I was produced before the Hon'ble Magistrate Court. PI Wadke threatened me if I disclose the date of arrest and assault in the Court then he will kill me by putting bullets in my head and also to my wife in the Police Station. I say that due to this crucial situation I could not took a decision whether to save myself or my family. So I was silent. My statements came to be recorded forcefully. I say that during my entire remand period my wife was kept in the Police Station. Investigating Officer also asked me to confess the statement regarding theft and sale of mobile, which I could not.

I. Due to the distorted mentality of the investigating officer's and deliberate mistakes systematically committed in this matter just to save the real culprits from the clutches of law, based upon the facts, the punishment was given by the trial court, the life of my dependents family members and me are ruined".

92. At the outset, most of the contents of the affidavit which has been filed only when the appellant was to be heard on the point of sentence, are incorrect and misleading for the simple reason that whenever the appellant was produced during the trial before the Additional Sessions Judge, he could have instructed his lawyer and brought all these facts to the notice of the Court. He could have stated everything during his statement under section 313 of the Code of Criminal Procedure what he had deposed in this affidavit before

this Court. Statement under section 313 of the Code of Criminal Procedure is a direct dialogue between the accused and the trial Court without any intervention of the Advocate. This affidavit is silent as to why the appellant did not disclose the so-called facts before the trial Court and, therefore, it can be definitely said to be a false affidavit only to garner sympathy and to divert attention of the Court. He states in the affidavit that on 7th September, 2013 at about 3.00 p.m, one Shahid son of Ramzan Shaikh a well-known Contractor and financially sound person was present at the Police Station. After some time, the said Ramzan took away his son Shahid from the Police Station. The appellant does not disclose as to why and how, he had named the said person in his affidavit and what was the role of his son. There is no further clarity on that aspect. The falsity of the affidavit is apparent as in his statement under section 313 of the Code of Criminal Procedure when it was brought to his notice that his blood samples were collected for DNA test in Hospital at Shahapur, he answered in the affirmative. However, in the affidavit, he deposed that on 9th September, 2013, when he was at the Police Station his semen samples were forcefully collected. It is difficult to believe as semen samples cannot be collected forcefully, that too by a Police Officer at the Police Station.

93. Falsity of his contention is also apparent from the evidence of P.W.20 - Dr. Trupti Rokade who had testified that she had collected blood samples, pubic hair, nail clipping and semen sample of the appellant for the purpose of DNA on 13th September, 2013. If that is the evidence of the medical officer, it is quite apparent that there was no question of forcibly collecting his semen samples by the Police Officer on 9th September, 2013 at the Police Station. Further, as per

evidence of P.W.24- Sunil Wadke, the appellant was arrested on 10th September, 2013 at about 8.00 p.m when he was found loitering in suspicion condition beneath Asangaon Fly Over Bridge on the railway track. This again falsifies his contention that his semen samples were collected on 9th September, 2013. It is obvious that the appellant tried to gain undue advantage of the fact that the samples collected from his person which were sealed and were kept safely in *Almirah* of P.W. 24 - Sunit Wadke, Investigating Officer for three days. Thereafter, it was sent for chemical analysis through carrier i.e P.W.15- Shridhar Korphade, Police Constable attached to Shahapur Police Station vide C.R. No.I-181-2013. The acknowledgment is at **Exhibit 81**.

94. Other recitals of his affidavit that he was offered money by P.W.24 - Sunil Wadke, PI which were kept on the table at the Police Station and asked him to confess the guilt is also something, no prudent man would believe, for, these are all afterthoughts only to gain sympathy of this Court as already stated above. It is not clear what was the exact offer alleged to have been made to the appellant by P.W.24 - Sunil Wadke. From the recitals of the affidavit, it can be easily inferred that this is the brainchild of a professional only to get over from capital punishment.

95. The fortiori of the entire discussion made hereinabove is that the prosecution has failed in establishing the charge of murder against the appellant and, therefore, the findings returned and the sentence awarded needs to be reversed by acquitting the appellant of the said charge. Interference in the impugned judgment of conviction and sentence is, therefore, warranted to that extent.

96. However, since the prosecution has succeeded in establishing the charge of rape beyond all reasonable doubts, we do not intend to interfere in the finding arrived at by the learned Additional Sessions Judge. Now, to the order.

: ORDER :

[1] The appeal is partly allowed.

[2] The reference of the confirmation of death sentence submitted by the learned Additional Sessions Judge, Kalyan in Sessions Case No.47 of 2014 under section 366 of the Code of Criminal Procedure is answered in the negative.

[3] The conviction of the appellant - accused under section 302 of the Indian Penal Code is set aside and he stands acquitted of the said offence.

[4] Fine amount of Rs.5000/- be refunded, if already paid by him;

[5] The conviction and sentence of the appellant - accused of the offence punishable under section 376 (1) of the Indian Penal Code with fine stands confirmed;

[6] As per an order of this Court dated 30th November, 2021, the appellant was produced from Nagpur Central Prison on production warrant for hearing him on the point of sentence. He shall be sent back to Nagpur Central Prison for undergoing remaining part of his substantive sentence.

[7] The District Legal Services Authority, Thane shall pay compensation to P.W.1 - mother of the victim in the sum of Rs.5,00,000/- (Rs. Five Lakhs only) within six months from the date of receipt of this order;

[8] Order as regards disposal of *muddemal* property is maintained.

[PRITHVIRAJ K. CHAVAN, J.]

[SMT. SADHANA S. JADHAV, J.]