

IN THE HIGH COURT OF JUDICATURE AT PATNA
DEATH REFERENCE No.3 of 2022

Arising Out of PS. Case No.-100 Year-2019 Thana- PRATAPGANJ District- Supaul

The State of Bihar

... .. Petitioner/s

Versus

1. Anmol Yadav Son of Chandra Yadav Resident of Village - Narhaiya, Ward No. 01, P.S. - Chhatapur, District - Supaul.
2. Ali Sher Son of Md. Nazir Resident of Village - Narhaiya, Ward No. 01, P.S. - Chhatapur, District - Supaul.
3. Md. Jamal Son of Late Md. Chedi Resident of Village - Narhaiya, Ward No. 01, P.S. - Chhatapur, District - Supaul.
4. Md. Ayyub @ Md. Ejub Son of Late Musrai Resident of Village - Narhaiya, Ward No. 01, P.S. - Chhatapur, District - Supaul.

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 483 of 2022

Arising Out of PS. Case No.-100 Year-2019 Thana- PRATAPGANJ District- Supaul

1. Ali Sher @ Md. Ali Sher Son of Md. Najir @ Md. Nabi Resident of Village - Narahaiya, Ward No.- 1, P.S.- Chhatapur, District - Supaul
2. Md. Jamal Son of Late Chhedi Resident of Village - Narahaiya, Ward No.- 1, P.S.- Chhatapur, District - Supaul
3. Md. Ayyub @ Md. Ejub Son of Late Musay Resident of Village - Narahaiya, Ward No.- 1, P.S.- Chhatapur, District - Supaul

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 540 of 2022

Arising Out of PS. Case No.-100 Year-2019 Thana- PRATAPGANJ District- Supaul

Anmol Yadav Son of Chandar Yadav R/O Village- Narhaiya, Ward No.-1, P.S.- Chhatapur, District- Siwan

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :



(In DEATH REFERENCE No. 3 of 2022)

For the Petitioner/s : Mr. Dilip Kumar Sinha, APP

For the Respondent/s : Mr.

(In CRIMINAL APPEAL (DB) No. 483 of 2022)

For the Appellant/s : Mr. Ansul, Advocate

Mr. Arun, Advocate

Ms. Sagrika, Advocate

Ms. Kanika, Advocate

Mr. Aditya Pandey, Advocate

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

(In CRIMINAL APPEAL (DB) No. 540 of 2022)

For the Appellant/s : Mr. Ansul, Advocate

Mr. Shyam Kishore, Advocate

Mr. Rishi Sinha, Advocate

Mr. Piyush Parasar, Advocate

For the Respondent/s : Mr. Manish Kumar No. 2, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE A. ABHISHEK REDDY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 22-03-2024

The death reference No. 3 of 2022 and the two criminal appeals, viz., Criminal Appeal (DB) No. 483 of 2022 and Criminal Appeal (DB) No.540 of 2022 have been taken taken up together and are being disposed of by this common judgment.

2. Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor has assisted us in Death Reference No. 3 of 2022.

3. The four appellants, viz., Ali Sher @ Md. Ali Sher, Md. Jamal, Md. Ayyub @ Md. Ejub [Criminal Appeal (DB) No. 483 of 2022] and Anmol Yadav [Criminal



Appeal (DB) No. 540 of 2022] have been represented by Mr. Ansul, assisted by Ms. Sagrika, learned Advocates. Mr. Ansul and Ms. Sagrika have also assisted us on behalf of the respondents in the Death Reference.

4. The Trial court vide its judgment dated 26.04.2022 in Sessions Trial No. 6 of 2022 has found the appellants guilty for the offences under Sections 341, 342, 323, 394/34 and 302/34 of the IPC and Section 27 of the Arms Act. The appellants/ Anmol Yadav, Ali Sher and Md. Ayyub have also been found guilty under Section 6 of the POCSO Act, 2012. The conviction of appellant/ Anmol is under Section 302 simpliciter for his having shot at the deceased, leading to her death.

5. Vide order dated 11.05.2022 the appellants have been sentenced as hereunder :-

(i) Appellant/Anmol Yadav has been sentenced to death, to pay a fine of Rs. 20,000/- and in default of payment of fine to further suffer SI for two months under Section 302 IPC.



(ii) Appellants/Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal have been sentenced to death, to pay a fine of Rs. 20,000/- and in default of payment of fine to further suffer SI for two months under Section 302/34 IPC.

(iii) Appellants/Anmol Yadav, Ali Sher, Md. Ayyub were sentenced to death under Section 6 of the POCSO Act.

(iv) Appellants/Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal have been sentenced to imprisonment for life till remainder of their natural life, to pay a fine of Rs. 50,000/- and in default of payment of fine to further suffer SI for six months under Section 376-D IPC.

(v) Appellants/Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal have been sentenced to undergo RI for ten years, to pay a fine of Rs. 30,000/- and in default of payment of fine to further suffer SI for one year under Section 394/34 IPC.



(vi) Appellants/Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal have been sentenced to undergo SI for one month, to pay a fine of Rs. 200/- and in default of payment of fine to further suffer SI for seven days under Section 341/34 IPC.

(vii) Appellants/Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal have been sentenced to undergo SI for one year, to pay a fine of Rs. 500/- and in default of payment of fine to further suffer SI for one month under Section 342/34 IPC.

(viii) Appellants/Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal have been sentenced to undergo SI for one year, to pay a fine of Rs. 500/- and in default of payment of fine to further suffer SI for one month under Section 323/34 IPC.

(ix) Appellants/Anmol Yadav, Ali Sher, Md. Ayyub and Md. Jamal have been sentenced to undergo RI for seven years, to pay a fine of Rs. 5,000/- and in default of



payment of fine to further suffer SI for one year under Section 27 of the Arms Act.

6. Since death penalty has been imposed on all the four appellants, the matter has come in reference as well for confirmation of the death sentence.

7. A grisly crime was reported on 09.10.2019 by Chandradeo Mandal (PW-4) alleging that while he along with eight of his family members were on their way to village Tintolia for witnessing a fair in the evening of 08.10.2019 at about 8:00 P.M., they were held captive by three persons who were waiting at that place from before. Later, three more persons arrived. The accused persons were armed with dabia (a sharp cutting weapon) and guns. On the gun point, they were asked to wait till the time a person by the name of Master, who was the target of the accused persons, would come and only thereafter, they were told, they would be released. The hands of PW-4 and his son-in-law (PW-5) were tied by a red cloth. Thereafter, the female folk were divested of their personal belongings



and ornaments that they had been sporting. When the wife of PW-4, viz., PW-3 and others raised alarm, one more person came at the spot. One of the miscreants fired at the deceased, viz., Kanchan Devi, who is the niece of PW-4. The wife and another niece of PW-4 were also assaulted. Later, one of his minor niece (PW-1) told him that two of the miscreants had committed rape with her. Later, all the miscreants ran away. PW-4 could learn almost simultaneously that alongside with him and his family members, three other persons were also held captive, viz., Sandip Kumar, Ganesh Kumar and Prem Kumar. The mobile telephones belonging to Ganesh Kumar and Prem Kumar were snatched from them by the miscreants. PW-4 had provided the mobile telephone number of aforesaid Ganesh Kumar and Prem Kumar, viz., 7643099143 and 8969936875. The SIM cards from the afore-noted telephone sets were removed and the mobile telephones were taken away. Those three persons could, on hearing the sound of firing, manage to escape. He along



with PW-5 brought his wife and niece to his home and thereafter to Raghapur Hospital from where they were sent to Supaul and Darbhanga for better treatment. The physiognomy of the accused persons was also provided by PW-4. All of them were found to be in the age group of 25-30 years.

8. The fardbeyan was recorded by SI/ Bindeshwar Ram of Raghapur Police Station, who has not been examined at the Trial, on 09.10.2019 at 10:30 A.M. at Raghapur Police Station.

9. One Jagdish Mandal was present when the fardbeyan was recorded. He too has not been examined at the Trial.

10. On the basis of the afore-noted fardbeyan statement of PW-4, Pratapganj P.S. Case No. 100/19 dated 09.10.2019 was initially registered for offences under Sections 341, 342, 323, 324, 307, 379, 376-D, 341 of the IPC and Section 27 of the Arms Act along with



Section 4 of the POCSO Act, 2012. Later, with the death of Kanchan Devi, Section 302 IPC was also added.

11. It may be relevant here to state that since the P.O. did not fall in the jurisdiction of Raghapur Police Station, the fardbeyan, though was recorded by the SI of Radhopur Police Station, but the same was sent through a messenger to Pratapganj Police Station for registration of the case.

12. The police after investigation submitted charge-sheet against six of the accused persons including the appellants. Two of them were declared to be absconders. All the four accused persons/ appellants were put on trial.

13. The Trial court, after having examined 12 witnesses on behalf of the prosecution and one on behalf of the defence, convicted and sentenced the appellants as aforesaid.

14. The learned Advocates for the appellants have argued that the Trial court did not understand the facts of



the case in correct perspective. There were discrepant statements of the witnesses with respect to the manner of occurrence; number of accused persons present at the scene; and that even the identification of the appellants by the witnesses before the Trial court was doubtful.

15. It has been urged on behalf of the appellants that the police adopted a very shortcut approach in closing the investigation only after having located one of the appellants/Md. Ayyub on the basis of telephone tracking.

16. As has been noted in the fardbeyan statement of PW-4, two telephone numbers were given by him but no IMEI number was provided even though Ganesh and Prem whose telephones were snatched were investigated by the police and their statements under Section 164 was recorded. However, the Investigator (PW-10) has stated before the Trial court that he interrogated Prem and Ganesh and obtained the IMEI number of their snatched telephones. It was on the basis of those IMEI numbers that it was tracked that with one such IMEI number



telephone, one Md. Sajjad (PW-2) was using his SIM card in one of those snatched telephones. When the police interrogated Md. Sajjad, he came up with an unbelievable story that he had given his SIM card to Md. Ayyub with whom he had developed friendship only in ten days of his working together with him at Rajgir after returning from Delhi. Md. Sajjad was also made to give his statement under Section 164 Cr.P.C.

17. On the basis of the afore-noted disclosure, viz., of Md. Sajjad (PW-2) of his having given his SIM card to Md. Ayyub, Md. Ayyub was arrested on 12.10.2019. Aforesaid Md. Ayyub confessed his guilt and named his other associates, viz., Ali Sher, Md. Jamal, Anmol, Md. Nabir and Sanmol.

18. As we have already noted, Md. Nabir and Sanmol could not be tracked.

19. Based on the disclosure of Md. Ayyub, appellant/ Ali Sher was arrested from his house and from his possession, a black coloured purse containing Rs. 750/-



and an Aadhar card of Prem Kumar which was actually recorded in the name of Mahesh Kumar, was recovered. A mobile telephone with two SIM cards were also recovered from Ali Sher. The motorcycle which was used in the occurrence was also found parked in the varandah of his house. All such articles were seized and a seizure-list was prepared. Thereafter an attempt was made to arrest Md. Jamal, Md. Nabir, Sanmol and Anmol but all of them were found to be missing from their houses. During the course of search, Anmol was arrested from near a tempo-stand. From his possession, a loaded country-made pistol and a mobile telephone with two SIMs were recovered. Those were also seized and a seizure-list was prepared. Anmol Yadav also confessed his guilt. Later Md. Jamal was arrested.

20. The SIM cards used by them were put on surveillance and the cyber-cell of the local police station was activated. It was found that the location of the appellants was somewhere near the P.O. on 08.09.2019.



21. The learned Advocates, therefore, have submitted that instead of investigating the case any further, this was the only material which was relied upon by the Investigating Agency for charge-sheeting them.

22. None of the appellants were put on the Test Identification Parade and they were only identified by the witnesses during Trial after four months.

23. The appellants on their arrest were also not put to any medical examination as mandated under Section 53A of the Cr.P.C.

24. The Investigator had seized blood from the P.O. and an empty cartridge but it was made no use of by him. The clothes of the victims were not seized only for the reason that those had been washed as claimed by the victims themselves.

25. Thus, the argument on behalf of the appellants is that the police on finding one smoking gun up their sleeve, they did not exert any further and concluded



that the appellants and two others who could not be tracked, had committed the offence.

26. The Trial court unsuspectingly believed the deposition of witnesses, especially with respect to their identifying the appellants in the dock. It was thus urged that the Trial court also went along with the short-cut approach adopted by the police and did not care to find out as to how the investigation had proceeded and whether the identification of the appellants by the victims/ witnesses was believable. The witnesses were examined after more than four months of the occurrence, except for PW-4, who, in his cross-examination, has asserted that he had seen the accused persons in the police station. There is no other statement from anyone of the witnesses that they were made to identify anyone of the suspected accused persons/ appellants.

27. It is the consistent case of the prosecution, the learned Advocates have argued, that none of the witnesses/ victims had any idea about the miscreants and



in that event, their identification for a preliminary confirmation that they were the persons who had committed the crime, was a must.

28. Additionally, it has been argued that the occurrence had taken place in the dead of the night, somewhere in the river-bed which had dried up where there was no source of light for identification. The destination village was situated far away and the witnesses had travelled for good distance when they had been stopped by the miscreants. One of the witnesses, it has further been argued, has clearly stated that many villagers had proceeded for Tintolia village for attending the fair and some of them were moving ahead of the victims while some were following them.

29. Under such circumstances, non-production of anyone of the independent witnesses including Ganesh and Prem, who were also victims of the occurrence, before the Trial court, definitely weakened the prosecution case.



30. The learned Advocates do not suggest that no such occurrence as reported had been committed but then they have only tried to impress upon the Court that the identification of the appellants is absolutely doubtful.

31. One of the additional grounds raised on behalf of the appellants is that against the prosecution version of the female folk having been badly assaulted and gang-raped by not less than four persons, no physical injury was found on anyone of the surviving victims. Except for PW-1, who had a minor swelling in her finger, there was no mark of violence on the body of anyone of the victim women. All this, in totality, only reflected that the investigation was wound up only on the presumption that since the tower location of the appellants were found to be somewhere near the P.O. on 08.10.2019, the appellants only would have committed the crime.

32. As opposed to the aforementioned contentions, Mr. Dilip Kumar Sinha and Mr. Manish Kumar No. 2, learned Additional Public Prosecutors have stated that in face of all



the witnesses having identified all the appellants with specific accusation of rape and firing at one of the deceased, the prosecution has been able to prove the case beyond all reasonable doubts. There was no confusion in the mind of the victims/ witnesses in so far as identification of the appellants was concerned. PW-1 and PW-3, the two surviving victims, pointed specifically towards the appellants and disclosed as to who had raped them. From their deposition, it was very clear that Md. Jamal had not raped PW-1 and that Anmol had shot at the deceased. All the four appellants are alleged to have raped PW-3.

33. Apart from this, the learned APPs have argued that with the recovery of the motorcycle which was used in the occurrence, the black purse, the telephone sets with specific IMEI number and the Aadhar Card of one of the victims, viz., Prem Kumar which was registered in the name of Mahesh Kumar, it was confirmed that the appellants only had committed the crime. Their tower



location further lent the proposition a certainty that the police had not barked up the wrong tree.

34. The law, Mr. Sinha has argued, is very clear and consistent that the accusation of the victims of rape could be sufficient to record conviction, provided it is found to be trustworthy. The Trial court has noted the demeanor of the witnesses and their specificity regarding the particular roles played by the appellants. It matters not, if in such background, the doctors did not find any visible sign of rape. Such findings of the doctor would lose much of its significance especially with respect to PW-3, who is a married woman.

35. Lastly, it has been submitted that there is no necessity of all the victims or all the possible on-lookers of the crime to be brought to the witness-stand for lending assurance to the prosecution version. PWs. 1 and 3 are the victims of rape, whereas PW-4 was a witness to the ordeal, whose wife and niece were raped.



36. Babloo Mandal (PW-5) is the person whose wife was shot dead. He had also witnessed the occurrence right from the beginning.

37. There is enough consistency in the statement of Md. Sajjad (PW-2) as on his disclosure that he had given his SIM card to Md. Ayyub, Md. Ayyub was arrested with the same SIM number which was provided by Md. Sajjad. That the police was not trying to rope in innocent persons is further evident from the fact that Md. Sajjad was never made an accused in the case. Even though the appellants were tracked only on the basis of the conversation which was made on the SIM provided by Md. Sajjad, which was used in a telephone set with a known IMEI number, which was the snatched telephone of the victims.

38. Thus, the prosecution case was foolproof and the Trial court was justified in handing out death sentence to the appellants.



39. The act was committed with exceptional depravity. In fact, Mr. Sinha has further argued that PW-5 had categorically claimed before the Trial court that his wife/ Kanchan Devi (the deceased) was shot at and while she survived, she was raped. Nothing could be more diabolical than this. The Trial court recorded the aggravating and mitigating circumstances and only then thought it fit to give death sentence to all the appellants, which is not required to be interfered with.

40. We have gone through the deposition of the witnesses rather carefully especially because with such an occurrence, they were completely distraught, which appears from the records and the findings of the Trial court while recording their deposition. PWs-1 and 3 broke down several times during the course of their deposition before the Trial court.

41. However, what is noticeable in the deposition of all the witnesses is that there is no unanimity with respect to the number of accused persons who were



present at the P.O. or who had participated ultimately. The witnesses have prevaricated with respect to the number of miscreants. Somehow or the other, the police submitted charge-sheet against six of them, including the four appellants but that was only on the basis of the confession made by the first arrestee, viz., Md. Ayyub.

42. The second noticeable aspect of the case is that PW-1 gave her statement under Section 164 Cr.P.C. on 09.10.2019 only when she did not talk about rape on her. In fact, she made a specific statement that she was not violated physically.

43. PWs-3 and 4 gave their 164 Cr.P.C. statement on 14.10.2019. Ganesh and Prem who actually provided the clue to the police by giving the IMEI number of their snatched mobile telephones were made to give their statements under Section 164 Cr.P.C. on 16.10.2019. Babloo Mandal (PW-5) got his statement recorded under Section 164 Cr.P.C. on 17.10.2019. After the 164 Cr.P.C. statements of PWs. 3 and 4 were



recorded, a request was made by PW-1 for getting her statement recorded again as on the first occasion, she was absolutely distraught and was under fear and, therefore, had not stated the truth. Her second statement was recorded under Section 164 Cr.P.C. on 15.10.2019, wherein she has spoken about her being raped by three persons, whereas PW-3 was raped by four of the miscreants.

44. In this chain of events, it is rather disconcerting for us to note that PW-1, the youngest of the victims was medically examined on 09.10.2019 by Dr. Puja Bharti (PW 6) with respect to the number of teeth for assessing her age. A medical team was also constituted comprising Dr. Manoj Kumar (PW 7), Dr. Reeta Singh (PW 9) and Dr. B.N. Bharti (PW 8). The Board had examined both the victims on 09.10.2019 and had found the age of PW 1 to be about 19-21 years.

45. On the person of PW 1, no injuries were found by the Medical Board. There were no injuries on the



private parts as well. No spermatozoa was found either living or dead and there was no confirmatory finding of rape. Despite this, it was deposed by Dr. Reeta Singh (PW 9) that the possibility of rape could not be excluded. Similarly, PW 3, when was examined by the Board on 14.10.2019, no injuries were found on her person; not also on her private parts.

46. On being specifically questioned about the absence of injury in case of gang-rape, an evasive answer was given by PW 9.

47. These inconsistencies in the prosecution case point towards lack of proper investigation.

48. What is again inexplicable to us is that after the occurrence of gang-rape and murder, the surviving victims and others came to the police station and thereafter went to the local hospital. There was every reason for the police of Raghapur police station, even though the P.O. did not fall in the territorial jurisdiction of such police station, to follow the necessary procedure in



cases of rape. The clothes of the victims were required to be collected and sent for forensic examination. The deceased definitely was shot at during the occurrence but whether she was raped also becomes very doubtful especially in view of the post-mortem examination report and the evidence of Dr. Rajiv Ranjan Das (PW 12) who had conducted the post-mortem examination on her body.

49. The post-mortem examination was held on 10.10.2019 i.e. on the second day of the occurrence. The Doctor had found stitched wounds in the abdomen. Wound of entry and wound of exit could be located at the back of the chest. There were abrasions on the chest and the nipple area. The stitched wounds definitely suggested that the deceased was subjected to treatment.

50. Where was she treated assumes importance.

51. Was she treated at Supaul, Darbhanga or at Patna where she died?

52. Nonetheless, the stitched wounds required a re-operative process. The death was opined to have been



caused by shock and hemorrhage as a result of firearm wound.

53. With such injuries on the person of the deceased, the statement of the witnesses; especially PW 4 and 5, which are somewhat discrepant, require to be examined rather carefully.

54. P.Ws. 4 and 5 both claimed to have brought the injured and the victims to home and then to Raghapur police station and thereafter to Simrahi PHC and thereafter to Supaul, Darbhanga and Patna. PW 5 claims to have brought his wife in injured condition on his shoulders to a village where his father-in-law resided. He picked-up his motorcycle from there and brought the injured while she was still surviving on the motorcycle to the hospital.

55. There is no reference of any treatment at anyone of the hospitals.

56. This may not render the prosecution case of the deceased being shot at and injured in the night of 08.10.2019 doubtful, but who did it is the question which



beckons an answer. The empty cartridge found at the P.O. was also not subjected to any forensic/ballistic examination. If it were seized, it should have been matched with the weapon of assault, which allegedly was found from the possession of appellant/Anmol Yadav who is said to have fired at the deceased. PW 5 claimed before the Trial Court that the deceased was first shot at and was then raped while she was injured. There is no evidence of the same which can be very well inferred from the post-mortem report as also the evidence of the doctor.

57. So far for the evidence against the appellants with respect to their participation in the crime, the non-examination of the person in whose presence FIR was registered or the S.I. of police who had recorded the fardbeyan of PW 4 or Ganesh and Prem who actually provided the inputs to the police, assume significance. There was no reason to keep them away from the Trial Court. They were the persons who could have really thrown light on what actually had happened.



58. There is yet another aspect of the prosecution case which requires to be analyzed. The appellants were arrested in short succession from 12.10.2019 to 17.10.2019. This was immediately after the occurrence. They ought to have been subjected to medical examination.

59. Section 53(1) of the Code of Criminal Procedure enables a police officer not below the rank of S.I. to request a registered medical practitioner, to make such an examination of the person arrested, as is reasonably necessary to ascertain the facts which may afford such evidence whenever a person is arrested on a charge of committing an offence of such a nature that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence.

60. By Act 25 of 2005, a new explanation was substituted under Section 53, in place of the original explanation. The substituted explanation elucidates that



"examination shall include the examination of blood, blood stains, semen and swabs in case of sexual offences and sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case".

61. Simultaneously with the substitution of the new explanation under Section 53, Act 25 of 2005 inserted another new provision in Section 53(A), which reads as hereunder.

"53A. Examination of person accused of rape by medical practitioner. —

(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometres from the place where the offence has been committed, by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:—

- (i) the name and address of the accused and of the person by whom he was brought,
- (ii) the age of the accused,



(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section."

62. In ***Krishan Kumar Malik vs. State of Haryana, 2011 (7) SCC 130***, it was held that in case where the victim of rape is alive and has testified before the Court, even then, the failure to obtain the report of the F.S.L. is fatal. With respect to the provisions contained in Section 53(A) the Supreme Court in *Krishan Kumar Malik (supra)* further held that with the introduction of Section 53(A) in the Code w.e.f. 23.06.2006, it has become necessary for the prosecution to go in for DNA test in such type of cases to facilitate the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid scientific provision in the Cr.P.C., the prosecution could have still resorted to this procedure of getting the



DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case.

63. And if it is not done, the prosecution must face the consequences.

64. However, eight years later, the Supreme Court in ***Rajendra Prahladrao Wasnik vs. State of Maharashtra (2012) 4 SCC 37*** held that Section 53 (A) is not mandatory but even then observed that failure to comply with the provisions under Section 53(A) would warrant an adverse inference [also refer to ***Chotkau vs. State of Uttar Pradesh (2023) 6 SCC 742***].

65. The forensics were completely forgotten by the police and therefore, even the seized cartridge and the blood stained earth which were seized, were not put to any test. The weapon of assault also, recovered from appellant/Anmol Yadav, was not put to any forensic/ballistic test.



66. Who would believe such tall claims of the police in the absence of their having paid any obedience to the statutory provisions of law with respect to investigation?

67. We have found from the tenor of the judgment that no procedural lapse was found by the Trial Court to have surmounted the identification of the appellants in Court by the witnesses.

68. We are strongly of the view that in a case of this kind, where none of the victims/witnesses were aware of the accused persons/miscreants, the police should have put the arrestees on TIP before proceeding any further in the matter.

69. The purpose of holding the TIP has been explained very succinctly by the Supreme Court in ***State of H.P. vs. Lekh Raj, (2000) 1 SCC 247.***

70. It has been held that during the investigation of a crime, the police agencies are required to hold identification parade for the purposes of enabling the



witness to identify the person alleged to have committed the offence, particularly when such person was not previously known to the witness or the informant. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint, leaving no doubt in the mind of the Court regarding his involvement. Identification parade may not also be necessary in a case where the accused persons are arrested at the spot.

71. The evidence of identifying the accused persons at the Trial for the first time is from its very nature inherently, is of a very weak character.

72. It was not for nothing that the Supreme Court in ***Budhsen vs. State of U.P., (1970) 2 SCC 128*** had held that the evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances the complainant or the witnesses came to pick-out the particular accused person and the details of the part which he allegedly played in the crime in question with



reasonable particularity. In such cases, TIP is always considered a safe rule of prudence to generally look for corroboration of the testimony of the witnesses in Court as to the identity of the accused, who are strangers to them. There could however be exceptions to this general rule; like when a Court is impressed by the particular witness on whose testimony, it can safely rely without such or other corroboration.

73. It may not be a substantive evidence, but is definitely a safe and a trustworthy evidence before the identification in the Court.

74. The Courts have been very careful in holding that this rule of prudence is required to be followed in cases where the accused is not known to the witness or the complainant.

75. In the factual scenario of this case, we are constrained to observe that not much weight can be attached to the evidence of identification in Court by the witnesses for the reason that it is not preceded by any TIP.



76. The witnesses deposed before the Court after four months of the occurrence.

77. The occurrence had taken place in the night somewhere in between two villages on a river-bed where no electricity is expected. The miscreants may not have been identified at that place. If they were shown to the witnesses after their arrest, their memory would have been re-freshened. Waiting for them to identify the appellants in Court after four months was a tactical fault on the part of the prosecution. [***Dastagir Sab and Anr. vs. State of Karnataka (2004) 3 SCC 106***]

78. With these lapses in the prosecution case, if the evidence of the witnesses are analyzed, it would become very clear that PW 4 and his family members were held captive. Three of the other villagers viz. Sandip, Ganesh and Prem were also kept in confinement. All of them were divested of their belongings. It was a case where the miscreants ran the roost against innocent and helpless villagers. All of them were on their way to attend



a fair in a neighbouring village. It could be a case of road burglary and in case of resistance, one of the women was shot dead.

79. There is no denying the fact that an occurrence had taken place in the night of 08.10.2019.

80. We have doubted the prosecution only for the reason of the lapses on the part of the investigator, which goes to the root of the matter.

81. It is difficult for us to accept and show our naivete that merely because all the witnesses/victims have identified the appellants therefore, their evidence is beyond the realm of doubt. The sequence of events as narrated by the investigator is that shortly after the FIR was recorded, Prem and Ganesh were interrogated who affirmed the prosecution version and also provided the IMEI number of telephones.

82. We are amazed at such eidetic memory of villagers, who without reference to any receipt or paper, were able to remember the IMEI number which runs in



several digits and would confer it on police for them to make it a stepping ground for tracking the offenders.

83. In any view of the matter, even if such IMEI numbers were located, the caller on a SIM card inserted in such of the telephones would easily be tracked. In this case, the SIM which was located on surveillance belonged to Md. Sajjad.

84. Even by way of repetition, we must state that the explanation offered by Md. Sajjad/PW 2 was readily accepted by the police. The story of PW 2 having given his SIM to Md. Ayyub whom he barely knew is also doubtful. That apart, the tower location of the persons who talked amongst themselves was no evidence unless it were certified to be from a source which was incapable of being tampered with.

85. The prosecution has chosen a sepoy in the cyber-cell to testify that from the analysis of CDR, the appellants were found to be in close vicinity of the P.O. Even if it were correct, they are also villagers who would



also have proceeded towards village Tintoliya for attending the fair. This, therefore, could not have been a clinched circumstance with respect to the accusation against the appellants. The recovery shown from the appellants is also not attended by any logical corroboration. For sure, a snatcher would not keep the Aadhar Card or for that matter the purse with him after a week of the occurrence.

86. We have also taken clue from the evidence of the witnesses that the local political persons had made several rounds of the village to pacify the villagers. The occurrence had taken place, for sure, but the police under the pressure appears to have adopted an approach which cannot be justified or be said to be a fair investigation.

87. Thus, the argument of the learned Advocates for the appellants that the entire case has hinged on the confession of Md. Ayyub is not far from true.

88. We are thus forced to reject the opinion of the Trial Court that the appellants had committed the



offence and that their identification with specific particularity was the surest test of their being truthful.

89. We have not gone into the aggravating and mitigating circumstances discussed by the Trial Court for the reason that we do not find the conviction of the appellants to be justified.

90. While saying so, we feel a sense of remorse where innocent villagers have been put to such barbarous act and a married lady has lost her life but while analyzing the evidence, a Court of Law has to be very careful about the rights of the accused as well.

91. Without any semblance of evidence, the appellants cannot be held guilty and be doled out death sentence.

92. For the aforementioned reasons, we reject the reference sent by the court below and allow the appeals.

93. The appellants are acquitted of their charges levelled against them, giving them benefit of doubt.

94. All these appeals stand allowed accordingly.



95. All the appellants are in jail. They are directed to be released from jail forthwith, if not required in any other case.

(Ashutosh Kumar, J)

(A. Abhishek Reddy , J)

krishna/rajesh

AFR/NAFR	AFR
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