

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL CONFIRMATION CASE NO.3 OF 2022

State of Maharashtra .. Petitioner
Versus
Sanjay Baban Katkar .. Respondent

WITH
INTERIM APPLICATION NO.2712 OF 2024
IN
CRIMINAL CONFIRMATION CASE NO.3 OF 2022

Sanjay Baban Katkar .. Applicant
Versus
State of Maharashtra .. Respondent

WITH
CRIMINAL APPEAL NO.1313 OF 2023

Sanjay Baban Katkar .. Appellant
Versus
State of Maharashtra And Anr. .. Respondents

Ms. Sahana Manjesh a/w Gaurav Bhawnani for respondent in CONF No.3 of 2022 and for applicant/appellant in IA No.2712 of 2024 & Appeal No. 1313 of 2023.

Mr.S.V. Gavand, APP for the State.

CORAM: BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.

DATED : 29th JULY, 2024

ORDER:- (PER BHARATI DANGRE J.)

1 The sentence of death imposed upon accused Sanjay Baban Katkar, who is held guilty for committing the offences punishable under Section 363 of IPC and Section 4 and 6 of the

Protection of Children from Sexual Offences, 2012 (POCSO) by the Special Judge (under POCSO Act) Pune, in Special Criminal Case No.285 of 2021, vide judgment dated 28/02/2022 is before us for confirmation.

The convict Sanjay Baban Katkar has also filed an Appeal calling in question the death sentence and also the finding of conviction rendered in the judgment dated 28/02/2022.

2 During the pendency of the aforesaid Appeal, the accused has taken out an application seeking the following reliefs:-

“A. Direct the Ld. Special Judge, Pune to summon Mr. VB Shahagadkar, Assistant Chemical Analyser, Regional Forensic Science Laboratory Pune, involved in preparation of the report ML Case No.376/2021 (Ex. 105, Pg. 224) and Mr. DV Mali, Assistant Chemical Analyser, Regional Forensic Science Laboratory Pune, involved in preparation of the reports ML Case No. Bp-894/2021 (Ex.99, Pg. 215), ML Case No.Bp-895/2021 (Ex.100, Pg.217), ML Case No. Bp-894/2021 (Ex.101, Pg. 218), ML Case No. Bp-894/2021 (Ex. 102, Pg.219) as witnesses and permit the counsel for the Applicant to cross-examine them.

B. Call for complete laboratory documentation of the Regional Forensic Science Laboratory, Pune in respect of ML Case No.DNAp-376/2021 (Ex.105, Pg.224), including but not limited to copies of the following:

a. All laboratory documentation including case register, worksheets, bench notes and equipment log sheets related to tests conducted and methods used for DNA extraction, quantification, amplification, electrophoresis and interpretation for all the articles received;

b. Electropherograms for DNA profiles and electronic raw data (.fsa) obtained from all exhibits received, allelic ladders and control samples used; and

c. Working procedure manuals including DNA manual used in examination of all exhibits received; and

d. Details of kits and softwares used for DNA extraction,

quantification, amplification, electrophoresis and interpretation in the case along with manuals of such kits and softwares; and

e. Details of seals and sample seals of all exhibits received.

C. Call for complete laboratory documentation of the Regional Forensic Laboratory, Pune in respect of ML Case No.Bp-894/2021 (Ex. 99, Pg. 215), ML Case No. Bp-895/2021 (Ex. 100, Pg 217), ML Case No. Bp-894/2021(Ex. 101, Pg. 218), and ML Case No.Bp-894/2021 (Ex. 102, Pg. 219), including but not limited to copies of the following:

a. All laboratory documentation including bench notes;

b. Details of tests conducted and techniques used for examination of the articles received as well as the results of these tests;

c. Working procedure manuals including of biology and/or serology division used in examination of the exhibits;

d. Details of seals and sample seals of all exhibits received”

3 The aforesaid application is preferred by the accused/applicant in the background that the biological samples were taken from the deceased during the conduct of postmortem in Sassoon Hospital on 17/02/2021, which included the oral swab, oral smear, anal swab, anal smear, vaginal swab, vaginal smear, nail clippings and blood. During investigation the frock worn by the deceased was also seized and even the shirt of the applicant was seized at Velha Police Station upon his arrest.

 The aforesaid sample/articles, were forwarded to the Regional Forensic Science Laboratory, Pune, for examination regarding the presence of blood and semen, and the report under the signature of Mr. DV Mali, Assistant Chemical Analyser, RFSL, Pune reported as below:-

“3.1 ML Case No. Bp-894/2021 (Ex.99, Pg. 215), which inter alia found human blood of B group on the jacket and rock, and semen stains on the frock.

3.2 ML Case No. Bp-895/2021 (Ex.100, Pg.217), which inter alia found the deceased’s blood to be of group B..

3.3 ML Case No. Bp-894/2021 (Ex.101, Pg, 218), which inter alia found human blood stains on the full shirt.

3.4 ML Case No. Bp-894/2021 (Ex.102, Pg. 219), which inter alia referred Applicant’s nail clippings to the DNA division.”

4 In addition, the DNA division of the very same laboratory furnished two sets of results in form of DNA report under the signature of Mr. VB Shahagadkar, Assistant Chemical Analyser, RFSL Pune, which is reported as under:-

“Report 1:-The DNA extracted from Ex.1 Oral swab, Ex.2 Oral smear, Ex.3 Anal swab, Ex.4 Anal smear, Ex.5 Vaginal swab and Ex.6 Vaginal smear of Ku. Gauri Akshay More (DNAP-216/2021), Ex.1 Blood of Sanjay Baban Katkar (DNAP-231/2021) and Ex.3 Semen stained cuttings from frock, Ex.4 Nail clippings from frock, Ex. 4 Nail clippings of Gauri Akshay More, Ex.5 Prepared blood stain of Gauri Akshay More and Ex.6 Blood stain cuttings from full shirt and was typed at 15 STR Loci and gender specific amelogenin locus using PCR amplification technique. No amplifiable DNA is obtained from Ex.1-Cotton swab.”

Report 2:- The DNA extracted from Ex.4 Anal smear, Ex.5 Vaginal swab of Ku. Gauri Akshay More (DNAP-216/2021) Ex.1 Blood of Sanjay Baban Katkar (DNA-231/2021) and Ex.3-Semen stained cuttings from Frock, was typed at 23 Y STR loci using PCR amplification technique.”

5 The Special Judge, while recording the finding of guilt against the accused has relied upon these reports and the inference drawn on the basis of the said report is recorded in the following manner:-

“The C.A report Exh.99 shows that there was semen on the frock (Article- ‘A’) of the prosecutrix. The blood having ‘B’ Group of the prosecutrix is established by the C.A. report Exh. 100. The same blood was found in the frock of the prosecutrix and jerkin of the accused as per C.A. report Ex.99 which were sent to DNA analysis. Exh.101 is C.A. report about the clothes of the accused having blood stains. The blood of the prosecutrix was detected in his shirt and jerkin. It was sent for DNA analysis. Exh.103 C.A. report shows that the clothes of male DNA profile were obtained from Exh.4 anal smear and Exh.5 vaginal swab and Exh.6 vaginal smear. C.A. report Exh.104 shows that DNA analysis profile is obtained from Exh.1 blood of the accused Sanjay Baban Katkar. It was sent for DNA analysis profile. On the basis of above referred C.A. report and DNA report at Exh.105(1) and Exh.105(2) clarifies that male haplotypes obtained from Exh.4 Anal smear, Exh.5 Vaginal swab of the prosecutrix (DNAP-216/2021) and Exh.3 Semen stained cuttings from the Frock (DNAP-376/2021) are identical and matched with male haplotypes obtained from Exh.1 Blood of accused Sanjay Baban Katkar (DNAP-231/2021). Thus, it is the evidence of conclusive nature.”

6 Dealing with the argument advanced on behalf of the accused that the DNA analysis kit was not kept in controlled atmosphere specified by the scientific norms and therefore, the report cannot be relied upon, the Special Judge has recorded that the independent and expert authority like CFSL, who gave DNA analysis in C.A. reports (Exh.105) have no reason to give such opinion and draw an inference of matching of blood of the accused with blood and semen found on the frock of the prosecutrix, and it cannot be coincidence. In paragraph 88, while enlisting the aggravating circumstances, the learned Judge has recorded that the vaginal and anal sexual intercourse by the accused was shameful and barbaric overt act and it was proved by the scientific and independent evidence of DNA and C.A. reports and the evidence of expert of Dr. Taware (P.W.9).

7 It is in the above background, the present application is preferred by the accused to summon and examine the DNA Analyst Mr. VB Shahagadkar and CA Analyst Mr. D.V. Mali, as it is specifically contended before us that the applicant was not afforded adequate opportunity to challenge the reports during trial, in absence of examination of the analyst and the reports were thus incomplete without the required underlying laboratory documents.

The learned counsel Ms. Sahana Manjesh has urged before us that the DNA and the CA reports were exhibited by the Investigating Officer P.W.16, who was not the author of the reports and who even lacked any knowledge of DNA or CA examination.

In absence of examination of the analyst, who signed the reports and since the reports were admitted under Section 293 of Cr.P.C, the learned counsel has urged before us that while recording the statement of the accused under Section 313 of the Code of Criminal Procedure, he was not confronted with the findings of the report.

The counsel would argue that the trial Judge, did not call for any underlying material, nor did he deemed it fit to examine the signatory of the reports, as they are the reports by the expert. She would submit that the reports being evidence of a scientific nature, require careful study and analysis and infact the applicant was not given adequate opportunity during trial to raise a challenge to the said report and denial of this opportunity has resulted in violation of his right to fair trial guaranteed by Article 21 of the Constitution.

In addition, she has submitted that the Advocate

representing the accused was appointed through Legal Aid and therefore, at the stage of trial, no effort was made to raise a challenge to the reports or even cross-examining P.W. 16, through whom the documents were exhibited.

8 Since the reports, relied upon by the trial Judge, to corroborate the case of the prosecution, according to Ms. Sahana Manjesh, the reports are in form of an opinion expressed by the experts, which must be supported by reasons and the underlying data and materials upon which such opinion is based must be brought before the Court, so as to enable the Court to independently review the accuracy and reliability of the expert opinion.

It is submitted before us that the standards under Section 45 of the Indian Evidence Act, 1872, must be satisfied by all expert reports, including those under Section 293 of Cr.P.C, which allow admission of reports by specific government scientific experts but by merely exhibiting such report, it does not prove the truthfulness of its contents. It is also submitted by the learned counsel that in case of DNA testing, it is very much imperative for the court to ensure adherence to quality control and quality assurance procedure followed so that the possibility of contamination is eliminated.

Reliance is placed by the learned counsel upon the decision of the Apex Court in case of ***Manoj and Ors. vs. State of Madhya Pradesh, (2023) 2 SCC 353*** and also in case of ***Rahul vs. State of NCT, Delhi, (2023) 1 SCC 83***.

Ms. Manjesh submit that in the present case, neither the Chemical Analyser, who signed the DNA report nor the one, who

signed the CA report are examined. Further, it is also urged that *While* the DNA report contains an allelic table mentioning the DNA profile obtained from each sample, it is not supported with the electropherograms or the underlying electronic raw data on the basis of which the table was prepared by the DNA analyst. Crucial information regarding the process followed for DNA examination, including, the kits and software used at different steps during DNA profiling, the notes and worksheets regarding the findings at each step and the supporting laboratory documentation for the different steps and processes involved in DNA analysis have not been provided either to the Hon'ble Court or the Applicant.

The CA reports similarly do not mention any details of the process followed, the tests conducted and the supporting laboratory documentation, is the argument canvassed.

In absence of the aforesaid, it is submitted that the trial Court could not have equipped itself with the potential to assist the credibility of findings of the DNA or CA reports, and neither could the accused avail an opportunity of challenging the findings adequately and effectively.

9 The learned counsel has placed reliance upon the Primer on Forensic DNA Profiling, published by National Law University, Delhi as well as the Working Procedure Manual issued by the Directorate of Forensic Science Services (DFSS), which are placed before us.

It is therefore, urged before us that the conclusivity in the said report which has been relied upon by the trial Judge, while

rendering a finding of guilt against the accused in absence of adequate opportunity to deal with the said evidence has resulted into gross-injustice to the accused thereby denying the right of fair disclosure, which even extend to the accused in terms of the decision of the Constitution Bench in case of ***P. Ponnusamy vs. State of Tamil Nadu 2022 (16) Scale 230.***

10 The DNA analysis according to the counsel for the applicant lacks the accuracy as it is not conclusively established that the integrity of the samples and process followed was not brought before the Court, as the witness is not examined by the prosecution, resultantly the opportunity to cross-examine him is also denied. A strong suspicion is therefore, raised about tampering/contamination of the crucial samples and the report is found to be untrustworthy in the wake of following factors:-

- (i) Y-STR analysis of oral smear and nail clippings is not reported
- (ii) Lack of genotyping of mixed profiles.
- (iii) Lack of statistical analysis.

 The forensic evidence relied upon by the prosecution is contained in the two reports dated 30/04/2021, the method adopted for analysis being the serology test and the DNA (STR) analysis. The DNA has been extracted from the anal smear, vaginal swab, of the deceased and blood of the accused and semen stained cutting of frock sent for Y-STR analysis. It is in light of these reports, the prayer which have reproduced above is made before us.

11 The learned APP Mr. Gavand, representing the State concede to the fact that the C.A. report and DNA report, which

contain the incriminating material against the accused was not put to him in his 313 statement, but as far as the prayers for calling of the expert is concerned, he has submitted before us that the said request was not made during trial and at this stage of hearing of the Appeal, the same cannot be considered.

12 Mr. Gavand, would rely upon Section 293 of Cr.P.C and according to him by virtue of sub-section (4) of Section 293, any report of Chemical Analyser or Assistant Chemical Analyser to the Government, upon any matter or thing duly submitted to him for examination or analysis may be used in evidence in any enquiry, trial or other proceedings under the Code.

Thus according to the learned public prosecutor, the reports produced before the Special Judge, in absence of any challenge raised to the same have been duly exhibited and Police Naik attached to Police Station Velha, who has deposed that A.P.I. Pawar, had directed him to hand over 12 sealed articles, 7 sealed samples, one viscera bottle and the letter for giving DNA kit to the office of Chemical Analyser along with two forwarding letters and accordingly, handed over the letters and articles in sealed condition, and obtained acknowledgment receipts. He also deposed that on yet another day, he went to CA office for depositing sealed articles (total 8) along with the letter signed by A.P.I. Manoj Pawar.

13 PW-16, Manoj Pawar, the Investigating Officer deposed that the incriminating articles were handed over to the constable Garud to be sent to CA and he also sent letter (Exhibit 46) for DNA kit to CA office. He also deposed that 8 CA reports, were received by him and they were marked as Exhibit 95 to 105.

According to Mr. Gavand, there is no cross-examination of this witness on the possibility of contamination of the samples or creating any doubt about the proper articles being forwarded for Chemical Analysis and in absence thereof, it is his submission that, the request made at this stage deserve to be declined.

14 We have considered the rival contentions. We must take note of Section 366 of the Code, which prescribe that when a Court of Sessions passes sentence of death, the proceedings must be submitted to the High Court for its confirmation.

Section 367 provide to the power of the High Court, to which the proceedings are submitted and it contemplate that if the High Court thinks that a further enquiry should be made into or additional evidence be taken upon, on any point bearing upon the guilt or innocence of the convicted person, it may make such enquiry or take such evidence itself, or direct it to be made or taken by the Court of Sessions.

On consideration of the case submitted to it the High Court may confirm the sentence or pass any other sentence warranted by law or may annul the conviction and convict the accused of any offence of which the Court of Session might have convicted him or order a new trial on the same or amended charge or it may acquit the person.

15 The proceedings contemplated under Chapter XXVIII under a caption “submission of death sentences for confirmation’ has been held to be proceedings in continuation of the trial, as it entitle the High Court to direct further enquiry or even to take additional

evidence and even the High Court is competent to acquit the accused, who has been sentenced to death by the Sessions Court.

Section 386 of the Code is a power to be exercised by an Appellate Court, which includes the power to reverse the finding and sentence imposed and acquit or discharge the accused or directing him to be re-tried and this power shall be exercised when the Court is hearing an Appeal either under Section 377 or Section 378 of the Code and when it is found that, there is no sufficient ground for interfering, the Appeal may be dismissed.

Section 391 allow the Appellate Court, if it thinks additional evidence to be necessary, record its reasons and either may take the evidence itself, or direct it to be taken by the Court of Session or a Magistrate with a right being conferred on the accused or his pleader to be present when the additional evidence is taken.

Sub-section (4) of Section 395 clarify that the taking of evidence under the said Section shall be subject to provisions of Chapter XIII as if it was an enquiry.

16 ***In Munna Pandey vs. State of Bihar AIR (2023) SC 5709***, the contours of the power to be exercised by the High Court, when it confirm a sentence of death imposed by the trial court has been specifically highlighted in the following words:-

“...The position is, however, different where the appeal is by an accused who is sentenced to death, so that the High Court dealing with the appeal has before it, simultaneously with the appeal, a reference for confirmation of the capital sentence under Section 366 of the CrPC. On a reference for confirmation of sentence of death, the High Court is required to proceed in accordance with Sections 367 and 368 respectively of the CrPC and the provisions of these Sections

make it clear that the duty of the High Court, in dealing with the reference, is not only to see whether the order passed by the Sessions Judge is correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considers it desirable in order to ascertain the guilt or the innocence of the convicted person. It is true that, under the proviso to Section 368, no order of confirmation is to be made until the period allowed for preferring the appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of, so that, if an appeal is filed by a condemned prisoner, that appeal has to be disposed of before any order is made in the reference confirming the sentence of death. In disposing of such an appeal, however, it is necessary that the High Court should keep in view its duty under Section 367 CrPC and, consequently, the Court must examine the appeal record for itself, arrive at a view whether a further enquiry or taking of additional evidence is desirable or not, and then come to its own conclusion on the entire material on record whether conviction of the condemned prisoner is justified and the sentence of death should be confirmed.”

17 While exercising this power we are called upon to consider the request of the accused to cross-examine the Chemical Analyser, who had submitted two reports including the DNA report and this request is examined by us in light of Section 293 of the Code of Criminal Procedure, which allow a document purporting to be a report under the hand of a Government Scientific Expert to be used as evidence in any enquiry, trial or proceeding under the Code, upon any matter or thing duly submitted to him for examination or analysis.

Sub-section (2) of Section 293 empower the court, if it things fit, to summon and examine any such expert as to the subject matter of his report.

Admittedly, the Section applies to the Chemical Analyser or Assistant Chemical Analyser to government, who is categorized as

Government Scientific Experts by virtue of sub-section (4).

18 Section 45 of the Evidence Act, is with reference to the opinion of experts and who are the persons who would fall in this category is culled out in section 45 which reads thus:-

“45. Opinions of experts.—When the Court has to form an opinion upon a point of foreign law or of science, or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts. Such persons are called experts.”

In order to bring the evidence of the witness within the category of expert it is to be established that he is the person, who has made special study of the subject or acquired a special experience therein or in other words that he is a skilled person or has adequate knowledge of the subject.

In Ramesh Chandra Aggarwal vs. Regency Hospital Ltd, (2009) 9 SCC 709, their lordships of the Apex Court has culled out the role of an expert witness in the following words:-

“20. An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.”

22. In the article “Relevance of Expert’s Opinion” it has been opined that the value of expert opinion rests on the facts on which it is based and his competency for forming a reliable

opinion. The evidentiary value of the opinion of an expert depends on the facts upon which it is based and also the validity of the process by which the conclusion is reached. Thus the idea that is proposed in its crux means that the importance of an opinion is decided on the basis of the credibility of the expert and the relevant facts supporting the opinion so that its accuracy can be cross checked. Therefore, the emphasis has been on the data on the basis of which opinion is formed. The same is clear from the following inference:

“Mere assertion without mentioning the data or basis is not evidence, even if it comes from an expert. Where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value.””

The take away of the aforesaid pronouncement is, that when the expert gives no real data in support of his evidence, such evidence even though admissible may be excluded from consideration, as it afford no assistance in arriving at the correct value.

19 In the present case before us, we have two expert reports by the two Analyst Mr. DV Mali, and Mr. VV Shahagadkar, the latter being the report of DNA Analysis of the DNA obtained from the deceased, through the anal swab, oral swab, oral smear etc, which is compared from the DNA profile of the accused obtained from his blood and it has been used for comparing the sweat stained cutting from the jacket and the semen stained cutting from frock of the deceased.

The method adopted being DNA (STR analysis- Y-STR analysis).

20 The Law Commission of India in its 185th report on review of Indian Evidence Act, 2003 has highlighted thus:-

“DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not “match”, then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA “profile” or “fingerprint” is found. It may be, for example, that the relevant profile is found in 1 person in every 1,00,000: This is described as the “random occurrence ratio.”

Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identify in a court of law.”

21 It cannot be doubted that modern DNA testing can provide powerful new evidence as there are major advances in DNA technology, culminating in STR technology , where it is now possible to determine whether a biological tissue matches a suspect and it can assist in nailing an accused or exonerating him by proving his innocence.

 However, time and again, the Apex Court as well as the higher Courts have emphasized the need for assuring quality control, about the samples and also the techniques that are used for testing. The probative value according to the DNA evidence varies from case to case, depending on facts and circumstances, and the weight accorded to other evidence on record, whether contrary or corroborative.

DNA testing has provided powerful new evidence, which has been relied upon world wide as DNA stands for deoxyribonucleic acid, which is the biological blue print of every life, being made up of double stranded structure consisting of deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acid referred to as adenine and guanine, purines and thymine and cytosine pyrimidines.

It is however, necessary to ensure the safeguards that would make the test effective and provided it passed through the quality control and quality procedure in the laboratory.

22 The learned counsel Ms. Manjesh for the accused has relied upon the Working Procedure Manual issued by the Directorate of Forensic Sciences, from which one can understand the basis of forensic DNA profiling, however the procedure has laid emphasis on the manner of collection, packaging, storage and transportation of DNA sample to ensure that the quality and quantity of DNA for the purpose of analysis is preserved. It has specifically highlighted that the packaging of biological fluid such as blood and semen involve their collection on a cotton gauze and air drying the gauze before packing it into a paper packet or envelope. In case of liquid blood sample the guideline prescribe that it must be refrigerated at 4° C and must be transported in a thermocol box. For stains found on clothes and fabrics, they must be air dried at room temperature and packed in a paper packet or cotton bag and the DFSS guidelines for the investigating officers and medical practitioners have been highlighted as best practices for collection, packaging, storage, and transportation of biological samples.

Another aspect which has been focused upon is the contamination of samples within a laboratory during DNA profile as the sensitivity to detect minuscule amount of DNA is though on the rise has also increased the chances of contaminated DNA being detected and therefore, it is advised to strictly adhere to anti-contamination measures to minimize the risk of contamination.

23 The most important aspect of the DNA analysis is the examination of the report evidencing the analysis and it contemplate the following information and documents to be supplied along with a DNA report:-

- . ***Chain-of-custody documents relating to all samples sent for DNA analysis.***
- . ***Worksheets and bench notes stating the type of serological examination undertaken for each exhibit and the source of biological material detected, such as blood or semen.***
- . ***Description of the methodology used, including worksheets and bench notes maintained during all stages of the process of DNA profiling.***
- . ***Details regarding the kits used during the process of DNA profiling and the working procedure manual (WPM) followed.***
- . ***EPGs of the exhibits, allelic ladder and the control samples which were interpreted as part of the DNA examination.***
- . ***Statistical analysis of the DNA profiling results.***

24 In addition the working procedure manual for DNA testing has set out the guidelines for proper recording of analytical data, which should be furnished in form of written report, which shall include the following:-

- . *Case identifier*
- . *Description of evidence examined*
- . *A statement addressing non-examined items*
- . *A description of methodology*
- . *Loci tested (where appropriate)*
- . *Results and conclusions*

25 In addition, there is also input provided on the technology to be adopted as it contemplates that typing of all SRT core loci for proficiency test and it is further prescribed that the proficiency testing for YSTRs must be done on a semi-annual basis and the Forensic Scientists qualified in both automated and manual methods are competent to perform alternate analysis of proficiency test.

Sample preparation, storage and distribution is the focus of the guidelines and there are minute guidelines issued on the laboratory organizations, DNA extraction, Concordant Analyses 'Duplicate Rule' as well as sterilization and sample processing.

26 From perusal of the manual for forensic data testing it is evidently clear that the submission of the counsel for the applicant that the DNA report and CA reports only contain the analytic opinion without the basis of the opinion cannot be sufficient to prove the guilt of the accused/applicant, warrant consideration.

In absence of the crucial information regarding the process followed for DNA examination including the kits and software used at different stages during DNA profiling, notes and worksheets regarding the finding at each step and the supportive laboratory documentation has not been provided. The reports, which

are exhibited, being presented through Chemical Analyser do not mention any details of the process or offer any clarification on the test conducted and the supporting laboratory documentation.

In addition, the strong likelihood of tampering/contamination of crucial samples in such a scenario cannot be ruled out. The report reveal a single source DNA profile matching the deceased DNA profile, which is found in the blood stained cutting from the applicants apparel, but it do not offer any clarity on the basis on which the samples were selected for the Y-STR testing as the STR analysis has reported of a female DNA profile on the anal smear and vaginal swab, however the Y-STR analysis finds male haplotypes on the anal smear and vaginal swab.

The counsel for the applicant has also emphasized on lack of genotyping of mixed profiles and the absence of any statistical analysis data in the DNA report and that is why she seek production of complete laboratory documents on the basis of which DNA reports were issued.

27 The Assistant Analyser, who were involved in furnishing this report Mr. Shahagadkar and Mr. DV Mali have not been examined as the witness by the prosecution, and hence the applicant/accused had no opportunity to cross-examine them. Since, the purpose of criminal trial is to ascertain truth and it contemplate every fair opportunity to be given to the accused to deal with the incriminating material which is relied upon by the prosecution in establishing his guilt, in our consideration the applicant deserve an opportunity in this regard.

28 After this opportunity is afforded, it is necessary that the incriminating material is put to the accused under Section 313 of Cr.P.C, so as to enable him to explain the incriminating circumstances, which is put up against him and he is afforded an opportunity to offer such explanation as he may choose to do, unless that is done, the piece of incriminating evidence cannot be relied upon for recording a finding of guilt against him.

Use of the words 'shall question him' in Section 313 of the Code indicate its mandatory character and cast an imperative duty upon the court and confer corresponding right upon the accused to an opportunity to offer his explanation for such incriminating material, appearing against him and the questioning put to him must be fair and couched in such form, which even an ignorant or a person of average intellect will be able to appreciate and understand. Fairness, therefore require that each incriminating material circumstance is put to an accused so that he is in a position to offer his explanation in that regard.

In the present case, we have noted that the DNA report, which is exhibited through the prosecution is not put to the accused in his Section 313 statement, which is therefore, an additional ground for us to grant the relief by permitting cross-examination of Mr. VV Shahagadkar, and Mr. DV Mali, Assistant Chemical Analysers, Regional Forensic Laboratory, upon they being summoned by the Special Judge, Pune in regards to Exhibit No. 99 to 105.

Upon their examination, as well as cross-examination, the substance of the evidence brought on record through these two witnesses, if incriminating, shall be put to the accused under Section

313 of the Code, by way of additional evidence.

29 In the wake of the above discussion, we proceed to pass the following order:-

ORDER

- a) Interim Application No.2712 of 2024 is allowed in terms of prayer clause (A).
- b) The Special Judge (under POCSO Act), Pune shall summon Mr. VV Shahagadkar, and Mr. DV Mali, Assistant Chemical Analysers, Regional Forensic Laboratory, in connection with Exhibit No.99 to 105 and upon their examination, afford an opportunity to the applicant/accused to cross-examine the two expert witnesses.
- c) Upon the examination of the expert witnesses, if any incriminating evidence is brought before the learned trial Judge, that shall be put to the accused under Section 313 of Cr.P.C, by way of additional evidence, either by securing his presence in person or by adopting virtual mode.
- d) The presence of the applicant/accused is dispensed with while the witnesses are examined/cross-examined, but it should be ensured that the evidence is taken in the presence of the counsel representing the applicant.
- e) We direct the Sessions Judge, to complete the entire exercise of recording evidence of the expert witnesses within a period of two months from the day of uploading of this order and if necessary, by putting the same to the accused under Section 313 of Cr.P.C, within a period of one month thereafter and submit the same before this Court on or before 14/11/2024, by complying the

provisions of Section 367(3) of Cr.P.C.

f) Record and Proceedings of the Special Case (POCSO Act) No. 285 of 2021, received in this Court, shall be remitted to the trial court forthwith for compliance of the aforesaid direction and along with the evidence, which is directed to be forwarded in the above clause, the R & P shall also be remitted back to this Court.

g) We direct the Registrar (Judicial) to communicate this order to the trial court in addition to the communication by the learned APP.

h) Parties to act on the authenticated copy of this order.

(MANJUSHA DESHPANDE,J)

(BHARATI DANGRE, J.)