

appellant Shahid has been convicted and sentenced under Section 302 IPC with death sentence and fine of Rs.1,00,000/-, in default six month rigorous imprisonment; under Section 201 IPC for a period of three years rigorous imprisonment and fine Rs.20,000/-, in default three months rigorous imprisonment and under Section 5/6 POCSO Act with death sentence and fine of Rs.1,00,000/-, in default six months rigorous imprisonment.

2. The learned trial court has also made reference to this Court for confirmation of death sentence.

3. The prosecution case in brief is that on 12.09.2023 at about 9 a.m. the victim aged about 4 years went missing from outside her house while she was playing there. Members of her family searched for her but could not find her out. At about 6 p.m. Nawab Alam resident of same village told the informant/ Abdul Haq that at about 10 a.m. he saw the victim following Shahid and his friend Daren heading towards poultry farm. On this information, the informant alongwith Sakib, Nurul Haq along with other persons proceeded towards poultry farm of Shahid and tried to search her out, however they found the deformed dead body of the victim/deceased, lying 100-150 metres away from poultry farm. The informant then lodged an F.I.R. by giving written tehrir on 12/13.09.2023 at 1.01 a.m. in the police station concerned which was registered as Crime No. 179 of 2023 under Section 376DB, 302, 201 IPC and 5/6 POCSO Act.

4. Investigation of the case was entrusted to S.I. Ashok Kumar.

5. The inquest of the deceased was conducted by S.I. Deepak Singh on 13.09.2023 at about 01.45 am to 3 am. The

dead body of the deceased was sealed and after preparing other relevant papers, it was sent for post mortem.

6. On 13.09.2023 at about 4.10 p.m. post mortem was conducted by Dr. Sumit Kumar, Senior Medical Officer, CHC Fatehgarh. The following ante-mortem injuries were found on her person:

(1) Animal bite over the face and neck which includes both mastoid region, B/C maxillar and mandibular region including external and internal structure of neck and face. This injury appears to be antemortem. Few tracheal are absent and few are depressed.

(2) Contusion 1.5 cm x 0.6 cm on right lateral aspect of nasal bridge. On dissection nasal bridge is slightly depressed.

(3) Multiple abrasion over the back of chest, trunk both buttocks and thighs measuring 3.5 cm x 1.3 cm to 1.0 cm x 0.5 cm.

(4) Linear abrasion measuring 3.3 cm to 1.5 cm on the private parts including labia majora.

(5) Multiple abraded contusion 3 cm x 1 cm to 1.8 cm x 0.7 cm on both side anterior lateral aspect of both side chest.

Two vaginal slides and vaginal swab prepared. Two anal slides and swab (anal) prepared.

In the opinion of doctor, cause of death could have been asphyxia as a result of antemortem injury.

7. The Investigating Officer recorded the statements of the informant and other witnesses and also prepared site plan after inspection of place of occurrence. The case under Section 302, 201, 376DB IPC and 5/6 POCSO Act was found to be established on the basis of material

collected during the course of investigation as a result charge sheet was filed against the present appellant and other co-accused Daren who was a minor at the time of alleged incident.

8. Learned trial court took cognizance of the offences on 17.10.2023 and case of co-accused Daren was separated from the case of present appellant, he being a juvenile.

9. The trial court after taking into consideration the material on record, framed the charges against appellant Shahid under Sections 376DB, 302, 201 IPC and Section 5/6 POCSO Act. The charges were read-over and explained to the appellant, he pleaded not guilty and denied the charges and claimed for trial.

10. Prosecution adduced P.W.1 Abdul Haq, the informant; P.W.2 Nawab Alam, the witness who told about the victim to the informant; P.W.3 Kamare Alam, said to be chance witness; P.W.4 Jahirul Haq; P.W. 5 S.I. Deepak Singh, who conducted inquest of the deceased; P.W.6 Dr. Sumit Kumar Singh, who conducted post mortem of the deceased; P.W. 7 S.I. Ashok Kumar, the Investigating Officer and P.W. 8 Dr. Praveen Kumar Srivastava, Scientist/incharge Kanpur zonal Field Unit, Kanpur Nagar.

11. After conclusion of prosecution evidence, statement of accused appellant was recorded under Section 313 Cr.P.C. in which he denied the allegations of rape, murder & concealment of evidence and alleged prosecution witnesses as interested witnesses. He also narrated about the testimony of P.W.2 Nawab Alam and P.W. 3 Kamare Alam to be false and further stated that the police arrested him from his

house and recorded his false confessional statement and also challanned him.

12. In defence, D.W.1 Radheshyam was examined.

13. The learned court after hearing the arguments of both the parties passed the impugned judgment and order dated 13.12.2023 holding appellant guilty under Sections 302, 201, 376DB IPC and Section 5/6 POCSO Act, thereafter, giving an opportunity of hearing, on sentence, passed the order dated 20.12.2023 awarding death sentence to the appellant. Being aggrieved and dissatisfied by the impugned judgment & order present appeal has been preferred along with the reference by the learned trial court.

14. Heard Sri V.P. Srivastava, learned Senior Counsel assisted by Sri Narendra Kumar Singh, learned counsel for the appellant, Sri Jitendra Kumar Jaiswal, learned counsel for the State, Sri Sagir Ahmed, learned Senior Counsel assisted by Sri Araf Khan, learned counsel for the first informant.

15. Learned counsel for the appellant placed the following arguments that: (i) At the time of inquest neither any underwear was found on the dead body of the deceased nor it was taken into possession. Likewise, at the time of post mortem it was not found but as per F.S.L. report, there was an underwear in the bundle of clothes sent for examination, which makes the whole prosecution story doubtful.

(ii) The F.S.L. report dated 16.12.2023, forwarded to S.O. Kampil for necessary action by C.O. on 17.12.2023, was not brought on record at the time of holding the appellant guilty on 13.12.2023.

This F.S.L. report was subsequently filed by the prosecution and taken on record by the learned trial court after holding the appellant guilty and was considered by the learned trial court while awarding the death sentence vide order dated 20.12.2023 which was not put to the appellant, thus depriving him of the opportunity to explain it which seriously prejudices his right to defend himself.

(iii) The victim is said to have gone missing on 12.09.2023 at about 9 am and her dead body was traced on the same day at about 6 p.m. and Tehrir was also written on 12.09.2023 but the F.I.R. was lodged on 13.09.2023 at about 01.01 a.m. with a delay about six hours without any explanation.

(iv) The antimortem injuries found on the neck of the deceased were infact a result of animal bite which cannot be said to have been caused by the appellant which does not lead credence to the prosecution story that the appellant has committed murder of the deceased.

(v) There is no direct evidence in the case but F.I.R. was lodged on suspicion presuming that the appellant committed rape and murder of the deceased. The D.N.A. report is negative and do not establish the fact that the appellant committed rape with the victim. Accordingly, the case, being based on circumstantial evidence, cannot be said to be proved beyond reasonable doubt. Since the dead body was recovered beside the poultry farm of the appellant so it was presumed that he may have committed rape and murder. Suspicion howsoever strong may be cannot take the place of proof.

(vi) There is nothing in the F.I.R. as well as in the testimony of the chance witness that the deceased was being taken by the appellant except the version that she

was following the appellant towards the poultry farm.

16. Learned A.G.A. vehemently opposed the arguments raised on the part of the learned counsel for the appellant and contended that in this case, the F.I.R. was promptly lodged on the same night. The victim was seen by P.Ws. 2, 3 and 4 following the appellant towards the poultry farm. The dead body was also found beside the poultry farm and there were several injuries on the person of the deceased indicating that she was raped and then done to death and thrown away in the field by the appellant alongwith the other co-accused. During the course of investigation, samples were taken from the appellant by Scientist/ in-charge zonal field unit Kanpur Nagar. Dr. Pravin Kumar Srivastava examined as P.W. 8 conducted the Benzidine test in which presence of blood was found on both hands of the appellant Shahid and in perennial swab blood and semen were also found to be present. On the basis of which his complicity was found to be established. It was further contended that the underwear which was present on the dead body of the deceased/victim was taken into possession by Incharge field Unit on 12.09.2022 and handed over to the Investigating Officer. *Fard*, challan was prepared i.e. paper no. 14-A/1, therefore, the contention of learned counsel for the appellant that no underwear was found at the time of inquest or postmortem makes the prosecution version false, is untenable. Further it could not be disputed that fard challan paper no. 14-A/1 has been prepared and proved by the concerned officer. It is also contended that F.S.L. report dated 16.12.2023 was taken on record after holding the appellant guilty and it was also relied upon as supportive evidence by the learned trial court, though the contents of

the report were not put to the appellant, however it is relevant and admissible under Section 293 Cr.P.C. Thus on that basis alone, the conviction and sentence cannot be said to be illegal.

17. From the arguments raised by the learned counsel for the appellant as well as learned A.G.A., it appears that issue nos. 1 & 2 strikes at the very root of the concept of fair trial to the accused as well as to the victim, therefore, we restrict ourselves to these two issues first and would later consider the other aspects raised by the appellant counsel.

18. Issue No. 1 :- So far as the argument related to the absence of underwear of the deceased at the time of inquest and post-mortem and its presence in the F.S.L. report is concerned it is germane to point out here that the inquest was conducted by S.I. Deepak on 13.09.2023 at 1.45 a.m. and concluded at 3 a.m. During inquest light pink coloured baniyan half sleeves smudged with blood and mud was found but there is no mention of underwear. Paper no. 15-A is F.S.L. report forwarded by F.S.L. Talgram Kannauj dated 20.09.2023 it shows the entry of underwear at serial no. 6 with other articles. Likewise F.S.L. report paper no. 50-A from F.S.L. Agra dated 16.12.2023 also shows that underwear at serial no. 5 with other articles. There is paper no. 14-A/1 on which it is mentioned that half underwear light cream colour smudged with blood and mud which was found stuck on the left foot of the deceased was handed over to the Investigating Officer present on the spot, it shows the recovery of underwear also from the dead body of the deceased but this paper no. 14-A/1 has not been proved and exhibited by the officer who prepared it, though it is required under

law to get it proved by the officer who has prepared this fard. It shows the inadvertence on the part of the prosecution before the learned court. On the other hand, it was also the duty of the learned trial court to meet the ends of justice to summon and examine such witness by exercising its powers under Section 311 Cr.P.C. but it was not done. On this point the learned prosecutor as well as learned trial court committed error in discharge of their duties.

19. Issue no. 2 :- The learned trial court held the appellant guilty on 13.12.2023. Till then the F.S.L. report dated 16.12.2023 sent from F.S.L. Agra, was not on record. The Paper No. 50-A, after endorsement of C.O. on 17.12.2023 was sent to S.O. kampil for necessary action, which was filed in the court after holding the appellant guilty but learned trial court while considering the question of sentence on 20.12.2023 has duly considered the said F.S.L. report and by placing implicit reliance on the findings recorded by the forensic expert has pronounced the death sentence upon the accused which is evident from the plain reading of para 135 of the judgment passed by the learned trial court. As a matter of fact the contents of this report has not been placed before the appellant for the purpose of providing him an opportunity to explain the same u/s 313 Cr.P.C. whereas it is settled principle of law that any incriminating piece of evidence to be relied upon by the learned trial court for conviction must be provided to the accused to enable him to explain about its contents however the said exercise has not been undertaken by the learned court, which amounts to a glaring error on the part of the learned trial court and renders the order of conviction bad in law.

20. D.N.A. report paper no. 50-A has been signed by the Deputy Director, D.N.A. Section F.S.L. Agra on 16.12.2023. Paper no. 15-A F.S.L. report Talgram was prepared on 20.09.2023 under Signature of Deputy Director, F.S.L. Talgram. However, none of the experts were examined to prove the contents/conclusions of the D.N.A. reports. Neither it was exhibited during the deposition of the police officers filing the report before the learned court nor its genuineness was admitted by the learned counsel for the defence .

21. Even the relevant questions regarding the D.N.A. report were not put to the accused person/appellant when his statements under Section 313 Cr.P.C. were recorded which caused him prejudice.

22. The cognizance of the offence was taken on 17.10.2023 and after conclusion of trial, the appellant was held guilty on 13.12.2023 i.e. within one month and twenty six days without completing the examination of necessary witnesses and getting the links proved and also without giving proper opportunity of hearing to the accused and concluding the trial with undue haste. The failure of the trial court to get the paper no. 14A/1 proved and to ensure the examination of scientific experts for relying on D.N.A. report is failure of justice which vitiates the trial. In cases where capital punishment may be an alternative award of sentence to the accused, the learned trial court is expected to be more cautious and vigilant to afford opportunity of hearing to the accused at every stage otherwise it would be violation of the fundamental right of the accused which would otherwise infringe his fundamental right of fair trial guaranteed under Article 21 of the Constitution of India.

23. A similar controversy was raised before the Hon'ble Apex Court in the case of *Anokhilal Vs. State of M.P. AIR 2020 SC 232* wherein the matter was remanded back to the trial court for de-novo trial, considering the fact that the entire trial was completed in a period of less than one month and D.N.A. report was received almost at the fag end of the matter, after such receipt though technically an opportunity was given to the accused, the issue on the point was concluded the very same day. The relevant extract is as under:

“26. Expeditious disposal is undoubtedly required in criminal matters and that would naturally be part of guarantee of fair trial. However, the attempts to expedite the process should not be at the expense of the basic elements of fairness and the opportunity to the accused, on which postulates, the entire criminal administration of justice is founded. In the pursuit for expeditious disposal, the cause of justice must never be allowed to suffer or be sacrificed. What is paramount is the cause of justice and keeping the basic ingredients which secure that as a core idea and ideal, the process may be expedited, but fast tracking of process must never ever result in burying the cause of justice.

.....

28. All that we can say by way of caution is that in matters where death sentence could be one of the alternative punishments, the courts must be completely vigilant and see that full opportunity at every stage is afforded to the accused.

29. We, therefore, have no hesitation in setting aside the judgments of conviction and orders of sentence passed by the trial court and the High Court against the appellant and directing de novo consideration. It shall be open to the

learned counsel representing the appellant in the trial court to make any submissions touching upon the issues (i) whether the charges framed by the trial court are required to be amended or not; (ii) whether any of the prosecution witnesses need to be recalled for further cross-examination; and (iii) whether any expert evidence is required to be led in response to the FSL report and DNA report. The matter shall, thereafter, be considered on the basis of available material on record in accordance with law.”

24. Since the present case is based on circumstantial evidence, therefore, the prosecution is to prove each link in the chain of circumstances indicating the guilt of the accused but the fard paper no. 14A/1, F.S.L. & D.N.A. reports paper nos. 15A & 50A have been left unproved though relied by the learned trial court in convicting and sentencing the accused without giving him opportunity to explain about it.

25. Further in the case of ***Irfan @ Bhayu Mevati Vs. The State of Madhya Pradesh in Criminal Appeal No. 166/1668 of 2021 decided on 16.01.2025*** where D.N.A. was neither admitted under Section 294 Cr.P.C. nor the evidence of D.N.A. expert signing report was adduced but these reports were relied on by the learned court and death sentence was awarded under Section 376DB IPC with other sections and POCSO Act, the Hon'ble Supreme Court held in para nos. 29, 30, 31 and 32, quoted as under:

“29. The instant case involves capital punishment and thus, providing a fair opportunity to the accused to defend himself is absolutely imperative and non-negotiable. The trial in the case at hand was concluded without providing

appropriate opportunity of defending to the accused and within and within a period of less than two months from the date of registration of the case, which is reflective of undue haste. The failure of the trial Court to ensure the deposition of the scientific experts while relying upon the DNA report, has definitely led to the failure of justice thereby, vitiating the trial.

30. *In the wake of the above discussion, we allow the application filed by the appellants. The case is remanded to the trial Court who shall summon the scientific experts associated with the preparation and issuance of the DNA report with the entire supporting material. These scientific experts shall be summoned and examined as Court witnesses with a proper opportunity of examination to the prosecution and the defence in that order. In case the accused are not represented by a counsel of their choice, a defence counsel having substantial experience in terms of the guidelines laid down by this Court in Anokhilal(supra) (extracted in Para 26 of this judgment) shall be appointed to defend the accused and in the de novo trial*

31. *Pursuant to the testimony of the scientific experts being recorded, the accused shall be again questioned under Section 313 CrPC in context to the fresh evidence. They shall be provided a fair opportunity of leading defence evidence. Thereafter, the trial Court shall proceed to re- hear the arguments and decide the case afresh as per law. The entire process as directed above, shall be completed within a period of four months from the date of receipt of this order.*

32. *That the discussion made above is confined to the issue of the right of the accused to seek examination of the scientific experts connected with the DNA report and the same shall not be taken to be a reflection on the merits of the matter,*

which shall be considered and gone into, uninfluenced by any observations made by us in this order.”

26. Thus, we are of considered opinion that in the facts and circumstances of the present case as discussed above, and in view of observation made by Hon'ble Supreme Court in the aforesaid cases, the judgment and order dated 20.12.2023 passed by learned trial court is hereby set aside and matter is remanded back to the learned trial court to summon the witnesses as court witnesses to prove fact regarding taking of underwear from the dead body of the deceased and scientific experts associated with the preparation and issuance of the F.S.L./D.N.A. report with the entire supporting material and opportunity of cross-examination be also given to the accused, in the light of the observations made in the case of *Irfan @ Bhayu Mewati (Supra)* as noted above and then to decide the case afresh.

27. Accordingly, the appeal is *allowed* and reference is disposed of.

28. Copy of this judgment alongwith original record of Court below be transmitted to the Court concerned for necessary compliance.

(2025) 5 ILRA 77
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2025

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE JITENDRA KUMAR SINHA, J.

Criminal Appeal No. 328 of 1986

Sarvanarain Tewari & Anr. ...Appellants
Versus

State of U.P.

...Respondent

Counsel for the Appellants:

Kritika Pandey, R.P. Singh, Rajesh Kumar Singh

Counsel for the Respondent:

A.G.A.

A. Criminal Law - Criminal Procedure Code,1973-Section 374(2)-Indian Penal Code,1860-Sections 302/34 & 201/34-Challenge to –Conviction-The incident occurred in1983 in District Azamgarh-The deceased was allegedly attacked by the appellants with lathis and other weapons over a land dispute-FIR was lodged promptly by the complainant/PW-1 naming all accused-The post mortem confirmed injuries consistent with blunt force trauma-The court found that eyewitnesses accounts were consistent and trustworthy, FIR was promptly lodged, no major contradictions in medical and ocular evidence-The presence of all accused at the scene with weapons was proven by all three eyewitnesses-Other eyewitnesses corroborated the version of PW-1, stated that all accused armed with lathis and sticks attacked the deceased-Medical report fully corroborated the eyewitnesses accounts regarding nature of assault and types of weapons used-postmortem report conducted by PW5(doctor) shows that deceased suffered multiple lacerated wounds and fractures on vital parts of the body-land dispute between the parties was cited as motive and defence failed to rebut or offer any plausible alternative motive-The common intention and participation of all accused was well-supported by all evidences-Thus, Conviction and life sentence u/s 302/149 IPC were upheld.(Para 1 to 34)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Jose @ Pappachan Vs S.I. Koyilandy & anr. (2016) 10 SCC 519