

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

HON'BLE THE CHIEF JUSTICE MS. RITU BAHRI
AND
HON'BLE SRI JUSTICE ALOK KUMAR VERMA

CRIMINAL REFERENCE No.06 OF 2018

11th June, 2024

State of Uttarakhand

Versus

Mohd. Azhar @ Antee

...Respondent

With

CRIMINAL APPEAL No.23 OF 2019

Mohd. Azhar @ Antee

....Appellant

Versus

State of Uttarakhand

...Respondent

Counsel for the appellant : Ms. Manisha Bhandari, learned counsel
in CRLA No.23 of 2019.

Counsel for the State : Mr. J.S. Virk, learned DAG, assisted by
Mr. Rakesh Joshi, learned Brief Holder.

JUDGMENT : (per Ms. Ritu Bahri, C.J.)

The present Reference has been sent by the Court of Additional Sessions Judge / FTC / Special Judge (POCSO), Dehradun, under Section 366 of the Code of Criminal Procedure, 1973, for affirmation of the sentence of death awarded by said court against the convict Mohd. Azhar alias Antee and also directed to pay fine of Rs. 20,000 under Section 302 IPC. Aforesaid convict has been further convicted under Section 376

IPC and Section 4 of the Protection of Children from Sexual Offences Act (POCSO), 2012 (in short, "Act, 2012) and in view of Section 42 of the Act, 2012 he has been sentenced to life imprisonment and also directed to pay fine of Rs. 70,000/- under Section 4 of the Act, 2012, vide judgment and order dated 10/12.12.2018, passed by Additional Sessions Judge / FTC / Special Judge (POCSO), Dehradun, in Special Sessions Trial No. 21 of 2016. Against said order, criminal appeal has also been filed by the convict.

2. Prosecution story, in brief, is that a complaint (Ext. A-1) was made on 02.01.2016, by the brother of the deceased to the In-charge Police Station, Bhandroli, Tehsil- Tuani, District Dehradun, stating therein that on 01.01.2016, the complainant had gone to Kanasar Temple from his home. His cousin went to Kotidhar to buy goods. On his way to Kotidhar, he saw deceased going with Azhar Khan and one other person, so the complainant stopped at Koti Barrier and waiting for that bike but when it did not come till 4-5 pm, he came back home by max. On reaching home when he asked at home about her, it was found that she went somewhere on bike with Azhar Khan and one other person and two other persons sitting on the Scooty followed them. In

the evening, when the deceased/victim did not return back, the complainant went out in the morning to search for her. Around 10 am, a dead body was seen hanging from a tree above Rotakhar bend. On looked closely, he found the dead body was of his sister/deceased. He has full doubt that these persons killed his sister and said that these people are vicious. He requested that a legal action will be taken by registering a report against the accused on the basis of his complaint. On the basis of the complaint, an F.I.R was lodged and directed for investigation.

3. Investigation of the case was done by S.I. Kamal Kumar, S.I. Hariom Raj Chauhan and S.I. Dilwar Singh Negi, who took statements of the witnesses, arrested the accused, prepared arrest memos and information memos, inspected the spot of the incident and prepared a map. After completing investigation, chargesheet has been filed against the accused.

4. The charges under Section 376, 302, 120B of the Indian Penal Code, 1860 and Section 5/6 and 3/4 of the Protection of Children from Sexual Offences Act, 2012 were framed against the accused persons. Accused pleaded not guilty and requested for a trial.

5. The prosecution examined the following witnesses: -

"P.W.1- Brother of the deceased

P.W.2- Son of the uncle of deceased

P.W.3- Mother of the deceased

P.W.4- Shri Bhopal Singh Dhiru Moli

P.W.5- Aarti Sharma

P.W.6- Dr. Harish Basera

P.W.7- C.O. Swapan Kishore Singh

P.W.8- S.I. Kamal Kumar

P.W.9- S.I. Hariom Raj Chauhan

P.W.10- S.I. Dilbar Singh"

6. Statement of the accused under Section 313 Cr.P.C. was recorded, in which, the accused had stated that the prosecution story was wrong and he had been falsely implicated. He further stated that there is a collar bone fracture and his hand does not work, but he did not present any evidence to show that his collar bone had been fractured.

7. P.W.1- Brother of the victim- deceased proved the photo of the dead body of the victim-deceased (Exhibit 1 & 2) and the complaint given in the context of the incident (Exhibit A1). The garland recovered was also proved as Exhibit 3. The bundle of object has been proved as Exhibit 4. The statement of P.W.1 was recorded before the Magistrate, which is Exhibit A-2.

8. P.W.2- Cousin of P.W.1 and deceased was the witness to the last seen of the victim with the accused.

9. P.W.3- Mother of the victim- deceased. She also accepted the photographs of the deceased (Exhibit- 1 & 2).

10. P.W.4- Shri Bhopal Singh Dhiru Moli proved the FIR (Exhibit A-3); the map of the place of incident where the deceased was lying dead (Exhibit A-4), and; Panchayatnama (Exhibit A-5). He also proved letter written to the Sub-Divisional Magistrate to transfer this complain to the local police (Exhibit A-6), Paper Nos.20A, 21A and 22A (Exhibit A-7, 8 and 9), Exhibit 5 sardine object, Exhibit 6 plastic foil and Exhibit 7 outer bundle.

11. P.W.5 Aarti Sharma proved S.R. register (Exhibit A-10), which was with reference to the school records of the victim. As per the S.R. register, the victim- deceased had studies from Class 6th to 9th and as per the S.R. register (Exhibit A-10), the victim- deceased was found to be minor on the date of incident. Her date of birth was recorded as 20.02.2001. The age of the victim was also recorded as minor in Panchayatnama (Exhibit A-5), and as per the post-

mortem, the age of the victim was found to be minor at the time of incident.

12. P.W.6 Dr. Harish Basera has proved the post-mortem report (Exhibit A-11). As per the doctor, the height of the deceased was average, stiffness after death was present in the body. The eyes were closed and the tongue was out. The hymen was torn in the private part of the deceased and was stretched by the vagina. Pubic hair was present around the vagina and dry blood on both thighs. There was a mark of a rope on the neck of the deceased, which was in area of 26cm X 4cm, which was oblique and interrupted between the bone and the thyroid. The rope mark was brown and hard. The subcutaneous tissue beneath the rope scar was white and shining. There were marks of drooling on the right side of the mouth. On internal examination of the deceased, the brain was congested. There was dark brown blood in the chambers on the right side of the heart. There was about 100ml of water in the stomach. The uterus was empty, meaning she was not pregnant. In his opinion, the cause of death was strangulation, hanging and rape. The deceased was raped before her death.

13. In the report from the Central Forensic Science Laboratory, New Delhi, it is mentioned at S.no.6 that: -

“Description of Parcel(s)/ Exhibit(s)- Parcel-1: One sealed cloth parcel sealed with the seals of “R.R. DISTRICT JUDGE D.DUN”. It contained three sub parcels which were marked as sub parcel-1, 2 and 3 in the Biology Division of this laboratory. Sub Parcel 2: One sealed paper envelope. It contained exhibit-2. Exhibit-2: Two microslides having reddish brown stains described as “vaginal.....deceased”. Parcel-4: One sealed plastic contained sealed with the seals of “R.R. DISTRICT JUDGE D.DUN”. It contained exhibit-4. Exhibit-4: Reddish brown liquid in two vaccutained tubes described as “Blood sample of Azher”. And in view of that, semen has been detected on Exhibit-2 and the DNA profile of the said semen has matched with the profile of the accused Azhar. Result of examination: 8.1 Semen was detected on Exhibit-2. 8.3 DNA profile generated from the male fraction DNA obtained from the source of Exhibit-2 (Vaginal slides) was found to be consistent with the DNA profile of Azhar (Source of exhibit-4: Blood sample). This has been proven by the doctor taking vaginal smears and taking pubic hair.

14. P.W.8 S.I. Kamal Kumar, in his examination-in-chief, stated that on 18.01.2016, an application was given in the Court for taking blood samples of the accused. On 20.01.2016, the blood sample of the

accused and the clothes, vaginal smear and pubic hair of the deceased was sent to the F.S.L, Chandigarh through Constable Lalit for DNA matching. On 21.01.2016, the accused got 14 days judicial remand. Then, on 22.01.2016, the DNA kit was returned back from C.F.S.L., Chandigarh as it was exhausted. Then again on the same day, it was sent to C.F.S.L., New Delhi as per the court order. On 31.01.2016, the receipt of the item deposited in C.F.S.L., Delhi was received.

15. The sample taken after the post-mortem of the deceased had been duly proved by P.W.6 Dr. Harish Basera. As per the report, all the samples were received in sealed condition in the lab, after which, semen was detected in the vaginal slide, which matched with the blood sample of the accused. No objection has been raised by the accused on the said document, neither has any statement been made regarding tampering of the samples sent to CFSL. No cross-examination was conducted of P.W.8 S.I. Kamal Kumar, who had taken samples after filing an application before the Court.

16. Keeping in view the above evidences, offence under Section 376 IPC and Section 4 of the Act, 2012 was proved against the accused. With respect to the

offence under Section 302 IPC, on the basis of the post-mortem report (Exhibit A-11), and the statement of P.W.6 Dr. Harish Basera, it has been proved that the victim was subjected to force sexual assault. The hymen of the victim- deceased was found to be torn. The cause of death, as per the post-mortem report was asphyxia, and secondly, ante-mortem hanging and rape.

17. The plea taken by the accused was that his collar bone was broken. No X-ray report regarding broken collar bone was produced as evidence. The burden is on the accused to prove this fact that his hand did not work, which was never proved by the accused.

18. As per the statement given by P.W.7 C.O. Swapann Kishore Singh, another ground taken by the accused was that he was arrested from Paonta Sahib, and at the time of arrest, no information was given to the local police after or before the arrest of the accused. P.W.7 C.O. Swapann Kishore Singh was cross-examined on this issue and he stated that it was correct to say that as per the Rules, while going to another State, the accused can be arrested only by giving information to the concerned police station. Since the case related to a heinous crime like rape and murder of a teenage girl and

there was a strong possibility of the accused absconding, and hence, it was necessary to take immediate action. This witness admitted that the accused was arrested outside their jurisdiction without any information. The Court further observed that after the arrest, during the interrogation of accused Azhar, the place where the accused committed rape was made to be observed, which has been proved by P.W.8 SI Kamal Kumar. There was no denial by the defence that the accused showed the incident of rape to the investigating officer. The garland containing black plastic beads has been recovered from the place of incident. The recovered garland was presented before the Court, which P.W.1 brother of the victim- deceased proved to be that of the victim. The evidence of recovery of the garland has been proved by Exhibit A-15 by the Investigating Officer PW 8. The rape of the victim was also proved as per the DNA report. PW2 has stated of seen the victim last time on 01.01.2016 at 12-12:30 PM and that has also been proved by the statement of the doctor who conducted the post-mortem of the deceased that the probable time after the death of the deceased is around 36 hours. The post-mortem of the deceased was done by the doctor on 03.01.2016 at 12:45 minutes. Hence, there was no time

gap between the last time the accused was seen with the victim- deceased and the incident happening to the victim, and the time of death. In view of this evidence, the Trial Court held that the accused had raped and had murdered the victim.

19. With regard to accused- Bissu, there is no evidence led to show that there was an agreement between the accused Azhar and Bissu to commit any illegal act, nor has it proved any cooperation by Bissu in the crime of murder or rape. Hence, the offence under Section 120-B IPC was not made out against Bissu. No investigation was done to find out whether he had hidden the key of the motorcycle in his front door knowing that Azhar had committed the crime, and in this backdrop, the accused Bissu has been acquitted for the offence under Section 376, 302, 120-B IPC and Section 4 of the Act, 2012.

20. After conviction, the Court proceeded to examine the quantum of sentence, and it referred to the judgment of the Hon'ble Supreme Court in ***Bantu vs. State of Uttar Pradesh, (2008) 11 SCC 113***, wherein the Hon'ble Supreme Court had confirmed death

sentence in a case where a minor girl of 05 years was raped and murdered.

21. Reference was also made to another judgment of the Hon'ble Supreme Court in ***Shyam Narain vs. State (NCT of Delhi), (2013) 7 SCC 77***. In this case, eight years old girl was raped, and then murdered. Thereafter, reference was made to the judgments of the Hon'ble Supreme Court in ***Purushottam Dashrath Borate & another vs. State of Maharashtra, (2015) 6 SCC 652; Sundar @Sundararajan vs. State, Inspector of Police, (2013) 3 SCC 215; Bacha Singh vs. State of Punjab, (1980) 2 SCC 684***, wherein guidelines have been laid down for giving punishment of death sentence for an offence. Aggravating circumstances would include: (1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions; (2) The offence was committed while the offender was engaged in the commission of another serious offence; (3) When the victim is innocent, helpless or a person relies upon the trust of relationship

and social norms, like a child, helpless woman, a daughter or a niece staying with a father/ uncle and is inflicted with the crime by such a trusted person; (4) When murder is committed for a motive which evidences totally depravity and meanness; (5) When there is a cold-blooded murder without provocation, and; (6) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society. In the present case, the age of the victim was about 15 year old, and the accused was young man of 25-26 years. The accused had deliberately taken the victim away from her house on the occasion of New Year on 01.01.2016, raped her, and thereafter, she was murdered, and keeping in view the above facts, he has been punished with death sentence under Section 302 IPC.

22. The accused was being tried under the Act, 2012 and the first question for decision was, whether the victim was minor on the day of the incident.

23. Reference was made to the judgment of the Hon'ble Supreme Court in ***M/S Ispat Industries Ltd. vs. Commissioner of Customs, Mumbai***, Appeal (Civil) 3972 of 2001, dated 29.09.2006. It was held that

if there is any conflict between the provisions of the Act and the provisions of the Rules, the former will prevail.

24. After implementation of Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, the Court, or the Board or the Committee had reasonable grounds to doubt whether the person brought before it is a child or not, then the Court, or the Board or the Committee, as the case may be, shall determine the age limit by obtaining the following evidences: -

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

25. Applying the above said Rule, the Court proceeded to examine the SR register (Exhibit A-10), which was the certificate related to the school of the victim. The victim was admitted to the above-mentioned government school in April, 2012. P.W.5 Aarti Sharma had stated that the date of birth of the victim was recorded on the basis of earlier Transfer Certificate (TC). This witness could not state on what basis the date of birth of the victim was recorded in the former school. The admission of the victim in the school could not be denied by learned counsel for the accused. Even as per the oral evidence given by the mother and the brother of the victim, and as per the *Panchayatnama* prepared (Exhibit A-5), in which the age of the body was identified as 16 years. Subsequently, post-mortem was conducted and the probable age of the deceased was mentioned as 16 years. Hence, the age of 16 years is being confirmed by the school records. The date of birth given by P.W.1 was 20.02.2001, and he had stated that his sister is 5-6 years younger than him. P.W.1 is 20 years of age. No cross-examination was done with reference to the above statement.

26. Keeping the said Rule, SR register was correctly made the basis to assess the age of the victim, taking her date of birth as 20.02.2001.

27. Learned counsel for the appellant has argued that as per the version of the prosecution on 01.01.2016, as per PW 1 – complainant, when he had gone to "*Kanasar Mandir*", which is about 8-9 kilometers away from his house, his cousin PW 2, who had also gone to purchase some goods at a shop at Kotidhar, informed him through phone that Azhar and Nikhil @ Nirmal, had taken his sister on a bike. Azhar was the pillion rider and the deceased was sitting behind him on the bike. As per PW 1, he waited from 1 PM till 5 -6 PM on the roadside at Koti, and when no one came, he returned home.

28. Further while referring to the deposition given by the PW 2, he had seen Nikhil and Azhar, on a bike, were going towards village *Kharora* on 01.01.2016, at about 3:30 PM. She further stated that if PW 1, brother of the deceased, had gone to a temple at Kanasar, and came back to *Koti*, the distance between Tyuni and Koti

is about 1-1.5 kilometers and Kanasar is about 2-3 kilometers ahead of koti.

29. PW - 2, had seen Nikhil @ Nirmal, Azhar and his sister on the bike, when he was at a shop at Kotidhar, this information had been given to the Investigating Officer by PW 1, when the information was given by PW 2 Manoj. The information was given by PW 2 Manoj to PW 1 at 3:30 PM on 01.01.2016, then the version given by the PW 1 that he was on the roadside at Koti at 1 PM till 5-6 PM, becomes doubtful.

30. Learned counsel for the appellant further argued that on 02.01.2016, the dead body of the sister of the PW 1 was found little above the roadside at "SETABEND". On 02.01.2016 as per PW 3 the dead body was recovered between 9-10 AM, and thereafter at 2:30 PM, PW 1 wrote the *tehrir* report mentioning Azhar Khan and other unknown persons given to the Patwari. On 03.01.2016, at 12:45 PM, the post-mortem was conducted, and the time of death stated was 36 hours before the post-mortem. On 05.01.2016, Azhar and Nirmal, were arrested and police remand were taken,

which was extended to 06.01.2016, and the statements were recorded on 07.01.2016.

31. The charge of the investigation was thereafter handed over to Kamal Kumar on 10.01.2016, and thereafter on 13.01.2016, he had again recorded the statements of Azhar and Nirmal, after they were given into police custody on 14.01.2016. In these statements, they have stated and disclosed the place where the prosecutrix/victim was raped. The place was identified by the accused and a "*mala*" was recovered as well.

32. Learned counsel for the appellant has argued that from the first statement was recorded on 07.01.2016, and the second statement was recorded by Kamal Kumar, Investigating Officer, on 14.01.2016, and this gap of seven days, the second statement, the place of incident, was identified and *mala* was recovered, and this identification of the place after seven days in itself shows that the investigation has been carried out in a manner to collect evidence against the accused, and their involvement in the murder of sister of the PW 1.

33. She further argued that after recovery of *Mala* the accused were taken to village Savara, and key of the bike was recovered from Bissu, and thereafter, the accused were taken to village Kharora, and as per the statements, the bike was recovered. No investigation has been carried out from 07.01.2016 till 14.01.2016, and this in itself creates a doubt that the information of the recovery of *mala*, identification of the place and recovery of key and motorcycle was done, when the investigation was taken over by the Investigating Officer Kamal Kumar, and after recovery of the *mala*, PW 1 identified and he signed the memo of recovery of *mala*.

34. Learned counsel for the appellant has argued that in the present case, the charges were framed against Bissu. However, he has been acquitted, keeping in view that there was no evidence to link him with the offence under section 120B of IPC, that he collided with Azhar to commit the crime of section 376 and 302 of IPC. Hence, once Bissu has been acquitted, and he is not one of the witnesses, who have seen with Azhar and deceased, the sister of the PW 1, never last seen with Azhar and the sister of PW 1. The version given by the

prosecution that it was his motorcycle which was used, also becomes doubtful.

35. Learned counsel for the appellant has further argued that the blood sample of the accused was taken on 20.01.2016, before the trial court and they were sent by Constable Lalit to Chandigarh for forensic analysis. The samples were returned back on 21.01.2016 by Chandigarh Lab, and thereafter on 22.01.2016, they were sent to CFSL, New Delhi. From 22.01.2016, she has referred to the DNA report, at page 272 of the LCR, and the evidence given by the Doctor B.K. Mohaptra, it is clear that from 22.01.2016 till 27.01.2016, where the samples were kept is not reflected, as per the DNA report, the samples were received on 27.01.2016, and the same version has been given by Doctor B.K. Mohaptra, while appearing as DW 8. The gap of five days is sufficient not to discard the DNA report for linking it with the offence under section 376 of IPC against the accused Azhar.

36. Learned counsel for the appellant has referred to the Hon'ble Supreme Court judgment on the examination and importance of the DNA report in 2023

(1) SCC 83 "Rahul Vs. State of Delhi, Ministry of Home Affairs and another", in this judgment, at paragraph 38, the Hon'ble Supreme Court has observed as under:-

"38. It is true that PW 23 Dr B.K. Mohapatra, Senior Scientific Officer (Biology) of CFSL, New Delhi had stepped into the witness box and his report regarding DNA profiling was exhibited as Ext. PW 23/A, however mere exhibiting a document, would not prove its contents. The record shows that all the samples relating to the accused and relating to the deceased were seized by the investigating officer on 14-2-2012 and 16-2-2012; and they were sent to CFSL for examination on 27-2-2012. During this period, they remained in the malkhana of the police station. Under the circumstances, the possibility of tampering with the samples collected also could not be ruled out. Neither the trial court nor the High Court has examined the underlying basis of the findings in the DNA reports nor have they examined the fact whether the techniques were reliably applied by the expert. In the absence of such evidence on record, all the reports with regard to the DNA profiling become highly vulnerable, more particularly when the collection and sealing of the samples sent for examination were also not free from suspicion."

37. As per the observation of the Hon'ble Supreme Court in the above said paragraph, it transpires that even in the facts of the present case the samples were received from Chandigarh Lab on 21.01.2016, and they were sent to CFSL, New Delhi on 22.01.2016. However, they were received on 27.01.2016, there is no evidence

where the samples were kept for these five days. In similar background, the Hon'ble Supreme Court while examining the case of the DNA report held that the DNA Profiling Report, becomes highly vulnerable, keeping in view the collection and sealing of the samples sent for the examination could not be free from suspicion.

38. She has further argued that in the present case as per last seen evidence by PW 2, the bike was being driven by Nirmal on which Azhar was sitting behind him and the sister of the PW 1, deceased, was sitting behind Azhar. Azhar and Nirmal were arrested. However, in the trial before the Juvenile Justice Board, since Nirmal has been acquitted and no appeal against that judgment of the acquittal has been filed by the State. Hence, once no appeal has been filed against the judgment of the acquittal, the presence of Nirmal himself becomes doubtful, then the version given by PW 2, that he had seen Nirmal and Azhar taking the deceased on the motorcycle in the morning and then coming back without the deceased on the motorcycle in the afternoon itself becomes doubtful.

39. She further argued that the body was found hanging from a tree, which is visible from the house of the deceased itself, and as per the version given by the PW 2, he had last seen the deceased on the motorcycle at Koti Kanasar, and the body was found hanging at SETABEND, which is on the way back from the place PW 2 had seen them on the motorcycle, they were going to Koti, Kanasar at 1:30 PM and the body was hanging at SETABEND, which was very near the house of the deceased.

40. Once the presence of Nirmal in itself was found to be doubtful, and he had been acquitted and the body was found at SETABEND, near the house of the deceased, and the DNA report also becomes doubtful as per the Hon'ble Supreme Court judgment, coupled with the fact that, recovery of the *mala* and bike from Bissu was recovered, after the statement was made by Azhar on 14.01.2016, when he had been in custody from 06.01.2016, leads to only one conclusion that the prosecution version is highly doubtful.

41. Moreover, the another point, which the learned counsel for the appellant has taken is that when

the post-mortem was conducted, the deceased was wearing lower tights and there was blood and no semen was found from the lower tights. Hence, if rape had been committed, no semen was found on the legging of the deceased, which she was wearing all through without under garment. As per the DNA report, no semen was found on the pubic hair of the deceased, only semen was found on the slide of which the Doctor is not specific and once he said that it was a swab, and internally he says that the same being a smear. There is a possibility that semen could have been soaked after arrest, and slide was prepared. It was not possible that legging do not have traces of the semen when the same was found on the slide which allegedly was made from the vaginal swab.

42. She has finally argued that even if the version given by PW 2, is taken to be correct, the deceased was wilfully going on the motorcycle with Azhar and Nirmal, and she was not resisting when she was travelling on the motorcycle, and it was a day time at 01:30 PM. Even if, she was a minor, she had not resisted going on the motorcycle, and at best, it could be a case where PW 2, saw her going on the motorcycle with Azhar, and

reported the matter to the family. However, since no steps were taken by the family members till the dead body was found hanging in the morning, the presumption can be drawn that they were well aware that the daughter was in the company of Azhar. Moreover, Azhar was known to PW 1 and the fact that he had suffered injury in the accident was also admitted by the PW 1, in the paragraph 32 of the trial court judgment. PW 1 stated that he heard that Azhar had serious injuries on his hand. Further, in cross-examination PW 1 stated that he had heard that the hand of the accused Azhar had become sore that he could not work with it and in this backdrop, it was not possible for him to ride motorcycle with the injury on his shoulder, and if the presence of Nirmal has been doubted and acquitted, there was no possibility that Azhar could have driven the motorcycle and taken the deceased as per the version given by the PW 2, and the version of the prosecution becomes doubtful.

43. She has finally argued that as per the certificate Exhibit A10, the date of birth of the victim was 20.02.2001, and she was 15 years of age. In this backdrop the provisions of the Act, 2012 will have to be

examined while considering the case under section 376 of IPC.

Acquittal of Nirmal

44. As per the judgment of the acquittal of the Juvenile Justice Board dated 25.03.2017, with respect to Nirmal, the entire evidence led by the prosecution was examined and it was observed that PW 1 brother of the deceased and PW 2 cousin of the deceased, were the main witnesses, and both these witnesses have given a clear evidence with regard to the recovery Exhibit A3, is the chain, and Exhibit A4, is the recovery of the motorcycle and Exhibit A5 is the recovery of the key. The said prosecution forms were signed by them when they were sitting at the Police Station, and they had no knowledge about the facts mentioned in the prosecution form. Since these recoveries were made after the seven days, when all the accused were in custody for seven days, and the recovery forms were not signed, when the site was identified by the accused where the alleged incident of rape and murder took place. Hence, the prosecution story regarding the recovery of the goods case Exhibit nos.A1, A3 and A4 were held to be doubtful because PW 1 and PW 2 denied having any information

with respect to the facts mentioned in the prosecution forms, and the very fact that they signed the form in the Police Station created a suspicion about the prosecution story.

45. Another point which the Juvenile Justice Board, had taken into account is that the name of Nirmal was not mentioned in the Tehrir Exhibit A2, and as per the prosecution version witness PW 2, who had seen the victim/deceased with Nirmal, and name of Nirmal was given to PW 1, brother of the deceased, and despite giving their name to the brother of the deceased, his name was not mentioned in the Tehrir Exhibit A2 by the PW 1 Narendra Singh. This also created a doubt with regard to the involvement of Nirmal in the incident. Further PW 2 Manoj, in his cross-examination refused to identify Nirmal, and also stated that he had not given any information about any such incident to the PW 1. After going through the evidence given by the PW1, PW 2 and PW3, they were found contradiction in the main examination as well as in the cross-examination. All the three witnesses in cross-examination denied to recognize the juvenile. Their evidence was not held to be reliable, and the chain of the circumstances did not

appear to have been found on the basis of which the involvement of the Juvenile Nirmal in the incident was proved.

46. Since both the PW 1 and PW 2, who were the brothers of the victim/deceased had denied that they had given any information regarding recovery of the items and had given their signatures in the Police Station with respect to the recovery of the items. The recovery of the motorcycle, Exhibit A4, was belonging to father of the juvenile Mr. Murari Lal, the recovery forms were signed in the Police Station. Hence, even if the motorcycle belong to the father of the juvenile, it would not involved the Juvenile in the incident as both the witnesses PW 1 and PW 2 had refused to identified him in cross-examination. Against the judgment of the Juvenile Justice Board, no appeal has been filed. Hence, once the presence of Nirmal itself had become doubtful, the fact of his absence will have to be examined while considering the appeal of Azhar. It led to a conclusion that the above said witnesses were not present at the place of the recovery at the time of the recovery of goods, and hence the recovery of the goods itself becomes doubtful.

47. Apart from the above said finding, even the medical and scientific evidence did not support the fact that the juvenile was involved in the incident. As per the FSL report, there was no evidence available regarding that the Juvenile had any physical relationship with the victim/deceased.

48. The Trial Court in the case of Azhar, as per the evidence given by PW 1, Azhar/accused was not in a position driving a four wheeler and he had not driven the four wheeler, after he had met with an accident, as per his injuries on the bone. PW 1, had stated in his examination-in-chief that he knew Azhar and he was used to drive four wheelers, and met with an accident and on account of injuries he has suffered, he was not driving the vehicle for the last few months. As per this version, he could not drive the motorcycle, after the acquittal of the juvenile Nirmal, his presence was found to be doubtful. Then the version given by the PW 2, that he had seen the victim/deceased riding on the motorcycle along with Nirmal and Azhar, also become doubtful, as if Nirmal was not present, it was not possible for Azhar to drive the motorcycle after suffering injuries, and taking victim/deceased on the motorcycle. Then, this version itself becomes doubtful.

49. Another fact which is doubtful is that the motorcycle recovered belong to the father of Nirmal, and since Nirmal has been acquitted, the possibility of using this motorcycle by Azhar, who was injured in an accident, also becomes doubtful. Further, the recovery memos of the garland, motorcycle and the key of the motorcycle, was signed by the PW 1 and PW 2, in the Police Station that too the recovery was affected after the accused were in custody for seven days when the investigation was taken over by the another Investigating Officer, and the whole version of the prosecution in this manner becomes doubtful.

50. The final aspect to be examined in the present appeal is that as per the version given by PW 2, he had seen the victim with both the juvenile and Azhar at 1:30 PM, and the point where he had seen the victim along with these two boys, is far away from where the dead body was hanging.

51. As per the prosecution story, where at 5:30 PM, PW 2, saw both Nirmal and Azhar coming back from the same road, the deceased was not sitting behind them. If presence of the juvenile Nirmal has been found

to be doubtful and has attained finality, as no appeal has been filed, it is more doubtful that Azhar, who could not drive the motorcycle had taken the victim when PW 2, saw him and after committing rape and murdered her, and then got her back and hanged her, at the point on the tree which was visible from their house.

52. Even this version is highly doubtful, if he had committed the rape and murder, he would have left the body there, and especially keeping in view the injuries suffered by him, it is highly doubtful, that he would have brought the dead body on the motorcycle and thereafter hang the body on the tree from where, as per the evidence led the dead body was visible from the house of the deceased, and it would be highly doubtful that anybody who has committed the murder and rape, would hang the body from the place, from where it is visible to everybody.

53. As far as the report of the DNA is concerned, learned counsel for the appellant has referred to the judgment of the Hon'ble Supreme Court, which has held that the evidence of the DNA has to be taken into account, if it is not vulnerable. The facts of the present case after the DNA samples were taken and sent to

Chandigarh Lab on 21.01.2016, they were returned back on 22.01.2016, and till 27.01.2016, there was no evidence where they were kept for these five days, and as per the C.F.S.L. report (Exhibit A24) they were received in the C.F.S.L. Delhi on 27.01.2016. Hence, absence of evidence regarding these five days in itself would make a report of the C.F.S.L. highly doubtful to come to the conclusion that the DNA report evidence can be made basis to give a finding of the rape under section 376 of IPC. Learned counsel for the appellant has referred to the Hon'ble Supreme Court judgment on the examination and importance of the DNA report in ***"Rahul Vs. State of Delhi, Ministry of Home Affairs and another, 2023 (1) SCC 83"*** will be applicable for discarding the DNA Report. In paragraph 38, the Hon'ble Supreme Court has observed as under: -

"38. It is true that PW 23 Dr B.K. Mohapatra, Senior Scientific Officer (Biology) of CFSL, New Delhi had stepped into the witness box and his report regarding DNA profiling was exhibited as Ext. PW 23/A, however mere exhibiting a document, would not prove its contents. The record shows that all the samples relating to the accused and relating to the deceased were seized by the investigating officer on 14-2-2012 and 16-2-2012; and they were sent to CFSL for examination on 27-2-2012. During this period, they remained in the malkhana of the police station. Under the circumstances, the possibility of tampering with the samples

collected also could not be ruled out. Neither the trial court nor the High Court has examined the underlying basis of the findings in the DNA reports nor have they examined the fact whether the techniques were reliably applied by the expert. In the absence of such evidence on record, all the reports with regard to the DNA profiling become highly vulnerable, more particularly when the collection and sealing of the samples sent for examination were also not free from suspicion."

54. Another fact, which is important to be examined in this case is that when the dead body was recovered the deceased was wearing legging and there was a blood, there was no semen in the legging and she was not even wearing any undergarments, if rape had been committed on her it is not possible that there would be no semen in the legging when the blood was present. Hence, once the DNA report cannot be made basis for conviction, the absence of the semen in the leggings when the dead body was recovered makes it more doubtful that she had been raped.

55. After going through the entire evidence, the age of the victim was 15 years on the date of the incident, i.e. 01.01.2016, as per certificate Exhibit A10. The DNA report cannot be made basis to return the

finding that the rape had been committed by the accused – Azhar. The accused Azhar and Nirmal were taken into custody on 05.01.2016, and after seven days the Investigating Officer was changed, and after gap of seven days, the recovery of chain Annexure A3, motorcycle and goods were affected. The Investigating Officer was changed, and thereafter the recoveries were made and PW 1 and PW 2, had signed the recovery memo. They had disclosed the place where the victim had been raped. After gap of seven days, the Investigating Officer SI Kamal Kumar, was appointed, and he proceeded to recover “mala”, recovery of the chain, recovery of motorcycle and recovery of key of the motorcycle was made, and prosecution forms were signed by PW 1 and PW 2 while sitting in the Police Station. The recovery forms were not signed when the site was identified by the accused, where the alleged incident of the rape and murder took place. In this backdrop, the recovery of the goods Exhibit A1, A3 and A4 also become doubtful, and this observation has been made in the judgment of the acquittal by the Juvenile Justice Board dated 25.03.2017. The said judgment of the acquittal of Nirmal has not been challenged. Even the recovery becomes doubtful, and the dead body was

found hanging from the tree, which was visible from the house of the deceased. The role of Azhar becomes more doubtful, as after suffering injuries could have driven the motorcycle, and taken the deceased at the site committed rape and after killing her, brought the dead body and hanged it from the tree, from where the dead body was visible to everybody and also from the house of the deceased.

56. The entire version of the prosecution becomes doubtful, and keeping in view the above facts, the appeal of the accused Azhar, is being allowed, and the judgment and order dated 10/12.12.2018, passed by Additional Sessions Judge / FTC / Special Judge (POCSO), Dehradun, in Special Sessions Trial No. 21 of 2016, is hereby set-aside. He is being acquitted of the offences under Sections 302 and 376 of IPC, and under Section 4 of the Act, 2012. The appellant - Mohd. Azhar @ Antee be released from judicial custody immediately, if not required in any other case.

57. The reference is answered accordingly and the appeal filed by Mohd. Azhar @ Antee is allowed.

58. Let a copy of this judgment along with LCR be sent back to the trial court for forthwith compliance. No order as to costs.

RITU BAHRI, C.J.

ALOK KUMAR VERMA, J.

Dated: 11.06.2024
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