

Tripura High Court

Sri Rajat Tati vs The State Of Tripura on 25 May, 2022

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HIGH COURT OF TRIPURA
AGARTALA
CRL.A (J) NO.45 OF 2020

Sri Rajat Tati,
Son of Sri Gopal Tati,
Of Padmapur, Radha Raman Road,
P.S. Dharmanagar, District-North Tripura.

-----Appellant(s)

Versus

The State of Tripura.

-----Respondent(s)

For the Appellant(s) : Mr. P.K. Biswas, Sr. Advocate.

Mr. P. Majumder, Advocate.

Mr. S. Mahajan, Advocate.

For the Respondent(s) : Mr. S. Debnath, Addl. P.P.

Date of hearing : 18.05.2022

Date of delivery of
Judgment & Order : 25/05/2022

Whether fit for reporting :YES.

BEFORE
HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE ARINDAM LODH

JUDGMENT & ORDER

(T. AMARNATH GOUD.J)

This is an appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 against the impugned judgment dated 28.08.2019 and order of conviction and sentence dated 31.08.2019,

passed by the learned Special Judge(POCSO), North Tripura, Dharmanagar, in Case No. Spl. (POCSO) 09/2017, whereby the appellant has been convicted under Section 4 of the POCSO Act and sentenced to suffer rigorous imprisonment for life years and to pay a fine of Rs.50,000/- only, with default stipulation and for the offence punishable under Section 302 of I.P.C., 1860 sentenced to suffer rigorous imprisonment of life years and to pay a fine of Rs.50,000/- only, with default stipulation, where it has been ordered that both the sentences will run concurrently.

2. The facts of the case in brief, which may be relevant for the present purpose and manifest on the record are that on 26.03.2017, at about 02.30 hours one Sri Bidyut Kanti Dey, son of late Manohar Dey of Mandap Para, P.S. Dharmanagar, District-North Tripura lodged an oral ejahar with the Officer-in- charge, Dharmanagar Women Police Station to the effect that on 25.03.2017 at about 05.00 pm., while he was near Matri Bhander at Office Tilla, he saw his daughter (real name withheld). She was going down the road. Thereafter at about 05.30 to 06.00 pm. he returned to his home and asked his wife about the whereabouts of his daughter. His wife told that his wife went to Kalibari to light candles and incense sticks. But as up to 07.00 pm. the victim did not return home they went out to search for their daughter. They also rang on her mobile phone but after some time, her mobile phone was found switched off. Thereafter, at about 11.00 to 11.30 P.M. he came to know from one Raja Ghosh that a dead body of a girl was found at Padmapur. After hearing the news, the complainant and some other persons rushed to Padmapur, Radha Raman Road and after reaching the spot found the dead body of his victim daughter. Seeing the condition, he believed that his victim daughter was murdered by someone else.

3. Based on the aforesaid complaint, the Officer-in- charge, Dharmanagar Women Police Station registered a case bearing No. Dharmanagar Police Station case No.2017WDN011 for the commission of offences under sections 302 of IPC against unknown miscreant and endorsed the case to Sub-Inspector Smt. Rinki Debbarma, for investigation.

4. On the completion of the investigation, a charge sheet was submitted against the accused-appellant, herein, Rajat Tanti, son of Sri Gopal Tanti of Padmapur, Radharaman road, P.S. Dharmanagar for the commission of offences punishable under Section 302/201 and 376(1) of IPC read with Section 4 of the POCSO Act, 2012.

5. Upon the receipt of the aforesaid charge sheet, cognizance of the offence punishable under Sections 302/201 and 376(1) of IPC read with Section 4 of the POCSO Act, 2012 was taken by the Court below. The copies of the incriminating documents were supplied to the accused person in compliance to the provision of Section 207 of Cr.P.C.

6. Subsequently, upon hearing both sides on the point of framing the charge and after being prima-facie satisfied, charges under Section 4 of the POCSO Act, 2012 read with Section 376(1)/302 of the Indian Penal Code in three heads were framed against the accused-Rajat Tanti (Rajat Tati). The contents of the charges were read over and explained to the accused person in Bengali in open Court to which he pleaded not guilty to the charges and claimed to be tried in open Court.

7. During the course of the proceeding before the Court below, the prosecution has examined as many as 34(thirty- four) witnesses which are as follows:-

P.W. 1:- Smt. Purnima Das (Dey).

P.W. 2:- Smt. Shikha Rani Das.

P.W.3:- Sri Haran Kanti Debnath.

P.W.4:- Sri Binay Bhusan Das.

P.W.5:- Sri Raja Ghosh.

P.W.6:- Sri Sujit Kumar Deb.

P.W.7:- Sri Amit Chakraborty.

P.W.8:- Dr. Chaitannaya Reang.

P.W.9:- Dr. Sudipa Biswas.

P.W.10:- Dr. Nitya Hari Bhowmik.

P.W.11:- Smt. Babita Sinha.

P.W.12:- Smt. Manika Debnath.

P.W.13:- Sri Bidyut Kanti Dey @ Dipak Dey.

P.W.14:- Sri Kajol Debnath.

P.W.15:- Sri Ashutosh Nath.

P.W.16:- Sri Rajat Debnath.

P.W.17:- Smt. Ruma Debbarma.

P.W.18:- Sri Mrinal Kanti Deb.

P.W.19:- Sri Rajib Kumar Deb.

P.W.20:- Sri Sandip Chakraborty.

P.W.21:- Sri Sandip Paul.

P.W.22:- Sri Suman Nath.

P.W.23:- Smt. Monica Debbarma.

P.W.24:- Dr. Subhankar Nath.

P.W.25:- Sri Tarun Kanti Sarkar.

P.W.26:- Sri Nripendra Debnath.

P.W.27:- Sri Pranab Chanda.

P.W.28:- Sri Lalit Mohan Nath.

P.W.29:- Sri Bijoy Ghosh.

P.W.30:- Sri Swapan Choudhury.

P.W.31:- Sri Subrata Kumar Das.

P.W.32:- Sri Paritosh Roy.

P.W.33:- Sri Rinki Debbarma.

P.W.34:- Smt. Swarna Debbarma.

8. The prosecution also exhibited some documents (Exbt- 1 to Exbt.39). The prosecution also exhibited some material objects (Exbt-MO-1 to Exbt-MO-XII).

9. The Court below framed the following points for determination:-

"(i) Whether the victim was a minor on the 25.03.2017.

(ii) Whether the accused on 25.03.2017 at any time between 05.00 pm to 11.30 pm in the abandoned bathroom of Shyamal Debnath committed penetrative sexual assault upon the victim.

(iii) Whether the accused on the fateful date and time and place committed rape upon the victim.

(iv) Whether the accused on the date, time and place committed murder of the victim by strangulation and by giving dash her with any hard substance on various parts of her body."

10. After hearing both the parties and appreciating the evidence on record, the learned Trial Court passed the impugned judgment dated 28.08.2019 and order of conviction and sentence dated

31.08.2019 in case No.SPL.(POCSO)09/2017 and convicted the appellant herein as stated above.

11. Aggrieved and dissatisfied with the aforementioned order of conviction and sentence, the accused-appellant herein has preferred this instant appeal and prayed for the following relief:-

"(i) Admit the appeal;

(ii) Call for the records from Lower Courts;

(iii) Issue notice upon the respondent; and

(iv) After hearing the parties would be pleased enough to set aside impugned Judgment dated 28.08.2019 and order of conviction and sentence dated 31.08.2019, passed by the learned Special Judge (POCSO), North Tripura, Dharmanagar, in Case No. SPL. (POCSO) 09/2017, whereby, the appellant have been convicted under Section 4 of the POCSO Act and sentenced to suffer Rigorous Imprisonment for life years and to pay a fine of Rs.50,000/- only, in default of making payment of fine to suffer further rigorous imprisonment for one year and for the offence punishable under Section 302 Indian Penal Code, 1860, sentenced to suffer Rigorous Imprisonment for life years and to pay a fine of Rs.50,000/- only, in default of making payment of fine to suffer further rigorous imprisonment for one year, where it has been ordered that both the sentences will run concurrently."

12. Heard Mr. P.K. Biswas, learned Sr. counsel assisted by Mr. P. Majumder, learned counsel, and Mr. S. Mahajan, learned counsel appearing for the appellant as well as Mr. S. Debnath, learned Addl. P.P. appearing for the State-respondent.

13. Mr. P.K Biswas, learned Sr. counsel assisted by Mr. P. Majumder learned counsel appearing for the appellant submitted that learned Trial Court has failed to apply his judicial mind in appreciating the evidence on record and as such came to a wrong finding and convicted the appellant herein under Section 4 of the POCSO Act read with Section 302, 376(2)(f) of the Indian Penal Code. Mr. Biswas, learned Sr. counsel further argued that the prosecution has miserably failed to prove the charges against the accused-appellant herein and wrongly shifted the onus of the alleged offence upon the shoulder of the appellant. Learned Sr. counsel further submitted that there is no iota of evidence on record to prove the charges against the appellant and the findings, order of conviction, and sentence are purely based on inadmissible evidence. As such, the order of conviction and sentence passed by the learned Trial Court are liable to be set aside. The judgment and findings of the Court below is not tenable because the learned Court below did not discuss the cross-examination of the prosecution witnesses and the defence of the accused person. The learned Court below misconceived and misunderstood the legal position of law and as such came to a wrong finding. To prove the charges under Section 4 of the POCSO Act, the prosecution has to prove that the deceased was a minor, i.e., the age of the deceased was under 18 years at the time of the commission of the alleged offence by the appellant herein. To prove the minority of the deceased, the prosecution has relied upon the birth certificate(Exbt-2) issued by the Department of Health and

Family Welfare, Government of Tripura showing the date of birth of the deceased as on 02.05.2000. But the defence has proved that the birth certificate is a fake and forged one. The learned Court below most whimsically has set an unreasoned proposition and held that the victim was minor at the time of the commission of the alleged offence and passed the impugned judgment and order of conviction.

14. Learned Sr. counsel submitted that the second charge framed against the accused person i.e. the charge under Section 376(1) of IPC was not proved. To prove the allegation of rape, the prosecution has examined particularly three witnesses (Medical Officers who have conducted the Post Mortem Examination) viz. P.W.8, Chaittannya Reang and Dr. Sudipa Biswas and P.W.24, Dr. Subhankar Nath (Forensic Officers). In the preliminary post mortem (Exbt-7 exhibited by P.W.8), it has been clearly stated that there is no sign of any recent sexual intercourse rather, it has been clearly stated that the hymen is old ruptured. Moreover, it has been stated in the post-mortem report "Public Hairs-Present, Adult type, Non Matted Vulva-No injuries seen. Labia Majora and minora healthy, no injuries seen. Hymen-old healed tears and present in 5, 7 and 9 o'clock position. No congestion was seen. Vaginal wall-No injuries seen." The medical reports are contradictory to each other hence the medical evidence cannot be relied upon and the impugned judgment and conviction is liable to be interfered. Learned Sr. counsel further submitted that the prosecution failed to prove the charge under Section 302 of IPC against the appellant. This is a case where there is no eyewitness to the occurrence of offence. The prosecution has completely relied upon circumstantial evidence. To establish a charge by way of circumstantial evidence, the chain of circumstantial evidence has to be complete. The prosecution failed to establish the chain regarding the cause of death with regard to establishing the ownership/possession of the Samsung Galaxy J-5 Mobile, leading to the Discovery/seizure of Jio SIM, empty water bottle, and 2/3 one time white coloured glass, point out memorandum and last seen together which are clear from the evidence hence the impugned judgment and conviction is perverse and not based on law. Lastly, the learned Sr. counsel submitted that the whole case of the prosecution is based on conjecture and surmises.

15. Mr. Biswas, learned Sr. counsel on the point of hostile witnesses and 2(two) sets of evidence contradicting each other has relied upon para-13, 14, and 15 of the Apex Court Judgment in Javad Masood and anr. Vs. State of Rajasthan titled as Criminal Appeal No.1522 of 2008 reported in 2010 AIR SCW 1656 which are reproduced here-in-below:-

"13. In the present case the prosecution never declared PWs 6,18, 29 and 30 "hostile". Their evidence did not support the prosecution. Instead, it supported the defence. There is nothing in law that precludes the defence to rely on their evidence. This court in Mukhtiar Ahmed Ansari vs. State (NCT of Delhi)¹ observed:

"30. A similar question came up for consideration before this Court in Raja Ram v. State of Rajasthan, (2005) 5 SCC 272. In that case, the evidence of the Doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The Doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the

evidence of the Doctor and it was binding on the prosecution.

(2005) 5 SCC 258

31. In the present case, evidence of PW1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his Maruti car to police in which police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, accused can rely on that evidence."

14. The proposition of law stated in the said judgment is equally applicable to the facts in hand.

15. It is clear that the evidence of PW-6 completely rules out the presence of Chuttu (PW-5) at the scene of offence. It is thus clear that PW-5 was not speaking truth, being interested witness obviously made an attempt to implicate the appellant in the case due to previous enmity. Be it noted that the entire prosecution case rests upon the Parcha Bayan (Ext. P12) lodged by PW-5. Once his presence is disbelieved, the whole case of the prosecution collapses like a pack of cards. In addition, the evidence of PWs 18, 29 and 30 who are all independent witnesses, also cast a serious shadow on the evidence of PWs 5, 13 and 14 as regards their presence at the scene of offence. It is under those circumstances, we find it difficult and impossible to place any reliance whatsoever on the evidence of PW-5 who is a highly interested and partisan witness. No reliance can be placed on his evidence in order to convict the appellants of the charge under Section 302, IPC. For the same reasons, the evidence of PWs 13 and 14 also is to be discarded. None of them was speaking truth.

16. On the point of 2(two) sets of evidence, learned Sr. counsel also relied upon para-9 & 11 of the judgment of the Apex Court passed in Harchand Singh and anr. vs. State of Haryana titled as Criminal Appeal No.32 of 1970 reported in AIR 1974 SC 344 which is reproduced here-in-under:-

" 9. It cannot be disputed that a murderous assault was made on Ajaib Singh on the day of occurrence as a result of which he died. The evidence of Dr. Shamsheer Singh, who examined Ajaib Singh when he was taken to Khanna hospital as well as the evidence of Dr. Gurcharan Singh Randhawa who performed post mortem examination on the dead body, shows that as many as eighteen injuries were inflicted upon Ajaib Singh deceased. Out of them, seven had been caused by sharp-edged weapons. Death, in the opinion of Dr. Randhawa, was due to shock and hemorrhage as a result of the cumulative effect of the injuries. According to the case of the prosecution, the two appellants joined in the assault on the deceased as a result of which the latter died. The prosecution in support of its case examined two sets of eye witnesses. The evidence of one set consists of the testimony of Amarjit Singh, Mal Singh and Teja Singh. So far as these witnesses are concerned, the trial court came to the conclusion that they were not present near the scene of occurrence and had not witnessed the occurrence. The trial court in support of this conclusion gave reasons

which appear to be cogent and weighty and find no particular ground to take a different view. The evidence of Ram Asra, who according to the prosecution case was with Ajaib Singh deceased at the time of the occurrence, shows that Amarjit Singh, Mal Singh and Teja Singh were not present at the time of occurrence. If Amarjit Singh, Mal Singh and Teja Singh had been present at or about the place of occurrence and had actually seen the occurrence, it is difficult to believe that Ram Asra would have remained unaware of their presence. According to Amarjit Singh, Mal Singh and Teja Singh, they saw the occurrence while they were coming from their house. They were at a distance of about 60 karams from the place of occurrence when they heard alarm being raised and on coming nearer they saw the six accused inflicting injuries upon Ajaib Singh deceased. As against that, the version of Ajaib Singh deceased in the dying declaration was that the above mentioned three witnesses were working in the field nearby when he was assaulted by the accused. Amarjit Singh, Mal Singh and Teja Singh claimed that they were proceeding from their house to the well with Tokras and Kahis for the purpose of consolidating the new channel with earth filling. If that was the purpose for which they were going to the well, they would have gone there before and in any case not after Ajaib Singh deceased so that they might prepare the channel before Ajaib Singh started operation of the persian wheel at the well. We thus find that not only the explanation given by Amarjit Singh, Mal Singh and Teja Singh regarding their arrival at that time is not convincing, there is material discrepancy in the version of Ajaib Singh deceased in his dying declaration and the testimony of Amarjit Singh, Mal Singh and Teja Singh PWs regarding the presence of these witnesses at or about the place of occurrence. On the top of all this we find that the evidence of Ram Asra, upon which reliance has been placed by the prosecution shows that Amarjit Singh, Mal Singh and Teja Singh were not there and had not witnessed the occurrence.

11. The function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which he is charged. If in a case the prosecution leads two sets of evidence, each one of which contradict and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation."

17. On the point of expert opinion, learned Sr. counsel also relied upon para- 30 and 31 of the Apex Court Judgment in Dayal Singh & ors. vs. State of Uttaranchal titled as Criminal Appeal No.529 of 2010 reported in AIR 2012 SC 3046 which is reproduced herein-under:-

"30. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The

expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the experts opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court. {Plz. See Madan Gopal Kakad v. Naval Dubey & Anr. [(1992) 2 SCR 921 : (1992) 3 SCC 204]}.

31. Profitably, reference to the value of an expert in the eye of law can be assimilated as follows:

"The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. The court is not to surrender its own judgment to that of the expert or delegate its authority to a third party, but should assess his evidence like any other evidence. If the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use. It is required of an expert whether a government expert or private, if he expects, his opinion to be accepted to put before the court the material which induces him to come to his conclusion so that the court though not an expert, may form its own judgment on that material. If the expert in his evidence as a witness does not place the whole lot of similarities or dissimilarities, etc., which influence his mind to lead him to a particular conclusion which he states in the court then he fails in his duty to take the court into confidence. The court is not to believe the ipse dixit of an expert. Indeed the value of the expert evidence consists mainly on the ability of the witness by reason of his special training and experience to point out the court such important facts as it otherwise might fail to observe and in so doing the court is enabled to exercise its own view or judgment respecting the cogency of reasons and the consequent value of the conclusions formed thereon. The opinion is required to be presented in a convenient manner and the reasons for a conclusion based on certain visible evidence, properly placed before the Court. In other words the value of expert evidence depends largely on the cogency of reasons on which it is based." [See: Forensic Science in Criminal Investigation & Trial (Fourth Edition) by B.R. Sharma]

18. Based on the above-mentioned judgments learned Sr. counsel argued that SFL reports are contradictory. One SFL report is saying there is the presence of spermatozoa and another SFL report is saying there is the absence of spermatozoa.

19. Learned Sr. counsel on the point that Court should not be swayed away by sentiment and the Court ought to be extra cautious has relied upon para-19 of the judgment of the Apex Court passed in State through C.B.I Vs. Mahender Singh Dahiya titled as Criminal Appeal No.1360 of 2003 reported in 2011 AIR SCW 1916 which is reproduced here-in-under:-

"19. Undoubtedly, this case demonstrates the actions of a depraved soul. The manner in which the crime has been committed in this case, demonstrates the depths to which the human spirit/soul can sink. But no matter how diabolical the crime, the burden remains on the prosecution to prove the guilt of the accused. Given the tendency of human beings to become emotional and subjective when faced with crimes of depravity, the Courts have to be extra cautious not to be swayed by strong sentiments of repulsion and disgust. It is in such cases that the Court has to be on its guard and to ensure that the conclusion reached by it are not influenced by emotion, but are based on the evidence produced in the Court. Suspicion no matter how strong cannot, and should not be permitted to, take the place of proof. Therefore, in such cases, the Courts are to ensure a cautious and balanced appraisal of the intrinsic value of the evidence produced in Court."

20. On the point of disclosure statement and recovery of material object amounting to an admission of guilt before the police, the learned Sr. counsel has relied upon para-27, 28 & 29 of the judgment of the Apex Court in *Mustkeem alias Sirujdeen vs. State of Rajasthan* titled as Criminal Appeal No.1327 of 2008 reported in 2011 AIR SCW 4410 which is reproduced herein-under:-

"27. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution.

28. If the recovery memos were prepared at the Police Station itself then the same would lose its sanctity as held by this Court in *Varun Chaudhary Vs. State of Rajasthan* reported in AIR 2011 SCC 72.

29. The scope and ambit of Section 27 were also illuminatingly stated in AIR 1947 PC 67 *Pulukuri Kotayya & Ors. Vs. Emperor* reproduced hereinbelow:-

"...it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are

inadmissible since they do not relate to the discovery of the knife in the house of the informant."

The same were thereafter restated in another judgment of this Court reported in 2004 (10) SCC 657 *Anter Singh Vs. State of Rajasthan*."

21. On a similar point, learned Sr. Counsel has also relied upon para-11 and 14 of the judgment of the Apex Court in *Anter Singh Vs. The State of Rajasthan* titled as Criminal Appeal No.1105 of 1997 reported in (2004)10 SCC 657 which is reproduced under:-

"11. The scope and ambit of Section 27 of the Evidence Act were illuminatingly stated in *Pulukuri Kotayya v. Emperor* (AIR 1947 PC 67) in the following words, which have become locus classicus:

It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the information to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which stabbed A.', these words are inadmissible since they do not related to the discovery of the knife in the house of the informant.

14. The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Section 25 and 26. It is not necessary in this case to consider if this Section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this Section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly" relates "to the fact thereby discovered" and is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this

partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered. (See Mohammed Inayuttillah v. The State of Maharashtra (AIR 1976 SC 483))"

22. On the point that confessional statement before the Magistrate cannot be accepted, learned Sr. counsel relied upon para-13 of the Judgment of the Apex Court in Zwinglee Ariel vs. State of Madhya Pradesh titled as Criminal Appeal No.47 of 1952 reported AIR 1954 S.C. 15 which is reproduced here-in-under:-

"13. Finally, the High Court relied on the statements alleged to have been made by the appellant when he was halted after leaving the Bedia Bungalow. Extracts from the evidence given by Pande, Joshi and Deo have been set out in para 18 of the High Court's judgment. The whole evidence of course was not quoted. It will be observed that the witness Pande tried to add a little embellishment to his statement by referring to the conduct of the accused, namely, that he started trembling and showed signs of being frightened, presumably to make it admissible in evidence as conduct of the appellant under Section 8, Evidence Act.

The two Magistrates, however, did not refer to any such conduct. The conduct being thus out of the way, it is clear that the appellant's statements in reply are not admissible at all under Section 8, Evidence Act. If these alleged statements are to be regarded as confessions then they will be hit by Section 25, Evidence Act. for they were made to Pande, the Police Officer, who was there. If they are sought to be brought in under Section 26 as confessions made in the immediate presence of the Magistrates, then also they will not be admissible in evidence in that they were not recorded by the Magistrates in the manner prescribed by Section 164, Criminal P. C.

Apart from these legal difficulties, it appears to us that these statements do not necessarily amount to a confession by the appellant of having committed the offence with which he was charged. The mistake referred to may not necessarily be the mistake of taking a bribe. It may conceivably refer to this mistake in accepting the invitation to tea and in agreeing to carry the letter. Indeed, the trial Magistrate in his judgment recognised that the statement did not amount to a confession of the offence but simply indicated a guilty mind."

23. Learned sr. counsel on the point of evidence of Doctor has preferred para-2 of the Apex Court Judgment passed in Mayur Panbhai Shah vs. State of Gujrat titled as Criminal Appeal No.47 of 1982 reported in AIR 1983 SC 66 which is reproduced here-in-under:-

"2. This is an appeal by special leave directed against the judgment passed by a Single Judge of the Gujarat High Court summarily dismissing an appeal preferred by the appellant against an order passed by the Additional Sessions Judge No. 11/Ahmedabad convicting the appellant of the offence under Section 376 of the Indian Penal Code and sentencing him to imprisonment for a period of one year. We think that this is not a case which should have been summarily rejected by the learned Single Judge and moreover we do not think that the learned Judge was right in observing that "our courts have always taken the doctors as witnesses of truth." Even where a doctor has deposed in court, his evidence has got to be appreciated like the evidence of any other witness and there is no irrefutable presumption that a doctor is always a witness of truth. We would therefore allow the appeal, set aside the judgment of the Single Judge and remand the appeal to the High Court with a direction that the appeal may be admitted and after issuing notice to the State it may be disposed of on merits. It would be preferable if the appeal is heard by a Judge other than the learned Judge who heard the appeal at the stage of admission.

24. Learned Sr. counsel has referred to para-1 of the Apex Court Judgment passed in The State of Rajasthan Vs. Daulat Ram titled as Criminal Appeal No.112 of 1974 reported in AIR 1980 SC 1314 which is reproduced here-in- under:-

"1. It is a admitted case of the Prosecution that the samples changed several hands before reaching the public analyst. In other words, the samples remained in the custody of S.I. Aidanram, P.S. Udai Mandir, Nathu Singh, Gajraj Singh Jawan Singh and the Assistant Public Analyst and yet none of these witnesses were examined by the prosecution to prove the while in their custody the seals were not tampered with. The inevitable affect to this omission is that the prosecution failed to rule out the possibility of the samples being changed or tampered with during this period a fact which had to be proved affirmatively by the prosecution. This is the main infirmity which has been relied upon by the High Court in holding that the prosecution has not proved that right from the stage of the seizure of the opium upto the time when the samples were handed over to be public analyst the seals remained in tact. The prosecution has not taken the Court into confidence in disclosing as to the reasons which the office of the Superintendent of Police refused to take the samples. Even though the lables were not in order it was for the prosecution affirmatively to prove that the seals were still in tact. It is true that Harak Chand and Jabbar Singh have stated that the seals of the samples were tact so long as they were in their custody. But then as pointed out above neither Jawan, Nathu, Gajraj, Aidanram and Assistant Public Analyst were examined hence it cannot be said that the prosecution has proved all the Jinks starting from the seizure of the sample till the same reached the hands of the Public Analyst so that the Court could conclude that their seals remained in tact throughout. The High Court in view of this serious lacuna was of the opinion that the prosecution has not proved beyond reasonable doubt that the opium seized was the opium which was sent to be Public Analyst. In fact, the prosecution realised its mistake and at the fag end of the trial an application

was made under Section 540 Criminal Procedure Code to examine Nathu Singh, Gajraj Singh and Jawan Singh. This application was rejected by the learned Magistrate. Even before the High Court the stand taken by the Counsel for the State was extremely vacillating and at one time he filed an application for additional evidence and some time later chose to withdraw it. It is obvious that the onus is on the prosecution to prove the entire case at the trial and the prosecution could not be allowed to fill up the gaps or lacuna left at the trial, at the appellate or revisional stage. In these circumstances, we do not find any error of law".

25. Learned Sr. counsel also relied upon para-15 of the decision of the Apex Court passed in Mayank Bohra Vs. State of A.P. titled as Criminal Appeal No.1592 of 2006 reported in 2010 CRI.L.J.152 which is reproduced here-in-under:-

"15. Learned Senior Counsel argued that the specimen hand writing and specimen finger prints are obtained neither in the presence of Magistrate nor under the orders of the Court and therefore the opinion of the Scientific Officers who have been examined as P.W.18, 20 and 24 is of no avail to the prosecution. Indisputably the specimen handwritings and fingerprints of A1 were taken neither in the presence of the Magistrate nor under the orders of the Court. The specimen handwritings, finger prints and chance fingerprints and standard handwritings were sent to the scientific officers by P.W.25 on 5.2.2002. He did not claim to have properly packed the specimen handwritings, fingerprints, chance prints and standard writings while being forwarded to the Scientific Officers. Even P.W.24 Smt.Rajani, Scientific Officer who has examined the standard writings and the disputed writings did not speak of her receiving the material from the Investigating Officer in a properly sealed manner. There is a gap of nearly a month between collecting the material and forwarding the same to the Scientific Officer. What proper care the Investigating Officer has taken to keep the incriminating material intact is not evident from the record. In these circumstances, we find it difficult to give any authenticity to the report submitted by the Scientific Officers. Even if this piece of evidence is discarded, the other circumstances which have been referred to supra gave ample corroboration to the CVNR, J & TA, J Dt: 30.10.2018 testimony of P.W.2. Therefore, the conviction of A1 for the offences u/s 302, 397, 364-A, 307 and 506- Part II of IPC does not warrant any interference in this Criminal Appeal."

26. Mr. S. Debnath, learned Addl. P.P. appearing for the State-respondent has vehemently opposed the submission of the learned Sr. counsel appearing for the accused-appellant herein. He urged this Court to uphold the judgment of the Court below. To support his contention, learned Addl. P.P. has relied upon para-21 and 22 of the Judgment of the Apex Court passed in Gangabhavani Vs. Rayapati Venkat Reddy and ors., titled as Criminal Appeal No.84 of 2011 reported in (2013) 15 SCC 298 which is reproduced herein-under:-

"21. This Court in Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204 examined the effect of non- cross examination of

witness on a particular fact/circumstance and held as under:

"31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter- alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses." (Emphasis supplied) (See also: Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181; and Gian Chand & Ors. v. State of Haryana, JT 2013 (10) SC 515).

22. Thus, it becomes crystal clear that the defence cannot rely on nor can the court base its finding on a particular fact or issue on which the witness has not made any statement in his examination-in- chief and the defence has not cross examined him on the said aspect of the matter."

27. We have heard both sides and scrutinized the evidence on record.

28. In the very inception of the discussion, it would be very important to see whether the victim was a minor on the date of occurrence i.e. on 25.03.2017. With regard to the aforesaid, P.W.1 (Purmina Das[Dey]), mother of the victim stated that the victim was born on 02.05.2000 and she studied up to Class-IX at Padmapur High School. During the investigation, police seized the birth certificate (Exbt-2) of the victim from her possession. But the genuineness of the certificate (Exbt-2) issued by the Register of Birth and Death was challenged by the defence. The defence failed to bring any cogent material evidence to show the Court below that 02.05.2000 was not the date of birth of the victim. From the cross-examination of P.W.1 nothing contrary against the evidence of P.W.1 could be brought with regard to the date of birth of the victim. On scrutiny of the evidence of P.W.31, it is revealed that the victim was admitted at Padmapur School and the victim studied in the said school up to Class-V. According to the entry No.37 of the Admission Register of Class-I to V, Volume No.4 from 2002 (Exbt-32) date of birth of the victim entered into the Admission Register is 02.05.2000 (Exbt.- 32/1). There is also no evidence that the Admission Register of the school was ever manipulated.

28.1. On scrutiny of the evidence of D.W.1, it is revealed that on his application dated 16.08.2017 SPIO (Medical Superintendent of Dharmanagar District Hospital), issued the copy of the Birth and Death certificate for 02.05.2000 maintained by Dharmangar District Hospital to confirm whether P.W.1, i.e. the mother of the victim gave birth of any baby on 02.05.2000. The copies of the Register were annexed with the information and marked as Exbt-D and D/1. But the document cannot be accepted as an evidence unless it is proved by the issuing authority. In the instant case, defence failed to bring the issuing authority before the Court below to prove the document.

28.2. The first criterion to determine the age of a child or a juvenile should be the matriculation/any equivalent certificate or the birth certificate. In the given case, there is no discrepancy with regard to the date of birth mentioned in the birth certificate allegedly issued by the Register of Birth and Death and entry in the Admission Register of the School. 28.3. Attending factors towards the determination of the age of the victim are:-

- i) The mother of the victim (P.W.1) stated before this Court that the victim was born on 02.05.2000;
- ii) At the time of admission in Class-I at Padmapur J.B. School, date of birth of the victim was registered as 02.05.2000.
- iii) Entry No.37 was made in the year 2007 in the Admission Register of the school wherein also the date of birth of the victim was recorded as 02.05.2000.
- iv) The birth certificate of the victim (Exbt-2) also shows that the date of birth of the victim was 02.05.2000.

Thereby this Court has no hesitation to accept the entry made in the Admission Register on the basis of the determination of the age of the victim.

29. From the evidence of P.W.13, Sri Bidyut Kanti Dey, the father of the victim and the complainant, it reveals that on 25.03.2017 at about 05.00 P.M. while he was standing in front of Matri Bhandar, a grocery shop, at Office Tilla his victim daughter was found to have been proceeding towards Dharmanagar town and at about 05.30 to 06.00 pm. He returned home and on his query about his daughter, his wife informed him that their daughter went to Kali Temple of Office Tilla for lightening candles and incense stick but when his daughter did not return home at about 07.00 P.M. he rang in the mobile of his daughter. Though the mobile of his daughter was ringing but she did not respond and after some time again he rang the mobile of his daughter. Then he found the mobile of his daughter was switched off. It is also revealed that thereafter, they went out in search of their daughter and then one Raja Ghosh (P.W.5) of their locality informed him that at the backside of Radharaman Ashram a dead body of a girl was seen. Then the witness, his wife, and Raja Ghosh rushed to the place of occurrence.

30. The evidence of P.W.5, Raja Ghosh reveals that on 25.03.2017 at about 11.00 P.M. to 11.30 pm. he received a telephonic call from one Sajal Debnath@ Sadhu who informed him that a dead body of

a minor girl was found lying in a place nearby Radha Raman Ashram at Padmapur area. He also requested him to inform the matter to the parents of the victim as they were also in search of their daughter. Accordingly, the witness informed the father of the victim and the witness also rushed to the place of occurrence.

31. From the evidence of P.W.5 and P.W.13, it is revealed that the place of occurrence is an abandoned house building situation at the backside of Radharaman Ashram at Padmapur. The body of the girl was lying in the bathroom of that building. P.W. 13 on seeing the footwear of his daughter and her dead body in the bathroom fainted but he was somehow managed by P.W.5. In the meantime huge number of people gathered there. With the help of mobile phone torchlight, the father of the victim could identify the dead body of his daughter. The body of the victim was lying on the floor touching the wall of the bathroom. She was almost in naked condition and there was no cloth in between the neck and her knee. Several injuries were found on different parts of her body. Severe injuries were also found around the left eye of the victim and her tongue was crossed by her teeth. Moreover, several other injuries were also found on the backside of the head. There was a black mark on the throat.

32. From the evidence of P.W.13, it is revealed that at about 02.00 am on that night at the place of occurrence, he lodged an oral ejahar which was recorded by a women police officer. P.W.33 (investigating officer) prepared an inquest over the dead body in presence of P.W.1, P.W.12, P.W.27 and seized the birth certificate of the victim (Exbt-2) and the cash memo (Exbt-6). The mobile of his victim was seized in presence of P.W.6, P.W.7 by P.W.34 (investigating officer). It is also revealed from the evidence of P.W.5 that after some time police came there with the accused-appellant herein, Rajat Tanti.

33. P.W.1, Smt. Purnima Das (Dey), the mother of the victim almost deposed in the same tune as her husband i.e. P.W.13. It is revealed from her evidence that she suspected that the accused-Rajat Tanti committed the offence because about two and half months prior to the incident one day, the accused-Rajat Tanti made a call to the victim over the telephone but P.W.1 received the call instead of her daughter. From the other side, Rajat Tanti proposed that he loved the victim very much and he would not survive without her. The accused-Rajat Tanti was in so much hurry and crazy that he could not even realize with whom he was talking. It was the witness with whom the accused was speaking over the telephone instead of the victim and then the witness scolded the accused-Rajat Tanti, From the other side, the accused Rajat Tanti threatened the witness with dire consequence. P.W.-1 knows Rajat Tanti by face as he used to move around the house of the witness with different girls. It is also revealed from the evidence of P.W.1 that she believed that her victim daughter was first raped and then murdered by the accused- appellant herein.

34. P.W.18, Sri Mrinal Kanti Deb revealed that he got introduced to the accused-Rajat Tanti in a marriage ceremony. He developed a friendship with him. On the night of 25.03.2017 at about 09.30 pm, the accused-appellant herein, Rajat Tanti called his mobile phone and asked him to meet with him near Padmapur Club as there was some urgency. Accordingly, he went near Juri Lodge. They met with each other and went to a foreign liquor shop at Central Road, Dharmanagar from where the accused-Rajat Tanti purchased a bottle of foreign liquor. They went to Krishna Hotel at Office

Tilla, Dharmangar where both of them consumed liquor. There the accused-appellant herein informed him that he has borrowed some money from another person but he was unable to repay the same. The accused appellant requested the witness to purchase a Samsung Galaxy J5(Exbt-MO-II) mobile for consideration money of Rs.5,000/-. The witness told that if his family members agreed then he would purchase the same. Then the accused appellant handed over the mobile to him and took out the SIM from the mobile and threw it in a use and throw glass full of water. Thereafter, the accuse-Rajat Tanti stated to the witness that the accused appellant noticed a dead body. From the aforesaid evidence of the witness, it is clearly revealed that the mobile phone did not belong to the accused- appellant herein otherwise he would not have destroyed the SIM card of the mobile. It is also revealed from the evidence of the said witness that on the following morning at about 09.00 am he received a telephone call from the police station and he was asked to go to the police station. Accordingly, while he was going to the police station and reached near "Shiv Bari" and "Juri Lodge" he met with the police on the way. He was taken to the police station. It is further revealed that the police inquired with him whether the accused-Rajat Tanti gave any mobile phone to him on the previous day. To which he replied in affirmative. Then the police told him to go home. The police also told that they shall go to his house later on and collect the mobile from him. Thereafter, at about 04.00 pm, police came to the house of the witness along with the accused-Rajat Tanti, and then the witness handed over the mobile to the police. On seeing the mobile, the accused-Rajat Tanti told the police that the mobile belonged to the victim who died the previous night.

It is very much clear from the evidence of the aforesaid witness and the statement of the accused-Rajat Tanti that the mobile set did not belong to the accused-Rajat Tanti. The witness herein came to know from the police that the victim already expired on the previous night and the mobile phone was seized by P.W.33., from the witness under a proper seizure list (Exbt-16/b as a whole) in presence of Rajib Kr. Deb (P.W.19) and another Arjun Kr. Dey. The signature of P.W.18 on the seizure list was marked as Exbt-16 and the signature of Rajib Kr. Deb (P.W.19) was marked as Exbt-16(a).The instant witness also made a statement under Section 164(5) of Cr.P.C. before the Magistrate.

35. From the evidence of P.W.14, Sri Kajol Debnath, P.W.15, Sri Ashutosh Nath, it revealed that on 25.03.2017 they along with Dipak Nath and others were playing Carrom at Padmapur Club, about 09.30 pm. Rajat Tanti came to the club and informed them that while he was hearing music on his mobile and proceeding towards his house, suddenly at the glimpse of the light of his mobile phone, he could notice the legs of women in the abandoned bathroom of the house of Dipu@Shyamal. He went to the bathroom and found a dead body of a girl lying there in a naked condition. The accused-appellant herein, Rajat Tanti was drunken at the material time. His conversation was suspicious. While the witnesses inquired, the accused as to why he did not inform the matter immediately to the police or any other neighbouring people of the locality, the accused simply avoided the question and stated that he did not inform the matter to the police as he was not willing to involve himself in such a matter. Immediately thereafter he left the place by a tri-cycle.

It is also revealed from the evidence of P.W.14 that thereafter he went home and took dinner. Then he received a telephone call from P.W.15 who informed him that he received a call from one Dipak

who informed him that the incident was true. Thereafter, the brother of the witness also came home from his shop and informed that he also came to know that a neighbouring girl of the locality was missing. It is further revealed from the evidence of the witness that he went to the place of occurrence and many persons had already gathered there prior to his arrival. The dead body was lying in the bathroom of the abandoned house and the body was in almost naked condition. There were injuries on her face and other parts of the body of the deceased. It is further revealed that the bathroom was situated at the backside of the room from the road and one could not see the legs of the girl. So, the statement of the accused-Rajat Tanti that he saw the feet of the girl from the road with the light of his mobile phone cannot be believed. From the evidence of this witness, it is revealed that the bathroom is situated on the backside of the house and the road is on the front side. The bathroom is not visible from the road and thereby the witness categorically stated how the accused-appellant herein could see the legs of the girl from the road in the light of his mobile phone whereas there is no question of any light to reach the bathroom from the road.

36. From the evidence of P.W.15, it is further revealed that after coming home, he received a call from Dipak Nath who requested him to go and verify the matter. Then they informed the matter to the President of the Club.

37. From the evidence of P.W.15 and P.W.27 (Sri Pranab Chanda) reveals that they along with others went to the abandoned house and found that by the side of the building there was a hut where a woman was residing with her daughter. They called the woman and requested her to show them the bathroom of the house of Shyamal Nath. The said lady led the witnesses to the bathroom of the house and then all of them went near the bathroom and seeing the dead body inside the bathroom, the woman suddenly cried out. Thereafter, the witnesses also found the dead body of the victim there in the bathroom with injuries. The dead body was placed in the direction of the back wall of the bathroom and the legs were placed outside of the bathroom.

It is also revealed from the evidence of P.W.15 that thereafter, Nitu Shil informed the police and the police came and took the dead body. The police thereafter recorded their statement and arranged for the recording of his statement by a Magistrate.

38. P.W.27, Sri Pranab Chanda deposed that he went to the place of occurrence on receipt of a telephone call from a member of Padmapur Club. On receiving the information, he first talked with Lalit Mohan Nath, Councilor (P.W.28) over the telephone and then to Sudip Das, previous Councillor. The matter was also informed to the police. It is also revealed from the evidence of P.W.27 and P.W.28 that they noticed a bottle of liquor (Exbt-MO-VII), a plastic water bottle (Exbt-MO-VIII), use and throw glasses (Exbt-MO-IX, IX/a, IX/b) and one headphone of a mobile white in colour (Exbt-MO-X) which was seized by P.W.33 in their presence.

39. Evidence of P.W.2 (Shikha Rani Das) and P.W.3 (Haran Kanti Debnath) reveals that in their presence penal swab, dried blood sample of accused*Rajat Tanti was seized by P.W.33 (Signature of the witnesses on the seizure list were marked as Exbt-3 and 3/a).

40. On scrutiny of the evidence of P.W.6 (Sujit Kr. Deb) and P.W.7 (Amit Chakraborty) reveals that police seized one case memo (Exbt-6) in respect of Samsung Galaxy J-5 mobile from Bidyut Kanti Dey@ Dipak Dey issued by a shop under the name and style of "Cell Planet" situated at Office Tilla Dharmanagar in their present (signature of the witnesses on the seizure list were marked as Exbt-5 and 5/a)

41. Evidence of P.W.11 (Babita Sinha) reveals that P.W.33 (investigating officer) seized the viscera of the deceased after post-mortem examination (Exbt-8) in her presence.

42. Evidence of P.W.12 (Manika Debnath) reveals that police seized one Sony Micro GB SD Memory Card (Exbt-MO- III) in her presence (signature of the witness on the seizure list was marked as Exbt-12).

43. Evidence of P.W.16 (Rajat Debnath) reveals that police seized a pair of ladies foot wear (Exbt-MO-I and MO- I/a) and an empty bottle of foreign liquor (white and blue) in his presence and ors (signature of the witnesses on the seizure list was marked as Exbt-14).

44. Evidence of P.W.17 (Smt. Ruma Debbarma) reveals that police seized one black steel brown colour Micromax mobile with SIM from the accused-appellant herein in her presence (signature of the witness on the seizure list was marked as Exbt-15).

45. The scrutiny of the evidence of P.W.20 (Sandip Chakraborty) reveals that on 25.03.2017 in the evening at about 04.30 to 05.00 pm, he received one WhatsApp message from the victim at his mobile No.8732880470 wherein, she mentioned that "Party kartani aj k ami tui r Rajat". But he did not go. The mother of the victim whom he addressed as Masi (aunt) visited his house at about 08.30 pm and requested him to call the victim as she did not return home from Kali Bari. He made a call on her mobile phone. Though her mobile was found ringing but none responded. Thereafter at the request of the mother of the victim, he went out in search of the victim and he searched till 10.30 pm and returned home.

From the aforesaid, it is revealed that at about 08.30 pm also the mobile of the victim was found in operation.

46. From the evidence of P.W.21 (Sandip Paul) it is revealed that as per the instruction of the investigating officer, he took video of the entire episode of Autopsy of the deceased and also video graphed different seizure items and took video of different spots as he visited with investigating officer.

47. On the scrutiny of the evidence of P.W.22 (Suman Nath) reveals that he downloaded and printed call details record (total 23 sheets) of three mobile SIM including that of the accused. He handed over the said call detail records to the investigating officer who seized the same. It is also revealed from his deposition that from the call detail record the IMEI No. of mobile, location of mobile, call duration, call date, and incoming and outgoing calls can also be traced.

48. P.W. 25 (Tarun Kanti Sarkar) revealed that on 26.03.2017 he being the D.C.M. of Dharmangar as per police requisition went to Dharmanagar hospital and was present at the time of post mortem of the minor victim girl. He was also present for the purpose of recording a confessional statement of the accused herein.

It is revealed from his evidence that the accused Rajat Tanti stated that he had a previous connection with the victim and on 25th March, the victim telephoned him at about 04.00 pm and expressed her intention to meet with him. She also desired to have a party. She disclosed that she would remain present near Kali Bari. Accordingly, he went to Kali Bari and met with her. Then by his Scooty both of them went out for roaming around. After some time gradually dusk prevailed. At about 05.00/05.30 pm both of them went to a foreign liquor shop situated at Central Road, Dharmanagar where he purchased a bottle of foreign liquor and went to Padmapur. He went to his house and left his Scooty in his house. Thereafter, he went with the victim to the abandoned house at Padmapur. Both of them consumed liquor in the abandoned bathroom of the said house. Thereafter they had repeated sexual intercourse. The accused-appellant herein also confessed before the witness that after consuming liquor she became intoxicated and during intoxication, he had a hot discussion with the victim. At the material time, he also used force upon the victim resulting which the victim fell down and sustained injuries on her person. He first tried to kill the victim by strangulation, by means of his hand. Subsequently, he put pressure on her throat with his feet and when her body became still he tested her nerves, and being satisfied that the victim already expired, he left that place taking the mobile of the victim. He threw the SIM of the mobile of the victim in the nearby jungle.

49. However, the confession made by the accused- appellant Rajat Tanti before the witness is nothing but an extra-judicial confession since the confessional statement of the accused was not recorded before any Court as per the provision of the Code. However, the probative value of extra-judicial confession is very weak unless it is fully corroborated by the evidence of other witnesses and supported by the circumstantial evidence and all the circumstances are synchronized and there is no missing link in the entire episode. The accused-appellant herein also showed the particular place where he threw the SIM of the mobile phone of the victim. The police took the accused-Rajat Tanti to the place of occurrence and he led them to the jungle and after searching the jungle, the accused-Rajat Tanti recovered on SIM (Exbt-MO-XI) which was seized by the police.

50. From the evidence of P.W.29 (Bijoy Ghosh) it is revealed that he was a proxy driver attached to Dharmanagar P.S. He saw a dead body of a female in half-naked condition. He was present there for about one hour and he returned with the police. The police detained a person claiming that the said person committed the murder. Thereafter police asked him to sign some papers.

51. On the scrutiny of the evidence of P.W.32 (Subrata Kr. Das) it is revealed that he was posted as the Headmaster of Padmapur H.S.(+2 Stage) School, Morning section since 30 th August 2008. He knew that the victim was admitted to that school and she also studied up to class V in the school. He showed the admission register "From 2002, Admission Register, Class I to V, Vol-4" (Exbt-32). He showed the entry of SL. No.37 of that of being the entry of admission of the victim (Exbt-32/1). He stated that the date of birth of the victim has been recorded in the admission register as 02.05.2000.

52. P.W.32 (Paritosh Roy) deposed almost deposed in the same tune as P.W.25.

53. P.W.10 (Dr. Nitya Hari Bhowmik) reveals that on 26.03.2017 he examined the accused-Rajat Tanti on production by police. On clinical examination, he opined that there was nothing to suggest that the accused was incapable of performing sexual intercourse in an ordinary way. He also collected the blood samples, both thumb impression and photograph of the accused-appellant herein. The police seized the blood sample and penal swab of the accused Rajat Tanti in their presence (the seizure list was marked as Exbt-3/c, as a whole, and signature of the witnesses on the seizure list of the blood sample of the accused Rajat Tanti were marked as Exbt- 3 and 3/a and 3/b respectively).

54. On the scrutiny of the evidence of P.W.8 (Dr. Chaitannya Reang) and P.W.9 (Dr. Sudipa Biswas) reveals that they conducted the Autopsy on the dead body of the deceased. They started the Autopsy in the morgue of the hospital at about 11.45 am and continued the autopsy up to 12.45 pm. On that very date, they submitted one preliminary report (Exbt-7) (signatures of the witnesses on the preliminary report were marked as Exbt-7/A and 7/b) based on their findings that injuries were similar to the inquest report (Exbt-1/a) submitted by the investigating officer. The hymen of the deceased was found ruptured and against organ of genital they mentioned pubic hair was present and it was adult type in distribution, Non-matted and at places soaked with forces, and regarding Vulva they mentioned no injury was seen on labia majora and labia minora. Against the column of hymen, they mentioned that there were old healed tears present at 5,7 and 9 O' clock position and no congestion was seen and no injury was found. There was sign of sexual experience and no sign of forceful sexual intercourse. They collected sample of her stomach and its contents, sample of liver, sample of kidney and sample of total uterus, blood sample in gauze cloth in dried condition, saliva sample of gauze cloth, sample of public hair, vaginal swab in dried form and wearing apparels of the deceased. The samples were handed over to the accompanied police personnel (signature of P.W.9 on the seizure list was marked as Exbt-9).

It also revealed from their evidence that in this regard they also submitted one final Post mortem report (Exbt-

8) on 16.062017 (signature of the witnesses on the post- mortem examination report was marked as Exbt-8/a and 8/b). In the final opinion, they mentioned that bleeding was present in right ear, there was abrasion over left side of chin measuring 2cm X 2 cm in size and there was bruise on upper chest wall just below right clavicle measuring 10 cm X 4 cm and there was bruise over right cheek measuring 3 cm X 4 cm in size and there was frothing with blood and both nostril and mouth were partially opened and tongue and protruded outside with blood in left angle of mouth due to tongue bite and there was black eye developed in both eye and more in left side and there was bruise over left cheek abrasion in left lateral zygomatic area near eye measuring 5 cm X 6 cm.

It is further revealed from their evidence that regarding "cause of death they opined that it was due to mechanical asphyxia as a result of throttling and all the injuries present on the body were antemortem in nature and caused by the impact of hard and blunt force and on perusal of the TSFSL report it was made clear that in the under-garments of the victim semen of accused Rajat Tanti was

detected". So, on perusal of the TSFSL report it can be said that the victim had sexual intercourse with accused-Rajat Tanti.

55. From Exbt-8, opinion of the autopsy surgeons, three points are mentioned (1) The cause of death was due to mechanical asphyxia resulting from throttling.

(2) All the injuries present in the body were ante mortem in nature and are caused by the impact of hard and blunt force.

(3) There was sexual intercourse between the accused and the victim.

56. On the scrutiny of the evidence of P.W.23 (Miss Monica Debbarma) it is revealed that she examined the viscera of the deceased. Exbt-A was the liver and kidney of the deceased, Exbt-B contained stomach of the deceased and Exbt- C contained Uterus of the deceased, Exbt-H contained the vomiting of the deceased and Exbt-I contained an empty bottle of alcohol, Exbt-I contained pant of accused-Rajat Tanti and all those exhibits she tested in the laboratory of toxicology to ascertain the presence of any toxic substance or poison or drugs or alcohol etc. After examination of the viscera of the deceased in Exbt-h, she detected the presence of ethyl alcohol and as the bottle of alcohol was marked empty as Exbt-I, no result come out from it. Nothing was detected in exbt.- A, B, C & I . She submitted her report.

From the aforesaid forensic report, intake of alcohol by the victim and the accused prior to the incident is very much clear.

57. From the evidence of P.W.24 (Dr. Subhankar Nath) it is revealed that he examined the following exhibits in the DNA Typing Davison of SFSL, Tripura:-

(1) Exbt-D was one white paper packet labelled with case reference and exhibit mark-D, inside which off white colour gauze piece without any blood like visible stain said to be the blood sample of the victim.

(2) Exbt-E was one white paper packet labelled with case reference and exbt. Mark-E, inside which very light straw colour gauze piece said to be contained saliva sample of the victim.

(3) Exbt-J was one white paper packet labelled with case reference and exbt mark J, inside which a gauze piece with light brown colour with mud like stain said to be the blood sample collect from of the place of occurrence.

(4) Exhibit-N was one white paper packet labelled with case reference and exbt marked N inside which a gauze piece with red stain said to be the blood sample of accused person.

(5) Exbt-P1 was ne white paper packet labelled with case reference and exbt. Mark P.1, inside which white and black printed cloth pieces without any visible stain said to be the cloth pieces of top(wearing apparels) of the victim.

(6) Exbt. P2 was on white paper packet labelled with case reference and exbt mark-P2 inside which black colour cloth piece with mud like stain said to be the cloth piece of top jacket (wearing apparel) of the victim.

(7) Exbt.P3 with one white paper packet labelled with case reference and exbt. Mark-P3, inside which white colour ribbin like cloth pieces without any visible stain said to be the pieces of bra of victim (wearing apparel).

(8) Exbt.P5 was one white paper packet labelled with case reference and Exbt mark P5, inside which black colour cloth pieces with very light starchy stain in small area in one cloth piece and other cloth pieces without any visible stain said to be the cloth pieces of pant of victim(wearing apparel).

And after examination he gave the following

conclusion:-

(1) The blood stain detected in the exhibit PO (Exbt-J) was originated from single source Exbt-E(saliva of the victim).

(2) The semen stain detected in the exhibit P5, panty of the victim was originated form single source exhibit- N(blood sample of accused).

(3) In view of no genetic profile generated from Exbt-, P1, P3 and P5 it is not possible to draw any opinion.

(4) In view of partial amplification in Exbt-P2 it is not possible to draw any opinion.

58. P.W.33, Smt. Rinki Debbarma is the investigating officer of the case. At about 12.05 hours she received the information from Dharmanagar P.S. that the public informed that one dead body was found in the abandoned bathroom of the Padmapur area. She entered information to the GD of the P.S. vide G.D. entry No.351 dated 26.03.2017. He informed the matter to SDPO. She went to the place of occurrence and found a dead body of a girl with severe injuries over face in almost naked condition. He informed to the same to the higher authority and meanwhile many local people gather there as well. One Purnima Dey and one Bidyut Kanti Dey also appeared there and claimed that the dead body was their daughter.

She prepared the inquest report (Exbt-1/c, as a whole) of the dead body of the deceased. From the place of occurrence a packet of wine bottle was recovered and some other items including some bloodstains collected from the wall of the P.O., bloodstains of the deceased, some vomiting substance, etc. (Exbt-31/b, as a whole).

He prepared a dead body challan(Exbt-34) and sent the dead body to the morgue of Dharmanagar Hospital, North Tripura for post mortem examination.

She recorded the oral Ejhar (Exbt.14/b) of Bidyut Kanti Dey in her own handwriting as per the version of the said Bidyut Kanti Dey(Exbt-39). She obtained the signature of Bidyut Kanti Dey in the statement (Exbt-35 and 35/1). She registered a case based on the statement vide Dharmanagar P.S. Case No.11 of 2017 under Section 302 of IPC. After registration of the case as O/C, she took up the investigation. She recorded the statement of Bidyut Kr. Dey and Purnima Dey in the police station and made a requisition to the hospital for collection of certain items. She rushed to the place of occurrence and made a hand sketch map (Exbt-36). Thereafter she examined and recorded the statements of Ashutosh Nath@ Ashu and Kajal Debnath under Section 161 of Cr.P.C. Thereafter based on their information, she went to the house of the Rajat Tanti at Padmapur and arrested him from his house and removed him for interrogation. Keeping him at the P.S. she went to the hospital and seized liver, kidney, stomach, uterus, etc., under a proper seizure list (Exbt-9/b, as a whole). He then interrogated the accused-appellant herein in presence of P.W.32, P.W.29, DCM (P.W.25), SDPO Dharmangar, and videographed the interrogation statement of the accused. Based on the statement, she prepared a disclosure memo in her handwriting and sealed and signed the same obtaining the signature of the present witnesses. After then she along with the accused-Rajat Tanti, DCM, SDPO Dharmanagar, videographer, and other persons went to the P.O. at Padmapur. There the accused as per the disclosure statement pointed out some places and articles, accordingly, she seized one SIM card of Jio company bearing No.89918650400009847062 (Exbt.MO- XI) and other items marked as exbt-29/b as a whole.

It is further revealed from the evidence of P.W.33 that the place of occurrence was not visible from the nearby vehicular road. Based on the disclosure statement of the accused-Rajat Tanti she along with the accused and other witnesses went to the house of the accused. As pointed out by the accused, she recovered one blue colour jeans full pant, where fashion jean was marked and mud with some marks of boiled rice, one ash colour full jeans jacket etc., under a proper seizure list marked as (Exbt-30/1, as a whole). Thereafter again as per the disclosure statement of the accused, she along with the accused and others went to the Shiv Bari, Dharmangar. There again being pointed out by him, she seized one Samsung mobile set of steel and black colour GG DUOS pasted with three stickers of Jio from the possession of Mrinal Kanti Deb@ Piklu (PW.18) under a proper seizure list (Exbt- 16/b, as a whole). Again as per the disclosure statement of accused-Rajat Tanti she along with him and others went to Krishna Hotel of Dharmanagar town but there at Krishna Hotel she could not recover SIM card as stated by the accused- appellant herein. Thereafter she returned to P.S. and there she recorded the statement of some witnesses under Section 161 of Cr.P.C.

It is also revealed from the evidence of P.W.33 that thereafter she went to the Dharmanagar District Hospital for medical examination of the accused in Dharmangar Hospital. After examination, the doctor handed over the blood sample and penal swab. She seized the same under a proper seizure list (Exbt-3/c as a whole). She also collected the medical examination report (Exbt-10) of the accused-Rajat Tanti given by Medical officer of Dharmangar Hospital. She also seized one mobile set Micromax with SIM card having IMEI No.911457650657450, 911457650907959 from the possession of the accused-Rajat Tanti at the time of his arrest under a proper seizure list (Exbt-15/a

as a whole). She also seized the birth certificate of the deceased and having found her age below 18 years she made a prayer to the learned Court for giving permission to add Section 376(1) of IPC and Section 4 of the POCSO Act and her prayer was allowed. She also recorded the statement of the witnesses namely Sajal Debnath and Raju Ghosh on 30.03.2017. As per the order of the authority, she handed over the case docket to Smt. Swarna Debbarma, Sub- inspector, and O/C of Dharmangar Women Police Station.

59. From the evidence of P.W.34 (Smt. Swarna Debbrama), the investigating officer of this case, reveals that on 30.03.2017 he took up the investigation. She visited the P.O. on 31.03.2017 and thereafter she examined Mrinal Kanti Deb and Kajal Debnath and recorded their statement. On that very date, she also collected CDR of mobile phone of the accused-Rajat Tanti and the victim which was previously seized by the predecessor I.O. She examined Smt. Purnima Dey and recorded her statement. On that very date she forward to TSFSL, Narsinghar some articles seized by her predecessor Investigating officer for examination.

After completion of her investigation of the case, she submitted the charge-sheet No.12/17 against accused Rajat Tanti for the commission of offences punishable under Section 302/201/376 of IPC, read with section 4 of the POCSO Act.

CONCLUSION

60. On perusal of the evidence on record, it is revealed that the victim went to Kali Temple at Office Tilla, Dharmanagar on 25.03.2017 at 05.00 pm which is corroborated by the evidence of P.W.13 (Bidyt Kanti Dey) and P.W.1 (Purnima Dey). Moreover, P.W.20 on 25.03.2017 in the evening at about 04.30 to 05.00 pm received a WhatsApp message from the victim on his mobile, wherein, she mentioned that "Party Kartani aj k ami tui r Rajat". When the victim did not return home at about 07.00 pm (P.W.13) rang the mobile of the victim and though the mobile of the victim was ringing but she did not pick up the mobile. After some time when he again rang the mobile of the victim, he found that the mobile of the victim was switched off. Thereafter, P.W.1 and P.W.13 went out in search of their daughter and one Raja Ghosh(P.W.5) of their locality met with them and informed them that a dead body of a girl was found lying at the backside of Radha Raman Ashram of Padmapur area. P.W.13 and P.W.1 and Raja Ghosh P.W.5, rushed to the spot.

61. From the evidence of P.W.14 (Sri Kajol Debnath) and P.W.15 (Ashutosh Nath) it is revealed that on 25.03.2017 they along with Dipak Nath and others while playing carrom at Padmapur Club. At 09.30 pm, the accused Rajat Tanti came to the club and informed them that while he was going to his house and hearing music on his mobile suddenly, at a glimpse of light he could notice the legs of a woman in the abandoned bathroom of the house of Dipu@Shyamal Nath. On seeing the legs he proceeded towards the bathroom and found the dead body of a girl laying there in the bathroom in naked condition.

62. From the evidence of P.W.18 (Sri Mrinal Kanti Deb) it is revealed that on 25.03.2017 at night at about 09.30 pm while he was at home, the accused-appellant herein made a call to his mobile and asked him to meet with him near Padmapur Club. Accordingly, the witness reached near "Juri

Lodge" and they met each other and went to a foreign liquor shop on central Road Dharmanagar. From there the accused- Rajat Tanti purchased a bottle of foreign liquor and they went to 'Krishna Hotel' in Office Tilla, where both of them consumed liquor. The accused-Rajat Tanti informed him that he had borrowed some money from another person but could not repay the same. The accused requested P.W.18 to purchase a Samsung Galaxy J5 mobile from the accused for consideration money of Rs.5,500/- to which P.W.18 told the accused that if the family member of the P.W.18 agreed, then he would purchase the same. The accused handed over the mobile to him and took out the SIM from the mobile and threw it in a disposable glass full of water. Thereafter, the accused Rajat Tanti stated to the witness that the accused noticed a dead body of a girl in Padmapur area in a bathroom of an abandoned house. He saw the dead body from the outside.

63. From the evidence of P.W.1, 5, 13, 14, 15, 27, and 28, it is revealed that all the witnesses and many others went to the place of occurrence and found the dead body of the victim herein. The father of the victim i.e. P.W.13 also identified the pair of the ladies' footwear of his daughter i.e. the victim herein. The body of the victim was found in front of the bathroom and the body was lying on the floor touching the wall of the bathroom. The body was in naked condition and there was no cloth between the neck and the knee. Several injuries were found in the different parts of her body.

64. From the evidence of the P.W.33, investigating officer, it is revealed that she along with the P.S. Staff went to the spot at Padmapur and found a dead body of the girl lying in an abandoned bathroom. He recorded the oral ejhar of the father of the victim and after registration of the specific case, she examined Bidyut Kanti Dey (P.W.13) and Purnima Dey(P.W.1). She also examined witnesses No.P.W.15, P.W.14 and recorded their statements under Section 161 of Cr.P.C. On the basis of the said statements of P.W.15 and P.W.14 she went to the house of the accused-Rajat Tanti at Padmapur and got him arrested.

65. From the evidence of P.W.25(DCM), P.W.29, and P.W.32, it is revealed that accused Rajat Tanti divulged to them that on 25.03.2017 the victim rang him over his mobile phone to meet her near Office Tilla Kali temple. Accordingly, he went to the Kali temple and found the victim. Then he took the victim by his Scooty at Dighalbak of Dharmanagar and there the victim requested him to make a party of entertainment since she had been feeling lonely. Then he went to the foreign liquor shop at Central Road and brought a bottle of foreign liquor and arranged for water and glass. Then, both of them together went to Padmapur in front of Sonali Industry. After arriving there, he told the victim to wait there and told her that he will come back leaving the Scooty to his father. Thereafter, he returned to the victim, and then both of them held a party of entertainment in the abandoned bathroom of one Shyamal Nath. Both of them consumed foreign liquor and also enjoyed sexual relationship. At last, when he wanted to return, leaving the victim, the victim caught hold of him and told him not to leave her. At that, he out of anger dashed out her. As a result, she had fallen over the wall. She sustained head injuries and having seen the head injuries of the victim, he again assaulted the victim and strangulated her. Thereafter to confirm her death, he pressed her throat with his right foot, and then he tested whether the victim died or not. By observing the pulse of the deceased, when he confirmed that she died, he then took away the mobile phone of the victim and left the place.

66. From the evidence of P.W.33 and P.W.34, it is revealed that the viscera, wearing apparel, and other samples of the victim and the wearing apparel, blood sample, and the penal swab of the accused were sent to TSFSL, for examination and report. From the evidence of P.W.24 (Subhankar Nath) it is revealed that the semen stain detected in the Exbt-P5, panty of the victim was originated from a single source, Exbt-N (Blood of the accused-appellant herein).

From the cross-examination of the witnesses, nothing material could reveal to rebut the evidence of the prosecution witnesses except the denial of the prosecution evidence. Whereas denial is not evidence and mere denial is not sufficient to discredit the evidence of the prosecution witnesses.

67. From the above evidence on record, it is clear that the prosecution has been able to establish the chain of events that points towards the guilt of the accused-appellant herein. Further, the behaviour of the accused-appellant herein was very uncommon and against the natural behavioural approach of a human being. Normal human nature is that in case of a dead body is found by anybody in an abandoned place and if the person finds that he has no connection with any complicity with the death of the person, it is the immediate reflex of the person that he being frightened shall start shouting resulting to which people of the locality shall immediately come out and gather near the place of occurrence. The people shall report the matter to the police. Since the accused is mature enough and as an adult person he shall never run away from the place silently unless has complicity with the dead body, which is the general behavior of a prudent person but in the given case, the behavior of the accused person herein is conflicting and against the human nature.

68. Further in reference to the deposition of P.W.18 (Mrinal Kanti Deb) if the mobile phone would have belonged to the accused-appellant herein, he would not have thrown away the SIM cards from the mobile set while handing it over to P.W.18, which, focused towards the fact that he took out the mobile of the victim after the commission of the offence and thereafter sold it out to the P.W.18.

69. Moreover if we give a look to the evidence of the witnesses as mentioned here-in-above, the accused-appellant herein made his confession before P.W.25 and other inclusive witnesses. The contents of the confessional statement were supported by the circumstances which were elicited from the evidence on record. It is clear to this Court that the statement made by the accused was voluntary without having any inducement, threat, or promise made to the accused and thus forms the chain of circumstance as proved by the prosecution in this case. It inspires the confidence of this Court.

70. The accused-appellant herein had special knowledge about the crime and the death of the deceased even before anyone noticed. It is he who had informed about the said incident which occurred on that fateful day. Reasonable apprehension that the accused person is connected with the crime in the light of the circumstantial evidence has to be considered in view of the relevant section of the Indian Evidence Act.

71. The father of the deceased girl has specifically stated that the accused person was behind his daughter saying that he is in love with her. He has deposed in regard to the incident and stated that his daughter went out and did not return. The motive behind the crime in the light of the

circumstantial evidence goes against the accused-appellant herein since he was in a relationship with the deceased victim- girl.

72. In view of this, the conduct of the accused person that he is innocent and he has not committed any crime and he is nowhere involved in this offence, and that he has not raped and killed the victim girl cannot be accepted.

73. Further since the semen of the accused was found in the panty of the victim, it is quite clear that all along after 05.00 pm on the fateful date of the incident the victim was with the accused herein. There was sexual intercourse between the victim and the accused and the consent or no consent of the victim is of no significance since the victim is a minor which is clear from the evidence of P.W.1 and P.W.31 who told that the date of birth of the victim was 02.05.2000. The date of occurrence was 25.03.2017 and thus the victim was of 16 years 10 months and 23 days on the date of the incident which has already been decided in affirmative.

74. From the above chain of the circumstance as proved by the prosecution, it clearly leads to the only hypothesis that it is none else but the accused-appellant, Rajat Tanti who committed the rape and brutal murder of the victim. The degree of the brutality of the accused in the killing of the victim is self-explanatory from the evidence of the witnesses as discussed above.

75. As mentioned herein-above Mr. P.K. Biswas, learned Sr. counsel, appearing for the accused-appellant relied upon Javad Masood(supra), Harchand Singh(supra), Dayal Singh(supra), State through C.B.I(supra), Mustkeem alias Sirujdeen(supra), Anter Singh(supra), Zwinglee Ariel(supra), Mayur Panbhai Shah(supra), The State of Rajasthan(supra) and Mayank Bohra(supra) to support his contention but all these judgments though are relevant to the facts of this instant case, but, the case has not been made out for considering the case of the accused-person for granting acquittal in the light of this above-mentioned judgments.

Per Arindam Lodh, J

76. I have gone through the well versed judgment. I am in full agreement with the view taken and the foundational reasons assigned by my esteemed Brother Justice Goud while upholding the judgment of conviction and sentence recorded by learned trial Judge. However, in view of the submissions advanced by Mr Biswas, learned Senior Counsel regarding contradictory reports of two scientific experts as evidenced from the statements of PW- 24 in his cross-examination over the issue of the presence of seminal stain in Ext P- 5 (the wearing apparel of the victim), it would be apposite to discuss the various facets of Biological/ Serological tests and DNA tests as a matter of academic importance qua to remove the doubts tried to be projected by learned Senior Counsel appearing for the appellant.

77. On minute appraisal of the evidence of Dr. Subhankar Nath (PW-24), it comes to light he has stated during his cross- examination that "In the report of Dr. Sabyasachi Nath, he mentioned that seminal stain/spermatozoa of human origin could not be detected in Exhibit-F, G, L, M, O, P1, P2, P3, P5 and P6 by Biology/Serology division."

78. Exhibit- P5 contains two pieces of clothes said to be panty (wearing apparel) of victim. PW-24 has deposed in his evidence that "The exhibit mark P5 was visually examined under light sources, Acid Phosphate and microscopic examination for detection of seminal stain which spermatozoa of human origin.

In results I mentioned that seminal stain/spermatozoa of human origin was detected in the Exhibit marked-P5."

79. From the evidence of PW-24 it manifests that Dr. Sabyasachi Nath only conducted Biological or Serological test. He has not conducted DNA test. DNA test has been conducted by PW-24. DNA test is more scientifically advanced and accurate than that of Serological test as it relates to identification of a specific person. It is noticed that the defence did not put any single question to Dr. Subhankar Nath (PW-24) as to the accuracy of the methodology or the procedure followed for the Serological test and DNA profile. Had the defence put questions regarding the methodology of both Serological and DNA profile, then, PW-24 would get an opportunity to explain the distinction between the Serological and DNA examination.

80. In the case of Santosh Kumar Singh vs. State, (2010) 9 SCC 747 (Priyodarshani Matto Rape Case), the Honble Supreme Court while dealing with the subject has held that DNA profile and report carry enough significance as it is scientifically more accurate. It is held that:

"71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in Kamti Devi v. Poshni Ram [(2001) 5 SCC 311 : 2001 SCC (Cri) 892 : AIR 2001 SC 2226]" (Para 10)....."

81. A few basic features of Serological test and DNA test may be highlighted herein-below in a tabular form:

No.	Basis of differentiation	Serology analysis	DNA analysis
1.	Meaning	Serology analysis refers to the screening of evidence for bodily fluids.	It refers to the efforts to individualize bodily fluid for specific person.
2.	Sources	Blood, bloodstains, blood	Blood, bloodstains, trail, blood pool, saliva, saliva stains, body tissues and urine, faces, sweat, nasal organs, post-mortem samples, secretions, tears, human foetal material.
3.	Stages	milk and semen Generally, bodily fluid identification performed on evidentiary samples before analysis is attempted.	After, evidentiary items have been screened and positively identified, DNA analysis can begin. Exception: Cases

kinship determination do require serology screening can also be sent immediately for DNA analysis as reference samples from individuals are used for determination and comparison to samples.

4. Serologists are responsible for DNA analysis at individualize DNA to a specific person.

documenting the type, person. quantity, and packaging of the evidence. Also, evidence with notes and diagrams or pictures regarding the types of stains present and their location on each item is placed into the case file. Also, detailed notes of their testing and outcomes.

5. Availability of Serology test can be performed only in a or handled (steering wheel, gear shift, etc.)

bodily fluid or such other phone, finger print etc.), do not items where bodily fluid contain a substantial amount of present. biological material and are processed for DNA without going through any type of serological screening .

6. Nomenclature The identification of In some instances, DNA biological fluids during analysis can be considered a serology analysis is type of confirmatory test accomplished through because it is species, although presumptive and not bodily fluid, specific for confirmatory testing. human DNA.

7. Identification of This method is useful to DNA is the inherited cellular Semen be able to forensically material that is the blueprint for (Semen=Seminal test for the presence of human development. Each fluid+spermatozoa) both seminal fluids and person's DNA is unique, except spermatozoa, as not all in case of identical twins. So, men produce forensic DNA analysis attempts spermatozoa(sperm) in to individualize DNA to a case of they have had a specific person.

vasectomy, certain birth defects, or as the result of some disease, seminal fluid will either not contain sperms or contain very few.

8. Operation Serology methods are DNA analysis is more complex

relatively simple and than serology analysis
straightforward. involves 3
(three) steps:
First, DNA extraction,
Secondly, lyse (break open)
cells to release DNA),
Thirdly, separate the DNA

(Source: Ashraf Mozayani & Carla Nozigilia, The Forensic Laboratory Handbook Procedures and Practice p. 1-14)

82. In furtherance thereof, a Division Bench of this court has elaborately and authoritatively discussed the importance of DNA profile in the judgment passed in Sri Rashida Tripura v. State of Tripura [Crl. A(J) No. 65 of 2019](to which I was the author). While dealing with the issue, it was observed and held thus:

"26.2. Now, what is DNA? "DNA, or deoxyribonucleic acid, is the hereditary material in humans and almost all other organisms. Nearly every cell in a persons body has the same DNA. Most DNA is located in the cell nucleus (where it is called nuclear DNA), but a small amount of DNA can also be found in the mitochondria (where it is called mitochondrial DNA or mtDNA)".

26.3. Further, "Deoxyribonucleic acid which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred per cent precise, experts opine" (Sarkar Law of Evidence, Vol-I, Page-1229, Section 45).

26.4. An important property of DNA is that it can replicate or make copies of itself. Each strain of DNA in the double helix can serve as a pattern for duplicating the sequence of a basis. This is critical when cells divide because each new cells need to have an exact copy of the DNA, present in the home cell.

26.5. Mr. Justice R.K. Abhichandani, Judge, High Court of Gujarat had written an article on " New Biology and Criminal Investigation", extracts from the article are as under:-

".....technological advances have made it more reliable, efficient and acceptable. DNA evidence can help to bring home the guilt, acquit the innocent, or exonerate those wrongly convicted. Forensic DNA Technology has revolutionized the modes of investigation of violent crimes as a result of its awesome ability to convict a perpetrator or exonerate a convicted offender. In sexual assault and homicidal cases, DNA evidence has become a powerful crime-fighting tool. The DNA evidence in the form of saliva, blood, skin tissue, hair and semen is often recovered from crime scenes and is a crucial tool for the investigation of violent crimes. Testing methods currently used for analyzing the DNA evidence are considered to be very reliable. Polymerase Chain Reaction (PCR) is the most common form of DNA analysis, because of its capability to amplify very small quantities of DNA.

DNA testing can lead to three types of results, namely, inclusion, i.e. when the DNA profile of a known individual (a victim or suspect) matches the DNA profile from the crime-scene evidence; exclusion i.e. when the DNA profile from an individual (a victim or suspect) does not match the DNA profile from the crime-scene evidence; and inconclusive where the DNA testing did not produce information that would allow an individual to be either included or exonerated as the source of the biological evidence. The real investigative power of DNA technology is realized in the context of the cases where a suspect has not yet been identified "26.6. In the case of Selvi & Ors vs State of Karnataka in Criminal Appeal No. 1267 of 2004 reported in (2010) 10 SCC 263, the Supreme Court has considered the admissibility of the scientific evidence at great length and the responsibility of the Court. Reference had been made to the pronouncement of the United States Supreme Court in *Daubert vs. Merrell Dow Pharmaceuticals Inc.*, 125 L Ed 2d 469; 509 US 579 (1993). In this case, the Supreme Court of the USA dealing with the testimony of experts observed that the "standard of general acceptance of the particular field" changed the rules with regard to the admissibility of the scientific evidence for several decades. In para-26 of the Selvi(supra), the Supreme Court of India has quoted from the majority opinion in *Daubert* case on the manner in which the Trial Court should evaluate scientific evidence; the relevance as well the reliability of the scientific technique in question.

Trial Judges first step should be a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid; whether it properly applies to the facts in issue; whether the theory/technique stands tested; stands subjected to peer review and publication; its known or potential error rate; existence and maintenance of standards controlling its operation; and whether it has attracted widespread acceptance within scientific community. The inquiry has been recommended to be a flexible one with its focus solely on principles and methodology, not on the conclusions which were generate, with the trial Judge performing a "gate keeping" role to decide on the admission of the expert testimony based on scientific techniques. These observations have relevance in as much as there is no specific legislation governing DNA profiling or guiding a Court on its permissibility, evaluation, application or methodology.

27. We may refer a celebrated judgment on the subject authored by one of us(A. Kureshi, C.J., sitting in Division Bench as a Judge of the High Court of Gujarat at Ahmedabad) decided on 05-06/08/2013 in Criminal Appeal No.133 of 2012(titled as State of Gujarat vs. Mohan Hamir Gohil Dalit & Anr.) where the subject we are mostly concern here has been extensively dealt with and gives us valuable assistance to decide the importance of technically advanced forensic science, particularly, relating to DNA profile analysis to identify the real culprits, in other words, the innocence or guilt of an accused connected with the crime. It would be very useful to us to reproduce the relevant extracts of the said judgment in its exact words as under:

"27. Before concluding this issue, one important aspect of forensic science needs to be dealt with. A ticklish issue of conflicting forensic opinions has arisen in this case. It would be necessary for us, therefore, to clear such doubt. Forensic science over a period of time has made great strides in investigation of crimes. It has often times enabled the investigating agencies to catch the real culprit and aided the courts to come to just conclusion by using such evidence in addition to other eye- witness and

circumstantial evidence. Equally, importantly, this science has often times been used for exclusion of a person from false charges. In other words, not only for convicting a real culprit, such science is equally useful in acquitting a person who has been falsely accused of commission of a crime. Enormous strides in the field of DNA testing in recent times has completely changed the complexion of criminal investigation. Every technology, however, must be seen in light of the limitation it comes with. While, therefore, appreciating any medical evidence or forensic reports, it would be of utmost importance for the court to properly understand its effectiveness, its fallibility or unfallibility as also the reason why a particular test may either fail or give misleading results.

28. This preamble was necessary since we found certain apparently conflicting forensic results. Immediately after the case was reported, various articles as part of rape investigation was collected from the victim , such as, her clothes, under-garments, saliva, vaginal swab, vaginal smear, etc. All these articles were sent for analysis to the Forensic Science Laboratory, Junagadh. Report Exh.392 confirmed the presence of human semen from three of these samples, namely, vaginal swab, vaginal smear and knickers of the victim. No blood was detected from these samples. In Exh.393, the serological report of these samples the semen is shown to be of B group. The same report also confirmed that the victims blood group was B. In isolation, this by itself would not be a matter of great concern. The accused were apprehended later on and their blood samples were collected for DNA testing. The Forensic Science Laboratory, Junagadh under serological report Ex.412 opined that accused No.1 has blood group A and accused No.2 has blood group O. Their saliva and semen samples also confirmed the same group. It would thus mean that the group of the semen found from the vaginal swab, smear and the knickers of the victim did not match with the blood group of either of the two accused.

29. As noted earlier, after arrest blood samples of both the accused were also sent for DNA testing along with the vaginal swab and vaginal smears and knickers of the victim. These samples were collected by Dr. Devendra Sojitra PW-32. He in his deposition at Exh.137 described the various samples collected from the accused. He had also produced supporting documents. Samples were taken under panchnama Ex.85. Though the panch witness Bodubhai Shaikh turned hostile, he admitted his signature on the panchnama. In view of the testimony of the doctor, we have no reason to doubt the sample. DNA analysis report of FSL Gandhinagar Ex.247 recorded the following conclusions:

"Conclusion From the above observations, it is concluded that:

1. Accused Mahesh @Bhada Mulji Dalit (Exhibit: BB) is consistent as source of semen stains present in Knickets (Exhibit: G 4) of victim Jyotiben D/O Dilip Chanabhai Khant.

2. Since only single human DNA profile is obtained from Semen Stains present on knickers (Exhibit: G

4), opinion regarding DNA match could not be offered for accused Mohan Hamir Dalit Exhibit:

AA)."

Two things emerge from these reports. Insofar as serological report is concerned, though there was semen detected in the vaginal swab, vaginal smear and knickers of the girl, it was analyzed as belonging to group B. On the other hand, two accused had blood group of A and O respectively. At the first blush, therefore, this report must be construed as excluding involvement of either of the two accused. Second aspect is that DNA analysis confirmed that the semen sample found from the knickers of the victim matched with the DNA profile of accused No. 2 while it did not match with that of accused No.1. We may record that in such report, it was indicated that since the samples from vaginal swab and vaginal smear were used up by FSL, Junagadh earlier, it was not possible to use such samples for DNA testing.

30. Thus, the conflict between the two scientific opinions is that according to the serological test, the semen did not belong to either of the two accused whereas the DNA analysis clearly establishes that semen belonged to accused No.2 and none else. The question, therefore, is how do we interpret these two reports and in case of unresolvable conflict, which of the two reports should be relied upon.

31. In order to do so, we may briefly appreciate what exactly the DNA technology is. DNA is the acronym of deoxyribonucleic acid. DNA technology is often times referred to as the finger printing of 21st century. In the book titled Handwriting and Finger Prints Analysis in Criminal Trial and Investigation by B.L.Bansal and Rajiv Rajeja, DNA is explained in simple terms as under:

"Simply stated, DNA is the blueprint of the body of every human being. The human body is made up of cells, each of which contains a nucleus. The nucleus is a special compartment that contains chromosomes which, in the human body, number forty-six. These chromosomes (23 from each parent) are composed of tightly wound up DNA molecules which lend each chromosome its unique characteristic shape. Each cell in the human body has the identical DNA makeup. Each DNA strand is composed of genes which determine a person's unique characteristics, such as body structure, or hair and eye colour. There are no two humans with identical DNA compositions."

In "A Textbook of Medical Jurisprudence and Toxicology" by Modi, Twenty-Fourth Edition, it is stated that : "DNA fingerprinting profiles are unique to each individual. When adequate number of DNA patterns in two unrelated individuals are compared, the chances of complete similarity are 1 in 30 billion to 300 billion, ie half the population of the world."

xxx In DNA typing, the DNA from samples like blood, semen, hair etc is cut into fragments of sequence patterns using a specific enzyme. The fragments are separated into bands by gel

electrophoresis and then the DNA pattern is transferred to an nylon membrane to which a radioactive probe is added. An X-ray is then taken. From any sample in that particular fragment length, the bands from the same source are the same. This individualization is utilised for comparison. The developed X-ray film shows the, DNA bands. They are then matched with the suspect. If they match, we can say that the person or the specimen is identified and its individuality established. Thus, it is now possible to connect the blood, semen, tooth, hair, form the crime scene or from a body to a particular individual."

In Rape Investigation Handbook by Joyn O. Savino and Brent E.Turvey, it is stated as under:

"DNA is the genetic code found within every living cell.

With the exception of identical twins, we are all genetically unique, a product of generations of genetic shuffling making us truly individuals. Our genetic material is inherited from our parents - one half from our mother and one half from our father, whose parents passed on their genetic patterns, and so on up the line. Children of the same parents differ from one another because the DNA passed on from each parent is really a jumble of different combinations of genetic patterns such that no two children ;get exactly the same mix.

DNA is made up of four major "building blocks" called nucleotides. They are adenine, guanine, cytosine, and thymine, or simply A, G, C, and T. These letters join to one another like four different-coloured breads placed apparently randomly on a very, very long string. These patterns somehow account for the structure and function of our bodies. Like a computer code that looks mostly like gibberish to the untrained eye, the large majority of our DNA does not code for things we can physically identify such as hair color or diseases. It is within these vast nonsensical regions that are found discrete patterns that only differ somewhat from person to person and can be used for identification purposes."

In Forensic Science in Criminal Investigation and Trials by B.R.Sharma, the author states that:

"There was never doubt about the individuality of body materials even before the diversity of DNA molecule structure was discovered. Scientists had not been able to establish the individuality of material from a particular source. The body materials were extensively utilised for blood group substances, enzyme and isoenzyme systems. In some cases the possibility of a particular source of the material could be excluded but positive identity of the individual source always remained elusive. DNA profiling has changed the whole context. It provides positive linkage with the possible source and equally positive delinkage in the case of an innocent suspect."

xxx "DNA profiling is of immense help in the following type of problems:-

1. Linkage of the criminal, the victim, the weapon of offence, vehicle used in the crime, scene of occurrence, routes, etc. inter se through body materials exchanged or deposited as clue materials.

2. Identification of the culprit or the victim, through body materials including fallen or pulled-out hairs.
3. Identification of culprit from semen, semen stains or vaginal swabs in rape cases."

The author goes on to record that:

"The structure of DNA varies from individual to individual. Each individual consequently is unique-different from all others. In monozygotic twins DNA structure is the same because they come forth by the division of single fertilised egg. Monozygotic twins are genetically identical."

32. There are several methods of analyzing DNA samples developed by the scientists over a period of time. Short Tandem Repeat (STR) method is considered to be the latest and highly sophisticated method of analyzing the DNA samples. This was the method employed by the Forensic Science Laboratory, Gandhinagar in this case. The book titled, "Criminalistics An Introduction to Forensic Science by Richard Saferstein, briefly explains this method as under: "Short Tandem Repeats (STR) The latest method of DNA typing, short tandem repeat (STR) analysis, may just prove to be the most useful technique of all. Not only does this process have the potential for a higher discrimination than RFLP DNA typing, but it also reduces the amount of time to obtain results from a sample and requires a sample size smaller than that needed for the current RFLP methods. STRs are locations (loci) on the chromosome that contain short sequence elements that repeat themselves within the DNA molecule. They serve as helpful markers for identification because they are found in great abundance throughout the human genome. What is important to appreciate is that the repeating sequence is relatively short in length, 3 to 7 bases, and that the entire strand of an STR is also very short, less than 400 bases in length. This means that STRs are much less susceptible to degradation and may often be recovered from bodies or stains that have been subject to extreme decomposition. In order to understand the utility of STRs in forensic science, let's look at one commonly used STR known as HUMTH01. This DNA segment contains the repeating sequence A-A-T-G. There have been seven HUMTH01 variants identified in the human genome. These variants contain five through eleven repeats of A-A-T-G. Figure 13-11 illustrates two such HUMTH01 variants, one containing six repeats and the other containing eight repeats of A-A-T-G.

During a forensic examination, HUMTH01 is extracted from biological materials and amplified by PCR in the same manner that was described on pp.416-419. The ability to copy an STR means that extremely small amounts of the molecule can be detected and analyzed. Once the STRs have been copied or amplified, they are separated on an electrophoretic gel. By examining the distance the STR has migrated on the electrophoretic plate, one can determine the number of A-A-T-G repeats that exist in the STR. Every person has two STR types for HUMTH01, each inherited from one parent. Thus, for example, one may find in a semen stain HUMTH01 with six repeats and eight repeats. This combination of HUMTH01 is found in approximately 3.5 per cent of the population.

What makes STRs so attractive to forensic scientists is that there are hundreds of different types of STRs found in human genes. The more STRs one can characterize, the smaller will be the percentage of the population from which these STRs can emanate. This gives rise to the concept of multiplexing.

Using the technology of PCR, one can simultaneously extract and amplify a combination of different STRs. For example, one system on the commercial market is the STR Blue kit. This kit provides that necessary materials for the coamplification and detection of three STRs

- D3S1358, vWA, and FGS (triplexing). The design of the system ensures that the size of the STRs does not overlap, thereby allowing each marker to be viewed clearly on an electrophoretic gel (see Figure 13-12). The combination of these STRs typically produces a frequency of occurrence of about 1 to 5000. Used in conjunction with DQA1 and Polymarker, the combination of these methods provides an impressive frequency of occurrence of about 1 in 25,000,000!"

33. From the above literature, it can be seen that over a period, the technology of DNA testing has made great strides and achieved sophistication leading to results which can often times be used either for inclusion or exclusion of the accused. DNA of a person is considered unique to himself (except in cases of identical twins) and can be traced from smallest quantity of blood, saliva, semen, root of hair, skin, nail and such like. Subject, of course, to the laboratory analyzing the sample following the scientific protocols, the DNA result becomes absolutely unquestionable.

34. Let us now see how the courts have viewed the advancement in DNA technology. Section 53A of the Criminal Procedure Code was introduced by Amendment Act 25 of 2005 with effect from 25.3.2006. Sub-section (1) section 53A, provides that a when a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose. Consent of the accused thus in giving blood sample, etc. is no longer necessary. Sub-section (2) of section 53A provides that such medical practitioner conducting the examination shall without delay, examine such person and prepare a report of his examination giving various details including the description of the material taken from the person of the accused for DNA profiling. This provision came up for consideration before the Supreme Court in the case of Krishan Kumar Malik v. State of Haryana, 2011 Cri.L.J. 4274, in which it was observed as under:

"45. Now, after the incorporation of Section 53 (A) in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by learned counsel for the Respondent-State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences."

In the case of Raghuvir Dessai v. State, 2007 Cri.L.J. 829, learned Single Judge of the Bombay High Court observed as under:

"..... The clinching evidence has come from the Senior Scientific Officer Shri Sathian PW 15 who carried out the DNA test on the basis of the material forwarded to him and which was ;collected by

Dr.Sapeco/PW 5. He has confirmed that the accused is the contributor of the semen which was collected by Dr.Sapeco in the form of vaginal swab. DNA (Deoxyribonucleic acid) is found specially in cell nuclei which are the foundation of heredity. DNA is the genetic blue print for life and is virtually contained in every cell. NO two persons, except identical twins have ever had identical DNA. DNA testing can make a virtually positive identification when the two samples match. It exonerates the innocent and helps to convict the guilty (See page 249 of Jhala and Raju's Medical Jurisprudence Sixth Edition). The DNA testing hits the nail on the head of the accused and is the last and clinching piece of evidence which shows that it is the accused and the accused alone who committed the rape of the victim/PW11."

In the case of Sanjay Singh v. State of Delhi, 2007 Cri.L.J.964, a Division Bench of the Delhi High Court observed as under:

"Dr.A.K.Sharma has held that while conducting post- mortem on local physical examination of private parts, it was noticed that black, curly, non-matted pubic hair and hymen intact, no tearing present, admitting one finger only. He has also given his opinion that the deceased has not been subjected to sexual intercourse. However, it is the DNA test conducted on the vaginal swabs, vaginal slide and underwear of the deceased compared with the blood sample of the accused that the experts have come to the conclusion that there is sperm present in the vaginal swabs and the DNA of the sperm so found present, matches with DNA of the accused obtained from his blood sample."

xxxx "48. The next question that engages us is whether the DNA test conducted was proper? It is in evidence of Dr.Lalji that the method used and the test conducted in determining and arriving at the conclusion were done as per standard practice as also per scientific technology suitable for such tests. The trial Court has elaborately introduced its learning based on literature which, to a large extent, was never even put to the expert witness and even otherwise there is no positive evidence on record to show that the test so conducted by the experts were perverse and/or not in keeping with the standard scientific methodology. We may make useful reference to judgments of the Supreme Court in AIR 1954 SC28 : (1954 Cri LJ 257); Sundar Lal v. State of Madhya Pradesh, AIR 1957 SC 580 : (1957 Cri LJ 889); Bhagwan Das v. State of Rajasthan wherein it has been held by the Supreme Court that findings of an expert witness can not be set aside by a Court by making a reference to some literature/book without confronting the expert with them and directing his opinion on it. In another case decided by the Honble Supreme Court in AIR 1982 SC 1157 : (1982 Cri LJ 1243): Gambhir v. State of Maharashtra, it was held that the Court should not usurp the function of an expert by arriving at its own conclusions contrary to the one given by the expert witness. There has been great effort made by counsel for the accused to discredit the test conducted as such by referring to either possibility of contamination and/or with reference to snippets of replies given by the experts in cross-examination but we find that at no stage has any of the expert witness said that the tests conducted by them have given a wrong result or there is a possibility that the test so conducted by them would have given a wrong result. On the contrary, they have categorically ruled out any such possibility of contamination and/or erroneous results."

In the case of Thogorani v. State of Orissa, 2004 Cri. L.J. 4003, a Division Bench of the Orissa High Court observed as under:

"11. Before answering the above contentions raised by the learned counsel for opponent No.3 it would be apt to note that the DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at scene of crime. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict but also serves to exonerate. The sophisticated technology makes it possible to obtain conclusive results in case in which the previous testing had been inconclusive. Moreover, DNA sampling may also impinge on familial privacy where information obtained from one person's sample provides information regarding his or her relatives."

In the case of Pantangi Balarama Venkata Ganesh v. State of A.P. 2003 Cri.L.J. 4508, a Division Bench of the Andhra Pradesh High Court described DNA as a perfect science and observed as under:

"Thus, the evidence of DNA expert is admissible in evidence as it is a perfect science. In the cross-examination P.W.46 has deposed as under:

If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 million world population.

It means that DNA test gives the perfect identity. It is very advanced science."

In the case of Sajeera v. P.K.Salim, 2000 Cri. L. J. 1208, learned Single Judge of the Kerala High Court observed that DNA fingerprinting test has been much advanced and resorted by the courts of law to resolve the dispute regarding paternity of the child. It was observed as under:

"15. It has been held in several cases that blood test is an important piece of evidence to determine the paternity of the child. Though by a blood test it cannot positively establish the paternity of the child, it can certainly exclude certain individual as the father of the child. Therefore, while the negative finding in a blood test is definite, the positive finding only indicates a possibility. Now the DNA finger-printing test has been much advanced and resorted to by the Courts of law to resolve the dispute regarding paternity of the child. It is true that without the consent of the person blood test cannot be conducted and there is no law in India enabling the Court to compel any person to undergo blood test as available in England."

35. From the above, it can be seen that several courts in India over a period of time have accepted DNA analysis as totally reliable, of course, as long as, the laboratories employ sufficient skill and care in doing so. DNA analysis is employed by various countries for criminal investigation and prosecution. Various countries have created data banks of DNA profile of the persons who are already convicted which can be matched with DNA profile of the samples collected from crime scene. We are aware that creating such data-base has several legal and constitutional issues. We are, however, in the present case, neither required nor called upon to enter such arena. We are only trying to demonstrate effectiveness of the DNA technology and that when properly done its results are infallible."

28. In our considered view, in the present scenario, when the crime against women have been increasing alarmingly and threatening the societal morality and sanctity, extensive use of biological evidence is made in crime investigations. DNA evidence has assumed great significance and legal recognition. In fact, DNA Profiling Bill, 2007 is pending before Parliament. The fact that such a bill has been introduced itself shows what is the need and importance of DNA evidence. Scientific investigations are the need of the hour and must be carried out. DNA test is a scientific test and its accuracy is 99.99 percent and as such, this must be used as evidence in sexual assault and violent crime cases."

83. In the light of above discussions and analogy, this court does not find any merit in the submissions of Mr. Biswas, learned senior counsel appearing on behalf of the appellant. In ultimate analysis, it can safely be concluded that the result of a genuine DNA test is found to be scientifically accurate; in that case, the DNA test and its report shall prevail over the Biological/Serological test.

(emphasis supplied) SENTENCE (T. AMARNATH GOUD,J)

84. In the light of the above discussion we are of the view that the impugned judgment dated 28.08.2019 and order of conviction and sentence dated 31.08.2019 passed by the learned Special Judge(POCSO), Dharmanagar in case No. Spl.(POCSO) 09 of 2017 is just and proper and thus is hereby confirmed and upheld.

85. With the above observation and direction, this instant appeal is dismissed and as a sequel, miscellaneous applications pending, if any, shall stand closed.

Send down the LCRs.

(ARINDAM LODH,J)

(T. AMARNATH GOUD,J)

suhanjit