



**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO(S). 1667-1668 OF 2021

IRFAN ALIAS BHAYU MEVATI **...APPELLANT(S)**

VERSUS

STATE OF MADHYA PRADESH **....RESPONDENT(S)**

WITH

CRIMINAL APPEAL NO(S). 220 OF 2022

ORDER

Mehta, J.

1. These appeals take exception to the judgment dated 9th September, 2021, rendered by the Division Bench of High Court of Madhya Pradesh at Indore,¹ whereby the criminal appeals² filed by the appellants Irfan @ Bhayu Mevati³ and Asif Mevati⁴ were dismissed, and the criminal reference⁵ under Section 366 of the

¹ Hereinafter referred to as 'High Court'.

² Criminal Appeal No. 7215 of 2018 was filed by Irfan @ Bhayu Mevati, and Criminal Appeal No. 7269 of 2018 was filed by Asif Mevati.

³ Hereinafter referred to as 'Irfan'.

⁴ Hereinafter referred to as 'Asif'.

⁵ Criminal Reference No. 14 of 2018.

Code of Criminal Procedure, 1973⁶ instituted upon being forwarded by the 2nd Additional Session Judge/Special Judge, POCSO Act, Mandsaur, Madhya Pradesh⁷ was allowed and the death penalty awarded to the appellants was confirmed.

2. The appellants were tried by the trial Court in Sessions Case No. 141 of 2018 for the offences punishable under Sections 363, 366-A, 376(2)(m), 307 of the Indian Penal Code, 1860⁸, Section 376(DB) of the Criminal Law(Amendment) Ordinance, 2018, and under Section 5(g), 5(j)(iii)(m) and Section 5(r) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012⁹. The trial Court, *vide* judgment dated 21st August, 2018, convicted the appellants and sentenced them as below: -

Conviction		Sentence	
Sections & Act	Imprisonment	Fine Amount	Imprisonment in lieu of fine
363 IPC	7 years	Rs. 10,000/-	6 months
366-A IPC	7 years	Rs. 10,000/-	6 months
307 IPC (in respect of appellant Irfan)	L.I.	Rs. 10,000/-	6 months
307/34 IPC (in respect of appellant Asif)	L.I.	Rs. 10,000/-	6 months

⁶ Hereinafter, referred to as 'CrPC'.

⁷ Hereinafter referred to as 'trial Court'.

⁸ Hereinafter referred to as 'IPC'.

⁹ Hereinafter referred to as 'POCSO'.

376(DB) Criminal Law (Amendment) Ordinance, 2018	To be Hanged by the neck till death		
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3. Being aggrieved by their conviction and sentence awarded, the appellants preferred separate criminal appeals¹⁰ before the High Court. Reference was forwarded by the trial Court to the High Court for confirmation of the capital punishment awarded to the accused under Section 366 CrPC. The criminal appeals preferred by the appellants and the reference made by the trial Court were decided as above *vide* common judgment dated 9th September, 2021, which is the subject matter of challenge in these appeals by special leave.

4. The prosecution story, in a nutshell, is that on 26th June, 2018, Smt. Kamlabai(PW-7), lodged an FIR¹¹ by alleging *inter alia* that her granddaughter¹², who was studying in the 3rd standard had gone missing from the school premises after the classes. Based on the said report, a police case for the offence punishable under Section 363 IPC was registered and the investigation was commenced. On the next day, i.e., on 27th June, 2018, the

¹⁰ Refer, Note 2

¹¹ Case No. 327 of 2018.

¹² Hereinafter, referred to as ‘child victim’.

Investigating Agency received information that the child victim had been seen in an injured condition by witness Karan(PW-10). Thereupon, the police rushed to the spot and took the child victim to the Civil Hospital at Mandsaur from where, looking at her serious condition, she was further referred to M.Y. Hospital at Indore.

5. The child victim was provided treatment and was operated upon. On inquiry being made from her, she narrated the story of her plight to the police officials alleging *inter alia* that on the day of the incident, after her school was over, she was waiting outside, when suddenly a person came and forcibly put a sweet(*ladoo*) in her mouth. Thereafter, the assailant forcibly took her to a secluded spot where he called another person. She was forcibly undressed and was subjected to forcible sexual assault by the person who gave her the sweet, while the other person caught hold of her hands. The police started searching for the alleged miscreants. Incriminating articles such as the underwear of the child victim, rocks, a beer bottle, a school bag, shoes, blood-stained soil, and normal soil were collected from the spot, sealed, and sent to the FSL¹³. Enquiries were made from the nearby shop keepers and

¹³ Forensic Science Laboratory

CCTV footage from three shops adjoining the place of the incident was collected. Upon analyzing the CCTV footage, certain suspicious movements were noticed. The persons known to the victim and her relatives were shown the CCTV footage and they identified the victim and the appellants in these footages.

6. The appellants were apprehended, and a Test Identification Parade (TIP) was carried out in the jail premises during which, PW-10 the witnesses who had allegedly seen the victim being taken away by the assailant(s), identified them as the miscreants. The child victim was also shown the photo albums containing the photographs of the accused along with photos of persons bearing similarity in appearance and she correctly identified both the accused (appellants herein) from the albums as the persons who had committed the ghastly crime upon her. Various specimens such as oral swab, vaginal slides, vulval pad, etc. were drawn from the child victim by the Medical Officers and were handed over to the Investigating Officer in a sealed condition, who, in turn, dispatched these articles to the FSL for DNA analysis.

7. The appellants were interrogated, and they suffered separate disclosure statements leading to the recovery of clothes worn by them at the time of the incident, and the vehicle used during the

commission of the crime. Both the accused were subjected to medical examination and the blood samples, semen slides, and hair including pubic hair, nails, etc. were collected. The appellant Irfan was found to be having marks of scratches and teeth-bite on his body and his private organ also bore redness which was considered to be an indicator of forcible intercourse on his part.

8. The medical examination of the victim revealed that not only she had been subjected to sexual intercourse, but in addition thereto, she was also subjected to serious assault leading to injuries to her throat and private parts, and one of her eyes had bulged out due to compression leading to compromised vision. The perineum and anus were found to be pierced, and she had to be surgically operated for the purpose of creating a passage in her abdomen in order to facilitate defecation.

9. The investigation was completed and a chargesheet was filed against the appellants. Charges were framed against them for the offences punishable under aforesaid sections.¹⁴ The appellants abjured their guilt and claimed to be innocent. 37 witnesses were examined, and various documents were exhibited by the prosecution to bring home the guilt of the appellants. The trial

¹⁴ Refer, Para 2.

Court questioned the appellants under Section 313 CrPC and confronted them with the allegations appearing in the prosecution case which they denied and claimed to be innocent. No evidence was led in defence.

10. Learned trial Court, *vide* judgment dated 21st August, 2018, convicted the appellants and sentenced them as above¹⁵. The appellants assailed their conviction and sentence by filing separate appeals¹⁶ before the High Court. Since the appellants were awarded capital punishment, the trial Court made a reference to the High Court for confirmation of death penalty under Section 366 CrPC.

11. *Vide* common judgment dated 9th September, 2021, the High Court dismissed the criminal appeals filed by the appellants and the reference forwarded by the trial Court was answered in the affirmative, confirming the capital punishment awarded to the appellants, which is assailed in these appeals by special leave.

12. The appellants have preferred an I.A. No. 98928 of 2022 under Section 391 CrPC read with Article 142 of the Constitution of India seeking complete laboratory documents and for

¹⁵ Refer, Para 2.

¹⁶ Refer, Note 2.

examination of expert witnesses. The prayer made in the application reads: -

“A. Direct Ld. 2nd ADJ/ Special Judge POCSO, Mandsaur, to summon and allow examination in chief, as well as allow cross-examination by counsel for the Applicant, of Dr. Anil Kumar Singh, Scientific Officer, and Assistant Chemical Examiner, Govt of Madhya Pradesh, FSL Sagar who would be competent to testify to the methodology, analysis, and conclusions of the DNA Report;

B. Direct Ld. 2nd ADJ/ Special Judge POCSO, Mandsaur, to allow such cross-examination by counsel for the Applicant, by calling for and with the aid of the complete laboratory documentation in relation to the report dated 11.07.2018 of FSL Sagar, bearing no. /DNA/1078, 1087, and 1132 /2018 filed in ST 88 of 2018 before the Ld. 2nd ADJ/ Special Judge POCSO, Mandsaur, including but not limited to copies of the following documents in the present case:

- i.** All laboratory documentation including worksheets, bench notes, and equipment log sheets related to the tests conducted and methods used for extraction, quantification, amplification, and genotyping for all the articles received;
- ii.** Details and complete laboratory documentation of tests conducted and results of the tests;
- iii.** Electropherograms for DNA profiles and electronic raw data (.fsa) obtained from all articles received, allelic ladders, and control samples used;
- iv.** Working procedure manuals including DNA manual and Serology manual used in examination of all exhibits received;
- v.** Details of kits used for DNA extraction, quantification, amplification, and genotyping in the case along with manuals of such kits; and
- vi.** Complete documentation of the chain of custody of all the Articles sent for examination to FSL Sagar, with details of the packaging seals and sample seals used.

C. Direct the trial Court to examine the Applicant under Section 313 CrPC in respect of such additional evidence.”

The grounds set out in the application are reproduced hereinbelow for the sake of ready reference: -

“A. APPELLANT DID NOT HAVE AN ADEQUATE OPPORTUNITY TO CHALLENGE THE DNA REPORT

6. As per the Order Sheet of the Ld. Trial Court, the chargesheet in the present case was filed on 10.07.2018. On such date, an advocate from the District Legal Services Authority was appointed for the Appellant; however, the said lawyer was not present in court. The chargesheet was filed while the DNA report was still awaited. The DNA report dated 11.07.2018 was submitted in court only on 19.07.2018. Thereafter, the 37 prosecution witnesses were examined on 8 days by 8.08.2018. The Appellant's examination under Section 313 CrPC was done one day later on 9.08.2018 and the matter was listed for final arguments on 10.08.2018.

7. The DNA report, being of a scientific nature, requires careful study and analysis. Given the above timeline, the Appellant was not afforded adequate time during the trial process to meaningfully understand and challenge the said report. The Trial Court did not call for any underlying materials or for examination of the DNA expert in order to understand the report in accordance with Section 45 of the Indian Evidence Act, as elaborated below. This is despite the prima facie errors in the report mentioned in part B below. Such denial of an adequate and meaningful opportunity to challenge the DNA report has resulted in violation of the Appellant's right to fair trial under Article 21 of the Constitution.

B. SUBSTANTIVE ISSUES WITH THE DNA REPORT WHICH MAKE THE REPORT UNRELIABLE

8. A prima facie examination of the DNA evidence reveals several discrepancies which raise doubts regarding the integrity of the samples, and the accuracy and reliability of the DNA examination. A brief description of these discrepancies is as follows:

i. **Discrepancy in the DNA profiles generated from vulval pad (item R) and evidence samples prepared from the same source:** As per the DNA Report (Ex. P157), a Y-STR DNA profile generated from the vulval pad (item R) is consistent with the Y-STR profile of the Applicant. However, other genital samples of the Prosecutrix prepared from the same and similar sources such as the vaginal slide (item O), smear tube (item Q), vulval smear (item U) did not contain any male Y-STR profile, which raises doubts regarding the integrity of the vulval pad (item R). This is particularly important since the vaginal slide (item O) was the first sample collected from the Prosecutrix after she was

brought to Civil Hospital Mandsaur on 27.06.18. After 6 days on 02.07.2019, the smear tube (item Q), vulval smear (item U), and the vulval pad (item R) were collected at MY Hospital Indore. It is also important to note that Directorate of Forensic Science Services (DFSS) MHA guidelines for medical practitioners note that vulval swabs should be taken before the collection of vaginal or cervical swabs in order to avoid contamination of vaginal samples from the DNA that may be present on the outer parts such as labia majora. [DFSS MHA Guidelines for Forensic Medical Examination in Sexual Assault Cases, 2018, pg 8] Despite ignoring that settled procedure, the presence of male DNA in the vulval pad (item R) and not the vaginal slide (item O) gains significance.

ii. Presence of Male DNA in the vulval pad (item R) and nails (item T) despite extensive medical procedures and delay in collection: The vulval pad (item R) and nails (item T) were collected along with smear tube (item Q), vulval smear (item U) on 02.07 .18, after the Prosecutrix had been admitted in the hospital for 6 days (Ex P116, Pg. 239 Hindi TCR). During this period, the Prosecutrix had undergone extensive medical procedures and treatment, including on her vaginal, perineal and rectal areas (see Ex. P78 Pg. 188, Ex. 86 Pg. 199, Ex. 97 Pg. 213, Ex. P108 Pg. 228, Ex. P111 Pg. 231, Ex. 113 Pg. 234 Hindi TCR). In such a scenario, the finding of viable male Y-STR DNA in the vulval pad collected 7 days after the sexual assault (approximately 163 hours after the alleged time of the incident) would be impossible. For this, reference may be made to established scientific protocols and literature, which state that DNA profile cannot be obtained from vaginal samples 96 hours after sexual assault. [Ministry of Health & Family Welfare, Guidelines & Protocols Medico-legal care for survivors/victims for sexual violence, 2014, pgs 29, 59; Gringas et. al. Biological and DNA evidence in 1000 sexual assault cases, Forensic Science International: Genetics Supplement Series 2 (2009) 138-140] Further, it is important to note that a set of samples, including nails, pad, hair combings, grass and mud samples, and swabs taken from labia and posterior fornix were collected from the Prosecutrix on 27.06.2018 at MY Hospital Indore (Ex.85, Pg. 198 Hindi TCR). No seizure memo was prepared after the collection of these samples and the chain of custody of these samples after collection by the doctors is unknown. Despite that, since the Prosecutrix's nails were collected on 27.06.2018 as per the medical record, the finding of Y-STR DNA on the second set of nail clippings collected after 6 days on 02.07.2018 would be impossible.

iii. Issues in the chain of custody of vulval pad (item R) which warrant further examination of DNA profiling results:

As per the medical records at MY Hospital Indore (Ex. 116, Pg. 239-240 Hindi TCR), the vulval pad (item R) was collected along with 4 swabs (from the perinium, vagina, preanal and anal), 2 smears, blood sample, hair and nail clippings on 02.07.2018 at 1 PM and handed over to PC Archana Dodiya (760). However, as per the seizure memo (Ex. 181, Pg. 348 Hindi TCR) and the forwarding memo from the police to SFSL Sagar (Ex. 154), these items were seized on 29.06.2018. It is important to note that no samples have been collected from the Prosecutrix on 29.06.2018. Therefore, the identity and custody of the vulval pad (item R) is dubious.

iv. Doubts over identity of pubic hair (item 1): Item I is alleged to be the pubic hair of the Applicant from which a mixed DNA profile has been generated that is reported to include the DNA profile of the Prosecutrix. However, the mixed DNA profile excludes the Applicant's DNA, on 5 out of 24 genetic markers or loci (THOJ, D22S1045, D10S1248, Y-Indel, DYS391) (Pg. 302 Hindi TCR), which raises doubts regarding the identity of the pubic hair. It is important to note that the DNA report fails to mention this exclusion for the Applicant's DNA in item I and incorrectly refers to Item I as pubic hair of the Applicant in the findings and opinion.

v. Absence of Applicant's DNA from clothes (Pant item K, Shirt item L and Baniyan item N): It is the prosecution's case that items K, Land N are clothes worn by the Applicant during the commission of the offence. As per the DNA report, the Pant item K and Baniyan item N only have a single source DNA profile which is consistent with the DNA of the Prosecutrix. Further, item L reveals a mixed DNA profile which is also reported as containing the DNA of the Prosecutrix. However, the Applicant is excluded from this mixed DNA profile on 9 out of 24 loci (D8S1179, D19S433, THO1, D22S1045, D13S317, D7S820, D10S1248, D1S1656, D12S391) (Pg. 302 Hindi TCR). Therefore, the Applicant's DNA is not found on any of the clothing items attributed to him which raises a serious doubt since a person's clothes may contain different sources of their DNA, including skin, saliva, sweat, semen, blood etc.

vi. Presence of unknown alleles in DNA profiles generated from hair found at crime scene (item Y) and Applicant's shirt (item L): The mixed DNA profile obtained from the shirt (item L) contains unknown alleles on 5 out of 24 loci (CSF1PO, D21S11, FGA, SE33, D2S1338) which are not attributable either

to the Prosecutrix or the Applicant (Pg. 302 Hindi TCR). Further, the mixed Y-STR DNA profile obtained from the hair found at the crime scene (item Y) contains an unknown allele on one locus (DYS635) (Pg. 299 Hindi TCR). Since both these samples show the presence of unknown alleles, it is more important to review the interpretation of the mixed DNA profile by reviewing the electronic raw data and the electropherograms. As explained in the section below, interpretation of DNA mixtures requires consideration of the number of contributors, the peak heights of the alleles as seen in the electropherograms and the peak height ratios to consider the allele pairs (or genotype) for ascertaining whether an individual's DNA is present within the mixture. Mere finding of individual alleles without identifying the genotypes is scientifically invalid. For example, if alleles A, B, C, D are present in a DNA mixture and the suspect has alleles C and D in their profile, it is incorrect to conclude that the suspect's DNA is present in the DNA mixture. This is because with these alleles, 10 possible genotypes are possible i.e. AA, BB, CC DD, AB, AC, AD, BC, BD, CD. In such a scenario, it is possible that genotype CD may not be present in the mixture although the individual alleles C and D are reported in the mixture. Further since unknown alleles have been found in DNA profiles generated from hair found at crime scene (item Y) and Applicant's shirt (item L), equipment log sheets are required to check for contamination, to determine which samples were run with the aforesaid samples.

In the absence of any interpretational data in the DNA report, the finding of unknown alleles in hair found at the crime scene (item Y) and the Applicant's shirt (item L) raise more concerns regarding the interpretation of the DNA mixtures to conclude the presence of the Applicant's and the Prosecutrix's DNA in these items, respectively.

vii. **Presence of off-ladder allele in multiple samples:** As per the allelic tables in the DNA report, the autosomal STR profiles for six samples shows an off-ladder peak on locus SE33 (Pg. 300 and 304, Hindi TCR). The samples include the hair found at the crime scene (item Y), and blood sample (item F), underwear (item A), pubic hair (item B), nail (item Z-4) and baniyan (item Z-7) collected from co-accused Asif. As per established scientific protocols, including the DFSS MHA Working Procedures Manual for Forensic DNA Profiling, an off-ladder peak may either be a true allele or an artefact created during the DNA profiling process. To determine the nature of an OL allele, re-amplification of the samples would be required,

particularly if the peak is observed in a DNA mixture such as the hair found at the crime scene (item Y). Interpretation of DNA profiles without determining the nature of the OL peak cannot be done. Further, as per the DFSS manual, documentation of an OL allele requires the electropherogram with both the sample and associated allelic ladder for the locus to be provided. (DFSS MHA, Working Procedures Manual Forensic DNA Testing, 2019, pg 131-132)

Since multiple samples have displayed an OL allele, it is essential to check if the procedures for interpretation of an OL allele have been followed in this case. The identity of this OL allele directly impacts the interpretation and genotyping of the other allelic peaks that present in these samples. Without such information, the interpretation and conclusions regarding these samples cannot be relied upon.

A. Lack of serological examination to identify the body fluid in item W: As per the forwarding letter (Ex. PI 54, Pg. 602 Hindi TCR), the soil seized from the crime scene (item W) was forwarded to the SFSL Sagar as "blood stained soil". The DNA Report refers to this sample as blood stained soil from the crime scene and concludes that the Prosecutrix's DNA is found in that sample. However, it must be noted that no serological examination has been done to conclude that this sample contains blood. Further, even assuming that the DNA profile generated is correctly reported in the allelic table, DNA examination cannot determine the biological material from which the DNA is sourced.

B. THE DNA REPORT (EX. 157) IS INCOMPLETE AND CANNOT BE RELIED UPON IN THE ABSENCE OF UNDERLYING REASONS

9. The DNA Report does not contain the complete data and materials relied upon during the DNA examination, which form the basis of the conclusion drawn in the report. It is pertinent to note that without examining these materials, neither this Hon'ble Court nor the Applicant can verify the accuracy and reliability of the DNA evidence. As per settled law, under Section 45 of the Indian Evidence Act, it is the duty of the expert to provide the "necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case." (State of Himachal Pradesh v Jai Lal, (1999) 7 SCC 280, para 18, Ramesh Chandra Agarwal v. Regency Hospital Ltd. (2009) 9 sec 709, para 20)

10. The DNA report only contains the allelic tables followed by the conclusions of the tests and analysis conducted. Crucial underlying data and materials, such as details of the amount of DNA extracted and amplified for each sample, quantification kits used, use of positive and negative controls during different steps of DNA profiling, use of allelic ladders for interpretation, the electronic raw data and electropherogram generated during the electrophoresis process which were interpreted to prepare the allelic tables, the method and thresholds for interpretation of the DNA samples, and the statistical analysis of the samples that have matched have not been provided to the Applicant.

11. There are glaring lapses in the chain of custody documentation with respect to crucial reference and evidence samples which cast a doubt over the integrity of the samples and require further examination of laboratory records. For instance, Article Z1 and Z2 i.e. the blood sample (used for generating reference DNA profile of the Prosecutrix) and oral swab of the Prosecutrix were sent to SFSL Sagar with letter bearing no. PO/Mand/FSL/177-A/20 18 dated 02.07.2018 (Ex .155, Pg. 292 Hindi TCR). As per the evidence of PW33 SI Vijay Purohit (Pg. 454, Hindi TCR), he deposited these articles to FSL Sagar. However, the receipt issued by SFSL Sagar dated 03.07.2018 (Ex Pl61, Pg. 311 Hindi TCR) mentions that the articles were brought by Constable Lalit (not examined).

12. Further, the Applicant has never been given access to these documents and therefore, has been denied an adequate opportunity to challenge the evidence adduced against him. The lack of these documents gains further significance in this case as the DNA report has been admitted under Section 293 CrPC (Pg.10 297 Hindi TCR) and the evidence of the DNA experts who have signed the report, Dr Kamlesh Kaitholia Scientific Officer, Dr. Praveesh Bhati Scientific Officer and Dr Anil Kumar Singh Scientific Officer & Assistant Chemical Examiner, have not been recorded. This has further limited the scope of the scientific and technical examination of the DNA evidence in the present case. In several decisions, this Hon'ble Court has reiterated the need to ensure quality control of the samples and the testing methods used as part of the DNA examination. Given the sensitive nature of DNA which makes it susceptible to issues of contamination and DNA transfer, this Court has also stressed on the need to ensure that possibility of contamination is eliminated (Anil v. State of Maharashtra (2014) 4 SCC 69 para 53, Manoj v. State of Madhya Pradesh, Crl. Appeal 248-250 of 2015 decided on 20.05.2022 paras 139-

141, Pattu Rajan v. State of Tamil Nadu (2019) 4 SCC 771 para 52)

13. The non-supply of the complete laboratory documentation violates the Applicant's right to an adequate and meaningful opportunity to challenge the DNA evidence adduced against him, resulting in violation of his right to fair trial under Article 21 of the Constitution. As explained above, without these documents, the scientific accuracy and reliability of DNA evidence cannot be ascertained. Furthermore, the absence of a request on the Applicant's part to supply these documents at an earlier stage cannot have the effect of foreclosing a right of the accused. [Manu Sharma v. State (NCT of Delhi) 2010 6 SCC 1 (paras 220-221), V.K. Sasikala v. State (2012) 9 SCC 771 (paras 20-21)]

C. THE DNA REPORT (EX. 157) HAS NOT BEEN PROVED BY THE DNA EXPERT

14. The DNA Report has been signed by Dr Kamlesh Kaitholia Scientific Officer, Dr. Praveesh Bhati Scientific Officer and Dr Anil Kumar Singh Scientific Officer & Assistant Chemical Examiner (Pg. 305 Hindi TCR). However, none of these experts were examined in order to prove the contents or the conclusions of the DNA report. In fact, the DNA report was proven by PW31 Rakesh Mukati, the Superintendent of Police, who merely mentions that the DNA report was received via letter bearing serial no. FSL/DNA/1078, 1087 and 1132 /2018 dated 11.07.2018 and was sent by PS City Kotwali for the purpose of attaching it to the case documents (PW31, Pg. 447 Hindi TCR). Not involved in the process of DNA examination, PW31 Rakesh Mukati does not testify to the methodology used during the different steps of the DNA profiling process or the basis for the interpretation of the DNA profiles. Further, given the absence of the DNA experts who conducted the examination, the Applicant is prohibited from cross-examining on the scientific and technical aspects of DNA profiling, which go to the foundation of the DNA evidence.

15. It is humbly submitted that errors in the DNA examination mentioned above have been overlooked by the lower courts and the DNA evidence has been incorrectly considered. Contrary to the correct scientific and legal position, the Ld. Trial Court in paragraph 62 of its decision even mentioned that DNA profile detection is an "advanced and precise science". Hence, the Ld. Trial Court did not question the conclusions of the DNA Report and took the opinions as facts.

16. That in order to effectively challenge the conclusions of the DNA Report, the Applicant seeks a copy of all underlying documents, including but not limited to, the worksheets for DNA extraction, quantification, amplification and electrophoresis for all exhibits received in the present case, electropherograms for DNA profiles generated in respect of all articles received, allelic ladders and control samples, details of all the tests conducted as well as their results, DNA working procedure manual used in examination of all exhibits received in the present case, complete chain of custody documentation for all Articles received, with details of the packaging, seals and sample seals used, in respect of all forensic DNA reports generated by FSL Sagar.

17. The Applicant further seeks that the Ld. Trial Court be directed to summon and take on record the testimony of Dr Anil Kumar Singh or any such person competent to testify to the methodology adopted, the manner in which DNA profiles were extracted, tests conducted, the chain of custody of articles within FSL Sagar, analysis of the DNA, and basis of the conclusions in the DNA Report.”

Notice was issued on this application on 10th August, 2022 and the State has filed a response to the same with a categorical plea that the State FSL has preserved the documents for 10 years and they are available with the State FSL, Sagar, Madhya Pradesh. It is further stated that the scientific officers are still in service of State FSL, but they have been transferred to different units and can be called upon as and when this Court deems it necessary to summon them so as to substantiate the exhibited reports.

13. Learned counsel appearing for the appellants vehemently and fervently contended that the denial of the permission to examine the

scientific experts with reference to the documents on which, the evidence of DNA Experts and the FSL Experts was based, has caused grave prejudice to the appellants and goes to the very root of the case.

14. He submitted that the DNA report signed by the scientific experts forms a critical piece of evidence, which has been relied upon by the trial Court and High Court while convicting the appellants. Therefore, the non-examination of these scientific experts has led to gross miscarriage of justice vitiating the entire trial.

15. Learned counsel urged that the DNA report has been signed by Dr. Anil Kumar Singh, Scientific Officer and Assistant Chemical Examiner, Dr. Kamlesh Kaitholia, Scientific Officer, and Dr. Pravesh Bhatti, Scientific Officer. However, none of these Experts were examined to prove the contents/conclusions of the DNA report (Exhibit - 157) which was proved during the evidence of Rakesh Mukati, Superintendent of Police (PW-31). It was submitted that the mere exhibiting of the DNA report during the deposition of the Police Officer would not satisfy the essential requirement to prove the methodology used during the different steps of DNA profiling or the basis of the interpretation of DNA profiling.

16. Learned counsel further pointed out that even the allele number entered into the table, was corrected subsequently after comparison from the Electropherogram, without giving any opportunity to the accused to

rebut the same. He urged that the State Government has admitted in its reply that there was a typographical error in the allele number, which was corrected at a later stage. He thus, urged that the accused have suffered grave prejudice on account of the failure of the prosecution to provide the fundamental material on which, the DNA report was based. It was also contended that the failure to examine the experts in evidence has led to a miscarriage of justice.

17. He submitted that even the relevant questions regarding the DNA report were not put to the accused persons (appellants herein) when their statements were recorded under Section 313 CrPC, which has caused them grave prejudice. He placed reliance on the judgment of this Court in the case of **Anokhilal v. State of Madhya Pradesh**¹⁷ and urged that the application deserves acceptance and the scientific experts be summoned and the accused be allowed to cross-examine these witnesses with reference to the complete records including the link evidence so that they can be provided a proper opportunity to defend themselves, more particularly as they face the daunting prospect of death penalty.

18. Learned counsel for the State has filed a detailed reply to the application filed by the accused under Section 391 read with Article 142 of the Constitution of India. It has been asserted in the reply that the

¹⁷ (2019) 20 SCC 196

discrepancy in the allele number entered into the table was simply a typographical error and thus, was *bona fide* corrected after comparison with the Electropherogram. It was further submitted that the trial Court acted in consonance with the legislative mandate of the Criminal Law Amendment Act, 2018 which requires that a trial for the offence under Section 376(DB) IPC must be completed in a time-bound manner and thus, no fault can be found in the procedure of conducting trial.

19. Learned counsel for the State urged that there is absolutely no necessity to examine the scientific experts and that the exhibiting of the DNA report under Section 293 CrPC is sufficient compliance of the statutory mandate. The examination of the expert(s) would have been a mere formality thereby, delaying the trial. Contending so, he implored the Court to dismiss the application.

20. Learned standing counsel appearing for the State was, however, not in a position to dispute the fact that the DNA report was formally exhibited in the evidence of the Superintendent of Police (PW-31) and none of the scientific experts who conducted the DNA profiling procedure, prepared and issued the report, were examined during trial so as to testify about the methodology used during the different steps of the DNA profiling or the basis for the interpretation thereof.

21. We have given our thoughtful consideration to the submissions advanced by the parties and have perused the material available on record.

22. It is an admitted position that the DNA profiling report (Exhibit-157) was formally exhibited by the Superintendent of Police(PW-31) in his evidence. None of the scientific experts involved in the process of conducting the DNA profiling examination and issuing the report have been examined by the prosecution.

23. The DNA profiling report is a document on which the entire fulcrum of the prosecution case is based. The defence has claimed grave prejudice on account of non-examination of these scientific witnesses and the non-production of the experts in evidence, thereby creating a grave doubt on the probative value of the report.

24. The aspect concerning evidentiary value of DNA report has been explained by this Court in ***Rahul v. State of Delhi, Ministry of Home Affairs***¹⁸, wherein it was held as under: -

"**36.** The learned Amicus Curiae has also assailed the forensic evidence i.e. the report regarding the DNA profiling dated 18-4-2012 (Ext. P-23/1) giving incriminating findings. She vehemently submitted that apart from the fact that the collection of the samples sent for examination itself was very doubtful, the said forensic evidence was neither scientifically nor legally proved and could not have been used as a circumstance against the appellant-accused. **The Court finds substance in the said submissions made by the Amicus Curiae. The DNA evidence is in the nature of opinion**

¹⁸ (2023) 1 SCC 83

evidence as envisaged under Section 45 and like any other opinion evidence, its probative value varies from case to case.

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

(emphasis supplied)

25. This Court in ***Zahira Habibulla H. Sheikh v. State of Gujarat***¹⁹ has emphasized that the object of the criminal trial is to search for the truth and the trial is not about over technicalities and must be conducted in such a manner as will protect the innocent and punish the guilty. The relevant extract is as follows:

"38. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such

¹⁹ (2004) 4 SCC 158

rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence. oral and circumstantial, and not by an isolated scrutiny.

39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored, and partisan trial.

40. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.”

26. The controversy in question is squarely covered by the decision of this Court in **Anokhilal**(*supra*), wherein, this Court remanded the matter to the trial Court for *de-novo* trial, considering the fact that the entire trial was completed in a period of less than one month and that the DNA report was received almost at the fag end of the matter, and after such receipt, though technically an opportunity was given to the accused, the issue on the point was concluded the very same day. The relevant extract is as under:

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

.....

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

29. We, therefore, have no hesitation in setting aside the judgments of conviction and orders of sentence passed by the trial court and the High Court against the appellant and directing de novo consideration. It shall be open to the learned counsel representing the appellant in the trial court to make any submissions touching upon the issues (i) whether the charges framed by the trial court are required to be amended or not; (ii) whether any of the prosecution witnesses need to be recalled for further cross-examination; and (iii) whether any expert evidence is required to be led in response to the FSL report and DNA report. The matter shall, thereafter, be considered on the basis of available material on record in accordance with law.”

27. This Court in **Anokhilal(supra)**, has further provided certain norms to remove the technical infirmities in Para 31 of the judgment, which reads as under:-

“31. Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:

31.1. In all cases where there is a possibility of life sentence or death sentence, learned advocates who have put in minimum of 10 years' practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.

31.2. In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.

31.3. Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard-and-fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.

31.4. Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have

meetings and discussions with the accused concerned. Such interactions may prove to be helpful as was noticed in Imtiyaz Ramzan Khan.”

28. Further, this Court in ***Naveen @ Ajay v. State of Madhya Pradesh***²⁰, wherein the accused was never asked as to whether he admits the documents, as required under Section 294 CrPC and neither the scientific experts were called to prove the reports, remanded the matter to the trial Court for *de-novo* trial holding that no proper opportunity was granted to the accused therein to defend himself. The relevant extract from this judgment is as under:-

“8.It is significant to note that the FSL report, Viscera report and DNA report were not submitted along with the charge-sheet. The same were presented before the Trial Court on 04.05.2018. The accused was never asked as to whether he admits the documents, as required under Section 294 of Cr. P.C.. Neither any witnesses were called to prove these reports. After the prosecution case was closed on 08.05.2018, the accused examination was conducted on the very next day i.e. on 09.05.2018 and thereafter on the next day i.e. on 10.05.2018, the case was fixed for examination of defence witness.

It requires special notice that the accused was in jail and was not defended by a counsel of his choice but by a legal aid counsel. He was not in a position to present the witness himself, yet he was directed to keep his witnesses present on the next day i.e. on 10.05.2018. On this date, he could not produce his witnesses, therefore, his defence was closed, and the case was posted for final arguments after recess.

22. In the case at hand, the prosecution is based on circumstantial evidence in which the prosecution has to prove each link in the chain of circumstantial evidence and the important chains in the link are DNA report, FSL report and Viscera report. **When the reports were challenged by the**

²⁰ 2023 SCC OnLine SC 1365

accused before the High Court, it was brushed aside by observing that even if the authors of the reports were not called for evidence, in terms of Section 293 Cr. P.C., the reports are not open to question as the defence had an opportunity to cross-examine the authors of the reports during the trial. In our considered view, the High Court was not correct in saying that the defence had an opportunity to cross-examine the experts. The trial has been conducted on day-to-day basis wherein the accused, who was in jail and defended by a counsel from legal aid, was compelled by the Trial Court to produce defence witness of his own in one day. It was impossible for the accused himself to produce Dr. Anil Kumar Singh and Dr. Kamlesh Kaitholiya, the authors of the Reports (Ex.P-72), in one day because the said experts are government servants and could not have attended the Court at the request of an accused in jail. The Trial Court treated the accused as if he is carrying a magic wand which is available to produce highly qualified experts, who are government servants, on a phone call. **There was no opportunity, in the real sense, to the appellant to cross-examine the experts.”**
(emphasis supplied)

29. The instant case involves capital punishment and thus, providing a fair opportunity to the accused to defend himself is absolutely imperative and non-negotiable. The trial in the case at hand was concluded without providing appropriate opportunity of defending to the accused and within and within a period of less than two months from the date of registration of the case, which is reflective of undue haste. The failure of the trial Court to ensure the deposition of the scientific experts while relying upon the DNA report, has definitely led to the failure of justice thereby, vitiating the trial.

30. In the wake of the above discussion, we allow the application filed by the appellants. The case is remanded to the trial Court who shall

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

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

32. That the discussion made above is confined to the issue of the right of the accused to seek examination of the scientific experts connected with the DNA report and the same shall not be taken to be a reflection on the merits of the matter, which shall be considered and gone into, uninfluenced by any observations made by us in this order.

33. Consequently, the judgment dated 21st August, 2018, passed by the trial Court and the judgment dated 9th September, 2021, passed by the High Court are quashed and set aside.

34. The appeals are allowed accordingly.

35. Pending application(s), if any, shall stand disposed of.

.....J.
(VIKRAM NATH)

.....J.
(SANJAY KAROL)

.....J.
(SANDEEP MEHTA)

**New Delhi;
January 16, 2025.**