

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

MONDAY, THE 11TH DAY OF DECEMBER 2023 / 20TH AGRAHAYANA,
1945

CRL.A NO. 811 OF 2019

AGAINST JUDGMENT & SENTENCE DATED 21.12.2018 IN SC NO.154

OF 2016 OF THE ADDITIONAL DISTRICT COURT, PALA

APPELLANT/ACCUSED:

SATHEESH BABU,
AGED 38 YEARS,

BY ADV JOSEPH JERARD SAMSON RODRIGUES

RESPONDENT/COMPLAINANT:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.
- 2 THE DEPUTY SUPERINTENDENT OF POLICE,
PALA.
SMT.AMBIKA DEVI, SPL. PP.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
22.11.2023, THE COURT ON 11.12.2023 DELIVERED THE
FOLLOWING:

C.R.

P.B.SURESH KUMAR & JOHNSON JOHN, JJ.

Criminal Appeal No.811 of 2019

Dated this the 11th day of December, 2023

JUDGMENT

P.B.Suresh Kumar, J.

A bizarre and horrifying occurrence in which a sexagenarian nun was allegedly murdered in the convent where she was living is the subject matter of this appeal. The sole accused in the case who stands convicted for the offences punishable under Sections 449, 302, 376A, 392, 457 and 380 of the Indian Penal Code (IPC) is the appellant.

2. As the victim was not seen for the morning prayer at the Chapel attached to the convent on 17.09.2015, the Mother Superior of the convent along with another went to the room of the victim in search of her and in the room, they found the victim lying on her back on her cot in a pool of blood in her night dress. A doctor in the nearby hospital who reached

the convent on coming to know of the occurrence, entertained a doubt as to the cause of death. The matter was accordingly informed to the police by the Mother Superior and a case was registered on the basis of the said information by the Pala Police on the same day as Crime No.1624 of 2015.

3. The then Deputy Superintendent of Police, Pala took over the investigation of the case soon and made arrangements for holding inquest and autopsy of the body of the victim. He also prepared the scene mahazar. In the course of preparing the scene mahazar, the investigating officer seized the objects found at the scene and caused the fingerprint experts to lift the chance fingerprints from the scene of occurrence as also surrounding areas. He questioned several witnesses in the meanwhile and thereafter, arrested the accused after a few days from Haridwar on 24.09.2015. The accused was brought to Pala on a transit warrant and had been produced before the Jurisdictional Magistrate on 27.09.2015. Later, the custody of the accused was obtained on 28.09.2015 and while the accused was in police custody, the weapon allegedly used by him for committing the crime is stated to have been discovered and seized based on the information

furnished by the accused. The final report in the case has been submitted thereupon alleging commission of the offences for which he is punished.

4. The accusation in the final report is that with the intention of committing robbery, the accused trespassed into the courtyard of the convent building by night at about 11:30 p.m. on 16.09.2015, secured entry into the terrace of the said building, came down to its courtyard from the terrace, broke open the lock of the grilled door at the courtyard and entered the corridor of the building, kept the outer grilled door opened after obtaining its key from the kitchen and thereafter proceeded to the first floor of the building at about 1.00 a.m. It is also the accusation in the final report that on reaching the first floor, the accused opened the door of the room of one Sr.Ruby, opened the wall almirah kept therein and committed theft of Rs.500/- kept in a plastic box in the almirah. It is also the accusation in the final report that the accused then proceeded to the second floor, opened the room of the victim and when the victim got up sensing the presence of the accused in the room, with the intention to kill the victim and to commit rape on her, the accused inflicted two blows on her

head with the blunt portion of an axe kept by him and when the victim went into a moribund state, he committed rape on her. It is also the accusation in the final report that the accused thereafter opened the wall almirah in the room and committed theft of Rs.2,000/- kept in a handbag. It is alleged in the final report that the victim succumbed to her injuries in the meanwhile.

5. On the case being committed for trial, the Court of Session framed charges against the accused in tune with the allegations in the final report. When the charges were read over and explained to the accused, he denied the same. Thereupon, on being called upon to give evidence, the prosecution examined 65 witnesses as PW1 to PW65 and proved through them 88 documents as Exts.P1 to P88. MOs 1 to 20 are the material objects identified by the witnesses examined in the case. Exts.D1 to D7 are the portions of the statements of some of the witnesses recorded under Section 161 of the Code of Criminal Procedure (the Code), a few judgments, as also a recovery mahazar produced by the accused which were proved through PW65, the investigating officer in the case. As the Court of Session did not find the case

to be one fit for acquittal under Section 232 of the Code, the accused was called upon to enter on his defence. The accused, however, chose not to adduce any evidence. Thereupon, after considering the explanation offered by the accused on the various incriminating circumstances brought out against him in the evidence, the Court of Session found that all the charges have been established by the prosecution. Consequently, the accused was convicted and sentenced to undergo imprisonment for life and to pay fine for the offence punishable under Section 302 IPC, rigorous imprisonment for 10 years and to pay fine for the offence punishable under Section 376 IPC, rigorous imprisonment for 7 years and to pay fine for the offence punishable under Section 449 IPC and rigorous imprisonment for 3 years and to pay fine for the offence punishable under Section 457 IPC. The appellant is aggrieved by the conviction and sentence imposed on him.

6. Heard Adv. Joseph Jerard Samson Rodrigues for the accused and Smt. Ambika Devi, the Special Public Prosecutor for the State.

7. Even though there is no challenge to the fact that the death of the victim was a homicide, it is necessary to

refer to the evidence let in by the prosecution in that regard in order to appreciate the contentions put forward by the learned counsel for the accused. PW40 is the doctor who conducted the autopsy. Ext.P35 is the autopsy certificate. The ante-mortem injury noted by PW40 on the body of the victim as recorded by her in Ext.P35 autopsy certificate as injury No.1 reads as follows:

“Split lacerated wound 8.5 X 4.5 cm, exposing the skull underneath, obliquely placed on the right side of head, with its lower front extent 5.5 cm above outer end of eyebrow at orbital margin, 6cm outer to midline. The frontal, parietal and temporal bone of skull underneath showed depressed comminuted fracture over an area 6x5cm, with extension as fissured fracture backwards for a length of 10 cm involving parietal bone upper margin of depressed fracture was semicircular. Base of skull showed hinge fracture involving both middle cranial fossa crossing pituitary fossa. Dura matter corresponding to the depressed fracture showed multiple tears varying in sizes from 1x1.5 cm to 3.2 cm overlying parietal lobe. Brain was contused 3.5x2.5x0.5cm and 4x3x0.5cm involving temporal and parietal lobes respectively. There was subdural and subarachnoid haemorrhage.”

PW40 testified that the death of the victim was due to the said head injury, that the same is one that could be caused by a hit with the blunt portion of MO3 axe and that the said injury is

sufficient in the ordinary course of nature to cause death. PW1 is the Mother Superior of the convent, PW2 is another nun and a paediatrician who was living with the victim in the convent and PW3 is the doctor who came to the scene on coming to know about the occurrence. It has come out from the evidence tendered by the said witnesses that the victim went to sleep as usual in her room in the convent on the previous night after dinner and watching television for sometime and they found, at about 7.30 a.m. on the succeeding day, the victim lying on her back on her cot in a pool of blood with injuries on her head. The evidence tendered by PWs 1 to 3 and 40 prove beyond doubt that the death of the victim was a homicide.

8. The learned counsel for the accused did not dispute the alleged occurrence. He also did not argue that the death of the victim was not a homicide. On the other hand, his contention was that the prosecution has not established beyond reasonable doubt, that it is the accused who is the perpetrator of the crime. As the case is one attempted to be proved by the prosecution upon circumstantial evidence, the essence of the elaborate arguments advanced by the learned counsel for the accused was that the circumstances stated to

have been proved by the prosecution, even if believable, are not sufficient to conclusively link the accused with the crime. The learned counsel has relied on the decisions of the Apex Court in **Kamal v. State (NCT of Delhi)**, 2023 SCC OnLine SC 933 and **Shivaji Sahabrao Bobade v. State of Maharashtra**, (1973) 2 SCC 793, in support of his argument. The learned counsel has also attacked the factual findings rendered by the Court of Session on various circumstances relied on by the prosecution. It was argued by the learned counsel that it was merely on a suspicion based on the statement given by PW14, an employee of Moonnani toddy shop, that the accused who was enjoying a drink in the company of PW14 in the said toddy shop near the convent, suddenly left the place on hearing the news that the police came to the convent in connection with the investigation of the crime that he was arrayed as the accused in the case, after manipulating the evidence against him. It was also argued by the learned counsel that the chance fingerprints stated to have been lifted by the fingerprint experts from the scene of occurrence and its surroundings are fingerprints manipulated by the investigating officer after the arrest of the accused. Placing reliance on the judgment of the Apex Court in **Prakash**

v. State of Karnataka, (2014) 12 SCC 133, it was argued by the learned counsel that the manner in which the fingerprints of the accused were taken and the identification of the accused based on the said fingerprints are also shrouded in mystery. It was also argued by the learned counsel that the accused had the habit of wandering and he left for Haridwar, as part of it. According to the learned counsel, the Court of Session, in the circumstances, ought not have relied on the fact that the accused had been to Haridwar as an incriminating circumstance against him. It was also argued by the learned counsel that the discovery and seizure of MO3 axe based on the information alleged to have been furnished by the accused have not been substantiated by the prosecution. Even if the discovery of MO3 axe is accepted as one found to have been made based on the information furnished by the accused, there is nothing to connect the said weapon with the occurrence, argued the counsel. It was also argued by the learned counsel alternatively, placing reliance on the decision of the High Court of Karnataka in **Rangaraju v. State of Karnataka**, 2023 SCC OnLine Kar 23 that at any rate, in the absence of any evidence indicating that the perpetrator of the crime had committed

rape on the victim before the murder, there is no question of convicting the accused for the offence of rape.

9. *Per contra*, the learned Special Public Prosecutor argued that the circumstances which are established are sufficient in a case of this nature to hold that the accused is guilty of the offences alleged against him. The incriminating circumstances pointed out by the learned Special Public Prosecutor as established in the case, are :

(i) that a few articles kept by PW2 in her room on the first floor of the convent in the almirah have been taken out and the remaining articles therein were disorderly moved between 12.30 a.m. and 1.45 a.m. on 17.09.2015 and Rs.500/- kept by PW2 in MO1 plastic box in the almirah has been stolen.

(ii) that the occurrence took place between 1.30 a.m. and 3.30 a.m. on 17.09.2015.

(iii) that 13 among the chance fingerprints lifted by the fingerprint experts from the scene of occurrence and surrounding areas on 17.09.2015, 18.09.2015 and 19.09.2015 are matching with the specimen fingerprints of the accused.

(iv) that two out of the 13 chance fingerprints which were found to be matching with the specimen fingerprints of the accused were lifted from the outer top portion of the door to the room of the victim and

one was lifted from MO1 plastic box kept by PW2 in the almirah in her room.

(v) that there is no satisfactory explanation from the accused as to how his fingerprints found to be there on the door to the room of the victim and on MO1 plastic box.

(vi) that the accused is a person who was moving in the locality near the convent before and after the occurrence.

(vii) that the accused who was enjoying a drink in the company of others in a nearby toddy shop, all of a sudden, left the toddy shop on hearing the news that police have come to the convent with a sniffer dog and he was not seen thereafter in the locality till his arrest.

(viii) that the accused left the locality of the convent after the occurrence and had been to Chennai first and then to Haridwar without any reason or explanation and without any preparation or resources for the same.

(ix) that the fatal injury suffered by the victim is one that could be inflicted using MO3 axe which was discovered and seized based on the information furnished by the accused.

(x) that blood was found in MO3 axe, although its origin and group could not be detected.

(xi) that the short hairs removed from MO3 axe by the Scientific Assistant were found to be similar to the hairs of the victim collected at the time of autopsy.

(xii) that Y-Chromosomal DNA profile obtained from the blood sample of the accused was found matching with the Y-Chromosomal DNA profile obtained from the vaginal swab and smear of the victim collected at the time of autopsy.

The learned Special Public Prosecutor refuted the argument that the chance fingerprints compared with the specimen fingerprints of the accused are manipulated. It was argued that no material whatsoever is made available by the accused to doubt the veracity of the evidence tendered by the prosecution in this regard. The learned Special Public Prosecutor has also refuted the argument that the evidence tendered by the investigating officer as regards the information stated to have been furnished by the accused on the basis of which MO3 axe was discovered and seized, is not convincing. The learned Special Public Prosecutor, however, conceded that there was an omission on the part of PW32, the Scientific Assistant who extracted hairs found in MO3 axe on its discovery to depose the said fact in Court and to prove the report furnished by her in

this regard, and inasmuch as the said omission was inadvertent, an application has been filed by the prosecution in the appeal invoking Section 391 of the Code seeking permission to let in additional evidence to cure the said irregularity. According to the learned Special Public Prosecutor, inasmuch as the report furnished by PW32 in this regard has already been produced by the Investigating Officer along with the final report, it is the duty of this Court to allow the said request to secure the ends of justice.

10. It is seen that it is based on the circumstances pointed out by the learned Special Public Prosecutor that the Court of Session came to the conclusion that the accused is guilty of the offences alleged against him. It is settled that in a case on circumstantial evidence, the circumstances from which the conclusion of guilt is drawn must be fully established and the same should be of a conclusive nature and tendency. As such, before proceeding to consider the question whether the circumstances referred to by the learned Special Public Prosecutor would establish the guilt of the accused, it is necessary to consider whether the circumstances aforesaid have been conclusively established by the prosecution. Let us,

therefore, consider the said aspect first. As the circumstances found to have been established are closely interlinked, according to us, it is suffice to consider the same topic-wise.

11. Place, Scene and Time of occurrence: There is no serious challenge to the fact that the occurrence took place in the early hours of 17.09.2015 in the room in the convent in which the victim was living. PW1 testified that when she woke up at about 2.00 a.m. on the said day to go to the bathroom, she heard a snoring sound from the room of the victim. It is PW1 who saw the victim after the occurrence for the first time when she went to her room at about 7.00 a.m. on the said day. PW2 testified that she left the convent on an urgent medical call by about 00.30 a.m. on 17.09.2015 and that she returned to the convent at about 1.45 a.m. and slept after changing her dress. It was also testified by PW2 that she woke up thereafter by about 4.45 a.m. and when she switched on the light, she found a few articles which were kept by her in the almirah, on the floor of the room and that when she opened the almirah, it was also found that some other articles in the almirah were disorderly moved and a sum of Rs.500/- kept by her in MO1 plastic box in the almirah was found missing. Even though PWs

1 and 2 were cross-examined, the evidence tendered by them as stated above, have not been discredited at all and the same can therefore be accepted.

12. The presence of the accused in the locality and his subsequent conduct: Ext.P12 scene mahazar gives an idea about the premises of the convent and its surroundings. It is recited in Ext.P12 that Cherupushpam Hospital is located on the south-western side of the convent. PW12 is a person engaged in the business of exhibiting billboards. PW12 testified that he used to visit the toddy shop located at the place called Moonnani; that he knows the accused as a regular visitor in the toddy shop and that the accused stayed with him as his bystander when he was admitted for treatment in Cherupushpam Hospital on 06.09.2015. As noted, PW14 was an employee of Moonnani toddy shop. PW14 testified that he knows the accused; that they used to drink together; that on 17.09.2015, while they were enjoying a drink, he mentioned about the death of the nun and on hearing the said news, the accused all of a sudden left the scene pretending that he needs to go to Kottayam urgently. PW15 is a friend of PW12 and an employee in the Moonnani toddy shop. PW15 also testified

more or less on the same lines on the evidence tendered by PW14. PW17 is another person who was frequenting the Moonnani toddy shop and he testified that one day during 2015, when he was enjoying a drink with the accused and others at the toddy shop, the accused had abruptly left on hearing the news that a sniffer dog was brought by the police to the convent in connection with the murder of the nun. Even though none of these witnesses stated specifically as to the distance between the convent and the toddy shop, from their evidence, it is clear that the toddy shop is one located in the neighbourhood of the convent and Cherupushpam Hospital. We have examined the evidence tendered by the said witnesses and we do not find any impediment in accepting their evidence to the extent that the accused was very much present in the vicinity of the convent immediately before and after the occurrence.

12.1. PW29 is a person who runs a tea shop at Moor Market in Chennai. PW29 testified that one day during September, 2015, the accused came to his shop and sought help from him informing that he lost his belongings and as permitted by him, the accused called his brother from the

phone in his shop. PW29 also testified that since he does not have an account number, he helped the accused to receive money from his brother through the account of one Rajiv Gandhi. PW44 is the brother of the accused. PW44 is an employee of Kerala State Road Transport Corporation (KSRTC) attached to its depot at Kasargod. PW44 admitted that the accused called him from Madras and when he requested for financial help, he transferred a sum of Rs.1000/- to the account of one Rajiv Gandhi. PW47 was the Branch Manager of Ponparappi Branch of State Bank of Travancore. Ext.P42 is the statement of the account maintained by Rajiv Gandhi in the said Branch of the State Bank of Travancore. Ext.P42 indicates that on 19.09.2015 a sum of Rs.1000/- had been deposited in the account of Rajiv Gandhi from Kasaragod and the same has been withdrawn on the same day from Chennai.

12.2. PW34 is a priest in a temple located at Haridwar. PW34 testified that on 22.09.2015, the accused came to the temple and sought his help stating that he lost his belongings. PW34 also testified that even though the accused stated that his brother is working in the Kasaragod depot of KSRTC, the accused informed him that he does not know the

telephone number of his brother. PW34 also testified that since he has a friend working in the Kasaragod depot of KSRTC, he obtained and gave to the accused the telephone number of his brother and the accused called his brother through the telephone of one Sathyan. PW34 also testified that on the following evening, the accused was taken into custody by the Haridwar police. PW42 is the person named Sathyan referred to by PW34. PW42 testified more or less on the same lines of the evidence tendered by PW34. PW44, as noted, the brother of the accused also affirmed that on 22.09.2015, he received a call from Haridwar from the accused and that the accused informed him that he is calling from the telephone of Sathyan. The evidence tendered by PW34, PW42 and PW44 would establish that the accused left for Haridwar from Chennai and he was residing at Haridwar until he was taken into custody by the police. From the evidence aforesaid, it is conclusively established that after the occurrence, the accused came to Chennai and then proceeded to Haridwar without any reason, preparation or resources for the same and was trying to sustain himself with the help of others by persistently lying.

13. **Fingerprint evidence:** Ext.P12 scene mahazar prepared at 2.15 p.m. on 17.09.2015 reveals that while preparing the same, the fingerprint experts who were present marked several chance fingerprints in and around the scene including seven on the top of the outer portion of the door to the room where the body of the victim was found. PW30 is the Police Photographer. PW30 testified that he went to the scene of occurrence along with PW38, the Tester Inspector attached to Kottayam Single Digit Fingerprint Bureau and PW39, the Finger Print Expert attached to the said Bureau, took the photographs of the chance fingerprints marked by PW38 and PW39 and handed over to PW38, the enlarged printouts of photographs taken by him. The suggestion made to PW30 by the learned counsel for the accused during cross-examination was that PW30 did not go to the scene of occurrence at all to take the photographs, and the same was emphatically denied by PW30.

13.1. PW38 testified that he inspected the scene of occurrence along with PW39 and developed thirty chance prints which were photographed by PW30 and out of the said thirty chance prints, five were unfit for comparison. It

was also testified by PW38 that on 27.09.2015, he received the arrest slip of the accused, and on a comparison of the chance fingerprints with the fingerprints of the accused contained in the arrest slip, it was found that thirteen chance prints marked as P4, P5, P9, P19, P20, P21, P22, P23, P24, P25, P26, P27 and P28 were identical with the right middle, right ring, left little, right thumb, right middle, right ring, left middle, left index, left middle, right little, right little, right middle and right ring finger impressions of the accused. Ext.P33 is the report furnished by PW38 to the investigating officer in this regard. PW38 was not seriously cross-examined.

13.2. PW39 who accompanied PW38 for lifting the chance fingerprints from the scene of occurrence explained that he marked eight identical ridge characteristics in the enlarged photographs of one of the identified chance prints marked as 'P4' and also in the specimen right middle finger impression of the accused marked as 'S' and since those ridge characteristics are present in their native and relative position in both the fingerprint impressions, PW39 opined that both the fingerprint impressions are made by the same finger of the same person. Ext.P34 is the report furnished by PW39 in this

regard to the investigating officer. PW39 testified that in order to give an opinion in the aforesaid manner, minimum six identical ridge characteristics are required and there will not be two fingers with the same and identical ridge characteristics. PW39 was cross-examined thoroughly by the learned counsel for the accused. In cross-examination, PW39 stated that he does not remember the particulars of the places from where the chance fingerprints including the chance fingerprint marked as 'P4' were lifted. Similarly, PW39 stated in cross-examination that he does not remember the time at which the arrest slip of the accused was received. Similarly, he stated that he does not remember the date on which he received the enlarged photographs of the chance fingerprints or the date on which the same were received by PW38, the Tester Inspector. PW39 denied the suggestion that he took the fingerprints from the door to the room where the body of the victim was found after the investigating officer caused the accused to hold the door while he was in police custody and that the chance fingerprints compared by him with the fingerprints of the accused to form the opinion are those chance fingerprints.

13.3. It is seen that PW39 was recalled and examined again. At that time, PW39 brought the file relating to the case. With the aid of the file, PW39 testified further that the chance print 'P4' is one obtained from the top portion of the door to the room where the body of the victim was found and the chance print 'P9' is one obtained from MO1 plastic box which was found in the room of PW2. PW39 also testified that the fingerprints slip of the accused was received on 27.09.2015 and the chance fingerprints identified with the accused are the chance fingerprints marked as P4, P5, P9, P19, P20, P21, P22, P23, P24, P25, P26, P27 and P28. Ext.P88 is the file relating to the case maintained at the Single Digit Fingerprint Bureau, Kottayam and Ext.P88(a) to Ext.P88(f) are different pages of Ext.P88 file.

13.4. It is evident from Ext.P88 that the chance fingerprints marked as P4 and P5 by the fingerprint experts which were found to be identical with the right middle and right ring fingerprints of the accused were lifted from the outside portion of the door to the room where the body of the victim was found. Similarly, it is evident from Ext.P88 that the chance fingerprint marked as 'P9' by the fingerprint experts which was

found to be identical with the left little fingerprint of the accused was one lifted from a pinkish red plastic pet box found in the room of PW2 in the first floor. The accused does not dispute the fingerprints found on the door to the room where the body of the victim was found nor does he dispute the fingerprint found on the said pet box, MO1 found in the room of PW2. It is seen that the explanation offered by the accused for the said incriminating circumstance is that the chance fingerprints which were found matching with his specimen fingerprints are fingerprints lifted after his arrest, while he was in police custody, after causing him to touch on the door and on the plastic box. Ext.P88 series pages of the file do not contain any endorsement as to the date on which the photographs of the chance fingerprints taken by PW30 were received by PW38 or PW39. The file contains an endorsement that the arrest slip of the accused was received on 27.09.2015. It is however seen that the initial report of the Fingerprint Bureau after comparison has been submitted to the investigating officer on 27.09.2015 itself. In other words, it could certainly be inferred that the photographs of the chance fingerprints were received by the Fingerprint Bureau before 27.09.2015 or otherwise, it would not

have been possible for the Fingerprint Bureau to issue a report in the nature of Ext.P33 on 27.09.2015, even though the same is signed by PW38 only on 28.09.2015. The materials on record indicate that the accused was arrested on 24.09.2015 and he was brought to Kerala only on 27.09.2015 and that he was produced before the Jurisdictional Magistrate on the same day itself and the custody of the accused was obtained only on the succeeding day namely, 28.09.2015. That apart, Ext.P82 is the mahazar prepared in connection with the seizure of MO1 plastic box found in the room of PW2. Ext.P82 indicates that the seizure has been effected on 17.09.2015. Ext.P60 is the property list, in terms of which the various objects found in the room of the victim as also in the room of PW2 were produced before the Jurisdictional Magistrate on 17.09.2015. Ext.P60 includes MO1 plastic box as well. Needless to say, the contention of the accused that the chance fingerprints compared with his specimen fingerprints as obtained from his arrest slip are manipulated, in the circumstances, is only to be rejected. In other words, it has been established by the prosecution beyond reasonable doubt that the chance fingerprints lifted from the top portion of the outer side of the

door to the room where the body of the victim was found and the chance fingerprint lifted from MO1 plastic box are the fingerprints of the accused.

14. Chemical Examination of the Vaginal swab and smear of the victim: PW40, the doctor who conducted the autopsy of the victim testified that vaginal swab and smear were collected at the time of autopsy and had been sent for chemical examination. PW46 is the examiner who conducted the chemical examination of the vaginal swab and smear. PW46 testified that human semen and spermatozoa were detected in the vaginal swab and smear of the victim. Ext.P36 series are the certificates of the chemical analysis issued by PW46. It was clarified by PW46 that the lifespan of human spermatozoa inside the human body is only approximately five days. It is seen that the chemical examination has been conducted on 29.09.2015. From the said evidence of PW40 and PW46, it is conclusively established by the prosecution that human semen and spermatozoa were found in the vaginal swab and smear collected from the body of the victim.

15. DNA profiling and its impact: Since there was no facility for DNA profiling in the Chemical Examination

Laboratory of the State Government, the vaginal swab and smear collected from the body of the victim were initially forwarded to the State Forensic Science Laboratory and then to Rajiv Gandhi Centre for Biotechnology, Thiruvananthapuram. PW64 was the DNA Examiner attached to Rajiv Gandhi Centre for Biotechnology, Thiruvananthapuram. PW64 testified that he received the blood sample of the accused and the samples of the vaginal swab and smear of the victim and the same received by him were properly sealed and labelled. PW64 also testified that he extracted DNA from the same, prepared the DNA profile using Autosomal DNA profiling kit as also Y-Chromosomal DNA profiling kit and found that the Autosomal DNA profile obtained from the blood sample of the accused did not match with the Autosomal DNA profile obtained from the vaginal swab and smear of the victim. PW64, however testified that the Y-Chromosomal DNA profile obtained from the blood sample of the accused was found matching with the Y-Chromosomal DNA obtained from the vaginal swab and smear of the victim. PW64 also testified that the DNA test results are sufficient to conclude that the accused cannot be excluded as a possible contributor to the DNA obtained from the vaginal swab

and smear of the victim. Ext.P61 is the certificate issued by PW64 in this regard. During cross-examination, PW64 stated that the Autosomal DNA profiling is intended to establish the identity of disputed individuals and the same is wide, elaborate and accurate. PW64 admitted in cross-examination that males belonging to same paternity shall have same Y-Chromosome.

15.1. There cannot be any doubt to the proposition that the DNA evidence is in the nature of opinion evidence as envisaged under Section 45 of the Indian Evidence Act, and like any other opinion evidence, its probative value varies from case to case and it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party. It is so held by the Apex Court in **Pattu Rajan v. State of T.N.**, (2019) 4 SCC 771. The relevant portion of the judgment reads thus:

“52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on the facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology

with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.”

In **Mukesh v. State (NCT of Delhi)**, (2017) 6 SCC 1, the Apex Court has held that DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper, and if there is no evidence as to the tampering of the samples, the DNA test report is to be accepted. Paragraph 228 of the said judgment reads thus:

“228. From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted.”

In **Mukesh**, the Apex Court has also quoted with approval a passage from the judgment in **Pantangi Balarama Venkata Ganesh v. State of A.P.**, (2009) 14 SCC 607, wherein the Apex Court has referred to the evidence tendered by an expert on the subject that the probability of two persons except identical

twins having the same DNA fingerprint is around 1 in 30 billion world population.

15.2. Ext.P61 report reveals that the blood sample of the accused was marked as Ext.A and the vaginal swab and smear of the victim was marked as Ext.B for the purpose of comparing the DNA profiles. Although Ext.P61 report recites that the Autosomal DNA profile obtained from Ext.A is not matching with the Autosomal DNA profile obtained from Ext.B, it is concluded in the report that the source of Ext.A cannot be excluded as a possible contributor to the DNA obtained from Ext.B. The concluding part of Ext.P61 report reads thus:

“Conclusion

The DNA test performed on the exhibits provided is sufficient to conclude that the source of Exhibit A (Blood sample said to be of Satheesh Babu (T 451/15)) cannot be excluded as a possible contributor to the DNA obtained from Exhibit B (Vaginal Swab & Smear (T 69/16))

Enclosures

- 1 Table 1: Allele Sharing Table - Autosomal DNA Profile
- 2 Table 2: Allele Sharing Table - Y-Chromosomal DNA Profile
- 3-6 Electropherograms”

Prima facie, it would appear that there is an anomaly in the report as it is stated therein that the Autosomal DNA profile obtained from the blood sample of the accused did not match with the Autosomal DNA profile obtained from the vaginal swab and smear of the victim and at the same time that the source of Ext.A cannot be excluded as a possible contributor to the DNA obtained from Ext.B when it was found. It is seen that PW64 was not questioned either by the Public Prosecutor or by the learned counsel for the accused on this point. This point assumes importance since, as noted, PW64 testified that the Autosomal DNA profiling is one used for ascertaining the identity of disputed individuals and that the same is wide, elaborate and accurate. Let us therefore, discuss that point before taking a decision on the acceptability or otherwise of the evidence tendered by PW64 and Ext.P61 report. The autosomal DNA profile shown in Table 1 of Ext.P61 report reads as follows:

Enclosure -1

Table 1: Allele Sharing Table - Autosomal DNA Profile

Locus	Exhibit A		Exhibit B	
D3S1358	15	16	16	17
vWA	17	18	18	19
D16S539	9	11	11	12

CSF1PO	10	11	10	12
TPOX	8	8	8	11
Y indel (Y-chromosome marker)	1		-	
Amelogenin (Gender Marker)	X	Y	X	X
D8S1179	12	13	13	15
D21S11	32.2	33.2	29	29
D18S51	14	18	13	20
DYS391 (Y-chromosome marker)	10		-	
D2S441	10	10	10	11.3
D19S433	13	13.2	14	14.2
TH01	7	9.3	6	8
FGA	25	25	19	23
D22S1045	15	16	15	16
D5S818	11	12	11	14
D13S317	8	12	8	10
D7S820	7	12	9	11
SE33	15.3	18	29.2	32
D10S1248	15	16	15	16
D1S1656	8	16	8	14
D12S391	17	19	19	23
D2S1338	20	22	20	26

The Y-Chromosomal DNA profiling shown in Table 2 of Ext.P61 report reads as follows:

Enclosure - 2

Table 2. Allele Sharing Table – Y-Chromosomal DNA Profile

Locus	Exhibit A	Exhibit B
DYS576	18	18
DYS3891	12	12

DYS635	20		20	
DYS389II	28		28	
DYS627	19		19	
DYS460	9		9	
DYS458	18		18	
DYS19	14		14	
YGATAH4	12		12	
DYS448	19		19	
DYS391	10		10	
DYS456	15		15	
DYS390	22		22	
DYS438	11		11	
DYS392	14		14	
DYS518	36		36	
DYS570	19		19	
DYS437	15		15	
DYS385	14	19	14	19
DYS449	33		33	
DYS393	12		12	
DYS439	12		12	
DYS481	22		22	
DYF387S1	35	38	35	38
DYS533	11		11	

Table 1 reveals that the Autosomal DNA obtained from Ext.A belongs to a male person and the profile shows the presence of both X and Y-Chromosomes. But the Autosomal DNA profile obtained from Ext.B as shown in the said Table contains only X-Chromosomes and hence, it can be inferred that the gender is

of a female person. Genetically, male persons have one X Chromosome and one Y Chromosome represented as 'XY' and female persons have only X-Chromosomes, represented as 'XX'. Ext.B being the vaginal swab and vaginal smear collected from the victim, the DNA belongs to her. It is thus clear from Table 1 that a set of male Autosomal DNA was not obtained from Ext.B for making a comparison with that of the accused person. At the same time, Table 2 shows that the Y-Chromosomal DNA was obtained from Ext.B and it proves that it also contains DNA contributed by a male person and since it matches with that of the accused, the finding that the accused person could not be excluded from being the possible contributor of the male DNA in Ext.B can certainly be accepted. In other words, according to us, PW64 ought not have reported that autosomal DNA profile obtained from Ext.A in Table 1 is not matching with the Autosomal DNA profile obtained from Ext.B. Instead, it should have been mentioned by PW64 in Ext.P61 that the Autosomal DNA profiling was not possible for want of male DNA sufficient for the same from the vaginal swab and smear of the victim. If the materials are analysed in this fashion, it can be seen that there is no anomaly in the report.

15.3. In this context, it is necessary to mention that the shortcoming of current DNA profiling techniques is the inability to get a male profile from the evidence collected in sexual assault cases, as when female cells vastly outnumber the available sperm cells, the amount of the DNA of the female is so great compared to the DNA of the male that the former swamps the process making the laboratory analysis extremely difficult. It is profitable in this context to refer to a few passages from an article published in the Forensic Science International: Genetics, Volume 19, 2015 titled Validation of a combined autosomal/Y-chromosomal STR approach for analyzing typical biological stains in sexual-assault cases, written by Josephine Purps, Maria Geppert, Marion Nagy, Lutz Roewer, Department of Forensic Medicine, Institute of Legal Medicine and Forensic sciences, Berlin, Germany. The relevant paragraphs of the article read thus :

Y-STR analysis is especially valuable for complex mixtures for which the contributor profiles could not be de-convoluted and for mixtures for which an expected male component was not detected via autosomal analysis.

Y-STR analysis can selectively identify a male component in a high female background to yield a single-source Y-STR profile,

whereas autosomal analysis fails due to preferential amplification.

Compared with autosomal analysis, Y-STR analysis is more successful at detecting and individualizing males in the mixture. In cases with inconclusive autosomal results, Y-STR profiling can be used to exclude or match a suspect if reference samples are available for direct comparison.

15.4. Be that as it may, reverting to the facts of the case on hand, since it is found that the finding in Ext.P61 report that the accused could not be excluded from being the possible contributor of the male DNA in Ext.B can be accepted, the pointed question is as to whether the the said finding is of any help to the prosecution. As already noticed, the only inference that could be drawn from the DNA profiling is that the perpetrator of the crime is a person who is in the same paternal lineage of the accused. In **Ravi v. State of Maharashtra**, (2019) 9 SCC 622, the Apex Court considered whether the matching of Y-Chromosomal DNA profile could be considered as the circumstance in a case attempted to be proved on circumstantial evidence and answered the said question in the affirmative, after taking note of the fact that although Y-Chromosomal DNA profile does not distinguish between males of same lineage, it can nevertheless, be used as a strong

circumstantial evidence to support the prosecution case.

Paragraph 35, 36 and 37 of the judgment in the said case read thus:

“35. The unshakable scientific evidence which nails the appellant from all sides, is sought to be impeached on the premise that the method of DNA analysis “Y-STR” followed in the instant case is unreliable. It is suggested that the said method does not accurately identify the accused as the perpetrator; and unlike other methods say autosomal-STR analysis, it cannot distinguish between male members in the same lineage.

36. We are, however, not swayed by the submission. The globally acknowledged medical literature coupled with the statement of PW 11 Assistant Director, Forensic Science Laboratory leaves nothing mootable that in cases of sexual assault, DNA of the victim and the perpetrator are often mixed. Traditional DNA analysis techniques like “autosomal-STR” are not possible in such cases. Y-STR method provides a unique way of isolating only the male DNA by comparing the Y-chromosome which is found only in males. It is no longer a matter of scientific debate that Y-STR screening is manifestly useful for corroboration in sexual assault cases and it can be well used as exculpatory evidence and is extensively relied upon in various jurisdictions throughout the world [“Y-STR analysis for detection and objective confirmation of child sexual abuse”, authored by Frederick C. Delfin — Bernadette J. Madrid — Merle P. Tan — Maria Corazon A. De Ungria.] & [Forensic DNA Evidence : Science and the Law, authored by Justice Ming W. Chin, Michael Chamberlain, Amy Rojas, Lance Gima.] . Science and researches have emphatically

established that chances of degradation of the “Loci” in samples are lesser by this method and it can be more effective than other traditional methods of DNA analysis. Although Y-STR does not distinguish between the males of same lineage, it can, nevertheless, may be used as a strong circumstantial evidence to support the prosecution case. Y-STR techniques of DNA analysis are both regularly used in various jurisdictions for identification of offender in cases of sexual assault and also as a method to identify suspects in unsolved cases. Considering the perfect match of the samples and there being nothing to discredit the DNA analysis process, the probative value of the forensic report as well as the statement of PW 11 are very high. Still further, it is not the case of the appellant that crime was committed by some other close relative of him. Importantly, no other person was found present in the house except the appellant.

37. There is thus overwhelming eyewitness account, circumstantial evidence, medical evidence and DNA analysis on record which conclusively proves that it is the appellant and he alone, who is guilty of committing the horrendous crime in this case. We, therefore, unhesitatingly uphold the conviction of the appellant.”

In the light of the decision of the Apex Court in **Ravi**, according to us, the report submitted by PW64 can certainly be considered as one of the circumstances in the chain of incriminating circumstances against the accused.

16. **Discovery and seizure of MO3 axe:** As already noticed, PW65 was the investigating officer in the case. PW65 testified that during interrogation, the accused informed him that he kept an axe in the premises of the convent and when he was taken there on 05.10.2015, the accused took and handed over the same to PW65 from the firewood shed attached to the convent. During cross-examination, PW65, however, admitted that a spade was discovered and seized based on the information furnished by the accused earlier from a place near the store room in the second floor of the convent building on 29.09.2015. Ext.D7 is the mahazar prepared by PW65 in connection with the discovery and seizure of the said spade. Ext.D7 does not show that blood was found on the said weapon when it was seized. The spade is seen to have been forwarded for forensic examination through court. Ext.P43 is the report furnished by the Forensic Science Laboratory in respect of the various objects seized by the police in connection with the investigation of the case. Item No.1 in Ext.P43 report issued by the Forensic Science Laboratory is the said spade. Ext.P43, however, indicates that blood was found on the said weapon when examined at the laboratory, although

its origin could not be determined. Let us assume that the blood found on the said weapon is not one that could be noticed with naked eyes. But, there was no reference about the discovery and seizure of the said weapon in the final report. If as a matter of fact, the discovery and seizure of the said weapon was based on the information furnished by the accused himself, and blood was found on the same, there should certainly have been an investigation as to how the accused knew that such a weapon was hidden in a place in the premises of the convent and as to the source of blood on the said weapon. The fact that there was no such investigation is not in dispute. But, what is strange in connection with the discovery of the spade is that the investigating officer chose to suppress the said fact from the Court. The said conduct on the part of the investigating officer is suspicious. It is all the more so since it has come out from the evidence of PW40, the doctor who conducted the autopsy that the investigating officer had shown to her a spade and that she had opined that the injury suffered by the victim could not have been caused making use of the said weapon. It was thereafter that MO3 axe was stated to have been discovered and seized from the firewood shed attached to

the convent. It has also come out from the evidence of PW40 that after sometime, he was shown MO3 axe by the investigating officer and he gave his opinion on the same. The relevant portion of the deposition of PW40 reads thus:

“Investigating Officer ഒരു കൈ തൂമ്പാ കാണിച്ചു തന്നിരുന്നു. അത് കൊണ്ട് അടിച്ചാൽ ഈ പരിക്ക് ഉണ്ടാവില്ല എന്ന് ഞാൻ I.O യ്ക്ക് പറഞ്ഞു കൊടുത്തിരുന്നു. Date ഓർക്കുന്നില്ല. അതിനു ശേഷം കോടാലി കൊണ്ടു കാണിച്ചു. ഞാൻ opinion പറഞ്ഞു. കോടാലി കാണിച്ചു തരികയായിരുന്നു. Within one week. തീയതി ഓർമ്മയില്ല.”

The acceptability of the evidence tendered by PW65 as regards the information stated to have been furnished by the accused on the basis of which MO3 axe was discovered and seized has to be considered in the above background.

16.1. Ext.P9 is the mahazar stated to have been prepared by PW65 in connection with the seizure of MO3 axe and Ext.P9(a) is the disclosure stated to have been made by the accused which led to the discovery and seizure of MO3 axe. Ext.P9 mahazar recites that it is the accused who took out the weapon from beneath a heap of coconut fibre and firewood kept in the firewood shed. The relevant portion of the recitals contained in Ext.P9 reads thus:

"ലിസ്യൂ കോൺവെന്റിൽ എത്തി, പ്രതി, ടി കോൺവെന്റിന്റെ കിഴക്ക് ഭാഗത്ത് വിറകുപുരയായി ഉപയോഗിക്കുന്ന കെട്ടിടത്തിന്റെ തെക്കുകിഴക്കേ മൂലയിൽ വിറകിനും, ചകിരികൾക്കും ഇടയിൽ നിന്നും എടുത്തു ഹാജരാക്കിതന്ന കോടാലി മേൽ നമ്പർ കേസിന്റെ തെളിവിലേക്ക് ബന്തവസ്സിൽ

എടുക്കുന്നതിലേക്ക് പാലാ ഡെപ്യൂട്ടി പോലീസ് സൂപ്രണ്ട് D.S.സുനീഷ് ബാബു 5.10.15 തീയതി പകൽ 12.15 മണിക്ക് തയ്യാറാക്കുന്ന റിക്കവറി മഹസ്സർ.

കോടാലി നോക്കിയതിൽ, അലകിന്റെ പിടിയോടുകൂടിയ കോടാലിയാണെന്ന് കാണുന്നു. ടി പിടിഭാഗത്തിന് ഉദ്ദേശം 90cm നീളംകാണുന്നു. ഇരമ്പു ഭാഗത്തിന് കഴ ഉൾപ്പെടെ ഉദ്ദേശം 26cm നീളവും അഗ്രഭാഗത്തിന് ഉദ്ദേശം 7.4cm വീതിയുമുള്ളതായും കാണുന്നു. ടി അഗ്രഭാഗം മുറിച്ചുള്ളതും, ഇരമ്പ് പിടിച്ചിട്ടുള്ളതുമാണ്. ടി കോടാലിയുടെ കഴ ഭാഗത്ത് മണ്ണും ഇരമ്പും പറ്റിപിടിച്ചിരിക്കുന്നതായും കാണുന്നു. ടി കോടാലി ഉപയോഗിച്ചു പഴുകിയതാണ്. ടി കോടാലി മേൽനമ്പർ കേസിന്റെ തെളിവിലേക്കായി ബന്തവസ്സിൽ എടുത്തു.”

As evident from Ext.P9 mahazar, the same does not disclose that anything was found stuck to MO3 axe other than dirt and rust at the time of its seizure. The same does not also show that there was blood stains on the said weapon when it was discovered. However, the specific case of the prosecution is that there were blood stains on MO3 axe and in addition, a few hairs were also found stuck on it when the same was discovered and seized. Let us assume that this might also be a case where blood stains and hairs were not visible to the naked eyes. Ext.P75 is the property list evidencing forwarding of MO3 axe to the Jurisdictional Magistrate on 05.10.2015. A sealed cover containing hairs claimed to have been collected from MO3 is also seen included in Ext.P75 with a description that the hairs contained in the sealed cover are hairs collected and submitted by the Scientific Assistant from MO3. It is those hairs

which have been described in Ext.P44 as item No.38 and Ext.P44 recites that the said hairs are found to be similar to the hairs of the deceased collected at the time of autopsy. This is one of the main circumstances relied on by the learned Special Public Prosecutor to link the accused with the crime. On a query from the Court, the learned Special Public Prosecutor submitted that the Scientific Assistant attached to the District Crime Records Bureau, Kottayam who was examined as PW32 in the case is the Scientific Assistant referred to in Ext.P75 property list. PW32 collected hairs found at the scene of occurrence and handed over the same to the investigating officer on 17.09.2015. Ext.P23 is the report furnished by PW32 in this regard. Even though PW32 deposed about the collection of hair from the scene of occurrence on 17.09.2015 and proved Ext.P23 report furnished by her in this regard, she did not depose anything regarding collection of hairs from MO3 weapon on 05.10.2015 and the report if any, submitted by her in this regard. Similarly, PW65, the investigating officer also did not depose anything regarding the collection of hairs from MO3 axe by PW32 after its seizure. It was towards the culmination of the hearing of the appeal, when the learned Special Public

Prosecutor was confronted with a situation where she was unable to make use of Ext.P44 report as regards the opinion given therein that the hairs found in MO3 weapon were found to be similar to the hairs of the deceased, it is seen that the interlocutory application referred to by the learned Special Public Prosecutor at the time of arguments was filed invoking Sections 391 and 482 of the Code seeking orders allowing the prosecution to seek additional evidence by recalling PW19, PW32 and PW65 stating that a report has been submitted in connection with the collection of hairs from MO3 and that the said report was omitted to be marked when the said witnesses were examined, though the same form part of the final report in the case. Copy of the said report was also produced along with the interlocutory application. In the report dated 06.10.2015 of PW32 produced along with the application, it is stated that she examined the weapon in the presence of the accused on 05.10.2015. It is also stated in the report that she found the weapon at the south west corner of the shed as shown by the investigating officer and on examination, she found some hairs found stuck on it. The relevant portion of the said report read thus:

“As per the requisition of the Investigating officer, I, Scientific Assistant DCRB Kottayam, have examined the suspected weapon in connection with Crime No.1624/15 of Pala Police Station in the presence of Sri.D.S.Suneesh Babu.DySP, Pala and the accused named Satheesh babu (28) on 05/10/15 AN.

I have found the weapon at the south east corner of the shed as shown by the investigating officer. The shed was at the east side of the “Lissuex Carmalite Convent”, Pala. The shed had a room at north east corner and the other portions were found with fire woods, coconut husk and some other materials and its roof thatched with tiles. The weapon was an axe (26cm x 7.4 cm) of sharp edge with wooden handle of length 90 cm. I have thoroughly examined the axe using scientific aids and some hairs were found stick on it. Also trace of blood could be detected from it by chemical test.

The following material object was collected for detailed chemical examination.

(1) Hairs collected from the axe.

This sample was packed, labelled, sealed and handed over to Sri.D.S.Suneesh Babu, DySP, Pala to forward the same to Forensic Science Laboratory through proper channel for further detailed examination.”

As evident from the extracted report, it recites that PW32 found the weapon at the south east corner of the shed as shown by the investigating officer, whereas, as noted, the recital in Ext.P9 mahazer is that the said weapon was seized by the

investigating officer when the same was taken out by the accused from beneath a heap of coconut fibre and firewood. The circumstances which are made out namely, (i) want of any investigation as to how the accused knew that a spade was hidden in a place within the premises of the convent and as to the source of blood on the said weapon, if the alleged discovery and seizure of the spade was a genuine one, (ii) the opinion stated to have been furnished by PW40 that the fatal injury suffered by the victim could not have been possible with the spade discovered and seized in terms of Ext.D7 mahazar, (iii) the discovery and seizure of MO3 axe with which the fatal injury suffered by the victim could be possible within a few days after obtaining the opinion of PW40, (iv) suppression of the discovery and seizure of the spade covered by Ext.D7 in the final report and (v) the inconsistent version as regards the recovery of MO3 axe as contained in Ext.P9 mahazar and in the report of PW32 attempted to be proved in this appeal invoking Section 391 of the Code, pose a serious doubt as to the genuineness of the evidence tendered by PW65 as regards the discovery and seizure of MO3 axe. Therefore, we are of the

view that it is not safe to place any reliance on the evidence tendered by PW65 in this regard.

17. It is settled that in a case on circumstantial evidence that the facts established must be consistent only with the hypothesis of the guilt of the accused, that is to say, there should not exist any other hypothesis except the guilt of the accused; that the circumstances must exclude every possible hypothesis except the one to be proved and that there must be a chain of evidence so complete as to not leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show in all human probability, that it is the accused who must have done the act [See **Paramjeet Singh v. State of Uttarakhand**, (2010) 10 SCC 439]. The question remaining to be considered is whether the circumstances established in the case as found by us in the preceding paragraphs would satisfy the aforesaid requirements of law to hold that it is the accused who committed the alleged crime. In the light of the discussion, according to us, the circumstances established by the prosecution are the following:

- (i) That a few articles kept by PW2 in the almirah in her room on the first floor of the convent were taken

out, a few of the remaining articles were disorderly moved and Rs.500/- kept by PW2 in MO1 plastic box in the almirah was stolen between 12.30 a.m. and 1.45 a.m. on 17.09.2015.

(ii) That the occurrence took place after about 2 a.m. and before 7 a.m. on 17.09.2015.

(iii) That 13 among the chance fingerprints lifted by the fingerprint experts from the scene of occurrence and surrounding areas on 17.09.2015, 18.09.2015 and 19.09.2015 are matching with the specimen fingerprints of the accused.

(iv) That two out of the thirteen chance fingerprints which were found to be matching with the specimen fingerprints of the accused were lifted from the outer top portion of the door to the room of the victim and one was lifted from MO1 plastic box kept by PW2 in the almirah in her room.

(v) That there is no satisfactory explanation from the accused as to how his fingerprints were found to be there on the door to the room and on MO1 plastic box.

(vi) That the accused is a person who was moving in the locality near the convent before and after the occurrence.

(vii) That when the investigating team brought the sniffer dog to the convent as part of the investigation, the accused left the locality and reached

Chennai on 19.09.2015 and thereafter proceeded to Haridwar and reached Haridwar on 22.09.2015.

(viii) That there is no satisfactory explanation from the accused as to the reason to leave for Chennai and to Haridwar immediately after the occurrence without any preparation or resources for the same and that he was trying to sustain himself in those places with the help of others by persistently lying.

(ix) Human semen and spermatozoa were found in the vaginal swab and smear collected from the body of the victim.

(x) That the Y-Chromosomal DNA profile obtained from the blood sample of the accused was found to be matching with the Y-Chromosomal DNA profile obtained from the vaginal swab and smear of the victim collected at the time of autopsy.

The aforesaid circumstances, according to us, would establish beyond doubt that it is the accused who caused the death of the victim, even though there is no evidence in this case as regards the weapon used by him to cause her death. The fact that there is no evidence as regards the weapon used by the accused to commit the crime is of no consequence, as it is now trite that recovery of the weapon used in the commission of the offence is not a *sine qua non* to convict the accused [See

Rakesh v. State of U.P., (2021) 7 SCC 188]. The aforesaid circumstances, according to us, are not only consistent with the guilt of the accused, but would also exclude every possible hypothesis except the guilt of the accused.

18. As noted, the charge framed against the accused is that the accused inflicted blows on the head of the victim with the weapon carried by him and when the victim went into a moribund state, he committed rape on her. The Court of Session, though found that the prosecution has not established the guilt of the accused under Section 376A of IPC, he has been convicted under Section 376 IPC. The evidence on record indicates that the accused committed rape on the body of the victim after inflicting fatal blows on her head. In order to attract the offence of rape, the victim should be a living person. To ascertain whether the victim was alive at the time of commission of rape, there must be evidence as regards the time of death. In this case, there is absolutely no evidence as to the time of the death of the victim. If that be so, the accused cannot be convicted for the offence of rape. Needless to say, the conviction of the accused under Section 376 IPC is unsustainable in law.

In the result, the appeal is allowed in part, the conviction of the accused under Section 376 IPC is set aside and his conviction under Sections 302, 449 and 457 IPC and the sentence imposed on him are confirmed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

Sd/-

JOHNSON JOHN, JUDGE.

ds 24.11.2023