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TOPICAL INDEX

ALTERATION OF CHARGE

Appeal against convictions - Alteration of charge - Trial Court hold that, appellants formed an unlawful assembly and in pursuance of a common object, kidnapped victim to compel his father to pay a ransom amount of Rs.15 Lakhs. appellants sought to take advantage of PW-21's confinement and the threat to cause death to him for compelling his father to pay the ransom - Held, Supreme Court has wide power to alter the charge under Section 216 of the Cr.P.C. whilst not causing prejudice to the accused - Essential ingredients to convict an accused under Section 364-A which are required to be proved by the prosecution - Court must exercise its powers under Section 216 judiciously and ensure that no prejudice is caused to the accused and that he is allowed to have a fair trial - The only constraint on the court's power is the prejudice likely to be caused to the accused by the addition or alteration of charges - - Conviction of the appellants is unsustainable u/s 364A of the IPC - Appeals are allowed. [*Ravi Dhingra vs. State of Haryana 2023(1)AIAJ 460*]

APPEAL AGAINST ACQUITTAL

Appeal against acquittal - Power of High Court - Held - Though the High Court has full powers to review the evidence upon which an order of acquittal is based, it will not interfere with an order of acquittal because with the passing of an order of acquittal the presumption of innocence in favour of the accused is reinforced - High Court should be slow in disturbing the finding of the fact arrived at by the trial Court - While exercising its powers to reverse an acquittal, the order of the trial Court must not only be erroneous, but also perverse and unreasonable - Appeal dismissed. [*Roopwanti vs. State of Haryana and Ors 2023(1)AIAJ 482*]

APPEAL AGAINST ACQUITTAL

Appeal against acquittal - Complainant himself disowned his case by saying that no demand was raised by accused - Held - Complaint himself is not supporting case of prosecution - No error in impugned order - Appeal dismissed. [*State of Gujarat vs. Farsahatkhan Fayazkhan 2023(1)AIAJ 493*]

APPEAL AGAINST CONVICTION

Appeal against conviction - Appellant was charged for kidnapping of girl and solemnizing marriage forcefully - After marriage, appellant and victim travelled several places - FIR was lodged after 3 days of incident - Appellant and victim were having friendship - Appellant proposed to marry victim but family of victim declined proposal - Vediography of marriage showed that victim was happy at time of marriage with appellant - No attempt was made by victim to escape while travelling with appellant from one place to another - Victim stated that she was not maltreated by

appellant - Held - Entire evidence is no way reflects that the appellant had any intention to kidnap - Conviction is set aside - Appeal allowed. [*K H Balakrishna vs. State of Karnataka 2023(1)AIAJ 401*]

APPEAL AGAINST CONVICTION

Appeal against conviction - Rape case - There is a delay of eight days in lodging the FIR - Held, in trial of rape cases conviction can be based on sole testimony of the victim if such evidence is cogent, reliable and consistent - Motive may not demonstrate or indicate lodging of false case but leaves possibility of creating an embellished version or hyperbolic story - This is assumes more significance in view of different versions contained in the written complaint as well as in the statements of the victim - Trial Judge failed to appreciate evidence in proper perspective - When the offence is grave like rape, stricter proof is necessary - Sole testimony of the victim girl, in the factual array of the case, which contains gaps and doubts, it is not safe toconvict the Appellant on the basis of such evidence - Entire prosecution case presented is not very cogent and reliable - In case of doubts, benefit must go to the Appellant and he should be acquitted - Appellant is acquitted - Appeal is allowed. [*Naresh Chandra Halder vs. State of West Bengal 2023(1)AIAJ 418*]

APPEAL AGAINST CONVICTION

Appeal against conviction - Judgment of acquittal of trial court reversed by High Court - Scope of interference in a case of acquittal - There is double presumption in favour of the accused - Presumption of innocence that is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law - Accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the court - Held, if two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial court - High Court has grossly erred in interfering with the well-reasoned judgment and order of acquittal passed by the trial court - Appeal is allowed. [*Nikhil Chandra Mondal vs. State of West Bengal 2023(1)AIAJ 424*]

APPEAL AGAINST CONVICTION

Appeal against conviction - Illegal gratification - Public servant taking gratification other than legal remuneration in respect of an official act - Presumption where government servant accepts gratification other than legal remuneration - Held, discrepancies cannot be considered to be minor in nature, pebbles in shapes, rather they appear to be boulders and Court should not jump over it - Discrepancy as to the date of demand stated by P.W. 1 should be considered as minor one - Prosecution has not been able to prove the charges under Section 7 and Section 13 (1)(d)(i) and (ii) of the P.C. Act against the accused person beyond reasonable doubt - Impugned judgement suffers from infirmity and should not be allowed to remain in force -

impugned judgement is set aside. [*Partha Pratim Ghosh vs. State of West Bengal & Anr 2023(1)AIAJ 435*]

APPEAL AGAINST CONVICTION

Appeal against conviction - Non compoundable offence - Compromise between the parties in respect of offences - Exercise of power by High Court - Both parties have solemnized the marriage with each other and they have been leading a very happy and peaceful life. In this case no such offence has been committed by which the society at large is going to be affected and it is also admitted during the course of the trial, the victim had been in love affair with appellant and over a period of time they have solemnized the marriage and now they are living a happy married life - Held, High Court, therefore, having regard to the nature of the offence and the fact that parties have amicably settled their dispute and the victim has willingly consented to the nullification of criminal proceedings, can quash such proceedings in exercise of its inherent powers under Section 482 Cr.P.C., even if the offences are noncompoundable - Limited jurisdiction to compound an offence within the framework of Section 320 Cr.P.C. is not an embargo against invoking inherent powers by the High Court vested in it under Section 482 Cr.P.C. - Appellant is acquitted - Application is disposed of. [*Rohit Rai vs. State of Jharkhand 2023(1)AIAJ 472*]

APPEAL AGAINST CONVICTION

Appeal against conviction - Court below convicted the accused for offence of rape - Prosecution did not produce any witness to establish version of victim and her mother - Other witnesses were found as hearsay - Enmity between accused and victim family was proved - Medical evidence did not support case of prosecution - No injury was found in private part of victim - Held - Conviction set aside - Order accordingly. [*Sukumar Ghosh @ Bishu vs. State of West Bengal 2023(1)AIAJ 507*]

APPRECIATION OF EVIDENCE

Appeal against conviction - Appreciation of evidence - It was alleged that, appellants have violated the kerosene Control Order, 1968 - Complainant made hasty step to inspect the shop room, the reason best known to him - Held, merely, investigating criminal case by the complainant/police officer is not fatal but there must have same engagement to that effect - Complainant himself took up the investigation - Without any proper authority, which is fatal in this case - Impugned order passed by the learned Special Judge is not based on proper appreciation of facts for not placed his reliance upon the evidence of P.W. 1 - Prosecution has miserably failed to proof the case beyond reasonable doubt against the appellant - Impugned order is set aside - Appeal is allowed. [*Nur Islam Mondal & Anr vs. State of West Bengal & Anr 2023(1)AIAJ 430*]

APPRECIATION OF EVIDENCE

Appeal against acquittal - Appreciation of evidence - AO.1 did not deal with the

tainted amount in any way on the date of trap - Defence forwarded a thrust theory in the trouser pocket of A.O.2 - The resultant solution under M.O.4 pertaining to the chemical test conducted towards right hand fingers of A.O.2 was not in pink colour - Neither the defacto complainant nor P.W.2 produced any proof in support of their claim to issue pattadar passbook in respect of other lands - So, P.W.1 bore grudge against A.O.1, as he did not concede to issue pattadar passbook and falsely implicated - Judgment of the Special Judge is convincing by appreciating evidence thoroughly, as such, absolutely, there are no grounds to interfere with the order of acquittal - Evidence adduced by prosecution is not believable - Appeal is dismissed. [*State of Andhra Pradesh vs. Atmakuri Varaprasada Rao 2023(1)AIAJ 485*]

CIRCUMSTANTIAL EVIDENCE

Appeal against conviction - Conviction on basis of circumstantial evidence - Held - Last seen theory is not proved - Conviction only on basis of seized weapon - No blood stain was found on weapon - Forensic report is not on record - Mere recovery of surgical blade on weapon of offence would be of no help to prosecution - Appeal allowed. [*Deveshdatt Tandon, S/o Gopatram Tandon vs. State of Chhattisgarh 2023(1)AIAJ 391*]

EVIDENCE OF WITNESS

Evidence of witness - Recording thereof - Held - Evidence of the witness has to be recorded in the language of the Court or in the language of the witness as may be practicable and then get it translated in the language of the Court for forming part of the record - However, recording of evidence of the witness in the translated form in English language only, though the witness gives evidence in the language of the Court, or in his/her own vernacular language, is not permissible - Even otherwise, when a question arises as to what exactly the witness had stated in his/her evidence, it is the original deposition of the witness which has to be taken into account and not the translated memorandum in English prepared by the Presiding Judge - Appeal allowed.

Appeal against conviction - Offence of rape - Victim was married women having 3 children - She had relationship with accused for five years - Held - Prosecutrix who herself was a married woman having three children, could not be said to have acted under the alleged false promise given by the appellant or under the misconception of fact while giving the consent to have sexual relationship with the appellant. [*Naim Ahamed vs. State (NCT of Delhi) 2023(1)AIAJ 405*]

EVIDENCE ON RECORD

Appeal - Conviction - Held - None of the statements of the witnesses, it has come that the appellant demanded the amount from the Complainant - It is very doubtful as to whether there was really any demand by the appellant from the Complainant - Considering the evidence that is brought on record by the prosecution and considering the cross-examination, the appellant has succeeded in bringing on record that there was

no demand by the appellant at the time of trap - The prosecution could not also prove the exact spot or exactly at which canteen the appellant and the Complainant had gone - impugned order set aside - Appeal allowed. [*Rajendra S/o Suryakant Kapile vs. State of Maharashtra 2023(1)AIAJ 450*]

EXTRA-JUDICIAL CONFESSION

Appeal against conviction - Extra-judicial confession - Benefit of doubt - Murder committed by appellant - Held, extra-judicial confession requires strong evidence to corroborate it and also it must be established that it was completely voluntary and truthful - Chain of circumstances have not been proved by the prosecution evidence, hence conviction cannot be uphold - Appellant would be entitled to benefit of doubt - Appellant is acquitted of all the charges - Appeal is allowed [*Indrajit Das vs. State of Tripura 2023(1)AIAJ 396*]

EXTRA-JUDICIAL CONFESSION

Extra-judicial confession - Conviction - Held - It is a weak piece of evidence - However, a conviction can be sustained on the basis of extrajudicial confession provided that the confession is proved to be voluntary and truthful - Evidentiary value of such confession also depends on the person to whom it is made - Court has to be satisfied with the reliability of the confession keeping in view the circumstances in which it is made - Appeal allowed. [*Pawan Kumar Chourasia vs. State of Bihar 2023(1)AIAJ 442*]

INHERENT POWERS OF COURT

Application - Conviction - Held - The inherent powers under Section 482 of the Code of Criminal Procedure or the extraordinary jurisdiction under Article 226 of the Constitution of India include the powers to quash the FIR, investigation or any criminal proceedings pending before the High Court or any Court subordinate to it and are of wide magnitude and ramification - The settlement has brought peace in the society and the parties who were once aggrieved, are now contended and are willing to lead harmonious life - In such circumstances, continuance of criminal proceedings will not serve any purpose - Application allowed. [*Pratikbhai Pravinbhai Parmar vs. Mayurbhai K Parikh (Proprietor of Omkar Firm) 2023(1)AIAJ 446*]

POWERS OF APPELLATE COURT

Offence punishable under sections 323, 504, 506(2) and 114 of Indian Penal Code and under section 3(1)(11) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocity) Act - Powers of appellate Court - Appeal against acquittal - An appellate Court has full power to review, re-appreciate and reconsider evidence upon which order of acquittal is founded - Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on evidence before it may reach its own conclusion, both on questions of fact and of law - An appellate Court, however, must bear in mind that in case of acquittal, there is double

presumption in favour of accused. Firstly, presumption of innocence available to him under fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law- Accused having secured his acquittal, presumption of his innocence is further reinforced, reaffirmed and strengthened by trial court - If two reasonable conclusions are possible on basis of evidence on record, appellate court should not disturb finding of acquittal recorded by trial court - Scope of appeal under Section 378 of Code of Criminal Procedure, no case is made out to interfere with impugned judgment and order of acquittal - Appeal dismissed

Appeal against acquittal - High Court while dealing with appeals against order of acquittal must keep in mind following propositions laid down by this Court, namely, (i) slowness of appellate court to disturb a finding of fact; (ii) non - interference with order of acquittal where it is indeed only a case of taking a view different from one taken by High Court. [*State of Gujarat vs. Karsanbhai Bachubhai Barad & Others 2023(1)AIAJ 498*]

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ALL INDIA ACQUITTAL JUDGEMENTS

2023(1)AIAJ1

IN THE HIGH COURT AT CALCUTTA

[Before Tirthankar Ghosh]

Cr A (Criminal Appeal) No 66 of 2012 **dated 23/11/2022**

Abdul Gaffar Molla

Versus

State of West Bengal

CHANGE OF STAND OF VICTIM

Indian Penal Code, 1860 Sec. 376, Sec. 417, Sec. 120B, Sec. 506, Sec. 493 - Code of Criminal Procedure, 1973 Sec. 164 - Commission of offence u/S.376/417 - No scope for interference appeal - Paternity test - One of salient feature in this case is change of stand of victim before different authorities which at inception was only restricted to a relationship for which there was sexual intercourse with promise to marry and which with a passage of time change to forceful/aggressive sexual encounter which is diametrically opposite to her narration of evidence - Considering victim has changed her stand from time to time it would be difficult to rely upon her sole testimony to arrive at a conclusion for convicting appellant - Appellant guilty of commission of offence - Set aside and appellant is acquitted of charges - Appeal allowed.

[Paras 23,24]

Law Point - One of salient feature in this case is change of stand of victim before different authorities which at inception was only restricted to a relationship for which there was sexual intercourse with promise to marry and which with a passage of time change to forceful/aggressive sexual encounter which is diametrically opposite to her narration of evidence

Acts Referred:

Indian Penal Code, 1860 Sec. 376, Sec. 417, Sec. 120B, Sec. 506, Sec. 493

Code of Criminal Procedure, 1973 Sec. 164

Counsel:

Satadru Lahiri, Abdul Hamid, Safdar Azam, Anasuya Sinha, Pinak Kumar Mitra

JUDGEMENT

Tirthankar Ghosh, J.- [1] The present appeal has been preferred against the judgment and order of conviction and sentence dated 20.01.2012 and 21.01.2012 passed by the Learned Additional Sessions Judge, Fast Track 4th Court, Diamond

Harbour, South 24 Parganas in Sessions Trial Case No. 4(7)08 arising out of Sessions Serial Case No. 1(2)08 thereby convicting the appellant for commission of offence under Section 376/417 of the Indian Penal Code and sentencing him as follows:

1) To suffer Rigorous Imprisonment for seven years and to pay a fine of Rs.1,00,000/- in default to suffer Rigorous Imprisonment for one year for the offence under Section 376 of the Indian Penal Code.

2) To suffer Rigorous Imprisonment for six months for the offence under Section 417 of the Indian Penal Code.

[2] Diamond Harbour Police Station Case no. 100 dated 13.04.2007 was registered for investigation under Section 376/493/120B of the Indian Penal Code against Abdul Gaffar Molla (accused/appellant), Hannan Molla, Taharia Bibi, Khalek Molla, Mannan Molla. One Zahira Khatoon lodged a complaint with the Officer-in-charge, Diamond Harbour Police Station to the effect that she developed a relationship with her neighbour Abdul Gaffar Molla (accused/appellant). The accused often used to propose her for marrying him and forced her for physical relationship, as a result of such physical relationship complainant became pregnant and informed the same to the parents and uncle(s) of the accused who asked her to undergo medical test. After medical test the complainant was confirmed regarding her pregnancy and when she informed the same to the accused and his relations they denied of any relationship and the accused/appellant threatened her that if the incident is divulged she would be killed. The accused along with his relations started harassing the complainant and attempted to take her away forcefully from her house for aborting the foetus. The complainant apprehended that she was running risk of her life and as such the accused and his relations should face consequences of their acts and be punished.

[3] The Investigating Agency on completion of investigation submitted charge-sheet under Section 376/493/120B/506 of the Indian Penal Code. The case was thereafter committed to the Court of Sessions and the trial Court framed charges under Section 376/506 of the Indian Penal Code against the appellant and under Section 417/506 of the Indian Penal Code against rest of the accused persons. The charge was read over to all the accused persons who pleaded not guilty and claimed to be tried.

[4] The prosecution in order to prove its case relied upon 13 witnesses which included PW1, victim; PW2, Syed Ali Molla, father of the victim; PW3, Esmotara Bibi, mother of the victim; PW4, Morsalim Sk, villager who organized salishi; PW5, Nurul Hassan Molla @ Salman, younger brother of victim; PW6, Kasem Sk, witness who was tendered for cross-examination, PW7, Samsul Beg, Co-villager; PW8, Karim Khan, Co-villager; PW9, Dr. Apurba Kr. Roy, doctor who conducted test of pregnancy of the victim; PW10, Dr. Prasanta Kr. Chowdhury, doctor who subsequently prepared medical report of victim; PW11, Nirmal Kr. Kar, ASI of police who filled up FIR and started case; PW12, Sandip Chatterjee, Superintendent of Diamond Harbour Sub-

divisional Hospital who produced the original Certificate Issue Register and PW13, Swapan Kr. Dey, Investigating Officer of the case.

[5] Prosecution relied upon some documents which included Ext.1, FIR and signature on the FIR; Ext.2, Statement under Section 164 of the Code of Criminal Procedure and the signatures, Ext.2 (series); Ext.3/1 and Ext.3/2, medical report and its signatures dated 30.04.2007; Ext.4/2, Medical Report dated 19.04.2007; Ext.5, Formal FIR; Ext.6, Attested Copy of Hospital Report of Birth Certificate; Ext.7, sketch map.

[6] PW1, is the victim lady who deposed that the house of the accused is situated across the pond of her residence and there are no adjacent house in between. At the time of the incident the accused Abdul Gaffar forcibly raped her at her room at a time when none were present at her house. She deposed that the accused/appellant on several occasions raped her although by village courtesy he happens to be her brother. When the complainant went to natures call he used to enter her room and threatened to kill her in case she did not meet her to have intercourse. As a result of such threatening she could not raise alarm and he also proposed her for marriage, however the misdeed of the accused made her pregnant and subsequently she informed her parents. A salish was held in her village about the incident wherein she narrated the facts but the accused was absent although his family members attended the Salish. The family members of the appellant represented in the salish that if at the time of blood test the baby which was in her womb was proved to be that of the appellant they would arrange marriage of their son with her. The other relations who have been accused were also present in the salish. The accused persons did not arrange for paternity test of the baby, however, on urine test it was found that she was pregnant. The matter was informed to them when the appellant fled away from his house as such no other discussion could take place. Having no other option she lodged complaint with the police who interrogated her and took her to the Learned Magistrate where her statement was recorded. She was also sent to the Hospital for medical examination and she also gave her statement to the police authorities. She gave birth to a male child whose name is Abdul Zahir Molla. She identified her signature in the FIR which was marked as Ext.1/1 and she stated that the complaint was written as per her instruction, she understood the contents of the same as it was read over and explained to her. She identified her signatures in the statement under Section 164 of the Code of Criminal Procedure which were shown to her, the same were marked as Ext.2 (series). Her consent for being examined by the doctor in the hospital was shown to her which was marked as Ext.3/1. Her ultra-sonography report where her signature appeared was marked as Ext.4/1. She also stated that she obtained Birth Certificate of her son from the Municipality and in the said Certificate the name of the father was that of the appellant. Victim stated that although the accused proposed to marry her and had sexual relationship with her for which the child was born but the accused/appellant refused to marry her.

[7] PW2, Sayed Ali Molla, father of the victim deposed that at the time of incident his daughter was aged about 16/17 years and the house of the accused persons were situated near their house and they had visiting terms. His daughter had a love affair with the appellant which he heard about 3 years ago from his wife. As a result of the relationship his daughter became pregnant at the instance of the appellant Abdul Gaffar Molla and his daughter confirmed the same. After knowing that his daughter was pregnant he along with his wife had been to the house of Abdul Hannan father of Abdul Gaffar who committed that in case his son was involved in the incident he would arrange marriage of their son with his daughter. His daughter was examined by the doctor at Sarisha Primary Health Centre where doctor told that his daughter was pregnant and as Abdul Gaffar/appellant refused to marry his daughter they had no other option except to report to the police authority. A village salish was held wherein all the accused persons were present except the appellant. He identified all the accused persons in Court.

[8] PW3 is Esmotara Bibi who deposed that she and her husband happened to be agricultural day labours and the victim happens to be their daughter. The house of the appellant was situated by the side of their house and they had visiting terms with the family. On seeing physical change in her daughter she made a query to which her daughter replied that she was carrying as she was subjected to forcible rape by the appellant. She also stated that her daughter told her that the appellant had promised to marry her and thereafter forced her for physical relationship. The witness stated that she informed the incident to her husband who clarified from her daughter and subsequently she and her husband had been to the house of Hannan Molla and narrated the incident, who promised that if his son is responsible for the incident then he would arrange marriage of his son with their daughter but subsequently, the appellant's family refused to arrange any marriage with their daughter. Thereafter she went to Diamond Harbour Sub-divisional Hospital with her daughter for her treatment and the doctor informed her that her daughter was carrying. The appellant's family however insisted for aborting the child and they would arrange for marriage of her daughter with their son. The incident was thereafter informed to the panchayat and a salish took place but the accused persons refused to accept the resolution of the salish, as such the Panchayat member requested them to lodge complaint with police station. She also stated that her daughter gave birth to a male child three years ago and he is still alive. The witness identified all the accused persons including the appellant in Court.

[9] PW4, Morsalim Sk is co-villager who deposed that he knew both the family of the victim as well as that of the appellant and is a resident of the same village. According to him in the year 2007 father of the victim came to his house and told him that his daughter was carrying because of the appellant's mis-deed and he requested to arrange for a salish. A salish was held in presence of respected persons of the village, both the parties appeared in the Salish and on being asked the victim narrated the incident. The victim narrated that she was carrying for three months and it was because

of the appellant Abdul Gaffar. After hearing both the sides the panchayat and the other members tried to arrange for marriage but Hannan Molla father of Abdul Gffar refused to accept such proposal of marriage as such he had no other option except to ask the victim and her father to take shelter of law.

[10] PW5, Nurul Hassan Molla is the younger brother of the victim. He identified all the accused persons including the appellant in Court. He deposed that Abdul Gaffar used to visit their house when his parents were not there. He stated that Abdul Gaffar told him that he would marry his sister and thereafter he came to know from his mother about three years ago that his sister was pregnant and Abdul Gaffar was responsible for the same. The matter was informed to the panchayat of the village, however, the accused persons refused to accept the resolution which was passed in the Salish and they fled away from the village.

[11] PW6, Kasem Sk was tendered by the prosecution however, his cross-examined was also declined.

[12] PW7, Samsul Beg is a co-villager who deposed that he knew the victim's family who are residing subsequently at Thakurpukur after leaving the village with the family members. He stated that Abdul Gaffar had visiting terms with the family of the victim and at that time the victim was a student and the victim's parents told him that their daughter became pregnant at the instance of Abdul Gaffar. On query from the victim he came to know the information was correct, matter was referred to the gram panchayat who arranged for a salish but the accused persons refused to accept the resolution of the salish.

[13] PW8, Karim Khan, deposed that he knew the victim and her family as also the accused persons and their family. He stated that he came to know from Syed Ali Molla that his daughter was pregnant at the instance of Abdul Gaffar. The witness clarified the same from the victim who supported such version and told him that the accused/appellant promised to marry her and had sexual intercourse as a result of which she became pregnant and subsequently refused such commitment. A Salish took place at the village, however, the accused persons refused to accept the resolution of the Salish.

[14] PW9, is Dr. Apurba Kumar Roy who deposed that on 30.04.2007 he conducted the ultra-sonography examination of the victim in reference to Diamond Harbour Police Station Case No. 100 dated 13.04.2007. He referred to his examination which was available in the report and is as follows:

> "After Examination I found a single live intra-uterine foetus and 17 weeks maturity in, change position with post-eriorly located placenta (Grade-0) and adequate liquour. This is the said report. This is my hand writing and signature with official seal. The medical report dt. 30/4/07 is marked as Exhbt.- 3/2."

[15] PW10, is Prasanta Kumar Chowdhury, he deposed that on 19.04.2007 he examined the victim who was 18 years, in reference to Diamond Harbour police station case no. 100 dated 13.04.2007. the brief history of the case as is present in the report was that the victim had love affair with Abdul Gaffar of her locality for about a year, who raped her. He told that he would marry her and had sexual intercourse several time at the residence of the victim girl and once at the home of the accused. Subsequently, the accused refused to marry her and she is presently having amenorrhoea. The examination report as stated by the doctor is set out as follows:

> "On examination an average built girl weight - 50 kg. Height - 5 ft. Mentally alert L.M.P. on 15th Pous.
>
> Breasts globular in shape, nipple developed, secondary areola developed. Axillary hair sparse. Pubic hair developed. Vulva and Vagina well developed.
>
> Hymen torned, vagina admits 2 fingers easily. Uterus 16 to 18 weeks size, A/V soft, mobile.
>
> For confirmation of pregnancy and determination of duration of pregnancy she was referred to radiology department.
>
> No marks of injury, recent or past detected on the private parts.
>
> No sign of V.D. detected."

[16] PW11 is Nirmal Kumar Kar, Assistant Sub-Inspector of Police attached to Diamond Harbour Police Station who received the written complaint from the victim and started the case being Diamond Harbour PS Case no. 100 dated 13.04.2007. The Formal FIR was also prepared by the witness who identified his signature. The Formal FIR was admitted in evidence and marked as Ext.5.

[17] PW12 is Sandip Chatterjee who is the Superintendent at Diamond Harbour Sub-Divisional Hospital who produced the original Certificate Issue Register from February 2007 to 21.10.2007 along with attested copy which was attested by Superintendent Dr. Anowar Hossain. The witness deposed that as per the Birth Certificate Register, serial no. 1673/2015 dated 30.09.2007 the victim gave birth to a child and in the said register Abdul Gaffer Molla is appearing as also Abdul Jaheer Molla. Name of the grand-mother of the child has been referred as Esmotara Bibi. The Original Register along with attested copy was admitted in evidence and marked as Ext.6.

[18] PW13, S.I. Swapan Kumar Dey is Investigating Officer of the Case. He deposed that on 13.04.2007 he was posted at Diamond Harbour Police Station and he was endorsed the investigation relating to Diamond Harbour Police Station case no. 100/07 dated 13.04.207. He narrated the manner in which he conducted the investigation after starting the case, which included preparation of sketch map with index, examination of the victim along with medical examination, recording of statements under Section 164 of the Code of Criminal Procedure, issuance of warrant proclamation and attachment of the absconding accused persons as also submission of

charge-sheet before the Jurisdictional Court being CS no. 150 dated 01.08.07 under Section 376/493/120B/506 of the Indian Penal Code.

[19] Mr. Satadru Lahiri, learned Advocate appearing for the appellant submitted that the victim's version from the inception is inconsistent as she has embellished, exaggerated and contradicted her own version which touches the root of the case. To demonstrate such contention learned Advocate pointed that in the FIR the victim stated she had an affair with the appellant and as a consequence she conceived out of such relationship. In her statement under Section 164 of Cr.P.C. before the learned Judicial Magistrate, victim narrated the events relating to sexual encounter in a manner which rules out any prior relationship as narrated in the FIR. Again before PW10 the doctor, victim admitted to have an affair and as such she entered in a physical relationship on several occasions resulting in her pregnancy. Before the Court in her deposition, victim made cryptic versions borrowing from all the three earlier representations. The contradictions in the version of the victim would be evident from the cross-examination of PW13 the Investigating Officer of the case. On the aforesaid aspect, learned Advocate for the appellant relied upon **Dilip & Anr. -Vs. - State of M.P.**, 2001 9 SCC 452; **Prakash Chand - Vs. State of Himachal Pradesh**, 2019 5 SCC 628; **Santosh Prasad alias Santosh Kumar -Vs. - State of Bihar**, 2020 3 SCC 443 and **Narender Kumar -Vs. - State (NCT of Delhi)**, 2012 7 SCC 171.

[20] Learned Advocate for the appellant also raised the issue relating to delay in lodging the FIR as according to him there was an inordinate delay in complaining to the police authorities which raises serious doubt regarding the authenticity of the version of the victim. To substantiate such contention, learned Advocate relied upon **Prakash Chand - Vs. State of Himachal Pradesh**, 2019 5 SCC 628; **Vijayan -Vs. - State of Kerala**, 2008 14 SCC 763; **K.P. Thimmappa Gowda -Vs. - State of Karnataka**, 2011 14 SCC 475; **Deelip Singh alias Dilip Kumar -Vs. - State of Bihar**, 2005 1 SCC 88 and Abdul Barik -Vs. - State of West Bengal,2022 SCCOnLineCal 417.

[21] It was further contended by the Appellant that the prosecution intentionally withheld the exact age of prosecutrix but from the different materials available in evidence it would reveal that she is not less than sixteen years and as such was unable to understand the consequences of her act. Learned Advocate to establish the same referred to the statement of the victim under Section 164 of Cr.P.C. as well as medical report where it reflects the age of the victim to be 18 years, while the parents have claimed her age to be of 16 years. On the other hand in spite of issuing process the prosecution did not tender the headmaster of the School as a witness to produce the School register. Relying upon K.P. Thimmappa Gowda (supra), Deelip Singh alias Dilip Kumar (supra), Saddam Hussain -Vs. - State of West Bengal,2021 SCCOnLineCal 3012 and Swapan Roy -Vs. - State of West Bengal,2016 SCCOnLineCal 611, learned Advocate for the appellant submitted that the victim was able to understand the consequences of her act and being more than 16 years there is no scope for bringing her case within the ambit of Section 417 or Section 90 of IPC.

Additionally it was submitted on behalf of the appellant that the marriage was not solemnised not for the appellant but for the resistance of the parents of the appellants. Learned Advocate lastly concluded that having regard to the totality of the evidence as relied upon by the prosecution, no case has been made out for convicting the appellant and as such the judgment and order of conviction and sentence passed by the Trial Court is liable to be set aside.

[22] Mrs. Anasuya Sinha, learned Advocate appearing for the State on the other hand resisted the submissions advanced on behalf of the Appellant and submitted that in the present case the evidence reflected that the parents of the victim girl are agricultural labours who are engaged in the field for their day to day living, as such the factum of the girl staying alone at home is a regular event. The background of the girl itself would go to show that she is unable to narrate her part of the events in a composed and calculated manner which would include each and every intricacies. The conduct of the appellant in this case cannot also be thrown away or ignored as immediately the news regarding the girl being pregnant spread, the appellant started evading her and from the inception the family members also started imposing conditions. It was pointed out before this Court that the statement of a rape victim is to be considered as if she is an injured witness and not an accomplice to the crime. Learned Advocate submitted that the victim girl being of tender age fell into the trap of the appellant who by promising to marry and threatening and thereafter running away when the victim became pregnant points to his culpability. The appellant or his family members did not arrange for any DNA testing which they represented before the panchayat while the girl in her medical examination was found to be pregnant. Learned Advocate for the State relied upon **State of H.P. -Vs. - Lekh Roy & Anr.**, 2000 1 SCC 247, **Yedla Srinivasa Rao -Vs. - State of A.P.**, 2006 11 SCC 615 and **Vijay alias Chinee -Vs. - State of Madhya Pradesh**, 2010 8 SCC 191 for supporting the judgment and order of conviction and sentence passed by the trial Court and submitted that there is no scope for interference in this appeal.

[23] On a scrutiny of the evidence available on record it reflects that the victim in the FIR narrated that she developed relationship with the accused/neighbour namely, Abdul Gaffar Molla and the accused often proposed that he would marry her and forced her for physical relationship, as a result of which she became pregnant. In her statement before the doctor PW10 the victim, PW1 narrated that she had an affair with Abdul Gaffar of her locality for a period of one year, who told her that he would marry her and had sexual intercourse several times at her residence and once at the home of the accused but subsequently he has refused to marry her and she is having Amenorrhoea for five months. The victim while in her statement before the learned Magistrate under Section 164 of the Code of Criminal Procedure narrated that while her parents had been to her elder sister's home she was alone in her house the accused entered into her room at night and forcefully disrobed her and she was embraced in such a manner that she was unable to overpower him which was a forceful sexual

intercourse at the instance of the accused, the accused thereafter repeated such misdeed on several occasions, as a result of which she became pregnant and when this was informed to Abdul Gaffar/accused/appellant and his relations they threatened of murdering her and as such she was compelled to institute the case. PW1 in her deposition before the Court narrated that the accused Abdul Gaffar raped her at her room when she was alone and none was present at her house and repeated such misdeed number of occasions. Whenever, she went to nature's call accused would enter her room and threatened to murder her in case she refused to have sexual intercourse. Because of such threat she could not raise any alarm and he also proposed to marry her. She became pregnant and the same was reported for which a Salish was held where the family members of the accused appeared and submitted that in case after blood test of baby it was found to be that of that appellant/Abdul Gaffar then they would arrange her marriage with him. The accused persons did not arrange for any paternity test, however she was taken to doctor and doctors after examination reported that she was pregnant.

[24] One of the salient feature in this case is the change of stand of the victim before different authorities which at the inception was only restricted to a relationship for which there was sexual intercourse with the promise to marry and which with a passage of time change to forceful/aggressive sexual encounter which is diametrically opposite to her narration of evidence as stated earlier. Considering the manner in which the victim has changed her stand from time to time it would be difficult to rely upon her sole testimony to arrive at a conclusion for convicting the appellant.

[25] Having regard to the above, I am of the opinion that it would not be safe to rely upon such evidence to arrive at a conclusion for holding the appellant guilty of commission of the offence.

[26] Accordingly the judgment and order of conviction and sentence dated 20.01.2012 and 21.01.2012 passed by the Learned Additional Sessions Judge, Fast Track 4th Court, Diamond Harbour, South 24 Parganas in Sessions Trial Case No. 4(7)08 arising out of Sessions Serial Case No. 1(2)08 is hereby set aside and the appellant is **acquitted** of the charges.

[27] Thus, CRA 66 of 2012 is allowed.

[28] The Appellant is on **bail** he is discharged from the **bail** bonds.

[29] Department is directed to send back the Lower Court Records to the respective Courts and communicate this judgment, so that effective steps are taken by the learned trial Court.

[30] All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

[31] Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities

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2023(1)AIAJ10

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Gita Gopi]

Criminal Miscellaneous Application; Criminal Appeal No 16798 of 2022; 1799 of 2022, 1799 of 2022 **dated 14/12/2022**

Bherulal Devilal Kharol

Versus

State of Gujarat

MATTER DISMISSED FOR DEFAULT

Code of Criminal Procedure, 1973 Sec. 204, Sec. 203, Sec. 256, Sec. 91, Sec. 205, Sec. 378 - Matter came to be dismissed for default by impugned order and the accused was acquitted - Complainant was represented by an Advocate on record - There was no reason for the trial Court Judge to dismiss the matter - When the pendency of matters with arrears show a long list, it would be not possible for the Court to deal with all the matters and it would not be expected from a litigant to simply sit in the Court while there would not be any progress in the matter, and more specifically when he is represented by an Advocate - A simple order of dismissal of the case without any scope of restoring the same would drag the litigant to the higher Court for filing the appeal to get the order quashed and set aside - Held, trial Court Judge was required to give an overview of his own proceedings - Order is without any application of mind; it is a mechanical order for disposing of the case rather than deciding the case on merits - Impugned order is quashed and set aside - Application stands disposed of.

[Paras 6 and 7]

Law Point: Order is without any application of mind; it is a mechanical order for disposing of the case rather than deciding the case on merits

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 204, Sec. 203, Sec. 256, Sec. 91, Sec. 205, Sec. 378

Counsel:

P P Majmudar, Hardik Mehta

JUDGEMENT

Gita Gopi, J.- [1] Order in Criminal Misc. Application In view of the submissions and the grounds raised in the application, leave to appeal is granted. The application stands disposed of.

Order in Appeal

Admit.

1. Advocate Mr. Jatin Yadav for Mr. P.P. Majmudar, learned advocate for the applicants has produced rojnama of the proceedings of Criminal Case No.47510 of 2013 to challenge the order dated 18.12.2022, where the matter came to be dismissed for default and the accused was acquitted.

[2] Mr. Yadav submitted that the learned Judge has not even perused the proceedings, when the matter was actually for the hearing of Exhibit-38, which was filed on 24.08.2018 under section 91 of Cr.P.C., praying for a direction to the accused to produce the documentary evidence. Thereafter, the matter stood transferred to 18th Additional Chief Judicial Magistrate and continued for hearing, where none of the parties had even prayed for any adjournment.

[3] Mr. Yadav submits that there was an application for summons to the complainant and on the very next adjournment, the proceedings shows that the Court was on video conferencing and matter stood adjourned to 03.07.2021, where the matter was again posted for hearing of Exhibit-38. Mr. Yadav submitted that it was strange that, an application, Exhibit-42, was moved from the side of accused to dismiss the matter and the learned Judge even thereafter posted twice the matter for hearing of Exhibit-42 and oblivious of the fact that on earlier date the matter was for hearing of Exhibit-38. Mr. Yadav submitted that the complainants were represented by Advocate on record and when the application was moved under section 91 of Cr.P.C. for a direction to the accused to produce documentary evidence, the learned trial Court Judge ought not to have dismissed the matter.

[4] Here, in this case, the verification of the matter was taken on the private complaint and Inquiry was numbered as 760 of 2013, and after verification under an order, the Criminal Case No.47510 of 2013 was registered, cognizance was taken and process was issued under section 204 of the Cr.P.C. The learned Judge ought to have considered that there was no dismissal of the complaint under section 203 of Cr.P.C. The learned Additional Chief Judicial Magistrate was of the opinion of taking cognizance of the offence considering to be a sufficient ground for proceeding and therefore, ordered for issuance of summons. The learned Judge ought to have taken into consideration the provisions of section 205 of Cr.P.C. and the very provision, which grants the power to the Magistrate to dispense with the personal attendance of the accused and permit him to appear by his pleader, and can direct the personal attendance of the accused as and when necessary. At the same time, ought to have seen that the complainant is represented by an Advocate on record and there was an application, Exhibit-38, to invoke the power under section 91 of the Cr.P.C.; the learned Judge should have heard that application first rather than entertaining the application for dismissal of the complaint, observing that the complainant is not interested in proceeding with the matter, where on record, the complainant had given his verification and the Court had deemed fit to take cognizance of the matter. The matter was for hearing of the application, Exhibit-38, and the order passed for

dismissal of the complaint for default of the complainant and acquitting the accused, is inherently bad in law.

[5] In **Associated Cement Co. Ltd. Vs. Keshvanand**, 1998 1 SCC 687, the Hon'ble Apex Court while referring to the provisions of section 256 of Cr.P.C. in context of the complaint filed under section 138 of the N.I. Act, has made observations as under:

> "15. Section 256 of the Code of Criminal Procedure, 1973(for short 'the new Code') is the corresponding provision to Section 247 of the old Code. The main body of both provisions is identically worded, but there is a slight difference between the provisos under the two sections. The proviso to section 256 of the new code is reproduced here:
>
> "Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the magistrate is of Opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case."
>
> 16. What was the purpose of including a provision like Section 247 in the old code (or section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The Section, therefore, affords a protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, court has a duty to acquit the accused in invitum.
>
> 17. Reading the Section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for progress of the case and also whether the situation does not justify the case being adjoined to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised

judicially and fairly without impairing the cause of administration of criminal justice."

5.1 This Court in case of **State v. Keshavram**, 1977 GLR 524, held as under:

"The power under Sec. 256 of the Criminal Procedure Code has been conferred on the Magistrate obviously for the ends of justice and with a view to see that an accused person is not subjected to any undue harassment. The proviso to Sec. 256 further lays down that when the complainant is represented by a Pleader or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. In the instant case, the situation on the day in question squarely fall within the proviso and still the learned Magistrate has acted under the main part of this section. This is really unfortunate and it is hoped that repetition of such instances would not be there in future in the Court of the Magistrate."

5.2 Similarly, in the the case of **Sureshchandra Chandulal Patni V. Natwarlal Keshavlal Patni**, 1992 1 GLR 626, this Court held that:

"In the instant case, the learned Magistrate has not recorded any reason about his thinking it proper to adjourn the hearing of the case to some other date. It appears that he has ignored the proviso to Sec. 256 of the Code of Criminal Procedure. The power under Sec. 256 of the Code of Criminal Procedure has been conferred on the Magistrate obviously in the interest of justice, with a view to seeing that the accused is not subjected to any undue harassment. It is clear from the proviso to Sec. 256 of the Code of Criminal Procedure that when the complainant is represented by a pleader or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with the personal attendance of the complainant and proceed with the case. In the instant case, the learned Magistrate does not appear to have applied his mind in dispensing with the personal attendance of the complainant and to proceed with the case or to adjourn the case to some other date as requested in the application submitted by the Advocate for the complainant. In the present case, the situation as on March 5, 1984 squarely falls within the aforesaid proviso and still the learned Magistrate acted under sub-sec. (1) of Sec. 256 of the Code of Criminal Procedure acquitting the accused. It is therefore, clear that the learned Magistrate has ignored the provision contained in the proviso to Sec. 256 of the Code of Criminal Procedure."

[6] Section 256 of Cr.P.C. has given the power to the Court concerned to dismiss the complaint only on the day when the summons has been issued on the complaint and on the day appointed for the appearance of the accused or in any subsequent day thereto, to which the hearing may have been adjourned, the complainant does not

appear, the Magistrate shall despite anything contained in Cr.P.C. acquit the accused, unless for some reason he deems fit to adjourn the hearing of the case to some other day. The proviso to the said sub-section (1) clarifies that when the complainant is represented by a pleader or by an officer conducting the prosecution or where the Magistrate is of the opinion that personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

[7] Here, in this case, the complainant was represented by an Advocate on record. There was no reason for the trial Court Judge to dismiss the matter. When the pendency of matters with arrears show a long list, it would be not possible for the Court to deal with all the matters and it would not be expected from a litigant to simply sit in the Court while there would not be any progress in the matter, and more specifically when he is represented by an Advocate.

7.1 The learned trial Court Judge has taken a shortcut to dispose of the matter rather than considering the case of the complainant to decide on merits. The learned trial Court Judge ought to have kept in mind that the order below section 256 Cr.P.C. dismissing the complaint in default leads to acquittal of the accused, and once an accused has been acquitted in the offence, the law provide a remedy by way of appeal against the order of acquittal under section 378(4) of the Cr.P.C. A simple order of dismissal of the case without any scope of restoring the same would drag the litigant to the higher Court for filing the appeal to get the order quashed and set aside. The learned trial Court Judge was required to give an overview of his own proceedings. The order is without any application of mind; it is a mechanical order for disposing of the case rather than deciding the case on merits.

[8] Thus, in view of the reasons given above, the order dated 18.12.2021 in Criminal Case No.47510 of 2013 passed by the 12th Additional Chief Judicial Magistrate, Surat, is quashed and set aside. The Criminal Case No.47510 of 2013 is ordered to be restored in original status on the file of the concerned Court with a direction to proceed with the matter from the stage of hearing of Exhibit-38. The application stands disposed of. Record & Proceedings, if any, be sent back to the concerned Court

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2023(1)AIAJ14

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before Sarang V Kotwal]

Criminal Appeal No 429 of 2015 **dated 29/11/2022**

Bhimrao Jagannath Koli

Versus

State of Maharashtra

SUFFICIENT DOUBT

Indian Penal Code, 1860 Sec. 504, Sec. 307, Sec. 506-Code of Criminal Procedure, 1973 Sec. 428-Appellant was handicapped by both hands and it was not possible for him to commit the act as alleged - The gap of two hours is unexplained - Timings are irreconcilable and, therefore, sufficient doubt is created about the genuineness of the prosecution case - Circumstance of unexplained injuries to the appellant - The appeal is allowed.

[Paras 13, 18, 19, 20, 21]

Law Point:- Sufficient doubt is created regarding truthfulness of the prosecution case. The benefit of doubt goes to the appellant and, therefore, he deserves to be acquitted.

Acts Referred:

Indian Penal Code, 1860 Sec. 504, Sec. 307, Sec. 506

Code of Criminal Procedure, 1973 Sec. 428

Counsel:

Ratnesh Dube, S R Agarkar

JUDGEMENT

Sarang V Kotwal, J.- [1] The appellant has challenged the judgment and order dated 17.3.2015 passed by the Additional Sessions Judge, Pune in Sessions Case No.380/2009. The appellant was convicted for commission of offence punishable under Section 307 of the Indian Penal Code and was sentenced to suffer RI for seven years and to pay fine of Rs.3,000/- and in default of payment of fine to suffer SI for three months. He was also convicted for commission of offence punishable under Section 506 of IPC and was sentenced to suffer three years and to pay fine of Rs.1,000/- and in default to suffer SI for one month. He was acquitted from the charge of commission of offences punishable under Section 504 of IPC. The substantive sentences were directed to run concurrently. He was granted set-off under Section 428 of Cr.P.C..

[2] The prosecution case is that the appellant was married to his wife Laxmi Koli and they were staying together with their daughter. On 28.10.2008 at about 4.00 p.m. under the influence of liquor the appellant poured kerosene on his wife and set her on fire. He had bolted the room from inside. The neighbours came to help the victim. He then opened the door and ran away. In the process, he banged his head against the wall and suffered injury. The victim was taken to hospital by her neighbours. She gave her statement to police. It was treated as FIR. The investigation was carried out. The appellant was arrested. Statements of witnesses were recorded. The spot panchnama was conducted. In the meantime, the parents of the victim who were residing at about 1 km away from their house were also informed. They came to see her. She narrated the same incident to them. The clothes and other articles were sent for chemical

analysis. However, the report is not on record. At the conclusion of investigation, the charge-sheet was filed and the case was committed to the Court of Session.

[3] During trial, the prosecution examined eight witnesses including the victim, her parents, a neighbour who took her to hospital and who informed her parents, two panchas, the Medical Officer and the investigating officer. Learned trial Judge believed the prosecution evidence. The defence of the appellant was of total denial. That defence was not believed and ultimately the appellant was convicted and sentenced.

[4] Heard Shri Ratnesh Dube, learned appointed counsel for the appellant and Shri S.R. Agarkar, learned APP for the Respondent-State.

[5] The prosecution story unfolds through the evidence of PW-1 Laxmi Koli. She has deposed that she was residing in a colony at Talegaon with the appellant and their daughter. She had got married with the appellant about nine years before the incident. The appellant was having a business of hotel at Talegaon Station. He was addicted to liquor. He used to suspect her character. The incident took place on 28.10.2008 at about 4.00 p.m.. At that time, the appellant came to his house under the influence of liquor and started abusing PW-1. The appellant threatened to kill their daughter by banging her on floor. He then picked her up. Therefore, PW-1 caught their daughter. The appellant then picked up the stove and poured kerosene on PW-1's person and then he set her on fire by lighting a matchstick. The appellant told her that he would kill her. She raised shouts for help. The neighbours came there and extinguished the fire. The appellant ran away in the meantime. He banged his head against the wall and sustained injuries to his head. After that she was taken to Talegaon General Hospital and was admitted there. At about 8.00 p.m. the police came there and recorded her statement. It was treated as FIR which is produced on record at Exhibit-33. Her father produced her clothes before the police.

In the cross-examination, she deposed that their marriage was result of a love affair. Her parents had opposed their marriage. They did not like her decision to marry the appellant. They had not attended their marriage. She has given very important admission that the appellant was handicapped by both hands since his birth. She has deposed that on many occasions, she had lodged complaint with the police regarding the appellant suspecting her character. She had given copies of those complaints to the police. She deposed that they had a gas-connection in the kitchen. She also admitted that in the incident their daughter did not suffer any injury. She denied the suggestion that she discussed the incident with her parents and thereafter this complaint was filed. She was given a suggestion that while cooking food on gas-stove because of the flames, her clothes caught fire and she received burn injuries. She also denied the suggestion that she had grudge against the appellant as he did not give money for household expenses.

The FIR is produced on record at Exhibit-33. It was registered at 8.15 p.m. at Talegaon Dabhade police station vide C.R. No.216/2008. It is in consonance with her deposition.

[6] PW-2 Sahebrao Lokhande is father of PW-1. He has deposed that PW-1 had love affair with the appellant and she had performed marriage with the appellant and had given birth to her daughter. He has deposed that when PW-1 used to visit their house, she used to disclose that the appellant used to consume liquor and used to suspect her character. He used to abuse and beat her. On 28.10.2008, he returned home at 4.30 p.m.. At that time, PW-1's neighbour Duryodhan Pawar came to him in a rickshaw and told him that PW-1 was admitted in General Hospital. PW-2 told this fact to his wife, who in turn told him that at 3.30 p.m. the appellant had gone to their house and had threatened to kill their daughter on that day itself. After that PW-2, his wife and Duryodhan Pawar went to General Hospital, Talegaon. PW-1 was admitted there. She had suffered injuries on her neck, chest and both hands. She told him about the incident of the appellant causing those burn injuries.

In the cross-examination, he could not tell the specific dates on which his daughter had complained to him about the appellant's conduct. He stated that the appellant's house was at a distance of 1 km from his own house. He denied the suggestion that the complaint was lodged after their discussion amongst themselves.

[7] PW-5 Alka Lokhande was mother of PW-1. She has deposed in the same manner as deposed by PW-2. She has deposed about the incident when the appellant had allegedly gone to their house at about 3.30 p.m. and had issued threats on 28.10.2008, but, this witness had not paid attention to his threats. At about 4.00 p.m., Duryodhan Pawar came to their house and informed about the incident. Then they went to the hospital where PW-1 was admitted.

In her cross-examination, she admitted that in this case the appellant was initially arrested but was subsequently released on bail and after that he had taken PW-1 for co-habitation. They were residing at Talegaon. Even PW-5 herself had consented for their cohabitation. PW-1 stayed with the appellant till 2012.

[8] PW-4 Duryodhan Pawar is an important witness. He has deposed that he knew the appellant who was residing with his wife and daughter. There used to be frequent quarrels between the appellant and his wife PW-1 and on a couple of occasions PW-4 had intervened. On 28.10.2008, it was a Diwali Day. At about 3.30 p.m. he was washing his auto-rickshaw near his house. He heard shouts from the house of the appellant. He went there. The door was closed from inside. Smoke was coming out from the window. PW-4 then called the appellant. He came out. He was having bleeding injury to his head. Then the appellant ran away. PW-4 then entered the house and saw that PW-1's clothes had got fired. He extinguished the fire by pouring water. PW-1 had sustained injuries. The neighbours Ravindra Aware and Gulab Raut were with him. They took her to General Hospital, Talegaon and admitted her there. In his

presence PW-1 narrated the incident to the doctor. After that the the doctor called the police. The police recorded her statement. PW-4 went to the house of the PW-1's parents and told them about the incident.

In the cross-examination, he deposed that he was in the house of the appellant at the time of incident for about 10 to 15 minutes. He could not describe the clothes worn by the accused at the time of incident. PW-1 was trying to extinguish the fire by her hands. She had not poured water on her person. The neighbour Vaikole gave water for extinguishing the fire. The General Hospital was about one and half kilometers from the appellant's house. At about 4.25 p.m., they reached the General Hospital. The doctor made enquiries with her. The complaint was lodged by PW-1 in his presence in the hospital. According to him, at that time, her parents were not present. He stated that before he brought PW-2 and PW-5 to the hospital, her complaint was lodged by PW-1. By the time, he went to call PW-2 and PW-5, the police had not reached the hospital.

[9] PW-6 Milind Sasane was a pancha in whose presence clothes of PW-1 were produced by PW-2 in Talegaon Dabhade police chowki on 29.10.2008. The panchnama is produced on record at Exhibit-47. However, in absence of any CA report this seizure of clothes of PW-1 is hardly of any significance. The fact that they were in burnt condition is not disputed.

[10] PW-7 Manohar Dabhade was landlord of PW-2 who had acted as a pancha for spot panchnama, which is produced on record at Exhibit-49. The spot panchnama mentions that the stove, the matchbox and the scarf was seized from the spot.

[11] PW-3 Dr. Umakant Kokane's evidence is important. He has deposed that on that day he was attached to Talegaon Rural Hospital. At about 6.00 p.m., PW-1 was brought to their hospital. He examined her and she was admitted to the hospital for the period of twelve days. There were superficial to deep burns over left hand, chest, neck and upper abdomen. She had suffered about 12% to 15% burn injuries. The medical certificate is produced on record at Exhibit-41. On the same day, he had examined the appellant. He had sustained deep abrasion over left parietal region of the size 3 cm and deep abrasion over left parietal region about 3 cm. There was abrasion over right hand and wrist. His medical treatment papers are produced at Exhibit-42. The medical certificate also mentions that the appellant was handicapped. The history mentioned in that medical certificate as assault by hard and blunt object over head and right hand.

In the cross-examination, he has stated that PW-1 was brought to the hospital by her husband that means the appellant had brought her to the hospital. He admitted that the burn injuries could be self-inflicted, accidental or homicidal.

[12] PW-8 PSI Kadam was the investigating officer. He has deposed that he conducted the investigation. He visited the spot and carried out the spot panchnama. He arrested the appellant on 29.10.2008. His clothes were seized. PW-1's clothes were seized. He collected the injury certificates. The articles were sent for chemical analysis. After completion of the investigation, the charge-sheet was filed.

[13] Learned counsel for the appellant submitted that the prosecution has not proved its case beyond reasonable doubt. The most important factor in this case is that the appellant was handicapped by both hands and it was not possible for him to commit the act as is alleged by PW-1.

[14] He submitted that the evidence of PWs-1, 2, 4 & 5 is not reliable, and in particular PW-4 is unreliable witness. The timings mentioned by him do not match. The police had come to the hospital at about 8.00 p.m. PW-4 has deposed that the victim was immediately taken to hospital at about 4.30 p.m. and he had gone to call the parents of PW-1 i.e. PW-2 & PW-5 after the first informant had given a complaint. These timings do not match. He has also not given clear answers regarding the actual incident.

[15] He further submitted that the doctor himself has deposed that the appellant had admitted PW-1 to the hospital. This story is contradictory to PW-4's version.

[16] Learned counsel further emphasized the fact that the PW-1 was residing with the appellant even after the incident till the year 2012. According to learned counsel, all these infirmities show that the prosecution has failed to prove its case beyond reasonable doubt. He also referred to the unexplained injuries on the head and hand of the appellant.

[17] Learned APP opposed these submissions. According to him, the evidence of PW-1 itself was sufficient to prove the case against the appellant. Her evidence is supported by the medical evidence as well as evidence of PWs-2, 4 and 5. He submitted that PW-5 has deposed that the appellant had gone to their house about half an hour before the incident and had threatened PW-5 that he would commit murder of PW-1. This is an important circumstance.

[18] I have considered these submissions. As rightly submitted by learned counsel for the appellant, the most important factor in this case is that the appellant is handicapped by both his hands and from his birth. It is mentioned so in the arrest panchnama as well as in the medical papers showing treatment given to him by PW-3. Because of his infirmity, it is very difficult to believe that he could over power PW-1 and commit all these acts attributed to him within a short span of time without PW-1 resisting him. The appellant first picked-up the stove, opened the lid, poured the kerosene on PW-1 and then picked up a matchstick and then lighted it setting her on fire. During all this period, PW-1 could have easily resisted him because of his infirmity and could have easily run away or at least could have tried to seek help from the neighbours. Therefore, considering his physical infirmity, it is difficult to believe that he could commit all these acts without PW-1 protecting herself. The doctor's evidence shows that the husband i.e. the appellant had taken her to the hospital. Therefore, through the evidence of the doctor, the evidence of PW-4 Duryodhan Pawar is falsified.

[19] As rightly submitted by learned counsel for the appellant, the timings mentioned by PW-4 do not match. The hospital was at a short distance. According to the prosecution case, the incident had taken place at about 4.00 p.m. but according to the

Medical Officer PW-3 she was brought to the hospital at 6.00 p.m.. The gap of two hours is unexplained. Even PW-1 has stated that the incident had taken place at 4.00 p.m.. This raises doubt about the actual occurrence. PW-1's evidence shows that the police had come to the hospital at 8.00 p.m. and had recorded her statement. The police station was not at a very far distance and yet, the statement was recorded at 8.00 p.m..

[20] PWs-2 & 5 have deposed that PW-4 Duryodhan Pawar had come to their house at about 4.00 p.m. and had told them about the incident. This also does not appear to be true considering all these timings. According to PW-5 after the police had recorded her statement, he had gone to call them and her statement was recorded after 8.00 p.m.. All these timings are irreconcilable and, therefore, sufficient doubt is created about the genuineness of the prosecution case.

[21] In addition, there is a circumstance of unexplained injuries to the appellant. There were two deep injuries on the head and one injury on the hand. These injuries are not explained by any of the witnesses. The Medical Officer has not deposed that those injuries are possible by banging head on wall. In fact the history shows that those injuries were caused by hard and blunt object.

[22] Thus, taking overall view of the matter based on above discussion, sufficient doubt is created regarding truthfulness of the prosecution case. With the result, the prosecution has failed to prove its case beyond reasonable doubt. The benefit of doubt must go to the appellant and, therefore, he deserves to be acquitted. Hence, the following order:

:: O R D E R::

i. The appeal is allowed.

ii. The impugned judgment and order 17.3.2015 passed by the Additional Sessions Judge, Pune in Sessions Case No.380/2009 is set aside.

iii. The appellant is acquitted of all the charges levelled against him.

iv. The appellant is in custody. He shall be released forthwith unless is required in some other case.

v. Criminal Appeal is disposed of accordingly

2023(1)AIAJ20

IN THE HIGH COURT OF KARNATAKA

[Before Dr H B Prabhakara Sastry]

Criminal Revision Petition No 395 of 2021 **dated 20/10/2022**

C V Narasimha Naik

Versus

Naveen N

COMPOUNDABLE OFFENCE

Negotiable Instruments Act, 1881 Sec. 147, Sec. 138 - Dishonour of cheque - Guilty for offence punishable under Section 138 of Negotiable Instruments Act, 1881 - Section 147 of N.I. Act has made every offence punishable under N.I. Act as compoundable - There is no bar for parties in proceeding to compound offence - Parties are permitted to compound offence under Section 147 of N.I. Act - Matter is settled as per terms mentioned in joint application filed by both side - Acquitted of offence punishable under Section 138 of N.I. Act - Appeal allowed

[Para 8]

Law Point - Parties be permitted to compound offence under Section 147 of N.I. Act.

Acts Referred:

Negotiable Instruments Act, 1881 Sec. 147, Sec. 138

Counsel:

N R Naik, Vinutha P Kale

JUDGEMENT

Dr H B Prabhakara Sastry, J.- [1] The present revision petition has been filed by the accused, challenging the judgment of conviction and order on sentence passed by the learned XVI Additional Chief Metropolitan Magistrate, Bengaluru City (hereinafter for brevity referred to as "the Trial Court") in C.C.No.4433/2017, holding the accused guilty for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter for brevity referred to as the "N.I. Act"), which was further confirmed by the Court of the learned LXIV Additional City Civil and Sessions Judge (CCH-65) at Bengaluru, (hereinafter for brevity referred to as "the Sessions Judge's Court") in the appeal filed by him. Challenging the impugned judgments of conviction and order on sentence passed by both the Courts, the petitioner/accused has filed the present revision petition.

[2] Learned counsels from both side along with their respective clients, as identified by their learned counsels, are physically present in the Court.

[3] Learned counsels from both side have filed a joint application - I.A.No.6/2022, under Section 147 of the N.I. Act, along with the affidavit of the revision petitioner/accused. In the joint application filed by both side, the parties have reported that, they have settled the matter amicably and have compromised the matter. The legal representative of the deceased respondent/original complainant has submitted her 'no objection' in allowing the revision petition by setting aside the impugned judgments and acquitting the petitioner/accused of the offence punishable under Section 138 of the N.I. Act.

[4] Learned counsels for the parties also make their submission on the lines of the compromise petition.

[5] The sum and substance of the joint application as well as the affidavit is that, the parties have settled the matter amicably, stating that, the petitioner herein (accused) has offered to pay in total a sum of Rs.1,00,000/- to the respondent/complainant - Sri. Naveen N., who has now been represented by his legal representative - Smt. Ramya N., as full and final settlement of the claim in this petition. Out of the said sum of Rs.1,00,000/-, a sum of Rs.40,000/- is stated to have been be deposited by the petitioner herein in the Trial Court and the petitioner has stated that the legal representative of the deceased respondent is at liberty to withdraw the said amount towards settlement of her claim in this matter and the remaining sum of Rs.60,000/- is said to have been given in cash to the legal representative of the present respondent - Smt. Ramya N., as full and final settlement of the matter.

[6] The legal representative of the deceased respondent - Smt. Ramya N., who is physically present in the Court and identified by the learned counsel for the respondent acknowledges the receipt of a sum of Rs.60,000/- by her in the form of cash, from the petitioner/accused. Further, a sum of Rs.40,000/- said to have been deposited by the present petitioner/accused in the Trial Court in C.C.No.4433/2017 be released in favour of Smt. Ramya N., being the legal representative of the deceased respondent - Sri. Naveen N., by the Trial Court, without any further orders from this Court in this regard, however, after her due identification and in accordance with law.

[7] The enquiry made with the parties who are physically present convinces the Court that both the parties out of their free consent and volition and in their best interest have settled the matter amicably which is further corroborated by the submissions made by their learned counsels. As such, I am of the view that on the terms of the said joint application, the parties be permitted to compound the offence under Section 147 of the N.I. Act, however, subject to the payment of the graded cost by the petitioner/accused.

[8] Section 147 of the N.I. Act has made every offence punishable under the N.I. Act as compoundable. As such, there is no bar for the parties in the proceeding to compound the offence. However, at the same time, the guidelines laid down by Hon'ble Apex Court in **Damodar S. Prabhu v. Sayed Babalal H**, 2010 AIR(SC) 1907 regarding imposing graded cost on litigant also to be borne in mind. According to the said Judgment in **Damodar S. Prabhu's Case (supra)**, if the application for compounding is made before the Sessions Court or High Court in revision or appeal, such compounding is permitted to be allowed on the common condition that the accused pays 15% of the cheque amount by way of graded cost.

[9] Admittedly, in the instant case, the four cheques' amount is for a sum of Rs.1,50,000/-, as such, the graded cost would be Rs.22,500/-.

[10] The learned counsel for the petitioner submits that, the graded cost payable by the petitioner by virtue of the judgment of the Hon'ble Apex Court in **Damodar S. Prabhu's case** (supra), which comes to a total sum of Rs.22,500/- would be deposited

by the petitioner. Accordingly, along with the application, the petitioner has also filed a Demand Draft bearing No.034258 dated 17-10-2022, drawn on Nyayamitra Sahakari Bank Niyamita, in favour of 'The Member Secretary, KSLSA, Bengaluru' for a sum of Rs.22,500/- towards graded cost as per the judgment of the Hon'ble Apex Court in **Damodar S. Prabhu's case (supra)**. The said demand draft is accepted towards the graded cost payable by the petitioner. Registry to do the needful in the matter.

[11] Accordingly, taking into consideration the joint application- I.A.No.6/2022 filed by both side, the guidelines given by the Hon'ble Apex Court in **Damodar S. Prabhu's case (supra)** and the circumstance of the case on hand, I.A.No.6/2022 is allowed. The parties are permitted to compound the offence under Section 147 of the N.I. Act. The matter is settled as per the terms mentioned in the joint application filed by both side and the petitioner herein who was accused in the Trial Court in C.C.No.4433/2017 is acquitted of the offence punishable under Section 138 of the N.I. Act. Accordingly, the present revision petition stands disposed of.

Registry to transmit a copy of this order to both the Trial Court and also to the Sessions Judge's Court, immediately

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2023(1)AIAJ23

IN THE SUPREME COURT OF INDIA

[From KERALA HIGH COURT]

[Before B R Gavai; Pamidighantam Sri Narasimha]

Criminal Appeal No. 1864 of 2010, 1865 of 2010 **dated 11/11/2022**

Gireesan Nair & Ors Etc

Versus

State of Kerala

DELAY IN HOLDING THE TIP

Indian Penal Code, 1860 Sec. 324, Sec. 149, Sec. 148, Sec. 143, Sec. 34, Sec. 111, Sec. 147, Sec. 109, Sec. 302, Sec. 307, Sec. 427, Sec. 326, Sec. 120B, Sec. 506-Explosive Substances Act, 1908 Sec. 5, Sec. 3-Prevention of Damage to Public Property Act, 1984 Sec. 3-It is for the prosecution to prove that a TIP was conducted in a fair manner and that all necessary measures and precautions were taken before conducting the TIP. Thus, the burden is not on the defence - The conduct of the TIP, coupled with the hovering presence of the police during the conduct of the TIP vitiated the entire process - Conviction not sustainable - In view of these lapses on the part of the prosecution, it is not necessary to consider various other grounds raised by the Appellants - Delay in holding the TIP coupled with other circumstances has cast a serious doubt on the credibility of the TIP witnesses - As the only evidence for convicting the appellants is the evidence

of the eye-witnesses in the TIP, and when the TIP is vitiated, the conviction cannot be upheld

[Para 31, 44, 49, 56]

Law Point- The identifications are held in police presence, the resultant communications tantamount to statements made by the identifiers to a police officer in course of investigation and they fall within the ban of Section 162 of the Code.

Acts Referred:

Indian Penal Code, 1860 Sec. 324, Sec. 149, Sec. 148, Sec. 143, Sec. 34, Sec. 111, Sec. 147, Sec. 109, Sec. 302, Sec. 307, Sec. 427, Sec. 326, Sec. 120B, Sec. 506

Explosive Substances Act, 1908 Sec. 5, Sec. 3

Prevention of Damage to Public Property Act, 1984 Sec. 3

Counsel:

Sonia Mathur, Vinay Navare, Bina Madhavan, S Udaya Kumar Sagar, Lakshay Saini, Katubadi Ismail, Nachiketa Joshi, Ankita Chaudhary, Archana Pathak, Santosh Kumar, Praneet Pranav, Suyash Pande, Kiron S Bhattathru, Amit Sharma, Simarjeet Singh Saluja, Himadri Haksar, M/S Lawyer S Knit & Co, Harshad V Hameed, Dileep Poolakkot, Ashly Harshad

JUDGEMENT

Pamidighantam Sri Narasimha, J.- [1] These appeals are directed against the judgment of the High Court of Kerala upholding the conviction of Accused Nos. 1-7, 9- 12, 14, 16 and 18 under Sections 143, 147, 148 of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC'.) , and Sections 3(2)(e) of Prevention of Damages to Public Property Act, 1984 (hereinafter referred to as 'the PDPP Act'.) , read with Section 149 of the IPC. A sentence of four years of rigorous imprisonment and a fine of Rs. 10,000, as imposed by the Trial Court**[1]** , was also upheld by the High Court.

[2] Facts: The facts of the present case can be traced back to the year 2000 when the State of Kerala decided to delink pre-degree courses from colleges and start plus-two courses at the school level. There were protests against the implementation of the said policy. During one of the protests on 12.07.2000, it is alleged that the police officials were harsh, and several protesters, including girl students, were injured. To avenge the police atrocity, it is alleged that Accused Nos. 1-2 and 25-33 hatched a conspiracy to launch a protest the next day to create fear and terror in the city.

[3] In furtherance of the alleged conspiracy, on 13.07.2000, about 1500 protestors armed with weapons proceeded towards the Government Secretariat. When the group was met with resistance from the police force, they became violent and caused damage to as many as 81 buses belonging to the Kerala State Road Transport Corporation (hereinafter referred to as 'the KSRTC'.) . A few protestors even went inside the garage of KSRTC, and when the KSRTC workers repelled them, the protestors turned even more violent, leading to the death of one Mr. Rajesh, a bus conductor with KSRTC.

[4] In the aftermath of this event, based on the statement given by Rajesh, an FIR was registered by PW-72 (head constable) under Sections 143, 147, 148, 307, 149 of the IPC, Section 3(2)(e) of the PDPP Act and Sections 3 and 5 of the Explosive Substances Act, 1908. As per the FIR, Accused Nos. 1-2 and 25- 33 hatched a conspiracy and abetted acts of rioting. The Appellants herein and Accused Nos. 17 and 19 being part of the mob, formed an unlawful assembly which resulted in riots and wide-scale destruction of public property. Further, Accused Nos. 17 and 19 were also alleged to have caused the death of Rajesh.

[5] Investigation: Pursuant to the lodging of the FIR, PW-78, Circle-inspector, Fort P.S., as the investigating officer, arrested Accused Nos. 1-16 on 13.07.2000. Two days later, the investigation was handed over to PW-76. After taking over the baton, PW-76 was informed that Rajesh had succumbed to the injuries. Immediately upon receiving that information, PW-76 proceeded to the hospital to conduct an inquest. After concluding that the death was homicidal, he approached the concerned court, which had taken cognizance of the matter to alter the charge under Section 307 to that of Section 302 of the IPC. Considering the gravity of the subject and wide-scale repercussions, the Director General of Police constituted a Special Investigation Team headed by PW-84, the then Dy. S.P., Narcotic and Economic Offences Cell, CBCID, Thiruvananthapuram. After taking charge of the investigation, PW-84 arrested Accused Nos. 17-18 on 01.08.2000 and Accused Nos. 19 on 04.08.2000. It is PW-84 who completed the investigation and filed a charge sheet before the Trial Court. However, before getting into the details of the charges levelled and the consequent decision of the Sessions Court, it is essential to mention the two Test Identification Parades conducted by PW-47, Judicial Magistrate First Class - IV, Thiruvananthapuram, which have a direct bearing on the final decision in this matter.

[6] 1st Test Identification Parade: Conducting a Test Identification Parade (hereinafter referred to as 'TIP'.) was crucial for the prosecution as there were more than 1500 people who were part of the mob, and only a handful of them were arrested and charge-sheeted. It is for this reason that the IO (PW-84) submitted a report before the Chief Judicial Magistrate (hereinafter referred to as 'CJM'.) and sought the consent of the CJM for conducting a TIP. The CJM accepted this request and, by his order dated 24.07.2000, directed PW-47 (JMFC- IV, Thiruvananthapuram) to conduct a TIP. Accordingly, PW-47 decided to conduct the TIP on 31.07.2000 for the identification of Accused Nos. 1-16.

[7] To protect the sanctity of the TIP, the Judicial Magistrate (PW-47) is said to have instructed the IO (PW-84) to ensure that the witnesses (who were later examined as PWs 1, 3, 4, 5, 6 and 7) earmarked for the TIP do not get any opportunity to see the Accused before the TIP. For conducting the TIP, the Judicial Magistrate (PW-47) directed the IO (PW-84) to arrange forty civilians as non-suspects. The IO (PW-84) could, however, arrange only for thirty non-suspects being twenty police officers and ten civilians. In addition to these thirty non-suspects, the Judicial Magistrate (PW-47)

is said to have shortlisted twenty-one undertrials to participate in the TIP. However, PW-47 decided to go ahead with only twenty-one undertrials and ten civilians. It is his version that he made an effort to fetch more undertrials for the TIP, but to no avail. Ultimately, he conducted the TIP by mixing the sixteen accused with the thirty-one non-suspects.

[8] The TIP began with the Judicial Magistrate (PW-47) taking note of the name, address, and other details of the non-suspects. After that, the suspects and non-suspects were mixed, and witnesses were asked to identify the Accused.

[9] After the conclusion of the identification process for Accused Nos. 1-16, the non-suspects were asked to leave, and when the suspects were alone, they were asked if they had any complaints about how the TIP was conducted. It is alleged that all of them replied in the negative. However, when questioned if they had anything else to say, Accused No. 2, on behalf of all the accused, stated that, when the suspects were in police custody from 20.07.2000 to 22.07.2000, they were all photographed and video-graphed and were also shown to all the six witnesses from the cabin of the IO (PW-84). All this is evident from the "Report of the Identification Parade of the 16 Accused Persons dated 31.07.2000".

[10] 1 2 nd Test Identification Parade: In the previous TIP, six witnesses identified accused 1-16. But as mentioned earlier, Accused Nos. 17-19 were arrested after the completion of the 1st TIP. In that view of the matter, permission to conduct the 2nd TIP was sought from the CJM by the IO (PW-84) to facilitate the identification of the Accused in three phases - (i) In the 1st Phase to identify Accused Nos. 17-19 by those very witnesses who identified Accused Nos. 1-16 in the 1st TIP (PWs 1, 3, 4, 5, 6 and 7); (ii) In the 2nd Phase to identify Accused Nos. 1-16 by PW's 10, 11, 12 and 15; and (iii) In the 3rd Phase to identify Accused Nos. 1-19 by PW's 8, 9 and 33. After receiving the request from the IO (PW-84), the CJM granted permission and directed the Judicial Magistrate (PW-47) to conduct the 2nd TIP. Accordingly, PW-47 decided to conduct the 2nd TIP on 26.08.2000. The conduct of the TIP in each of the phases is as under.

10.2 In the 1st Phase of this TIP, Accused Nos. 17-19, who were to be identified, were mixed with sixteen under-trial non-suspects. After the identification process culminated, Accused No.19, for himself and the other two accused, stated that while they were in police custody, they were shown to the six witnesses, PWs 1, 3, 4, 5, 6 and 7. Further, he also stated that they were all photographed and video-graphed and that they were allowed to be seen by all the witnesses when they were taken to court for extending their remand.

10.3 In the 2nd Phase of the TIP, Accused Nos. 1-16 who were to be identified were mixed with 45 non-suspects, with thirty-one of them being under-trials and the remaining being civilians. Thereafter, PWs 10, 11, 12 and 15 proceeded with the identification.

10.4 In the 3rd Phase of the TIP, Accused Nos. 1-19 were to be identified by PWs 8, 9 and 33. For identification, the Accused were mixed with the pre-existing 45 non-suspects. After the end of the identification process, Accused No. 2, on behalf of others, stated that when Accused Nos. 1-19 were taken to court for remand, and the presence of all the witnesses was arranged in the court by the police. He reiterated that while they were in police custody, they were photographed and video-graphed and were also made to be seen by all the witnesses from the chamber/cabin of the IO (PW-84). All the Accused collectively stated that they were wearing the very same dress, straight from their arrest, till the date of the TIP. All this is evident from the "Report of the Identification Parade of the 19 Accused Persons dated 26.08.2000".

[11] Thus, it can be seen that from the very beginning, the Accused had objected to how the TIP was conducted and the events preceding it, which inter-alia included - (i) the Accused being shown to the witnesses from the cabin of the IO (PW-84); (ii) the Accused being photographed and video-graphed while they were in police custody; (iii) securing the presence of the witnesses in court while the accused were produced for extension of their remand; and (iv) the Accused wearing the same dress straight from their arrest till the date of the TIP.

[12] Upon completion of the investigation, including the TIP as indicated above, charge sheet was filed on 23.09.2000, and the case was committed to the Court of Additional District and Sessions Judge (Fast-track Court - I), Thiruvananthapuram, on 27.10.2000.

[13] Sessions Court and High Court: On 26.05.2005, the Sessions Court framed charges under Sections 120B, 143, 147, 148, 324, 427, 506, 302, 109 and 111 r/w 149 of the IPC and Sections 3(2) (e) of the PDPP Act against Accused Nos. 1-33. The prosecution examined 85 witnesses and marked 134 documents as exhibits. Thereafter, the defence examined 3 witnesses and marked 24 documents as exhibits. After hearing the matter in detail, the Sessions Court framed 12 points for consideration, which can be broadly classified into three issues (i) conspiracy hatched by Accused Nos. 1-2 and 25-33; (ii) the murder of Rajesh; and (iii) the destruction of KSRTC buses and other public properties.

[14] Re: Conspiracy hatched by Accused No. 1-2 and 25-33: To establish a conspiracy case against Accused Nos. 1-2 and 25-33, the prosecution examined PW-68 and PW-85. PW-68, who deposed before the court that he had overheard the conversation between the Accused hatching the conspiracy. PW-85, on the other hand, turned hostile. Therefore, based on the deposition of PW-68, the Sessions Court convicted Accused Nos. 1-2 and 25-33 under Sections 120B of the IPC r/w Section 3(2)(e) of the PDPP Act, Sections 109 and 111 of the IPC, and sentenced them to four years of imprisonment. In appeal, the High Court disbelieved PW-68 and consequently set aside the conviction of Accused Nos. 1-2 and 25-33 under the abovementioned

provisions. The decision of the High Court on the issue of conspiracy against Accused Nos. 1-2 and 25-33 has attained finality as the State has not preferred an appeal.

[15] Re: Charge of the murder of Rajesh against Accused 17 and 19: In so far as the issue relating to the charge of murder of Rajesh against Accused Nos. 17 and 19 is concerned; the prosecution relied upon the evidence of PWs 5, 6 and 8. These witnesses deposed that while Accused No. 17 beat Rajesh with an iron pipe, Accused No. 19 beat him with a wooden reaper. Based on the deposition of PWs 5, 6 and 8, the Sessions Court convicted Accused Nos. 17 and 19 under Sections 302 r/w 34 of the IPC for life. The High Court, in appeal, set aside this conviction and instead found them guilty under Section 326 r/w 34 of the IPC and sentenced them to 7 years of rigorous imprisonment. The finding of the High Court on this issue has also attained finality as the State has not appealed before this Court against the altered conviction and the reduced sentence. In fact, even Accused Nos. 17 and 19 have not appealed since they had already served a sentence of seven years.

[16] Given the findings of the Trial and the High Court on the issue of conspiracy and murder attaining finality, the only question that falls for consideration is the issue relating to the destruction of public property. In fact, this is the only question that was raised and argued before us. We will now proceed to examine this aspect in detail.

[17] Re: Charge of the destruction of public property against Accused Nos. 1-7, 9-12, 14, 16 and 18 under Sections 143, 147, 148 of the IPC and Sections 3(2)(e) of the PDPP Act r/w Section 149 of the IPC: To establish the charge of destruction of public property, the prosecution relied upon the evidence of PWs 5, 6, 8, 31 and 33, as eye-witnesses to the crime. To prove the presence of these witnesses, the prosecution had to necessarily rely on the TIP proceedings. The defence questioned the TIP on various grounds, among other things, the presence of IO (PW-84) at the time of conducting the TIP, the accused being photographed and video-graphed while they were in police custody, among others.

[18] The Sessions Court rejected all the objections to the legality and credibility of the TIP by holding that (i) the IO (PW-84) was just present and did not influence the TIP in any manner; (ii) the imbalance in the ratio between suspects and non-suspects in the TIP is not the Judicial Magistrate's (PW-47) or the IO's (PW-84) fault, because they tried their best to fetch more non-suspects; (iii) the IO (PW-84) took steps to prevent disclosure of identity of accused to witnesses before the TIP by covering the side of the vehicle in which they were brought to the court for extension of remand, though, he also stated that he did not put a mask on them; (iv) there is no material to show that photographs or video-graphs of the Accused were taken and shown to the witnesses prior to the TIP; and (v) even though PW-3 and PW-4 admitted in cross-examination before the Court that some of the accused were shown to them before the TIP, during re-examination, both of them frankly admitted that after the incident, they had seen the miscreants for the first time during the TIP. In view of its conclusions on

the TIP, the Trial Court proceeded to convict Accused Nos. 1-7, 9-12, 14, 16-19 under Sections 143, 147, 148 IPC and 3(2)(e) of PDPP Act r/w 149 of the IPC and sentenced them to four years of imprisonment.

[19] The High Court has, while exercising criminal appellate jurisdiction, failed to consider any of the submissions made by the Appellants on the legality or the integrity of the TIP. The following passage is the only discussion on this argument:

> "43. .... The Court below has made its finding regarding the offence punishable under Ss.143, 147 and 148 IPC and S.3(2)(e) of the PDPP Act, based on the identification of the various witnesses in court. The matter has been dealt with elaborately by the Court below. It is idle for the appellants to say that there was no proper identification and so, it was not possible to say, who had caused obstruction to the KSRTC buses. Moreover, when a group of persons cause damage to public properties, each one of that illegal group will be held liable for the acts of the other members in the group also."

In view of the above, the High Court upheld the conviction of Accused Nos. 1-7, 9-12, 14, 16-19 under Sections 143, 147, 148 IPC and 3(2)(e) of PDPP Act r/w 149 of the IPC and also the sentence of four years imprisonment imposed upon them by the Sessions Court. Therefore, the learned counsel for the Appellants were justified in contending that the High Court has not considered the submissions of the Appellants on law and on fact. The High Court, while exercising criminal appellate jurisdiction under Section 386 of the Code of Criminal Procedure, 1973, has to necessarily assess the evidence on record with a view to satisfy itself that the appreciation of evidence by the Trial Court is not vitiated by any illegality and is not palpably erroneous. The dismissal of appeal without considering an appellant's contention is a serious infirmity, which will result in no legal judgment in the eye of law**[2]** .

[20] Submissions of the Parties: Ms. Sonia Mathur, learned Senior Advocate appearing for Accused Nos. 1-7, 9, 14, 16 and 18, at the very outset, contended that the High Court has not rendered any independent finding on the issue of destruction of public property and has merely reiterated what the Sessions Court had held.

[21] Be that as it may, the central thrust of Ms. Mathur's submission was on the manner in which the TIP was conducted. According to her, the TIP was of utmost importance, considering that this was a case where criminal liability was fastened only against a few protestors. She raised questions over the integrity of the TIP by contending that (i) the ideal ratio of suspects to non-suspects as laid down by the Kerala High Court in **Pradeepan v. State of Kerala**, 2005 3 KerLT 1075 , has not been followed; (ii) the presence of IO (PW-84) in the premises of central jail during both the TIPs vitiates the TIP in its entirety; (iii) the IO (PW-47) in both the TIPs did not record physical features, age etc. of the non-suspects. The learned senior counsel gave an example by stating that Accused No. 7 had a long beard, but there were no non-suspects having a long beard; (iv) the IO (PW-84) has admitted that Accused Nos.

1-16 were in his custody when he questioned the eyewitnesses in his office; (v) PW-3 and PW-4 have admitted that they had seen the Accused while they were at the Police Station; (vi) PW-1, PW 8-12 and PW-33 have admitted that they had identified the Accused in the TIP based on the pictures they saw in the newspaper; (vii) the Accused had complained that while they were in police custody, they were photographed and shown to the witnesses from the cabin of PW-84; (viii) Remand Report dated 14.07.2000 clearly stated that Accused Nos. 1-16 were shown to the eye-witnesses; (ix) there has been a delay in holding in the TIP which is fatal, in light of the decision in **Acharaparambath Pradeepan and Anr. v. State of Kerala**, 2006 13 SCC 643 , **Lal Singh and Ors. v. State of UP**, 2003 12 SCC 554 and **Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra**, 1998 5 SCC 103; and (x) no importance can be given to the identification made in the TIP when the same witness fails to identify the same accused before the court. For this purpose, reliance was placed on the judgement of this Court in **Lalli alias Jagdeep Singh v. State of Rajasthan**, 2003 12 SCC 666 . Independent of her submissions on the aspect of TIP, the learned senior advocate also relied upon the decision of the Delhi High Court in Capitol Art House (P) Ltd v. Neha Datta,2022 SCCOnLineDel 1746 , where it was held that re-examination of witnesses should not be allowed, especially to facilitate them to rectify their mistakes. This submission was made in the context of PW-3 and PW-4s contradictory statements made in the chief examination and the re-examination.

[22] Shri Vinay Navare, learned Senior Advocate appearing for Accused Nos. 10-12 contended that the statements given by PW-5, PW-6 and PW-8 could not form the basis of conviction because (i) PW-5 had stated in his deposition that he was not present at the time of the incident and that he reached the place of occurrence only after the incident; (ii) PW-6 could only identify Accused Nos. 17 and 19 and could generally identify the other accused as the agitators; (iii) PW-8 had stated in his deposition that he identified the Accused on the basis of the images he saw in a newspaper.

[23] Shri Navare also raised questions over how the TIP was conducted by submitting that (i) the purpose of conducting a TIP fails when pictures of the accused are published in newspapers. He relied upon the decision of this Court in **Ravi alias Ravichandran v. State represented by Inspector of Police**, 2007 15 SCC 372 , where this Court had held that no importance could be attached to a TIP where the photos of the alleged suspects were making rounds in newspapers and also when the witnesses had a chance to look at the accused while the accused were in police custody. Additionally, he also placed reliance on the judgement of this Court in Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra (supra) to bolster his submission on the same point; (ii) the ratio of suspects to non-suspects was improper in the 1st TIP; (iii) the IO (PW-84) was present in the hall where both the TIPs took place; (iv) there was a delay of over one month between the date of the incident and the dates of the TIP, which facilitated the investigation officer to acclimatise the

witnesses to the way the Accused's look. He relied upon the decision of this Court in **Suresh Chandra Bahri v. State of Bihar**, 1995 Supp1 SCC 80 where it has been held that a TIP has to be conducted at the earliest possible opportunity; and (v) the identification made by PW-5, PW-6 and PW-8 are of no consequence as they are not an independent witness.

[24] Shri Harshad V. Hameed, learned counsel appearing for the State, countered the submissions made regarding the conduct of the TIP by contending that - (i) the decision in Pradeepan v. State of Kerala (Supra No. 8), is not binding. The same were mere guidelines which could be adjusted based on the facts and circumstances of a case. Reliance was also placed on the decision of the Kerala High Court in **Mohanan Nair v. State of Kerala**, 1989 CrLJ 2106 (Ker) , to support the same point; (ii) a TIP can be accepted as a piece of evidence based on the subjective satisfaction of a court, which has occurred in this case; (iii) if there were concerns about the manner in which the TIP was conducted, then the TIP itself should have been challenged. In that view of the matter, it was submitted that when it has not been challenged, then under Section 80 of the Indian Evidence Act, 1872, a presumption arises that the TIP Report is a valid proof of evidence; (iv) the JFMC (PW-47) took every measure within his reach to ensure smooth conduct of the TIP; (v) the IO (PW-84) took all possible measures to ensure that the TIP is conducted at the earliest possible opportunity; (vi) reliance was placed on the decision of this Court in the case of **Munna Kumar Upadhyay v. State of Andhra Pradesh**, 2012 6 SCC 174 , where it was held that if pictures of the suspects were circulated in newspapers months before the TIP is conducted, then the circulation would have lost its effect on the minds of the witnesses; (vii) the Sessions Court has only convicted those accused, who were identified both before the Court as well as in the TIP. The testimony of these eyewitnesses never suffered from any infirmities; and (viii) the evidence of PW-5, PW-6 and PW-8, which was relied upon by the Trial Court, was not biased.

[25] Analysis: Heard the learned counsel for the parties and perused the case records. We may, at the outset, note that the eyewitnesses questioned by the prosecution did not give out the names or identities of the Accused participating in the riot and involved in the destruction of public property. Therefore, the IO (PW-84) had to necessarily conduct a TIP. The object of conducting a TIP is threefold. First, to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the crime. Second, to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. Third, to test the witnesses' memory based on first impression and enable the prosecution to decide whether all or any of them could be cited as eyewitnesses to the crime (**Mulla and Anr. v. State of U.P.**, 2010 3 SCC 508 (Paras 44, 45 and 55)).

[26] TIPS belong to the stage of investigation by the police. It assures that investigation is proceeding in the right direction. It is a rule of prudence which is

required to be followed in cases where the accused is not known to the witness or the complainant (**Matru alias Girish Chandra v. State of U.P.**, 1971 2 SCC 75 (Para 17); Mulla and Anr. v. State of U.P. (Supra No.19 (Paras 41 and 43).) and **C. Muniappan and Ors. v. State of Tamil Nadu**, 2010 9 SCC 567 (Para 42)). The evidence of a TIP is admissible under Section 9 of the Indian Evidence Act. However, it is not a substantive piece of evidence. Instead, it is used to corroborate the evidence given by witnesses before a court of law at the time of trial. Therefore, TIPs, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of an accused can be sustained (**State of H.P. v. Lekh Raj and Anr.**, 2000 1 SCC 247 (Para 3); and C. Muniappan and Ors v. State of T.N., (Supra No. 22 (Para 42))).

[27] It is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that a TIP is held without avoidable and unreasonable delay after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses before the test identification parade. This is a very common plea of the accused, and therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution. But reasons should be given as to why there was a delay (Mulla and Anr. v. State of U.P. (Supra No.19 (Para 45)) and Suresh Chandra Bahri v. State of Bihar (Supra No.15)).

[28] In cases where the witnesses have had ample opportunity to see the accused before the identification parade is held, it may adversely affect the trial. It is the duty of the prosecution to establish before the court that right from the day of arrest, the accused was kept "baparda" to rule out the possibility of their face being seen while in police custody. If the witnesses had the opportunity to see the accused before the TIP, be it in any form, i.e., physically, through photographs or via media (newspapers, television etc...), the evidence of the TIP is not admissible as a valid piece of evidence (Lal Singh and Ors v. State of U.P. (Supra No.10) and **Suryamoorthi and Anr. v. Govindaswamy and Ors.**, 1989 3 SCC 24).

[29] If identification in the TIP has taken place after the accused is shown to the witnesses, then not only is the evidence of TIP inadmissible, even an identification in a court during trial is meaningless (Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra (Supra No.11)). Even a TIP conducted in the presence of a police officer is inadmissible in light of Section 162 of the Code of Criminal Procedure, 1973 (**Chunthuram v. State of Chhattisgarh**, 2020 10 SCC 733 and **Ramkishan Mithanlal Sharma v. State of Bombay**, 1955 1 SCR 903).

[30] It is significant to maintain a healthy ratio between suspects and non-suspects during a TIP. If rules to that effect are provided in Prison Manuals or if an appropriate authority has issued guidelines regarding the ratio to be maintained, then such

rules/guidelines shall be followed. The officer conducting the TIP is under a compelling obligation to mandatorily maintain the prescribed ratio. While conducting a TIP, it is a sine-qua-non that the non-suspects should be of the same age-group and should also have similar physical features (size, weight, color, beard, scars, marks, bodily injuries etc.) to that of the suspects. The concerned officer overseeing the TIP should also record such physical features before commencing the TIP proceeding. This gives credibility to the TIP and ensures that the TIP is not just an empty formality (**Rajesh Govind Jagesha v. State of Maharashtra**, 1999 8 SCC 428 and Ravi v. State (Supra No.14)).

[31] It is for the prosecution to prove that a TIP was conducted in a fair manner and that all necessary measures and precautions were taken before conducting the TIP. Thus, the burden is not on the defence. Instead, it is on the prosecution (Rajesh Govind Jagesha v. State of Maharashtra (Supra No.32 (Para 4))).

[32] We will now consider the three major contentions raised by the Appellants before us, being (i) the credibility of the eye-witnesses who participated in the TIP to identify the accused; (ii) delay in conducting the TIP; and (iii) legality of the TIP and the presence of the IO during the conduct of the TIP. We will now consider each of these submissions.

[33] Re: Credibility of the eyewitnesses who participated in the TIP to identify the accused:

[34] PW-3, in his deposition before the Sessions Court, stated that:

"Prior to the date of identification parade, I had been to the Crime Branch office on different days.

(Q). Were there 10-18 accused at time of first parade.

(A). So many people were there.

(Q). Were some of the accused shown to you from the crime branch office

(A). They were shown

(Q). Were some more of the accused were shown to you before going to the 2nd parade

(A). Yes"

[35] PW-4, in his deposition before the Sessions Court, has stated that:

"I went to Crime Branch office for giving statement.

That was 8-10 days prior to the first parade.

(Q). When you went there to give your next statement did they show you some of the accused

(A). They were there

(Q). After the first parade I have given statement to the Crime Branch. That was before 2nd parade. Did they show you the accused at that time

(A). They were there. Thus, those persons I saw or shown to me were identified at the time of parade."

[36] Both these witnesses, during their re-examination, have, however, contradicted themselves by stating that they saw the Accused for the first time during the TIP.

[37] In so far as PW-5 is concerned, his presence at the scene of the offence and seeing the Accused committing the offence is in serious doubt. During his cross-examination, he stated that

"(Q). Did you go and see the place of incident.

(A) I went there at the place of occurrence after the incident. Then I saw three employees. Altogether, there were 10-20 persons including who stood outside the office and at the place of occurrence.

(Q). Did you ask them about the incident.

(A) No.

(Q). Did you reach there only after accused left the place.

(A). Yes"

[38] PW-6, whose evidence has been relied upon by the prosecution, has also stated that he had visited the crime branch office eleven days prior to the 1st TIP, i.e., on 20.07.2000. This date coincided with the date when the Accused were also taken into police custody. On the other hand, PW-8, whose evidence has also been relied upon by the prosecution, has stated in his deposition that he identified the Accused in the TIP based on the pictures published in a newspaper.

[39] PW-31, an employee of KSRTC, has deposed only on the financial loss caused to KSRTC because of the destruction. His deposition is not helpful to fasten any liability on the Accused.

[40] The last witness relied upon by the prosecution to prove the charge of destruction of public property was PW-33. However, this witness turned hostile. Therefore, his deposition takes us nowhere.

[41] Proceeding to the deposition of the Judicial Magistrate (PW-47), he was asked, if before commencing the parade, he had asked any of the witnesses whether they had any prior acquaintance with the suspects or non-suspects or whether the suspects or non-suspects were shown to them by the IO (PW-84). PW-47 stated that he did not ask any such question to the suspects before commencing the parade. However, he said that he asked the suspects at the end of the parade if they had any objection to the manner in which the TIP was conducted. It may be recounted that Accused No. 2 had objected that they were shown to the witnesses while they were in police custody.

[42] This Court in **Budhsen and Anr. v. State of UP**, 1970 2 SCC 128 , had directed that sufficient precautions have to be taken to ensure that the witnesses who are to participate in the TIP do not have an opportunity to see the accused before the

TIP is conducted. In Lal Singh v. State of U.P. (Supra No.10) , this Court had held that a trial would be adversely affected when the witnesses have had ample opportunity to see the accused before the identification parade is held. It was held that the prosecution should take precautions and establish before the court that right from the day of his arrest, the accused was kept "baparda" to rule out the possibility of his face being seen while in police custody. Later, in Lalli v. State of Rajasthan (Supra No.12) and **Maya Kaur Baldevsingh Sardar and Anr. v. State of Maharashtra**, 2007 12 SCC 654 , this Court has categorically held that where the accused has been shown to the witness or even his photograph has been shown by the investigating officer prior to a TIP, holding an identification parade in such facts and circumstances remains inconsequential. Another crucial decision was rendered by this Court in Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra (Supra No.11), where it was held:

> "8. .... But, the question arises: what value could be attached to the evidence of identity of accused by the witnesses in the Court when the accused were possibly shown to the witnesses before the identification parade in the police station. The Designated Court has already recorded a finding that there was strong possibility that the suspects were shown to the witnesses. Under such circumstances, when the accused were already shown to the witnesses, their identification in the Court by the witnesses was meaningless. The statement of witnesses in the Court identifying the accused in the Court lost all its value and could not be made the basis for recording conviction against the accused. The reliance of evidence of identification of the accused in the Court by PW 2 and PW 11 by the Designated Court, was an erroneous way of dealing with the evidence of identification of the accused in the Court by the two eyewitnesses and had caused failure of justice. Since conviction of the appellants have been recorded by the Designated Court on wholly unreliable evidence, the same deserves to be set aside."

[43] In so far as evidence of PW-8 is concerned, who has stated that he identified the accused in the TIP based on pictures published in newspapers, the position of law is clear. This Court in Suryamoorthi v. Govindaswamy (Supra No.28), has held as follows:

> **"10.** Two identification parades were held in the course of investigation. At the first identification parade PW 1 identified all the seven accused persons whereas PW 2 identified three of them, namely, Accused 2, 6 and 7 alone. It is, however, in evidence that before the identification parades were held the photographs of the accused persons had appeared in the local daily newspapers. Besides, the accused persons were in the lock-up for a few days before the identification parades were held and therefore the possibility of their having been shown to the witnesses cannot be ruled out altogether. We do not, therefore, attach much importance to the identification made at the identification parades."

Reiterating the same principle, this Court in Ravi v. State (Supra No.14) , has again reaffirmed the aforesaid position by holding as follows:

"**17.** Certain facts are not in dispute. The test identification parade was held after ten days. It is also not in dispute that the photographs of the accused were taken at the police station. The investigation officer allowed them to be published. Photographs of the appellant and the said Udayakumar were not only published, according to the prosecution witnesses, they were shown to be the accused in the aforementioned crime. Some of them admittedly were aware of the said publication. The purported test identification parade which was held ten days thereafter, in our opinion, looses all significance, in the aforementioned fact situation.

19. In a case of this nature, it was incumbent upon the prosecution to arrange a test identification parade. Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the witnesses concerned or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification."

[44] Having considered the evidence of crucial eye-witnesses and the material indicating the conduct of the TIP, we are of the opinion that the witnesses had the opportunity of seeing the accused before the conduct of the TIP. Not only have the witnesses deposed that they had seen the suspects before the TIP, even Accused No. 2, at the end of the 1st TIP, had raised a grievance that the suspects were all photographed, video-graphed and were shown to the witnesses from the cabin of the IO (PW- 84). At the end of the 2nd TIP, he had also stated that when Accused Nos. 1-19 were taken to court for the purpose of remand, and the presence of all the witnesses was arranged in the court by the police. In fact, all the Accused collectively stated that they were wearing the very same dress, straight from their arrest, till the date of the TIP to indicate that the TIP did not serve its purpose. We find no reason to disbelieve the truthfulness of the statement of the Accused because they had raised this contention right from the beginning and have maintained it all along.

[45] In view of the above, we are of the opinion that there existed no useful purpose behind conducting the TIP. The TIP was a mere formality, and no value could be attached to it. As the only evidence for convicting the appellants is the evidence of the eye-witnesses in the TIP, and when the TIP is vitiated, the conviction cannot be upheld. We will now examine the other lapses while conducting the TIPs.

[46] Re: Delay in conducting the TIP: Undue delay in conducting a TIP has a serious bearing on the credibility of the identification process. Though there is no fixed timeline within which the TIP must be conducted and the consequence of the delay would depend upon the facts and circumstances of the case (Supra No.9), it is imperative to hold the TIP at the earliest. The possibility of the TIP witnesses seeing

the accused is sufficient to cast doubt about their credibility. The following decisions of this Court on the consequence of delay in conducting TIP have emphasised that the possibility of witnesses seeing the accused by itself can be a decisive factor for rejecting the TIP. In Suresh Chandra Bahri v. State of Bihar (Supra No.15) , it was held that:

> "It is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards were effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of a TIP."

[47] In Budhsen & Anr. v. State of UP (Supra No. 35) , this Court set aside the conviction imposed on the appellant therein, on the ground that no conviction can be based by solely relying on the identification made in a TIP. While holding that a 14-day delay by itself in conducting the TIP may not cause prejudice to the accused, it observed that there is a high chance of accused being seen by the identifying witnesses outside the jail premises. In **Subash and Shiv Shankar v. State of U.P.**, 1987 3 SCC 331, this Court acquitted an accused on the ground that the TIP was held three weeks after the arrest was made. This Court suspected that the delay in holding the TIP could have enabled the identifying witnesses to see the accused therein in the police lock-up or in the jail premises. In **State of A.P. v. Dr M.V. Ramana Reddy and Ors.**, 1991 4 SCC 536 , this Court acquitted respondent nos. 2 and 3 therein on the ground that there was a delay of 10 days in conducting the TIP, and in those 10 days, there was a high likelihood of their photographs being shown to the witnesses. In Rajesh Govind Jagesha v. State of Maharashtra (Supra No.32) , a delay of about one month was viewed seriously by this Court since there was a possibility of the accused being shown to the witnesses.

[48] Returning to the facts of the present case, we have already noted that Accused Nos. 1-16 were arrested on 13.07.2000. Instead of filing an application for conducting a TIP at the earliest, the IO (PW-84) filed a remand application, pursuant to which the Accused were remanded to police custody. There is strong evidence that the Accused were shown to the witnesses during their police custody period. The fact that an application for conducting a TIP was filed on 23.07.2000, i.e., the very next day after the police custody period ended, leads to the inevitable conclusion that the Accused were taken into police custody to facilitate their easy identification during the TIP. Otherwise, we see no reason why an application for conducting a TIP was not filed immediately after the arrest of the Accused. In such circumstances, we firmly

believe that the delay in holding the TIP coupled with other circumstances has cast a serious doubt on the credibility of the TIP witnesses.

[49] Re: Legality of the TIP and the presence of the IO during the conduct of the TIP: A three-judge bench of this Court in Chunthuram v. State of Chhattisgarh (Supra No.30), by relying on Ramkishan Mithanlal Sharma v. State of Bombay (Supra No. 31), has held that any identification made by witnesses in a TIP in the presence of a police officer tantamount to statements made to the police officer under Section 162 Cr.P.C. The Court held:

> "The infirmities in the conduct of the test identification parade would next bear scrutiny. The major flaw in the exercise here was the presence of the police during the exercise. When the identifications are held in police presence, the resultant communications tantamount to statements made by the identifiers to a police officer in course of investigation and they fall within the ban of Section 162 of the Code."

[50] The evidence of IO (PW-84) about the conduct of the Test Identification Parade may be noted: -

> "(Q). Did you make any arrangement to prevent the witness and the accused from seeing each other inside the jail?
>
> (A). I did not think it as something needed."

[51] Further, when a question regarding the presence of the IO (PW-84) was put to JMFC (PW-47), he stated that:

> "...in the parade conducted on 31.07.2000, 31 non-suspects were selected. The civilian were produced by the IO. On that date also Dy. SP and CI were present in the premises of the jail....."

[52] With respect to the 2nd TIP conducted on 26.08.2000, the JMFC (PW-47) stated that:

> "On 26.08.2000 Dy. SP S.P. Joshwa was also present in the central prison".

[53] Having considered the statement of the JMFC (PW-47) and the evidence of the IO (PW-84) together, we are of the view that the presence of the Investigating Officer at the time of the TIP cannot be ruled out. The Investigating Officer has stated that he has not taken any steps to ensure that the accused and the witnesses do not see each other. It is rather surprising to note that Investigating Officer thinks that such a measure is not necessary.

[54] In this very context, we may also note the first TIP report dated 31.07.2000 made by the JMFC (PW-47). The Magistrate recorded that the Accused had raised concerns over the manner in which the TIP was conducted. The relevant portion of the TIP report is noted hereunder:

> "21. Thereafter when the suspects alone were left in the hall, they were asked, whether they have got any complaints, as to the manner of the conduct of the

parade. All of them replied in the negative. When questioned, whether they have got anything else to say, they unanimously asked Mr. Padma Kumar (A2) to state something. He then said that when the suspects were in Police custody, they were all, photographed and videographed and were also shown to all the 6 witness, who are made to identify them in the parade, from the cabin of the Dy. SP. Mr. Joshwa."

[55] Even the report of the second TIP dated 26.08.2000 as recorded by the JMFC (PW-47) notes as hereunder:

"22. When the accused persons along were left in the hall, they were questioned, my whether they have got any complaint regarding the manner of the conduct of the parade. They all replied in the negative. When queried further, whether they have got anything else to say all of them wanted the second accused Padma Kumar to make some comments. Thereupon, the second accused stated that accused Nos. 1 to 16 were, before their production in court, in police custody for three days; that accused nos. 17 to 19 were similarly in police custody for 6 days; that when all the 19 were taken to the court on 24 and 25.8.2000 presence of all the witnesses in the court were arranged by the Police, so as to enable them to see all the accused persons; and that while in Police custody all of them were photographed and videographed and were also made to be seen by all the witnesses, from the chamber of Deputy Superintendent Of Police, the investigating officer. All the accused had also stated that they were wearing the very same dress, straight from their arrest till date."

[56] In view of the evidence available on record, we are of the opinion that the conduct of the TIP, coupled with the hovering presence of the police during the conduct of the TIP vitiated the entire process. The Trial Court as well as the High Court have committed a serious error in relying on the evidence of the TIP witnesses for convicting and sentencing the Appellants. We are of the opinion that the conviction and sentencing are not sustainable. In view of these lapses on the part of the prosecution, it is not necessary for us to consider various other grounds raised by the Appellants.

[57] Conclusion: Having considered the matter in detail and having noted the various discrepancies in the manner in which both the TIPs were conducted, we believe that the prosecution has not established its case beyond reasonable doubt. Apart from the TIPs, we find no other evidence put forth by the prosecution to prove the guilt of the Accused for offences under Sections 143, 147, 148 IPC and 3(2)(e) of PDPP Act r/w 149 of the IPC.

[58] For the reasons stated above, and in conclusion, we: -

i. Allow Criminal Appeal Nos. 1864-1865 of 2010 arising out of the judgment of the High Court of Kerala in Criminal Appeal Nos. 384 and 385 of 2006, and

ii. Set aside the conviction and sentence of the Appellants under the judgment of the High Court of Kerala in Criminal Appeal Nos. 384 and 385 of 2006 dated 14.01.2010 and the judgment of the Court of Additional District and Sessions Judge (Fast-track Court - I), Thiruvananthapuram in Sessions Case Nos. 302 of 2001, 1786 of 2001 and 1313 of 2002 dated 15.02.2006 under Sections 143, 147, 148 IPC and 3(2)(e) of Prevention of Damages to Public Property Act, 1984 r/w Section149 of the IPC.

iii. The Appellants are acquitted of all the charges, and their bail bonds, if any, stand discharged. Pending interlocutory applications, if any, stand disposed of in terms of the above order.

iv. Parties shall bear their own cost.

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1 Additional District and Sessions Judge (Fast Track-1), Thiruvananthapuram in Case Nos. 302 of 2001, 1786 of 2001 and 1313 of 2002 dated 15.02.2006.

2 Sohan and Anr. v. State of Haryana and Anr., 2001 3 SCC 620; **State of Rajasthan v. Hanuman**, 2001 1 SCC 337; **Badri and Ors. v. State of Rajasthan**, 2000 10 SCC 246

2023(1)AIAJ40

IN THE SUPREME COURT OF INDIA

[From DELHI HIGH COURT]

[Before Uday Umesh Lalit; S Ravindra Bhat; Bela M Trivedi]

Criminal Appeal No. 611 of 2022, 612 of 2022, 613 of 2022, 614 of 2022, 615 of 2022 **dated 07/11/2022**

Rahul; Ravi Kumar; Vinod @ Chhotu

Versus

State of Delhi Ministry of Home Affairs & Anr; State of Nct of Delhi

MATERIAL WITNESSES

Indian Penal Code, 1860 Sec. 363, Sec. 201, Sec. 34, Sec. 302, Sec. 365, Sec. 377, Sec. 367, Sec. 376-Code of Criminal Procedure, 1973 Sec. 357, Sec. 313-Evidence Act, 1872 Sec. 65B, Sec. 165, Sec. 27, Sec. 8, Sec. 25-Material witnesses examined by the prosecution having not been either cross-examined or adequately examined -In order to sustain conviction, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused only and none else - Trial court also having acted as a passive umpire - Courts to exercise their powers under Section 165 of the Indian Evidence Act for eliciting the truth

in the cases before them, howsoever heinous or otherwise they may be - Conviction and sentence are set aside.

[Paras 31, 33 and 35]

Law Point- If a criminal court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth."

Acts Referred:

Indian Penal Code, 1860 Sec. 363, Sec. 201, Sec. 34, Sec. 302, Sec. 365, Sec. 377, Sec. 367, Sec. 376

Code of Criminal Procedure, 1973 Sec. 357, Sec. 313

Evidence Act, 1872 Sec. 65B, Sec. 165, Sec. 27, Sec. 8, Sec. 25

Counsel:

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JUDGEMENT

Bela M. Trivedi, J.- [1] All the appeals arise out of the common judgment and order dated 26.08.2014 passed by the High Court of Delhi at New Delhi, in the Death Sentence Reference No. 01/2014 with Criminal Appeal Nos. 563/2014, 726/2014 and 1036/2014, whereby the High Court while affirming the sentence of death and other sentences imposed on the Appellants-accused by the Additional Sessions Judge, Special Fast Track Court, Dwarka Courts, New Delhi (hereinafter referred to as the 'Trial Court') in Sessions Case No. 91/2013 had dismissed the criminal appeals filed by the Appellants-accused. The Trial Court vide the Order dated 19.02.2014 had convicted all the three Appellants-accused i.e., A1 Ravi Kumar, A2 Vinod @ Chhotu and A3 Rahul for the offences punishable under Sections 365/34, 367/34, 376(2)(g), 302/34 and 201/34 IPC, however had acquitted all the three from the charge under Section 377/34 IPC. The order of sentences imposed on the accused read as under: -

> "1. To imprisonment for a period of five years alongwith a fine of Rs.25,000/- each for the offence punishable under Section 365/34 IPC. The convicts shall undergo further imprisonment for a period of six months each in case of default in payment of fine; and
>
> 2. To imprisonment for a period of five years alongwith a fine of Rs.25,000/- each for the offence punishable u/s. 367/34 IPC. The convicts shall undergo further imprisonment for a period of six months each in case of default in payment of fine; and

3. To imprisonment with a fine of Rs.50,000/- each for the offence punishable u/s 376(2) (g) IPC. The convicts shall undergo further imprisonment for a period of one year each in cases of non-payment of fine; and

4. To death for the offence punishable u/s 302/34 IPC with a fine of Rs.50,000/- each; and

5. To imprisonment for a period of three years with a fine of Rs.10,000/- each for the offence punishable u/s201/34 IPC. The convicts shall undergo further imprisonment for a period of six months each in case of nonpayment of fine."

[2] The case of prosecution as emerging from the record and proceedings of the Trial Court is that an information was received in the Police Station Chhawla on 09.02.2012 at 09:18 PM from the police control room that a girl was kidnapped in the red-coloured Tata Indica Car near Hanuman Chowk, Qutub Vihar, Chhawla and the car had proceeded towards Shyam Vihar. The information was recorded as DD No. 27 A, and the investigation was entrusted to SI Prakash Chand. Accordingly, SI Prakash Chand along with the constable Rakesh reached at the spot near Hanuman Chowk, Qutub Vihar, where they met a girl named Saraswati. On her statement being recorded to the effect that on 09.02.2012 at about 08:45 PM, when she was returning from her job at DLF Gurgaon along with her friends Pooja, Sangeeta and the victim Anamika (name is changed), and when they were walking near the Hanuman Chowk, a red coloured Indica Car came from behind; the driver suddenly applied breaks on reaching near to them; that a boy opened the door of the car and pulled Anamika forcibly inside the car; that there were other three or four boys sitting in the Indica Car. On the basis of the said statement of the complainant Saraswati, an FIR was registered under Section 363 of IPC. The investigation was commenced by the SI Prakash Chand.

[3] On 12.02.2012, the investigation of the case was transferred to the special staff south-west New Delhi and was entrusted to SI Ashok Kumar. On 13.02.2012, further investigation of the case was entrusted to Inspector Sandeep Gupta. On the same day ASI Rajender Singh produced the accused Rahul and a red coloured Indica Car bearing registration no. DL3 CAF-4348 before the Inspector Sandeep Gupta, stating that accused Rahul who was found perplexed and roaming in the said car near Metro station, sector-9 Dwarka, New Delhi.

[4] During the course of interrogation of the accused Rahul by the Inspector Sandeep Gupta, Rahul confessed that he along with his brother Ravi and one Vinod @ Chhotu had kidnapped a girl from Qutub Vihar; had committed rape on her, had killed her and had thrown her dead body in the fields ahead of Jhajjar. The said accused Rahul therefore was arrested, and subsequently the accused Ravi and accused Vinod were also arrested. The disclosure statements of the other two accused were also recorded wherein they had admitted to have kidnapped, gang raped and killed the victim.

[5] As per the further case of the prosecution, when the aforesaid Tata Indica car was seized, mobile phones were recovered from the personal search of the accused Rahul and the accused Ravi, and they were also seized. Thereafter, inspector Sandeep Gupta alongwith his staff and the two accused Ravi and Vinod left for the search of the dead body of the victim, and found the same lying in the mustard fields, near Karawara Morel, village Rodai, at the instance of the two accused. Information about the same was conveyed to P.S. Rodai. Thereafter ASI Balwan alongwith his Crime Team from P.S. Rodai also reached at the spot. The Crime Team lifted some hair strands from the body of the deceased as well as two plastic glasses, one empty pouch of snacks, piece of earthenware pot, a broken piece of a red-coloured plastic bumper and one wallet near the dead body. Thereafter ASI Balwan Singh sent the dead body to Civil Hospital, Rewari for postmortem examination. The two accused were brought to Delhi and were got medically examined. During the course of further interrogation, the accused Rahul got recovered the mobile phone of the deceased. The accused also got recovered the panty of the deceased which she was wearing at the time of incident and the steel Parat, in which they had burnt the articles belonging to the deceased.

[6] On 15.02.2012 further investigation of the case was entrusted to Inspector Ranjeet Singh. He got the aforesaid Tata Indica Car inspected by CFSL team. Hair strands found inside the car as well as in its seat covers were seized. He obtained the opinion from the autopsy doctor regarding the Jack and Pana, which were found in the Tata Indica Car and it was opined by the doctor that the external injuries found on the body of the deceased were possible by the said Jack and Pana. The hair strands of the deceased which had been preserved by the autopsy doctor were sent to Safdarjung Hospital for examination. All the articles lifted from and near the dead body were sent to CFSL for examination. The Tata Indica Car was also sent to CFSL for examination. The IO also obtained the call details record of mobile no. 9540594640 of the deceased, mobile no. 9968988533 of the accused Rahul and mobile no. 8802090923 of the accused Ravi. The DNA reports were also obtained on the articles seized and sent to the CFSL, New Delhi.

[7] After completion of the investigation, Charge Sheet was laid before the concerned court. Upon the committal of the case to the court of Sessions, Charges u/s 365/34 IPC, u/s 367/34, u/s 376(2)(g) IPC, u/s 377/34 IPC, u/s 302 IPC and u/s 201/34 IPC were framed against all the three accused on 26.05.2012. Since the accused pleaded not guilty to the said charges, trial was held.

[8] The prosecution had examined 49 witnesses to bring home the guilt of the accused. The accused were examined u/s. 313 Cr.PC on 27.11.2013 wherein all of them denied the incriminating facts and circumstances put to them and claimed false implication. One witness was examined on behalf of the accused Rahul and Ravi in their defence. He was the Legal Assistant of 'Nav Bharat Times' and had brought the issue dated 15.02.2012 of daily newspaper 'Nav Bharat Times' Ex.DW1/A.

[9] The Trial Court after appreciating the evidence on record adduced by the prosecution and by the accused, convicted and sentenced them as stated hereinabove, which has been confirmed by the High Court vide the impugned order.

[10] The present appeals were filed by the accused through the Supreme Court Legal Services Committee. Considering the facts on record, the Court vide order dated 05.12.2019 had requested learned Senior Counsel Ms. Sonia Mathur to appear as an Amicus Curiae. Accordingly learned Amicus Curiae Ms. Mathur and learned Senior Advocate Mr. A. Sirajudeen, appearing for the Appellants-accused and learned ASG Ms. Aishwarya Bhati appearing for the Respondent-state were heard at length.

[11] The learned Amicus Curiae Ms. Sonia Mathur and learned Senior Advocate Mr. Sirajudeen for the appellants broadly made the following submissions:

(i) The identity of any of the Appellants-accused in the alleged abduction of the victim was not established.

(ii) The circumstances under which the possession of red coloured Tata Indica Car was recovered from the appellant Rahul, and the circumstances under which all the three accused were arrested, were not proved.

(iii) The recoveries made from the scene of offence allegedly at the instance of the appellants on 13.02.2021, were also not proved.

(iv) The recoveries of articles like broken piece of bumper, wallet and hair strands allegedly recovered from the place where the body of the deceased victim was found, were highly doubtful, as the same were not mentioned by the key witnesses during the course of their respective depositions.

(v) There were discrepancies with regard to the photography and the videography done by the Delhi Police and Haryana Police and with regard to the position of the arm, visibility of the jeans lining and mud on the jeans of the deceased and the presence of a wallet seen in the photographs, which created a dent in the credibility of the investigation carried by the prosecution.

(vi) Recoveries of articles made on 14.02.2012 from the open places which were easily accessible to the public was not supported by any independent witnesses.

(vii) The post-mortem report did not prove the time of the death of the victim, in view of the state in which the body was discovered.

(viii) The forensic evidence collected against the accused during the course of investigation was not scientifically and legally proved and therefore could not be used as a circumstance against the appellants.

(ix) The call details record of the accused Rahul and Ravi were not proved to be incriminatory.

(x) There was violation of fair trial rights of the accused, as ten material witnesses were not cross-examined, and many other crucial witnesses were not adequately examined by the defence counsel during the course of the trial.

[12] The learned ASG Ms. Aishwarya Bhati has made the following submissions:

(i) There being concurrent findings of the facts and convictions recorded by the Trial Court and the High Court after fully appreciating the evidence on record, this Court may not disturb the same considering the gravity of the offences for which the appellants were charged.

(ii) The case against Rahul was proved by the prosecution by examining all material witnesses including the ASI Rajender Singh who had apprehended him, while he was driving red coloured Tata Indica Car in question. A jack and spanner and a strand of hair were found in the said Tata Indica Car and the jack was found to be stained with blood.

(iii) DNA profile generated from jack and hair found in the car and female fraction DNA obtained from the vaginal swab of Anamika were consistent with each other.

(iv) The injuries found on the victim Anamika were possible to have been caused by the jack and spanner found in the car

(v) A broken piece of bumper found near the dead body of Anamika was opined to be the piece of bumper of red coloured Indica Car being driven by Rahul.

(vi) From the testimony of PW-10 Hari Om, it was established that the car was with Rahul from 07:45 AM on January 9, 2012 till around 10:00 AM of February 10, 2012, during the period when the crime was allegedly committed.

(vii) The semen of Rahul was detected on the seat cover of the Indica Car.

(viii) A wallet containing two ATM cards, a driving licence, photocopies of school leaving certificates and PAN card, was found near place where Anamika's dead body was recovered and it was proved that it was the wallet of the accused Rahul.

(ix) The hair strand recovered from the dead body of Anamika matched with the DNA extracted from the blood sample of the accused Ravi.

(x) The accused Ravi was carrying a mobile phone having telephone no. 8802090923 when he was arrested, and the call details records showed that during the period Anamika was removed from Delhi and her body dumped in village Rodai, the said phone was found around the area of village Rodai.

(xi) So far as the accused Vinod was concerned, the DNA profile of the semen extracted from the vaginal swab of Anamika matched with his DNA profile, and his semen was also detected from the seat cover of Tata India Car driven by Rahul.

[13] After the arguments on the issue of conviction were concluded, certain directions were given by this Court to the Respondent-State to place the report of the Probation Officer relating to the appellants, the report of the Jail Administration about the nature of the work done by the appellants in jail. Directions were also issued to the Director VIMHANS to constitute a suitable team for the psychiatric evaluation of the appellants and to place the report on record. Accordingly, all the reports have been

placed on record by the concerned authorities. The father of the victim Kunwar Singh Negi had filed an application being Crl.M.P. No. 5559 of 2015 seeking his impleadment as a party respondent to enable him to participate in the proceedings. Another application was also filed by one Yogita Bhayana to implead her as a party respondent on the ground that she was a support person of the family of the deceased-victim and activist working in the field of providing counselling and succour to sexually abused children in Delhi as well as other states.

[14] Having heard the learned counsel for the parties, in the light of the evidence on record, it cannot be denied that the entire case of prosecution rested on the circumstantial evidence, and that the victim was raped and brutally murdered. The Trial Court relying upon the following circumstances as "proved" convicted and sentenced the Appellants-accused for the charged offences:

"(1) The deceased has been kidnapped in a red colour Tata Indica car.

(2) The red colour Tata Indica car bearing registration No. DL 3C AF 4348 belonging to PW-10 was in the custody of accused Rahul from 07.45 am on 9.2.2012 till 9 a.m. on 10.2.2012 and from 11.2.2012 to 13.2.2012.

(3) The female hair strand was found on the rear seat of the aforesaid Tata Indica car and DNA generated from it was found similar to the DNA of the deceased implying that it was the hair of the deceased.

(4) The DNA generated from the semen spots found on the seat covers of the aforesaid Tata Indica car was similar to that of accused Rahul.

(5) The dead body of the deceased was recovered from the fields of village Rodai at the instance of accused Ravi and Vinod on 13.2.2012.

(6) A red colour purse containing some cash, ATM cards as well as PAN card and driving license in the name of Rahul were found near the dead body of the deceased.

(7) The three accused had pointed out the spot, on which they had smashed the head of the deceased with a 'Matka' in order to kill her.

(8) A Jack and pana were recovered from the boot of the aforesaid Tata Indica car bearing registration No. DL 3C AF 4348, which was having blood spots and DNA generated from the blood spots was found similar to that of the deceased implying that deceased was hit by said Jack and Pana.

(9) The autopsy doctor (PW26) opined that the injuries found on the dead body of 'Anamica' could be possible by aforesaid Jack and Pana.

(10) A broken piece of bumper of the aforesaid Tata Indica car bearing registration No. DL 3C AF 4348 was also recovered from near the dead body of the deceased in the fields of village Rodai.

(11) The panty of the deceased was got recovered by accused Vinod from a vacant plot adjacent to house No. RZ-54, Palam Vihar, Sector-6, Dwarka, belonging to PW-11 where the three accused were residing as a tenant.

(12) Accused Rahul had got recovered the broken mobile phone of the deceased from amongst the bushes on the central verge in front of the road near Karnal Cinema Hall, near Rajinder Dhaba, Delhi.

(13) The vaginal swab of the deceased was found to have mixed male DNA profile, which was similar to that of accused Vinod as well as accused Ravi.

(14) The location of mobile phones of the accused Rahul, accused Ravi and the deceased was around Jhajhar, Haryana in the night intervening between 09.2.2012 and 10.2.2012 when the deceased was kidnapped, raped and murdered."

[15] The High Court also believing the same set of circumstances as "proved" further noted that the two incriminating circumstances of the DNA of a strand of hair recovered from Anamica's dead body matching DNA of Ravi and DNA generated from semen spots found on seat cover of the Indica car matching DNA profile of Vinod were overlooked by the Trial Court.

[16] The law pertaining to the appreciation of circumstantial evidence is quite well settled by this Court in catena of decisions. In **Sharad Birdhichand Sarda vs. State of Maharashtra**, 1984 4 SCC 116, this Court after taking note of earlier decisions had carved out five principles: -

"**152.** Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is **Hanumant v. State of Madhya Pradesh**, 1952 AIR(SC) 343:[1952 SCR 1091: 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of **Tufail (Alias) Simmi v. State of Uttar Pradesh**, 1969 3 SCC 198: [1970 SCC (Cri) 55] and **Ramgopal v. State of Maharashtra**, 1972 4 SCC 625: [AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in **Hanumant case**, 1952 AIR(SC) 343: [1952 SCR 1091: 1953 Cri LJ 129]:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the

innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in **Shivaji Sahabrao Bobade v. State of Maharashtra**, 1973 2 SCC 793:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

[17] In **Padala Veera Reddy vs. State of Andhra Pradesh & Ors**, 1989 Supp2 SCC 706 , it was observed as under:

"10............ (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of

the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra ."

[18] The said principles have also been followed in **Navaneethakrishnan vs. State by Inspector of Police**, 2018 16 SCC 161. Keeping in view the afore-stated principles, let us examine whether the circumstances relied upon by the Trial Court and the High Court cogently and firmly established the guilt of the Appellants-accused.

[19] The first and foremost circumstance relied upon by the prosecution was with regard to the victim having been kidnapped in a red coloured Tata Indica Car on 09.02.2012 at about 8:45 p.m. In this regard the prosecution has relied upon evidence of PW-1 Pooja Rawat, PW-2 Vikas Singh Rawat, PW-4 Vikas, PW-29 Saraswati and PW-42 Sangeeta. As per the case of the prosecution, the victim along with PW-1 Pooja Rawat, PW-29 Saraswati and PW-42 Sangeeta was returning home and when she and her friends were walking through Hanuman Chowk, a red-coloured Tata Indica car came from behind and suddenly stopped near them. One boy thereafter came out of the car and pulled the victim into the car. There were other three-four persons sitting in the said car. At that time PW-4 Vikas tried to intervene, but the said boys in the car started quarrelling with him and thereafter drove out the car along with victim. Though the said story put forth by the prosecution to an extent, is supported by the concerned witnesses viz. PW-1 Pooja Rawat, PW-4 Vikas, PW-29 Saraswati, and PW-42 Sangeeta, none of the said witnesses had identified the accused sitting in the Court during the course of their respective depositions. Even the PW-4 Vikas, who had some altercations with the boys attempting to kidnap the victim also could not identify any of the accused sitting in the Court during the course of his deposition and say that the accused were the boys with whom he had the altercations as they were kidnapping the victim. Further, the PW-1 Pooja Rawat stated that the Appellants-accused had covered their faces, whereas PW-29 Saraswati and PW-4 Vikas stated that the faces of the accused could not be recognized because of darkness. PW- 2 Vikas Singh Rawat who happened to be the brother of PW-1 Pooja Rawat and whose house was situated near Hanuman Chowk had immediately come out of the house and had stated to have seen the red coloured Indica car going towards Tajpur. The said witness also therefore could not identify the persons who had kidnapped the victim. The PW-8 Kunwar Singh Negi, father of the deceased had stated that his daughter was kidnapped on 09.02.2012 by some unknown persons when she was returning from Gurgaon along with her friends, however, he having not witnessed the incident, also could not identify the accused. There was no T.I. parade conducted by any of the Investigating Officers during the course of their respective investigations.

[20] From the said evidence of the concerned witnesses, it clearly transpires that neither any T.I. Parade was conducted by the investigating officer during the course of investigation for the identification of the accused, nor any of the witnesses had

identified the accused during their respective depositions before the Court. Therefore, the very identity of the Appellants -accused having not been duly established, the entire case of the prosecution falls flat on the very first circumstance having not been duly proved by any evidence much less clinching evidence, against the Appellants-accused.

[21] The next important circumstance relied upon by the prosecution was the arrest of the accused Rahul with red coloured Indica car on 13.02.2012. Again, turning to the case of prosecution, it appears that after the alleged incident of kidnapping, an information was received by the Police Station Chhawla, New Delhi through call at 21:18 hours on 09.02.2012 to the effect that a girl was kidnapped in a red-coloured Tata Indica Car near Hanuman Chowk, Qutub Vihar, Chhawla. The said information was recorded as DD No.27A at the said police station. On receving the said information S.I. Prakash Chand (PW-45) who was posted at P.S. Chhawla, along with constable Rakesh had gone to the spot at Hanuman Chowk, where they met the complainant- Saraswati. She gave her statement with regard to the alleged incident and on the basis of her statement, the FIR was got registered under Section 363 IPC by SI Prakash Chand. Thereafter on 13.02.2012 when the investigation was entrusted to the SHO, P.S. Chhawla, Inspector Sandeep Gupta (PW-48), the ASI Rajinder Singh from P.S. Sector-23, Dwarka (PW-12) produced the accused-Rahul and one red coloured Indica Car bearing Registration No. DL 3C AF 4348 stating that the accused Rahul was found roaming in the said car near Metro station, Sector 9, Dwarka, New Delhi.

[22] As regards the arrest of the accused-Rahul, PW-12 ASI Rajinder Singh had stated before the Court that the accused-Rahul was seen driving the red Indica Car, and he looked perplexed; when he asked for the documents of the said vehicle, the accused-Rahul could not produce them and therefore he (PW-12) apprehended Rahul and handed over his custody to the SHO at P.S. Chhawla. The PW-12 ASI Rajinder had tried to explain that there was a message from the Control Room that a girl was abducted in a red coloured Indica Car and the police had to apprehend the said vehicle and to report to the concerned SHO, and therefore he apprehended Rahul. Thus, the accused Rahul was apprehended because he was driving one red Indica Car. Pertinently, none of the witnesses examined by the prosecution had identified the Indica Car which was allegedly being driven by Rahul on 13.02.2012. P.W-29, the complainant Saraswati had admitted in her cross- examination that she could not say with certainty that it was the same car in which the victim was kidnapped. None of the witnesses had seen even the registration number of the car in which the victim was kidnapped.

[23] Now, as per the further case of the prosecution, the accused-Rahul gave a disclosure statement (Ex. PW-39/B) before Inspector Sandeep Gupta on the basis of which the other accused Vinod and Ravi were brought to the police station by the beat constables, and they were also arrested at 14:45 and 15:00 hours respectively. They also gave their disclosure statements (Ex. P.W-39/A and Ex. PW-39/C) before P-1

Sandeep Gupta. The said beat constables were not examined by the prosecution before the Trial Court. The non-examination of the said beat constables has created a cloud of doubt in the story of the arrests of the accused, as in the further statements, recorded under Section 313 of Cr.P.C., the accused-Rahul had stated that Ravi was lifted from his house, and when he (i.e., Rahul) reached to the police station in the evening to enquire about Ravi, he was arrested and the car was seized. The accused-Vinod and Ravi have also stated that they were picked up from their home. Thus, the circumstances under which the accused were arrested and the car was seized have also raised serious doubts in the story put-forth by the prosecution.

[24] Curiously, the evidence with regard to the time as who reached to the place of incident first where the body of the victim was lying, is also not clear. PW-46 ASI Balwan Singh P.S. Rodai, Haryana, stated that on 13.02.2012 on the receipt of DD No. 24, he along with head constable Vinod and head constable Aman Kumar had reached to the fields near Karawara Railway Phatak, Rewari, where he found that SHO P.S. Chhawla, Sandeep Gupta (PW-48) and other staff members were already there. In his cross- examination PW-46 stated that he received the DD No. 24 at about 11.30 a.m or 12.00 noon, and he had reached to the spot at around 4.30 p.m. P.W. 48 P1 Sandeep Gupta stated that on 13.02.2012, after arrest of all the three accused and visiting the spot from where the alleged kidnapping had taken place, he along with his team and the two accused Ravi and Vinod, leaving Rahul at the police station, had gone to P.S. Rodai, Distt. Rewari, Haryana he further stated that thereafter, on the accused Ravi and Vinod having indicated, they all reached to the spot i.e., the field where the dead body of the victim was lying. Since a PCR van of P.S. Rodai was parked there, an information was sent to P.S Rodai through PCR officials and thereafter ASI Balwant Singh along with his staff reached the spot. Thus, there are contradictions in the respective depositions of P.W.-46 and P.W.-48 as to how and when they reached to the spot where the dead body of the victim was found lying. Though the said DD No. 24 was an extremely crucial piece of evidence, the said document was not got exhibited as an evidence by the prosecution.

[25] At this juncture, it may be noted that the trial court had allowed the entire disclosure statements of the three accused to be admitted in evidence by exhibiting the same as Ex. PW-39/B, PW-41/B and PW-41/C. The said statements were recorded by the PW-48, Sandeep Gupta, when they were in police custody. The said statements being in nature of the confessions before the police were hit by Section 25 of the Evidence Act. The law in this regard is very clear that the confession before the police officer by the accused when he is in police custody, cannot be called an extra-judicial confession. If a confession is made by the accused before the police, and a portion of such confession leads to the recovery of any incriminating material, such portion alone would be admissible under Section 27 of the Evidence Act, and not the entire confessional statements. In the instant case, therefore the trial court had committed gross error in exhibiting the entire disclosure statements of the accused recorded by the

PW-48 P1 Sandeep Kumar Gupta, for being read in evidence. Though, the information furnished to the Investigating Officer leading to the discovery of the place of the offence would be admissible to the extent indicated in Section 27 read with Section 8 of the Evidence Act, but not the entire disclosure statement in the nature of confession recorded by the police officer.

[26] This takes us to the next circumstance with regard to the alleged discovery of incriminating articles on 13.02.2021 namely, the broken piece of bumper, wallet containing the documents connecting the accused-Rahul etc. In this regard, the evidence of the Delhi Police and the Haryana Police Officers would be relevant. Though PW-32 Head Constable Omkar Singh of P.S. Chhawla and PW-36 ASI Atar Singh, in charge of Crime Team South-West District, New Delhi, stated about the recovery of the said incriminating articles, PW-37, PW-38, PW-39 and PW-41 who were also there at the spot did not make any mention about the said articles. Again PW-31 photographer called at the instance of P.S. Rodai also did not state about the said articles. The other non-official witnesses i.e. PW-3, PW-7, PW-8 and PW-14 also did not state anything about such discoveries or recoveries. The prosecution had also not proved by cogent evidence that the broken piece of bumper lying near the dead body of the victim was of the red coloured indica car seized from the accused-Rahul. Further, the seizure memo of the wallet (Exhibit 34/A) mentioned only that one red coloured wallet containing Rs.365 and a list of things was seized. There was no mention about any document in the seizure memo which could connect the accused Rahul. If the ATM cards, driving licence, photocopies of school leaving certificates and PAN card connecting the accused Rahul, were found from the said wallet, no Investigating Officer would commit such a blunder of not mentioning them in the seizure memo. The accused- Rahul in his further statement under Section 313 had stated that the said articles were taken away from him at the police station.

[27] The recovery of a strand of hair found from the body of the deceased by ASI Balwan Singh as per the Seizure Memo (Exhibit 34/A) is also highly doubtful, inasmuch as the same was allegedly found from the body of the deceased which was lying in the open field for about three days and three nights. The PW-8 father of the deceased and PW-3 and PW-7 neighbours of the deceased who had identified the dead body of the victim had not stated anything about the articles lying near the dead body. The learned advocates for the appellants had also drawn the attention of the Court with regard to number of inconsistencies and contradictions appearing in the evidence of the Haryana Police, Delhi Police and also in the testimonies of the formal witnesses, which render the entire evidence with regard to the discovery and recovery as also seizure of the incriminating articles, very unreliable. The seizure of the articles like burnt ash, underwear of the deceased etc. on 14.02.2012 at the instance of the accused were also not duly proved by the prosecution. The said articles were sent to the CFSL for examination however, no conclusive opinion was given by the CFSL to establish their link with the accused.

[28] The next circumstance relied upon by the prosecution was the alleged recovery of the phone of the deceased at the instance of the accused Rahul from the bushes on the road divider opposite to Rajinder Dhaba near Kamal Cinema. Though PW-8 Kunwar Singh Negi, father of the deceased had stated that mobile phone no.9540594640 was in his name and was used by his daughter, he was not shown the phone instrument for the purpose of identity. The call details record of the said phone being electronic record, was also not proved in terms of Section 65B of the Evidence Act. Hence, this part of the evidence also does not take the case of the prosecution any further.

[29] In the instant case, the alleged incident of kidnapping had taken place on 09.02.2012 and the dead body of the victim was found on 13.02.2012. Hence, the time of death was also very much significant, however in view of the state in which the dead body was found, the Post-Mortem Report Ex.26/A is also not clear about the timing as to when the death had occurred. The Post-Mortem report stated the time of death to be 72 to 96 hours i.e. between 10.02.2012 to 11.02.2012, as the post-mortem had taken on 14.02.2012. However, as per the case of the prosecution, death would have taken place on the intervening night of 09.02.2012 to 10.02.2012. The body of the deceased also did not show any signs of putrefaction. It is highly unlikely that the dead body would have remained in the field for three days without being noticed by anybody.

[30] The learned Senior Advocates appearing for the appellants have also rightly drawn the attention of the Court to the timings and the manner in which the samples were collected during the course of post-mortem of the deceased, to submit that the PW-48 P1 Sandeep Kumar was present at the hospital when the post-mortem was conducted on 14.02.2012, and therefore there was no reason to collect the samples from the body of the deceased on 16.02.2012. The collection and sealing of the samples during the MLC of the accused which had taken place on 14.02.2012 at the RTMR Hospital, Jaffarpur also does not inspire confidence. The story of blood stains and semens found on the seat covers of the Indica Car seized on 13.02.2012 and sent to the CFSL for examination also appears to be highly improbable and unreliable. There is no clear evidence as to who was in custody of the said car after its seizure till it was sent to CFSL for examination and as to whether the car was sealed during the said period.

[31] The learned Amicus Curiae has also assailed the forensic evidence i.e., the report regarding the DNA Profiling dated 18.04.2012 (Exhibit 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 Appellants-accused. The Court finds substance in the said submissions made by the Amicus Curiae. The DNA evidence is in the nature of opinion evidence as envisaged under Section 45 and like any other opinion

evidence, its probative value varies from case to case. In this regard a very pertinent observations made by this Court in case of Manoj and Ors. Vs. State of Madhya Pradesh,2022 SCCOnlineSC 677 deserve to be made. This Court has in detail dealt with the issue of DNA profiling methodology and statistical analysis, as also the collection and preservation of DNA evidence. The relevant paragraphs read as under:-

> "**138.** During the hearing, an article published by the Central Forensic Science Laboratory, Kolkata was relied upon. The relevant extracts of the article are reproduced below:
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> "Deoxyribonucleic acid (DNA) is genetic material present in the nuclei of cells of living organisms. An average human body is composed of about 100 trillion of cells. DNA is present in the nucleus of cell as double helix, supercoiled to form chromosomes along with Intercalated proteins. Twenty-three pairs of chromosomes present In each nucleated cells and an individual Inherits 23 chromosomes from mother and 23 from father transmitted through the ova and sperm respectively. At the time of each cell division, chromosomes replicate and one set goes to each daughter cell. All Information about Internal organisation, physical characteristics, and physiological functions of the body is encoded in DNA molecules in a language (sequence) of alphabets of four nucleotides or bases: Adenine (A), Guanine (G), Thymine (T) and Cytosine (C) along with sugar-phosphate backbone. A human haploid cell contains 3 billion bases approx. All cells of the body have exactly same DNA but it varies from individual to Individual in the sequence of nucleotides. Mitochondrial DNA (mtDNA) found in large number of copies in the mitochondria is circular, double stranded, 16,569 base pair in length and shows maternal inheritance. It is particularly useful in the study of people related through the maternal line. Also being in large number of copies than nuclear DNA, it can be used in the analysis of degraded samples. Similarly, the Y chromosome shows paternal inheritance and is employed to trace the male lineage and resolve DNA from males in sexual assault mixtures.
>
> Only 0.1 % of DNA (about 3 million bases) differs from one person to another. Forensic DNA Scientists analyse only few variable regions to generate a DNA profile of an individual to compare with biological clue materials or control samples.
>
> ....
>
> **DNA Profiling Methodology**
>
> DNA profile is generated from the body fluids, stains, and other biological specimen recovered from evidence and the results are compared with the results obtained from reference samples. Thus, a link among victim(s) and/or suspect(s) with one another or with crime scene can be established. DNA

Profiling Is a complex process of analyses of some highly variable regions of DNA. The variable areas of DNA are termed Genetic Markers. The current genetic markers of choice for forensic purposes are Short Tandem Repeats (STRs). Analysis of a set of 15 STRs employing Automated DNA Sequencer gives a DNA Profile unique to an Individual (except monozygotic twin). Similarly, STRs present on Y chromosome (Y-STR) can also be used in sexual assault cases or determining paternal lineage. In cases of sexual assaults, Y-STRs are helpful in detection of male profile even in the presence of high level of female portion or in case of azoo11permic or vasectomized" male. Cases In which DNA had undergone environmental stress and biochemical degradation, min lSTRs can be used for over routine STR because of shorter amplicon size.

DNA Profiling is a complicated process and each sequential step involved in generating a profile can vary depending on the facilities available In the laboratory. The analysis principles, however, remain similar, which include:

1. isolation, purification & quantitation of DNA
2. amplification of selected genetic markers
3. visualising the fragments and genotyping
4. statistical analysis & interpretation.

In mtDNA analysis, variations in Hypervariable Region I & II (HVR I & II) are detected by sequencing and comparing results with control samples:.....

Statistical Analysis

Atypical DNA case involves comparison of evidence samples, such as semen from a rape, and known or reference samples, such as a blood sample from a suspect. Generally, there are three possible outcomes of profile comparison:

1) Match: If the DNA profiles obtained from the two samples are indistinguishable, they are said to have matched.

2) Exclusion: If the comparison of profiles shows differences, it can only be explained by the two samples originating from different sources.

3) Inconclusive: The data does not support a conclusion Of the three possible outcomes, only the "match" between samples needs to be supported by statistical calculation. Statistics attempt to provide meaning to the match. The match statistics are usually provided as an estimate of the Random Match Probability (RMP) or in other words, the frequency of the particular DNA profile in a population.

In case of paternity/maternity testing, exclusion at more than two loci is considered exclusion. An allowance of 1 or 2 loci possible mutations should be taken Into consideration while reporting a match. Paternity of Maternity Indices and Likelihood Ratios are calculated further to support the match.

Collection and Preservation of Evidence

If DNA evidence is not properly documented, collected, packaged, and preserved, It will not meet the legal and scientific requirements for admissibility in. a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be Identified, preserved, packed and sent for DNA Profiling."

139. In an earlier judgment, R v. Dohoney & Adams the UK Court of Appeal laid down the following guidelines concerning the procedure for introducing DNA evidence in trials: (1) the scientist should adduce the evidence of the DNA comparisons together with his calculations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the Crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the basis of the calculations; (3) the Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.

140. The Law Commission of India in its report, observed as follows:

"DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not 'match', then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for example, that the relevant profile is found in 1 person in every 100,000: This is described as the 'random occurrence ratio' (Phipson 1999).

Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a court of law."

141. In Dharam Deo Yadav v. State of UP this court discussed the reliability of DNA evidence in a criminal trial, and held as follows:

"The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a

deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines......DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory."

142. The US Supreme Court, in District Attorney's Office for the Third Judicial District v. Osborne, dealt with a postconviction claim to access evidence, at the behest of the convict, who wished to prove his innocence, through new DNA techniques. It was observed, in the context of the facts, that

"Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue. DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others."

143. Several decisions of this court - Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh, Santosh Kumar Singh v. State Through CBI, Inspector of Police, Tamil Nadu v. John David, Krishan Kumar Malik v. State of Haryana, Surendra Koli v. State of Uttar Pradesh, and Sandeep v. State of Uttar Pradesh, Rajkumar v. State of Madhya Pradesh and Mukesh v. State for NCT of Delhi have dealt with the increasing importance of DNA evidence. This court has also emphasized the need for assuring quality control, about the samples, as well as the technique for testing-in Anil v. State of Maharashtra

"7. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on

forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory."

[32] 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 Ex. 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 14.02.2012 and 16.02.2012; and they were sent to CFSL for examination on 27.02.2012. 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 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.

[33] Thus, having regard to the totality of circumstances and the evidence on record, it is difficult to hold that the prosecution had proved the guilt of the accused by adducing cogent and clinching evidence. As per the settled legal position, in order to sustain conviction, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused only and none else. The circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. As demonstrated earlier, the evidence with regard to the arrest of the Appellants-accused, their identification, discoveries and recoveries of the incriminating articles, identity of the Indica Car, the seizures and sealing of the articles and collection of samples, the medical and scientific evidence, the report of DNA profiling, the evidence with regard to the CDRs etc. were not proved by the prosecution by leading, cogent, clinching and clear evidence much less unerringly pointing the guilt of the accused. The prosecution has to bring home the charges levelled against them beyond reasonable doubt, which the prosecution has failed to do in the instant case, resultantly, the Court is left with no alternative but to acquit the accused, though involved in a very heinous crime. It may be true that if the accused involved in the heinous crime go unpunished or are acquitted, a kind of agony and frustration may be caused to the society in general and to the family of the victim in particular, however the law does not permit the Courts to punish the accused on the basis of moral conviction or on suspicion alone. No

conviction should be based merely on the apprehension of indictment or condemnation over the decision rendered. Every case has to be decided by the Courts strictly on merits and in accordance with law without being influenced by any kind of outside moral pressures or otherwise.

[34] The Court is constrained to make these observations as the Court has noticed many glaring lapses having occurred during the course of the trial. It has been noticed from the record that out of the 49 witnesses examined by the prosecution, 10 material witnesses were not cross-examined and many other important witnesses were not adequately cross-examined by the defence counsel. It may be reminded that Section 165 of the Indian Evidence Act confers unbridled powers upon the trial courts to put any question at any stage to the witnesses to elicit the truth. As observed in several decisions, the Judge is not expected to be a passive umpire but is supposed to actively participate in the trial, and to question the witnesses to reach to a correct conclusion. This Court while not accepting the submission that it was improper for the Court to have interjected during the course of cross-examination of the witness, had observed in the case of **State of Rajasthan vs. Ani alias Hanif and Others**, 1997 6 SCC 162 thus:-

> **"11.** We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the power whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question.
>
> **12.** Reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a bout or combat between two rival sides with the Judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses in the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or crossexamination or even during re-examination to elicit truth. The corollary of it is that if a Judge felt that a witness has committed an error or a slip it is the duty of the Judge to ascertain whether it was so, for, to err is human and the chances of erring may

accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence-collecting process. It is a useful exercise for trial Judge to remain active and alert so that errors can be minimised.

13. In this context it is apposite to quote the observations of Chinnappa Reddy, J. in **Ram Chander v. State of Haryana**, 1981 3 SCC 191: [1981 SCC (Cri) 683: AIR 1981 SC 1036]: (SCC p. 193, para 2)

"The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth."

[35] In the instant case, material witnesses examined by the prosecution having not been either cross-examined or adequately examined, and the trial court also having acted as a passive umpire, we find that the Appellants-accused were deprived of their rights to have a fair trial, apart from the fact that the truth also could not be elicited by the trial court. We leave it to the wisdom and discretion of the trial courts to exercise their powers under Section 165 of the Indian Evidence Act for eliciting the truth in the cases before them, howsoever heinous or otherwise they may be.

[36] Having said that and for the reasons stated above, the judgments and orders of conviction and sentence passed by the trial court and the High Court are set aside. The Appellants-accused are acquitted from the charges levelled against them by giving them a benefit of doubt, and they are directed to be set free forthwith if not required in any other case. The appeals deserve to be allowed accordingly.

[37] It is needless to say that in view of Section 357(A) Cr.PC, the family members of the deceased- victim would be entitled to the compensation even though the accused have been acquitted. Hence, while allowing these appeals and acquitting the Appellants- accused, we direct that the parents of the victim would be entitled to the compensation, if not awarded so far by the Delhi State Legal Services Authority, as may be permissible in accordance with law.

[38] In view of the above, the appeals stand allowed. All pending applications also stand disposed of.

[39] Before parting, we place on record the valuable assistance rendered by the Amicus Curiae Ms. Sonia Mathur and the learned Senior Advocates and their associates appearing for the parties

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2023(1)AIAJ61

PUNJAB AND HARYANA HIGH COURT

[Before Arvind Singh Sangwan]

Cr A (S) (Criminal Appeal (S)) No 2324 of 2022 **dated 18/11/2022**

Ramesh Kumar @ Lilu

Versus

State of Haryana

APPEAL AGAINST CONVICTION

Indian Penal Code, 1860 Sec. 34, Sec. 285, Sec. 307, Sec. 323, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 437A, Sec. 173, Sec. 313, Sec. 207 - Arms Act, 1959 Sec. 25 - Appeal against conviction - Commission of offence - Once the trial Court has acquitted both the accused under Sections 323, 307, 506 read with Section 34 IPC, on appreciation of the evidence have not supported the prosecution - Benefit of doubt - Charge under Section 25 of Arms Act qua the appellant is not sustainable- Appellant has already undergone of sentence, hence, reduced - Convicting the appellant under Section 25 of Arms Act, is set aside and the appellant is acquitted of the charge under Section 25 of Arms Act - Appeal allowed

[Paras 7,8]

Law Point - Where the accused is facing charge under Section 307 IPC read with Section 25 of Arms Act and if the prosecution failed to prove the substantive charge under Section 307 IPC, charge under Section 25 of Arms Act would also fail.

Acts Referred:

Indian Penal Code, 1860 Sec. 34, Sec. 285, Sec. 307, Sec. 323, Sec. 506

Code of Criminal Procedure, 1973 Sec. 437A, Sec. 173, Sec. 313, Sec. 207

Arms Act, 1959 Sec. 25

Counsel:

Navjot Singh, Deepak Grewal

JUDGEMENT

Arvind Singh Sangwan, J.- [1] CRM-43367-2022

For the reasons stated in the application, same is allowed and delay of 48 days in filing the appeal is condoned.

CRM stands disposed of.

CRA-S-2324-2022

[2] Prayer in this appeal is for setting aside the judgment of conviction and order of sentence dated 27.07.2022, vide which appellant Ramesh Kumar @ Lilu and co-accused Lal Bahadur @ Vikas were **acquitted** of the charges under Sections 323, 307,

506 of the Indian Penal Code (for short 'IPC'), however, the appellant was convicted under Section 25 of Arms Act and was sentenced to undergo R.I. for a period of two years with a fine of Rs.1,000/- for the commission of said offence and in default of payment of fine, to undergo further R.I. for a period of 10 days.

[3] Brief facts of the case are that on 27.08.2018, SI Jagdish Ram along with EASI Jai Lal, EASI Makhan Lal was present in Bhattu Mandi on patrol duty and he received a telephonic call from Police Station Bhattu Kalan regarding admission of injured Satbir Singh son of Lal Chand, resident of Thuian in General Hospital, Fatehabad, whereupon SI Jagdish Ram along with fellow officials reached there and after obtaining medical ruqa and MLR from Police Post General Hospital, Fatehabad, he sought the opinion of the doctor, who declared the injured unfit to make statement. Similarly, regarding admission of injured Sharwan son of Shamsher Singh, resident of Thuiyan in Beniwal Hospital, Bhattu Mandi, he sought the opinion of doctor, who declared the injured unfit for statement. Thereafter, on 28.08.2018, SI Jagdish Ram recorded statement of injured Satbir Singh Ex.P3, who stated that on 27.08.2018, he and Sharwan were irrigating the fields with tubewell water. At about 03:00 pm, Ramesh Kumar @ Lilu and his father Rattan, neighbourers of their fields came and said that on that date, they will take the water, upon which the complainant said that after their turn, they may take the water, upon which Ramesh Kumar @ Lilu picked a brick and hit the same on the waist and arm of Sharwan and then Ramesh Kumar and his father Rattan Singh left from there. Thereafter, at about 04:00 PM, Ramesh Kumar @ Lilu and Vikas son of Teja Singh came on a motorcycle. Vikas fired in air with a countrymade pistol and on his instigation, Ramesh, with the intention to kill him, fired a shot and the bullet hit him on the left side of his neck, upon which he fell down. He and Sharwan cried and on hearing their noise, Mohar Singh son of Jagdish and others came and on seeing them, the assailants fled away from the spot with their motorcycle, while extending threat to kill them on finding opportunity in future. Mohar Singh, after making arrangement of a vehicle, got them admitted in the hospital. He prayed for taking legal action against the assailants. On this statement, case was registered under Sections 323, 307, 285, 506 read with Section 34 of IPC and Section 25/54/59 of Arms Act. During investigation, accused Ramesh @ Lilu again suffered disclosure statement Ex.P24, in pursuance of which, he got recovered one countrymade pistol, the khaka of said pistol Ex.P25 was prepared and taken into police possession vide recovery memo Ex.P26. Rough site plan of recovery of pistol Ex.P27 was also prepared. In verification of investigation, Rattan Singh and Partap Singh were found innocent. After completion of other usual formalities of investigation, supplementary report under Section 173 Cr.P.C. was submitted against accused Vikas in the Court. After supplying copies of challan to accused persons free of costs in view of provisions of Section 207 Cr.P.C., the case was committed to the Court of Sessions by the learned Illaqa Magistrate.

[4] Thereafter, the prosecution, in support of its case, examined 17 PWs. The accused were examined under Section 313 Cr.P.C. and they did not adduce any

evidence in defence. The trial Court, thereafter, on appreciation of the evidence, recorded the following findings: -

> "It appears that there is some compromise between the accused persons and the injured witnesses outside the Court and that is why the material private witnesses (PW5 and PW6) of the prosecution are not supporting the cause of prosecution. Whatever may be the reason, for not supporting the cause of prosecution, this Court is merely to assess the evidence as it has been led before it in a proper legal perspective and there is no denying fact that these star and material witnesses of the prosecution have not served the cause of prosecution regarding charges under Sections 323, 307 and 506 read with Section 34 of IPC. Learned Public Prosecutor for the State has made earnest efforts while cross-examining its own witnesses in order to elicit truth but the witnesses remained firm on their stance and not supported the prosecution case at all. It is established that the accused persons facing trial have not caused any injury to PW5 and PW6. It is also well established that the accused persons facing trial have also not given any threat to Satbir Singh (PW5) and Sharwan (PW6).
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> This being so, the only irresistible conclusion is that the prosecution has utterly failed to bring home the guilt against both the accused persons namely Ramesh @ Lilu and Lal Bahadur @ Vikas with respect to charges framed against them for the offence punishable under Section 323, 307 and 506 read with Section 34 of IPC."

[5] However, with regard to charge under Section 25 of Arms Act, the trial Court convicted the appellant on the basis of statements of PW15 & PW17.

[6] The operative part of the impugned judgment reads as under: -

> "Now coming to the charge under Section 25 of the Arms Act is concerned, to prove the same, the prosecution has relied upon recovery memo (Ex.P26). From perusal of said recovery memo, it is clear that countrymade pistol .315 bore was recovered from accused Ramesh @ Lilu on dated 18.11.2018 in the presence of SI Jagdish Ram (PW17) and HC Poonam Chand (PW15). SI Jagdish Ram when appeared into the witness box as PW17 has stated that on 18.11.2018, Constable Poonam Chand remained associated with him in the investigation of this case. He further deposed that on interrogation, accused Ramesh @ Lilu suffered his disclosure statement (Ex.P22) regarding his involvement in the present case. He further deposed that during police remand accused Ramesh @ Lilu again suffered his disclosure statement (Ex.P24) and as per his said disclosure statement, he got recovered one pistol .315 bore from bed situated in the room in his house. He has further deposed that said pistol was taken into police possession vide recovery memo (Ex.P26) which was signed by accused and witnessed by Constable Poonam

Chand. HC Poonam Chand also supported the said version of SI Jagdish Ram (PW17) on the same lines. Further, as per case of prosecution, accused Ramesh @ Lilu failed to produce any license regarding possession of said pistol .315 bore. Further as per FSL report Ex.PZ, the countrymade pistol which has been recovered from accused Ramesh @ Lilu vide recovery memo Ex.P26 is a fire arm as defined in Arms Act, 1959 and its fire mechanism was found in working order. Further, as per FSL report, .315 bore fired cartridge has been found fired from countrymade pistol (which has been recovered from accused Ramesh @ Lilu vide recovery memo Ex.P26) and not from any other fire arm. It means that the countrymade pistol which was recovered from the accused Ramesh @ Lilu on 18.11.2018 is a fire arm as per provisions of Arms Act, 1959 and it was in working condition. Further, the prosecution has proved required sanction order (Ex.P20). Hence, the prosecution has succeeded to prove the fact that on dated 18.11.2018, one countrymade pistol of .315 bore was recovered from the possession of accused Ramesh @ Lilu without any permit or license. So far as the argument of learned defence counsel regarding contradiction in the testimonies of material witnesses is concerned, HC Poonam Chand (PW15) and SI Jagdish Ram (PW17) are not alleged to have any animus or hostility against accused Ramesh @ Lilu prior to the incident and therefore, no motive can be ascribed to them to testify falsely in this case. There is no material contradiction in their testimonies. Certain discrepancies have also been pointed out by learned defence counsels in their statements. While appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the case of prosecution, must not prompt the court to reject the evidence in its entirety. Irrelevant details do not corrode the credibility of a witness and should be ignored. The court has to ascertain whether the evidence, read as a whole, appears to have a ring of truth. Once that impression is formed, it is necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, draw back and infirmities pointed out in the evidence as a whole and weigh them to find out whether it is against the general tenor of the evidence given by the witnesses. The court is not supposed to give undue importance to contradictions and discrepancies which do not go to the root of the matter nor shake the basic version of the prosecution case. The evidence of the witness must be read as a whole. Police officials are involved in investigations day in and day out. A witness cannot be expected to possess a photographic memory and to recall the details of an incident verbatim. Ordinarily, it so happens that a witness is overtaken by events. A witness could not have anticipated the occurrence which very often has an element of surprise. The mental faculties cannot, therefore, be expected to be tuned to observe all the details. The court also cannot loose sight of the fact that the

witnesses were recorded after some time of the incident. Human memory has its own shortcomings and minor discrepancies are bound to occur in the statements of truthful witnesses. This is a feature from which no criminal case is free. There may be discrepancies here and contradictions there, but so far as the time, place and manner of the recovery are concerned, statements of the witnesses are found to be consistent, faith inspiring and free from doubt. After a careful and conscious scrutiny, court is of the view that the statements of crucial witnesses namely HC Poonam Chand (PW15) and SI Jagdish Ram (PW17) are cogent convincing and do not suffer from any infirmity the benefit of which accused can derive. As such, the contention in this regard raised by learned defence counsels is hereby repelled.

Learned defence counsel has argued that recovery memo (Ex.P26) cannot be relied upon because no independent witness was joined at that time by the investigation officer. However, this plea of learned defence counsel does not hold water because suffice, it to say that people are generally averse to join the police and depose in favour of the prosecution, as they are afraid of the fact that joining the police and deposing in favour of the prosecution may expose them to serious consequences. Moreover, as already noticed that PW17 SI Jagdish Ram is not alleged to have any ill-will or hostility against the accused prior to the day of the recovery. So, the contention raised by learned defence counsel to the effect that evidence of PW17 SI Jagdish Ram cannot be relied upon for want of corroboration by the evidence of independent witness, is repelled.

This being so, the only irresistible conclusion is that the prosecution has utterly failed to bring home guilt against the accused namely; Ramesh @ Lilu and Lal Bahadur @ Vikas with respect to charges framed against them for commission of offences punishable under sections 323, 307 and 506 of the IPC read with section 34 of IPC. Thus, benefit of doubt is extended to both the accused persons, facing trial. They are accordingly, **acquitted** of the charges for offence punishable under sections 323, 307 and 506 of the IPC read with section 34 of IPC by extending them benefit of doubt. **Bail** bond of accused Lal Bahadur @ Vikas stand discharged and he is directed to furnish **bail** bonds in compliance of provisions under Section 437-A of NDPS Act. **However, the prosecution has proved its case against accused Ramesh @ Lilu beyond shadow of reasonable doubt, under section 25 of Arms Act, 1959. Accordingly, accused Ramesh @ Lilu is hereby held guilty and convicted under section 25 of the Arms Act, 1959. Let accused Ramesh @ Lilu be heard on the quantum of sentence."**

[7] Learned counsel for the appellant has submitted that the appellant is in custody for the last 06 months and 20 days. Learned counsel has relied upon a judgment of the Hon'ble Supreme Court in **Sumersinbh Umedsinh Rajput @ Sumersinh Vs. State of**

Gujarat, 2008 1 Crimes(SC) 57, wherein it is held that where the accused is facing charge under Section 307 IPC read with Section 25 of Arms Act and if the prosecution failed to prove the substantive charge under Section 307 IPC, charge under Section 25 of Arms Act would also fail. It is thus argued that once the trial Court has **acquitted** both the accused under Sections 323, 307, 506 read with Section 34 IPC, on appreciation of the evidence that PW5 & PW6 have not supported the prosecution version, as noticed above, conviction of the appellant under Section 25 of Arms Act is also liable to be set aside, in view of judgment of the Hon'ble Supreme Court in **Sumersinbh Umedsinh Rajput @ Sumersinh's** case (supra).

[8] In reply, learned State counsel could not dispute that till date, no appeal has been filed by the State challenging acquittal of the appellant under Section 307 IPC, however, it is submitted that the trial Court has recorded a finding that in view of statements of PW15 & PW17, the appellant was found in possession of the weapon without there being any proper licence, therefore, the trial Court has rightly held the appellant guilty of the offence punishable under Section 25 of Arms Act and sentenced him to undergo R.I. for a period of two years.

[9] After hearing learned counsel for the parties, I find merit in the present appeal.

[10] Admittedly, appellant Ramesh Kumar @ Lilu and co-accused Lala Bahadur @ Vikas stand **acquitted** of the charges under Sections 323, 307, 34 IPC, therefore, in view of judgment of the Hon'ble Supreme Court in **Sumersinbh Umedsinh Rajput @ Sumersinh's case** (supra), charge under Section 25 of Arms Act qua the appellant is not sustainable. Even otherwise, the appellant has already undergone 06 months and 20 days of sentence, which could be reduced.

[11] Accordingly, the present appeal is allowed and the impugned judgment of conviction and order of sentence dated 27.07.2022 passed by the trial Court, convicting the appellant under Section 25 of Arms Act, is set aside and the appellant is **acquitted** of the charge under Section 25 of Arms Act.

[12] Since the appellant is in custody, he be released forthwith, if not required in any other case

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2023(1)AIAJ66

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[From AURANGABAD BENCH]

[Before Vibha Kankanwadi; Rajesh S Patil]

Criminal Appeal No 329 of 2015 **dated 24/11/2022**

Shaikh Mazhar S/o Shaikh Haidar

Versus

State of Maharashtra

APPRECIATION OF EVIDENCE

Indian Penal Code, 1860 Sec. 302, Sec. 498A-Code of Criminal Procedure, 1973 Sec. 313- Evidence Act, 1872 Sec. 27-appellant - acquitted-conviction set aside-no proper appreciation of evidence- offence not proved beyond reasonable doubt-discovery not inspiring confidence- natural conduct on the part of any accused to leave muddemal and not to carry it- discovery-doubtful- prosecution was supposed to rule out the possibility of accidental death - witnesses- not believable-even if the accused failed to bring it on record that it was a suicidal death, yet the prosecution is not relieved of ruling out the possibility of accidental death as well as suicidal death if it intend to prove that it was homicidal -ground of cruelty and demand of money - there is no concrete evidence - Appeal allowed

[Para 7, 8, 9]

Acts Referred:

Indian Penal Code, 1860 Sec. 302, Sec. 498A

Code of Criminal Procedure, 1973 Sec. 313

Evidence Act, 1872 Sec. 27

Counsel:

Sharda P Chate, A M Phule

JUDGEMENT

Vibha Kankanwadi, J.- [1] The appellant has been convicted by the learned Sessions Judge, Parbhani in Sessions Trial No.23 of 2013 on 31.01.2015 after holding him guilty of committing offence under Sections 302 and 498-A of Indian Penal Code (for short "IPC") and he has been sentenced thus:-

> "1) Appellant - accused Shaikh Mazhar s/o Sk. Haidar is hereby convicted of the offence punishable under Section 302 of IPC and he is sentenced to suffer rigorous imprisonment for life. He is also liable to pay fine of Rs.5,000/- (Rs. Five Thousand) in default of payment of fine amount he shall suffer simple imprisonment for six months.
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> 2) Appellant - accused - Shaikh Mazhar s/o Sk. Haidar is hereby convicted of the offence punishable under Section 498-A of IPC and he is sentenced to suffer three years of rigorous imprisonment. He is also liable to pay fine of Rs.2000/- (Rs. Two Thousand) in default of payment of fine amount he shall suffer simple imprisonment for one month."

[2] The learned Advocate for the appellant submitted that there is no dispute that the appellant got married to deceased Nagma Begum about one and half year prior to FIR dated 19.10.2012. At the time of incident, the appellant and deceased were the only persons, who were residing in Amin Colony at Parbhani. Her matrimonial home was at Pingli. The charge levelled against the appellant is that he had subjected deceased to cruelty by making unlawful demand of Rs.1,00,000/- for purchasing auto

rickshaw since two months after the marriage till her death and on 18.10.2012, he murdered deceased by setting her to fire. The FIR has been lodged by the father of the deceased i.e. P.W.2 Shaikh Wahab. According to him, deceased Nagma had talked to him eight days prior to the incident informing about the harassment and then a day before the incident also, she had given a telephonic call to the father informing about the threat that was given by the appellant. The incident is alleged to have been occurred around 9 to 10 p.m. on 18.10.2012. Prosecution has examined in all 11 witnesses to bring home the guilt of the accused, whereas the accused has examined two witnesses in defence. P.W.1 Salid Ahemad Khan and P.W.6 Taufique Ahmad Khan are stated to be the witnesses who had extinguished the fire and according to the prosecution, P.W.1 Salid had seen appellant - Mazhar coming out of the house while running and he had a white Can in his hand. P.W.2 Shaikh Wahab is the father of the deceased and P.W.4 Syed Abrar is the uncle of the deceased. P.W.5 Mirza Nafiz Baig and P.W.10 Taslim Begum are the husband and wife who had given one of their room adjacent to their house on rent to appellant and his deceased wife Nagma. It is also the case of the prosecution that a day prior to the incident, Nagma had given call to her parents from the mobile of P.W.5 - Mirza Nafiz Baig. P.W.8 Mohd. Afzal Abdul Wahab is the brother of the deceased. P.W.9 Mohasin Ahmad Khan is the panch witness in whose presence the appellant has given memorandum and discovered the plastic Can containing kerosene. Other witnesses are the panch witnesses or the police persons including the Investigating Officer. The defence witness D.W.1 Ayub Khan is the employer of appellant and D.W.2 Dr. Aziz Quadri is the Medical Practitioner, who runs hospital in the name as Mental Health Center with whom deceased Nagma had taken treatment.

[3] The learned Advocate for the appellant has further submitted that P.W.2 Shaikh Wahab - father of the deceased has admitted that his several relatives reside in the same colony i.e. Amin Colony. Then it is surprising as to why deceased had not conveyed about the alleged cruelty to those relatives. It has been contended that the appellant was subjecting her to cruelty by making demand of Rs.1,00,000/- for purchase of auto, however, it can be certainly said that auto rickshaw cannot be purchased only with the amount of Rs.1,00,000/-, it requires more amount. Secondly, the father of the deceased accepts that the appellant never drove auto rickshaw in the past. Then it is hard to believe that the appellant would have demanded amount for purchase of such vehicle and would have subjected deceased to cruelty. The father admits that deceased was mentally disturbed and was taking treatment. Therefore, the possibility of commission of suicide by her cannot be ruled out. P.W.1 - Salid as well as P.W.6 - Taufique have stated that they were required to break upon the zinc sheets of the house to go inside and then they had extinguished the fire. However, the spot panchanama and other documents do not support the same. The possibilities are created that when the house was closed from inside and people were required to broke upon the zinc sheets to make way for extinguishing the fire, then it is a case of suicide.

None of them have made a specific statement that there was ladder put to the house from outside. The husband and wife i.e. the landlord and the landlady have tried to contend that on telephone call Nagma had informed about the ill-treatment to her father, however, the police have not collected the call details, mobile numbers etc. to support the oral contention. From the testimony of D.W.2 Dr. Quadri, it can be seen that deceased was taking treatment for her mental illness. The learned Trial Court ought to have considered properly the effect of such treatment and the substance in the defence that has been raised. Only interested witnesses have been examined by the prosecution and, therefore, the conviction awarded to the appellant is illegal and it deserves to be set aside.

[4] Per contra, the learned APP has submitted that the defence that has been taken by the accused is twofold. One is plea of alibi and second is suicidal death due to mental health. As per the statement of accused under Section 313 of the Code of Criminal Procedure (for short "Cr.P.C."), he was working with D.W.1 Ayub Khan on the day of incident, however, that evidence appears to be unbelievable. He does not, in specific words, say that the accused was with him at the relevant time i.e. when deceased found got fired. In the normal course even if we accept that deceased was working with P.W.1 Ayub Khan at Hingoli, then the appellant would have returned to his house within a reasonable time, at Parbhani. When the incident is alleged to have taken place around 9 to 10 p.m., the appellant's return from Parbhani to Hingoli was possible. D.W.2 Dr. Quadri rather in his cross-examination accepts that he had not seen the suicidal tendency in the mind of deceased. Therefore, both the defences of the appellant goes away.

[5] It has been further pointed out by learned APP that P.W.1 Salid has categorically stated that he had seen the present appellant running out of the house with white Can. He also states in his examination-in-chief that he entered the house of the deceased from the open door i.e. front door. No doubt, he later on says that the zinc sheets were broken, but here even if we brush aside the testimony of P.W.1 Salid, yet the other evidence on record would support the prosecution story. The illegal demand of money has been proved by P.W.2 - the father of the deceased and P.W.8 - the son of the informant. There is also evidence in the form of the landlord and the landlady that prior to the incident deceased Nagma had gave call to the father and informed him about the threat that has been given by the appellant to her. The discovery of Can under Section 27 of the Indian Evidence Act is from the place, which is to the backside of the house of the appellant. The said Can was taken from the bushes around Babool tree. Independent witness has been examined to prove the said discovery. Though he has stated that he is knowing some of the relatives of the informant, yet that cannot be a ground to brand him as interested witness. Learned APP submitted that he is supporting the reasons given by the learned Trial Judge and prayed for the dismissal of the appeal.

[6] It is to be noted from the testimony of P.W.2 Shaikh Wahab - father of the deceased that the marriage of deceased with accused had taken place about three years prior to his deposition i.e. as per the FIR, it was one and half years. He states that after the marriage, she had gone to reside with her in-laws and after spending good days for a couple of months there, according to him, the appellant started ill treating her. He states that the appellant used to tell her that she should fetch amount for purchasing auto rickshaw. At the first point of time, he has not stated as to how much amount was demanded by the appellant. He says that then he went to Pingli along with his relatives and told appellant that he should not harass his daughter. Interesting point to be noted is that he has not given the details as to what were the acts of harassment/cruelty, those were told by his daughter to him, those were given by the appellant to the deceased. P.W.2 - Shaikh Wahab further says that after staying at Pingli for some days and before the incident, he had taken amount of Rs.10,000/- and given to appellant. Thereafter, the appellant and deceased came to Parbhani and started staying at Amin Colony. Thereafter, deceased gave phone call to her brother 8-10 days prior to the incident informing that the appellant has given threat that "fetch Rs.1,00,000/- otherwise you would be killed by setting fire". Deceased informed on phone that she is being ill treated and beaten. Thereafter, he says that his daughter had called upon him on phone, but since he had kept his mobile for charging at the neighbours place, he could not talk. Then around 9.00 to 10.00 hours at night, one Israrkhan Pathan from Parbhani gave phone call to him and informed that his daughter has been killed by appellant by pouring kerosene and setting fire. Interesting point to be noted is that most of his examination-in-chief has been taken in question and answer form by the learned Presiding Officer. No doubt, it is the prerogative of the concerned Judge as to how he should record deposition of a person, however, only in respect of clarifications etc. such question and answer form can be adopted. It cannot be for many questions. Rather it shows that the witness is not willing to tell all the facts to the Court, but then it has been so extracted. Testimony of such person rather loses credibility. A very lengthy cross-examination has been taken on behalf of the defence and it can be found that most part of it, is irrelevant. Going into the minute details may not be acceptable. What remains in this case is the father is not sure as to when exactly the amount of Rs.1,00,000/- was demanded. Initially, when alleged demand was made, there was no specification and when specific amount was demanded, it was only on phone that was given to the son of the informant about 8-10 days prior to the incident. The testimony of P.W.2 - father of the informant then does not say as to what he had immediately done after hearing that the daughter has been so harassed. The testimony of P.W.8 Mohd. Fazal - son of P.W.2 - Shaikh Wahab would rather show that the amount of Rs.1,00,000/- was demanded by the appellant after one and half months after the marriage. The chronology is totally changed by him and then he says that after the said demand of Rs.1,00,000/- for purchasing auto rickshaw, the father had given Rs.10,000/- to the present appellant. That means on the ground of cruelty, in fact, there

is no concrete evidence. Another fact that appears to have not been considered by the learned Sessions Judge is that whether there was detailed inquiry by either P.W.2 or by P.W.8 as to whether an auto-rickshaw can be purchased even in 2012 for an amount of Rs.1,00,000/- or whether appellant was having some amount and he was short of amount of Rs.1,00,000/- and, therefore, he was demanding it. It was also not considered by the learned Sessions Judge that there was absolutely no direct dialogue between these two witnesses and the appellant on the said point. Therefore, when there was no substantial conclusive evidence, the appellant could not have been convicted for the offence punishable under Section 498-A of IPC. It appears that the learned Sessions Judge relied on the testimony of P.W.5 Mirza Nafiz Baig and his wife P.W.10 Taslim Begum, however, from the testimony of P.W.5 - Mirza Nafiz Baig, it can be seen that he had only lend his mobile to deceased so that she could make a call to her parents. He might have heard what deceased was saying and on the basis of same, he is saying that deceased told her parents that the husband is torturing her and therefore, they should come and take her to the house. P.W.10 Taslim Begum says that deceased Nagma told to her parents on phone that they should take her back to the house otherwise husband would do something to her life. That means on phone this couple had not heard as to what was the reason for which deceased was allegedly harassing Nagma. They had not even attempted to extract from her the reason. Such kind of evidence cannot be believed which can be said to be not complete evidence at all. Therefore, testimony of these two witnesses also could not have led the learned Sessions Judge to award conviction for the offence punishable under Section 498-A of IPC. P.W.5 further says that he rushed to the house after it was made known to him about the fire in the house of Nagma. In his examination-in-chief itself he has stated that two tins were found broken and Nagma was lying in the door in dead condition after sustaining burns. The persons who extinguished the fire told him that her husband had ablazed her and fled from the house cannot be accepted, as it amounts to hear say. P.W.10 Taslim Begum also says that she heard noise from the outside and, therefore, she came out. The noise was of breaking of the tin and pouring water. She then found that Nagma was lying dead near door and she also heard the same thing from the people, who extinguished the fire. Interesting point to be noted is that these two witnesses reside in the adjacent room. Still, when people from outside gathered, started breaking the tin, these two persons had not gone outside to see what has happened. The learned Trial Judge ought not to have relied upon the testimony of these two witnesses. P.W.2 - Shaikh Wahab and P.W.8 Mohd. Afzal - son of P.W.2 had reached the spot at much late time and, therefore, they cannot be said to be the appropriate witnesses on the point of offence under Section 302 of IPC.

[7] P.W.1 - Salid, P.W.6 - Taufique are the persons who had extinguished the fire. They went to the said spot after they were informed by a boy. Both of them have stated that they had seen appellant going away from the house with a Can in his hand. In fact, what the boy had informed these two persons was that there is fire in the house of the

appellant. P.W.-1 Salid has used word running whereas P.W.6 Taufique does not say that. That means, out of them one had seen that the accused was running with Can. They have not given the distance, nor they say that they shouted and asked the appellant to stay there to see what has happened in his house. How they could have allowed the appellant to flee away from the place, is a question. Another glaring fact that has to be noted is that both these witnesses have not stated that there was a lock that was put to the main door of the room occupied by the deceased and the appellant. When the examination-in-chief of P.W.1 Salid had started on 22.11.2013, he had stated that the house/room occupied by the appellant and his wife had zinc sheet boundary and its door was open. They had entered through that open door. Thereafter, the recording of evidence was deferred on the submission of learned APP and, thereafter, it appears that it was not taken up on the same day. The examination-in-chief then continued on 25.11.2013 and then the same witness has stated that they extinguished the fire and at that time they had broken a tarnished zinc sheets and had entered the house. That means two contrary things were brought on record by the prosecution itself and then there was no clarification from the witness as to how he has made those statements on the earlier occasion. Such attitude and approach is not expected from prosecution. Why they were required to broke upon the zinc sheets for entering the house has not been asked at all. In his cross-examination, which is again a lengthy, he has stated that they had broke upon the zinc sheets. The fact about breaking the zinc sheets has also been brought on record through cross-examinations of P.W.2 Shaikh Wahab, P.W.5 Mirza Nafiz, P.W.6 Taufique Ahmad, P.W.10 Taslim Begum. Interesting point to be noted is that the spot panchanama does not mention that zinc sheet was broken from any side. Rather it makes a mention that the door of the room was open. This glaring fact ought to have been considered by the learned Trial Judge. When the witnesses referred above were speaking against the fact situation, then they are not believable.

[8] No doubt from the inquest panchanama, postmortem report and overall evidence of all the witnesses it is not in dispute that Nagma died because of the 100% burn injuries. Three possibilities would arise one is accidental, second is suicidal death and third is homicidal death. Here, the appellant has tried to take defence that it was a suicide and, therefore, he also examined D.W.2 Dr. Quadri. Though it has come on record that Nagma had taken treatment for mental stress from him, in his cross-examination he has admitted that he had not seen the suicidal tendency in Nagma. That means the said witness is not supporting the theory put-forth by the accused. Yet, it is to be noted that the burden that is on the accused to prove his defence is not equivalent to prove a fact beyond reasonable doubt. Therefore, even if the accused failed to bring it on record that it was a suicidal death, yet the prosecution is not relieved of ruling out the possibility of accidental death as well as suicidal death if it intend to prove that it was homicidal death only. Taking into consideration the testimony of the above referred witnesses, it cannot be said that there was any reason for Nagma to commit

suicide. Even if we rule out the possibility for suicidal death, the prosecution was supposed to rule out the possibility of her accidental death also. Here, at this stage, it can be noted that the accused had taken the plea of alibi and had also examined his employer, but his testimony does not rule out a fact that even after doing the work on that day, the appellant could not have reached Parbhani from Hingoli. We cannot assume that the accused would have been in the house itself at that point of time. The testimony of P.W.1 Salid and P.W.6 Taufique cannot be accepted on the point that they had seen appellant running away from the house unless there would have been a concrete evidence that the accused was in the house at the relevant time and he can be the only author of the crime. Now, the prosecution has tried to connect the said fact with the discovery of the Can which has been tried to be proved through P.W.9 Mohasin. He has deposed that the accused made voluntary statement before him and the police that he would discover the plastic Can and then he had taken them to the place which was in the Amin Colony and took out the Can from the bushes which was thereafter seized. The first and the foremost fact that comes in mind is, if the accused had poured kerosene on his wife and ablazed her and then had the intention to flee away from the spot, then why he would go along with Can. The natural conduct on the part of any accused would be to leave the Can at that place itself. Now, in order to bring the case within that ambit, it appears that such evidence is led. The said discovery is in fact not inspiring confidence. One more fact that ought to have been taken note of is that neither P.W.1 Salid, nor P.W.6 Taufique had tried to give a distance from the place where they are standing to the house of accused and within how much minutes, they could reach the said place after they were informed. If the said fact about information to them and then they proceeding towards the house of the accused would have matched, then only there was a possibility that they would have seen the accused running with plastic Can. Another fact in the cross-examination of P.W.1 Salid is that he has clearly admitted that he has not told police on the day of incident that he had seen the accused running with Can.

[9] The other evidence on record can be said to be formal in nature and needs no discussion. Therefore, taking into consideration all these aspects, the learned Trial Judge ought to have arrived at a conclusion that the offence against the appellant is not proved beyond reasonable doubt. This is not a case where merely because a second possibility is shown; this Court is considering the second possibility. From the aforesaid reasons, it can be seen that the learned Trial Judge had not appreciated the evidence properly. When there is no proper appreciation of evidence, there is no question of Appellate Court taking a second possible view while reversing the decision. The appeal deserves to be allowed. Hence, we proceed to pass the following order:-

ORDER

i) The appeal stands allowed.

ii) The judgment and conviction against the appellant in Sessions Trial No.23 of 2013 by learned Sessions Judge, Parbhani on 31.01.2015, stands set aside.

iii) The appellant stands acquitted of the offence punishable under Sections 302 and 498-A of IPC.

iv) He be set at liberty forthwith if not required in any other case.

v) Fine amount paid, if any, be refunded to the appellant after the statutory period.

vi) It is clarified that there is no change in the order regarding disposal of Muddemal

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2023(1)AIAJ74

IN THE HIGH COURT AT CALCUTTA

[Before Chitta Ranjan Dash; Partha Sarathi Sen]

Cr A (Criminal Appeal) No 417 of 2004 **dated 22/11/2022**

Srimanta Mandi

Versus

State of West Bengal

CIRCUMSTANTIAL EVIDENCE

Indian Penal Code, 1860 Sec. 376, Sec. 302, Sec. 450 - Code of Criminal Procedure, 1973 Sec. 161 - Motive - Circumstantial evidence - No endeavour was made by the prosecution to send the bloodstained alleged weapon of offence for forensic examination as well as no finger print report was obtained with regard to the available finger prints as found in the said alleged weapon of offence - Failed to establish the motive of the present appellant to commit the aforementioned crime but also they have completely failed to establish the complete chain of link connecting the present appellant with the crime - Found not guilty of the charge under Section 302 of the Indian Penal Code , acquitted.

[Paras 24,25]

Law Point - "Even in case of a circumstantial evidence absence of motive which may be one of the strong link to complete the chain would not necessarily become fatal to the prosecution where other circumstances are such as to complete the chain connecting the accused with the crime."

Acts Referred:

Indian Penal Code, 1860 Sec. 376, Sec. 302, Sec. 450

Code of Criminal Procedure, 1973 Sec. 161

Counsel:

Partha Sarathi Bhattacharyya, Faria Hossain, Sujata Das

JUDGEMENT

Partha Sarathi Sen, J.- [1] The present appeal arises out of the Judgment dated 19.06.2003 as passed by learned Sessions Judge, Purulia in S.T. No. 5 of 2003 (arising out of Sessions Case No. 63 of 2003 and G.R. Case No. 156 of 2001) whereby and whereunder the present appellant was found guilty under Section 302 of the Indian Penal Code and thus sentenced to suffer imprisonment for life and to pay a fine of Rs.5000/- (rupees five thousand) i.d. to suffer additional rigorous imprisonment for one year. The convict felt aggrieved and thus preferred the instant appeal.

[2] In order to dispose of the instant appeal fairly and effectively, the facts leading to S.T. No. 5 of 2003 is required to be dealt with in a nutshell.

[3] On 22.05.2001, one Rabilal Kisku, son of Shri Hapan Kisku of village Kelahi, Kalidaha lodged a written complaint with O.C., Kashipur Police Station to the effect that on 21.05.2001 at about 5 P.M., he along with his all the family members left for cultivation and at that time his daughter Purnima Kisku, aged about 22 years was alone in her home. It has been alleged in the said written complaint that taking advantage of such situation one Srimanta Mandi (the appellant herein) committed rape upon his said daughter and thereafter murdered her by cutting her throat. It has been alleged further that when his wife came back to his home, she noticed that the said accused was fleeing away and after entering into her house, she also noticed that her said daughter i.e. Purnima Kisku was lying in dead condition and besides her dead body one cap and one napkin (gamcha) were lying.

[4] On the basis of the said written complaint Kashipur P.S. Case No. 43 of 2001 dated 22.05.20001 under Sections 450/376/302 Indian Penal Code was started. Investigation was taken up and on completion of the same charge sheet was submitted under Sections 450/302 Indian Penal Code. Learned ACJM, Purulia found that the said case is exclusively triable by a Court of Sessions and accordingly by his order dated 08.04.2003, he committed the said case record to the learned Sessions Judge, Purulia for trial and disposal.

[5] Lower Court Record reveals that on 23.04.2003, the learned Trial Court considered the charges against the accused and on perusal of the entire materials as placed before him, framed charge under Section 302 of the Indian Penal Code and since the accused (the appellant herein) pleads his innocence, the trial proceeded.

[6] Lower Court Record reveals further that in order to bring the charges, the prosecution has examined 11 (eleven) witnesses in all and various documents have been exhibited both on the side of the prosecution and defence.

[7] For the sake of convenience the prosecution witnesses can be categorised in the following manner:-

Private Witnesses	Police Official	Medical Practitioners
PW-1 ñ Informant/father	PW-11 ñ Recording	PW-6 ñ Autopsy surgeon.

of the victim. PW-2 ñ Mother of the victim. PW-3 ñ Co-villager. PW-4 ñ Brother of the victim. PW-5 - Scribe	Officer as well as Investigating Officer.	PW-7 ñ Medical Officer of Purulia Sadar Hospital. PW-8 ñ Radiologist of Purulia District Sadar Hospital. PW-9 ñ Medical Officer (Surgeon) of Purulia District Sadar Hospital. PW-10 ñ Medical Officercum-pathologist attached to the B.C. Roy Polio Clinic and Hospital, Kolkata.

[8] In considered view of us there is no necessity to discuss the oral evidence of all the prosecution witnesses since those are not much relevant for effective adjudication of this appeal and thus in this judgement the evidence of those prosecution witnesses will be discussed which are relevant and have a strong bearing with the case in hand.

[9] As discussed above P.W.-1 being the informant as well as the father of the victim in course of his examination-in-chief practically echoed the version of his written complaint (Exhibit-1). In course of his examination-in-chief he stated that his daughter Purnima Kisku was unmarried at the time of her murder and such incident of murder took place on 21.05.2001 at 5 P.M. He stated that since the distance between his residence and the local Police Station is six miles, he could not lodge written complaint with the said Police Station on the very fateful day and thus he reported the matter on the next day morning. It is his further version that on the relevant day and hour, he along with his all family members except his victim daughter Purnima Kisku went to paddy field for the purpose of cultivation and on the said day when his wife returned from paddy field, she found the convict Srimanta Mandi was coming out from his house and thereafter he ran away. He further stated that after getting information when he reached his house he found his said daughter was no more and at that time her wearing apparel was lifted up.

[10] In considered view of us, the cross-examination of P.W.-1 is not much relevant and accordingly, the same is not discussed in detail.

[11] P.W.-2 according to the prosecution is the mother of the victim who in her examination-in-chief stated that her victim daughter Purnima Kisku at the time of her death was aged about 22 years and the accused Srimanta Mandi (the appellant herein) used to come to her house in their absence. She stated that there was no negotiation of marriage between the accused and Purnima Kisku. She further stated that on the relevant day her said daughter was alone in her house and at that time the other family members including her went to the paddy field for cultivation. It is her further version

that on the relevant day and hour when she reached at the door of her house, the accused ran away after pushing her and at that time the accused did not give any reply to P.W.-2 as to why he was running away. It is the further version of P.W.-2 that on entering into her room she noticed that there was injury on her said daughter's neck and that she was ravished. She stated that by the side of the dead body of her said daughter she found one napkin (gamcha) and a cap of the accused as well as one bloodstained batali (a sharp edged weapon). The cross-examination of P.W.-2 is however very much relevant. P.W.-2 stated in her cross-examination that when she came back to her home on the relevant day from the paddy field, dark was nearly approaching and when she stepped into the court yard, the accused Srimanta Mandi ran away from her bed room by giving a push to her. She reiterated that after entering into her room she found that her said daughter was dead and her wearing apparel was lifted up. She denied all the suggestions as given to her by the learned Advocate for the accused.

[12] Pw-3 in course of his examination-in-chief stated that after hearing hue and cry he came to the house of the P.W.1 and after entering into his room he found that the victim Purnima Kisku was lying in dead condition having cut injury on her throat and at that time her wearing apparel was lifted up. In course of cross-examination he stated that when he went to the house of P.W.-1, it was almost dark.

[13] P.W.-4 being the brother of the victim lady stated that on the relevant day the accused murdered her sister at their home when no other of his family members was present. He saw the dead body of Purnima Kisku on the relevant date. In course of his examination-in-chief he identified the cap of the accused as well as the napkin (gamcha). In cross-examination P.W.-4 stated that on the relevant day and hour he went to the paddy field. He stated further that similar type of cap and napkin (gamcha) were available in the market. He further stated that on the basis of the identification of the cap and napkin (gamcha) and after hearing the entire incident from his mother he understood that the accused had commited murder of his sister.

[14] P.W.-5 in course of his examination-in-chief stated that the written complaint was written by him as per instruction of P.W.-1 and that he was present at the time of the inquest of the dead body of the victim. The cross-examination of the P.W.-5 in considered view of us is not much relevant and accordingly the same is not discussed.

[15] P.W.-6 being the autopsy surgeon in course of his examination-in-chief duly proved the autopsy report (Exhibit 4). He stated that in course of post-mortem examination he found one penetrated wound at the anterial part of neck and the measurement of such wound is 1 inch x 1/2 inch deep to trachea. He further noticed that the trachea was injured and presence of foetus and placenta in the uterus of the victim which he sent for forensic examination. According to him the death of the victim occurred due to severe shock and haemorrhage and as a result of the abovementioned injury which is anti-mortem and homicidal in nature. In course of his cross-examination, he stated that the injury caused depends upon the dimension of

batali (the alleged weapon of offence). He further stated that he noticed that the depth of the injury was up to trachea although he did not measure it numerically. He stated further that at the time of post-mortem examination he found no injury on the private parts of the victim. However, he noticed that the deceased was pregnant.

[16] Lower Court record reveals that four other medical practitioners, namely, P.W.-7 to P.W.10 were examined by the learned Trial Court. However, their evidence has got no bearing with the charges framed as against the accused by the learned Trial Court and thus we find no necessity to discuss such evidence.

[17] P.W.-11 being the Officer-in-charge of Kashipur Police Station received the written complaint from P.W.-1 and thereafter he himself took the charge of investigation. In course of his examination-in-chief he stated that he visited the P.O., prepared the sketch map, made inquest over the dead body of the victim, examined the available witnesses, collected the post-mortem report and prepared the seizure list and on completion of investigation he submitted charge sheet against the accused. In course of his cross-examination P.W.11 stated that while examining P.W.-2 under Section 161 Cr.P.C. the said P.W.-2 did state to him on the relevant day and hour the accused pushed her down and fled away. He stated further that P.W.-2 did not state to him that the wearing apparel of the victim was lifted up then. He denied that he conducted a perfunctory investigation.

[18] In course of his argument, Mr. Bhattacharyya, learned Advocate for the appellant as appointed by this Court draws attention of this Court to the certified copy of the impugned judgement. It is contended by him that while passing the impugned judgement learned Trial Court has miserably failed to appreciate that the present case is based on circumstantial evidence and that the chain of circumstances as required to be proved in such type of cases are absolute incomplete and therefore learned Trial Court misdirected himself in coming to a conclusion that the present appellant has committed offence under Section 302 of the Indian Penal Code. It is contended further that while passing the impugned judgement learned Trial Court misdirected himself in placing too much reliance upon the evidence of the P.W.-2 and at the same time failed to appreciate that P.W.-2 is not the ocular witness of the alleged murder of the victim. Mr. Bhattacharyya, learned Advocate thus submits that it is a fit case for allowing the instant appeal by setting aside the impugned judgement as passed by the learned Trial Court.

[19] Ms. Faria Hossain, learned Advocate for the State in course of her argument opposed the contention as raised by Mr. Bhattacharya, learned Advocate. It is argued by her that learned Trial Court committed no error of fact or error of law in placing his reliance upon the unchallenged testimony of P.W.-2. It is contended that learned Trial Court while passing the impugned judgement found that P.W.-2 could not be shaken in course of her cross-examination and therefore learned Trial Court committed no

mistake in convicting the present appellant under Section 302 of the Indian Penal Code. It is argued that it is a fit case for dismissal of the instant appeal.

[20] We have perused the entire materials as placed before this Court. We have also given our due consideration over the submissions of the learned Advocates of both the sides. On perusal of the evidence of the prosecution witnesses there is no doubt in our mind that death of the victim lady was homicidal in nature since the evidence of P.W.-6 i.e. the autopsy surgeon as discussed above is very much clear to that effect. In course of his cross-examination nothing could be established on the part of the defence that the death of the victim is either natural or accidental.

[21] There is no iota of doubt in our mind that the instant case is based on circumstantial evidence and accordingly we propose to peruse the five golden principles relating to circumstantial evidence as time to time enunciated by the Hon'ble Supreme Court of India as well as by the different High Courts of our country.

[22] In the reported decision of '**Sarad Birbhichand Sarda Vs. State of Maharashtra**, 1984 AIR(SC) 1622'. The Hon'ble Supreme Court of India while dealing with a case of circumstantial evidence expressed the following view:-

> "(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established;
>
> (ii) The facts so established should be consistent only the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (iii) The circumstances should be at a conclusive nature and tendency;
>
> (iv) They should every possible hypothesis except the one to be proved;
>
> (v) There must be chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

The same view was taken in the reported decisions of '**State of Rajastan Vs. Rajaram**, 2003 8 SCC 180' and '**State of Haryana Vs. Jagbir Singh**, 2003 11 SCC 261'.

[23] Keeping in mind the above five principles relating to circumstantial evidence we now propose to look to the evidence of P.W.-2 once more. On careful scrutiny of the evidence of P.W.-2, it appears to us that it is the version of the P.W.-2 that on the fateful day and hour she noticed that the accused was coming out from her house and on being asked by her, the accused did not answer to her query and on the contrary he pushed her and fled away. It is her further version that thereafter she entered into her room and found cut injury on the throat of her daughter Purnima Kisku. Apart from this, no other positive evidence came out from the mouth of the P.W.-2 to rope the appellant with the charge of murder. It appears to us that the learned Trial Court while passing the impugned judgment expressed the view that this piece of evidence clearly

and categorically indicates towards the guilt of the accused for which he was charged. In considered view of us the view taken by the learned Trial court while appreciating the evidence of P.W.-2 is not at all correct since the aforesaid conduct of the accused i.e. running away from the house of the victim on the relevant day and hour after giving a push to P.W.-2 does not categorically indicate that none but him has committed the crime of murder of the said victim lady. Admittedly in course of investigation the alleged weapon of offence, one cap and one napkin (gamcha) were seized from the P.O. but before the Trial Court the prosecution has miserably failed to prove that those cap and napkin (gamcha) belong to the accused. No endeavour was made by the prosecution to send the bloodstained alleged weapon of offence for forensic examination as well as no finger print report was obtained with regard to the available finger prints as found in the said alleged weapon of offence.

[24] As rightly pointed out by Mr. Bhattacharyya, learned Advocate that before the learned Trial Court no endeavour was made by the prosecution even to prove a motive of the present appellant to commit such crime. In this regard we propose to look to a reported judgement '**Ganesh Lal Vs. State of Maharashtra**, 1992 3 SCC 106'. The relevant portion of the aforesaid reported decision is reproduced hereunder:-

> "Even in case of a circumstantial evidence absence of motive which may be one of the strong link to complete the chain would not necessarily become fatal to the prosecution where other circumstances are such as to complete the chain connecting the accused with the crime."

The same view was taken in the case of '**Vivek Kalra Vs. State of Rajasthan**, 2013 2 CalCriLR 826' (SC).

[25] In view of the discussion made hereinabove we have got no hesitation to hold that before the learned Trial Court the prosecution has not only failed to establish the motive of the present appellant to commit the aforementioned crime but also they have completely failed to establish the complete chain of link connecting the present appellant with the crime.

[26] In view of such, the instant appeal succeeds. The impugned judgment and order of conviction dated 19.06.2003 and 20.06.2003 as passed by Learned Sessions Judge Purulia in Sessions Trial No. 5 of 2003 arising out of Session Case No. 63 of 2003 is hereby set aside. The present appellant Srimanta Mandi is thus found not guilty of the charge under Section 302 of the Indian Penal Code and he is thus **acquitted** from S.T. Case No. 5 of 2003 arising out of Sessions Case No. 63 of 2003. The present appellant Srimanta Mandi is also discharged from his **bail** bond and be set at liberty at once, if not, detained in connection with any other case.

[27] Let a copy of this judgment along with the LCR be sent down at once.

[28] Let a free certified copy of this judgement be forwarded to the Secretary, District Legal Services Authority, Purulia for onward transmission of the same to the correctional home authority where the present appellant is detained now.

[29] Urgent Photostat certified copy of this Judgement, if applied for, be given to the parties on completion of usual formalities.

I agree.

(Chitta Ranjan Dash, J.

2023(1)AIAJ81

DELHI HIGH COURT

[Before Purushaindra Kumar Kaurav]

Crl A (Criminal Appeal) No 56 of 2018 **dated 02/11/2022**

State (NCT of Delhi)

Versus

Karan Singh S/o Porkhi Ram

APPEAL AGAINST ACQUITTAL

Indian Penal Code, 1860 Sec. 304A, Sec. 279, Sec. 338 - Code of Criminal Procedure, 1973 Sec. 313 -Appeal against acquittal - Cannot be restrictive - Appreciation of evidence - High Court has full power to re-appreciate, review and reweigh at large the evidence on which the order of acquittal is founded and to reach its own conclusion on such evidence - Both question of fact and question of law are open to determination by the appellate court - Nonetheless it is not correct to say that unless the appellate court in an appeal against acquittal under challenge is convinced that the finding of acquittal recorded by the trial court is "perverse", it cannot interfere - If appellate court on re-appreciation of evidence and well established principles, comes to a contrary conclusion and records conviction, such conviction cannot be said to be contrary to law - Powers of the appellate court for interference in cases where acquittal is recorded by the trial court - Prosecution has failed to establish its case beyond reasonable doubt - Appeal dismissed

[Para 11]

Law Point - It is settled principle of law that presumption of innocence is further strengthened after passing of the order of acquittal and therefore, there is double presumption in favour of the accused.

Acts Referred:

Indian Penal Code, 1860 Sec. 304A, Sec. 279, Sec. 338

Code of Criminal Procedure, 1973 Sec. 313

Counsel:

Utkarsh, Kashmir Singh

JUDGEMENT

Purushaindra Kumar Kaurav, J.- [1] This appeal is directed against the impugned judgment dated 09.12.2015, whereby the learned Metropolitan Magistrate-02, North District, Delhi has **acquitted** the respondent/accused from the charges of offences punishable under Sections 279/338/304A of the Indian Penal Code, 1860 (IPC).

[2] Learned APP for the State submits that the impugned judgment is erroneous and the findings are perverse. He contends that the learned trial court has committed a grave error while **acquitting** the respondent. According to him, the evidence available on record has been ignored and the facts and the legal position have not been appreciated in the right perspective. He therefore, submits that in view of the fact that the accused admits that he was driving the vehicle at the given place and time and was apprehended at the spot, there was no reason for the trial court not to believe that the accused has committed the crime in question. He further states that the offending vehicle was seized from the possession of the respondent which further reinforces complicity of the accused.

[3] Learned counsel appearing on behalf of the respondent opposed the prayer and according to him the impugned judgement of acquittal is strictly in accordance with law. While taking this court through the evidence of various prosecution witnesses, he emphasized that the prosecution has not been able to prove its case beyond reasonable doubt and therefore, no interference is called for.

[4] I have heard the learned counsel appearing for the parties and perused the record.

[5] The case of the prosecution is that on 26.04.2001 at about 11:20 AM at Badli Chowk near Senior Secondary School, Delhi, the accused was driving Tata Tempo DL 1L C9324, and caused the death of one Ms.Maya Devi not amounting to culpable homicide and has caused grievous injuries to one Shyamu. According to the prosecution, the respondent was driving the vehicle rashly and negligently endangering human life and personal safety of others and therefore, he committed offence punishable under Sections 279/338/304A of the IPC.

[6] The police after registration of the FIR No.275/2001 carried out the investigation and filed the chargesheet against the respondent. After framing of the charges the respondent/accused pleaded not guilty and claimed trial.

[7] The prosecution in order to prove its case, examined four witnesses and various documents were also exhibited. After completion of the prosecution evidence, the entire incriminating material was put to the respondent and he was examined under Section 313 of the Cr.P.C. He pleaded his innocence but did not lead any evidence.

[8] Paragraph No.16 of the impugned judgment shows that PW-4, namely, Shyamu was the injured witness. In his cross-examination, the said witness stated that he did not give any statement to the police and his signatures were obtained on a blank

paper. According to him, he saw the accused for the first time in court. He denied that he had witnessed the incident. He was re-examined by the learned APP for the State. He stood by his version given in the cross-examination to the defence counsel.

[9] Another important witness namely, Mahesh Kumar (PW-1), who happens to be the son of the deceased mother, was also examined by the prosecution to prove its case. He stated that the deceased mother used to pick PW-1's son during 11 AM - 12 Noon and on the date of the incident, he was 20-25 paces behind his mother. According to him, when the incident took place, he heard shouting from the public regarding the incident and when he rushed to the spot he saw that his mother was dead and he became unconscious. When he gained consciousness, some statement was made by him but he could not recollect what he had stated in his statement at that time. He had stated that "he saw the accused first time in court". In view of the aforesaid, testimony of two material witnesses, the trial court in paragraph No.19 of the impugned judgment has recorded that the case of the prosecution was not proved beyond reasonable doubt. The identification of the accused as the driver of the offending vehicle was not done in accordance with law and in absence thereto, the prosecution has been found to have failed in establishing the case beyond reasonable doubt. The paragraph No.19 of the order passed by the learned Metropolitan Magistrate is being reproduced as under:

> "The two public witnesses i.e PW Mahesh and PW Shyamu have created a doubt regarding the identity of the accused by not identifying him as driver of the offending vehicle and it is the cardinal principal of law that the prosecution has to prove its case beyond reasonable doubt and if there is any doubt then benefit of doubt must be given to the accused".

[10] It is settled principle of law that presumption of innocence is further strengthened after passing of the order of acquittal and therefore, there is double presumption in favour of the accused. Under the facts of the case and on the basis of the material available in the present case, no conclusion can be drawn that the respondent was the driver of the offending vehicle at the time of the incident. Presumption cannot be drawn on the basis of the fact that he was apprehended on the spot or the vehicle in question was seized from his possession. The prosecution will have to prove its case beyond reasonable doubt on the basis of substantial material and admissible evidence.

[11] The Hon'ble Supreme Court in the matter of **State Of Maharashtra v. Sujay Mangesh Poyarelar**, 2008 9 SCC 475 while considering its earlier pronouncements including the decision in the case of **Chandrappa & Ors. v. State of Karnataka**, 2007 4 SCC 415 has held that the power of the appellate court in an appeal against acquittal cannot be said to be restrictive and the High Court has full power to re-appreciate, review and reweigh at large the evidence on which the order of acquittal is founded and to reach its own conclusion on such evidence. Both question of fact and

question of law are open to determination by the appellate court. It has also been held that nonetheless it is not correct to say that unless the appellate court in an appeal against acquittal under challenge is convinced that the finding of acquittal recorded by the trial court is "perverse", it cannot interfere. If the appellate court on re-appreciation of evidence and keeping in view the well established principles, comes to a contrary conclusion and records conviction, such conviction cannot be said to be contrary to law.

[12] The Supreme Court in the matter of Hakeem Khan &Ors v. State of M.P.,2017 5 SCC 715 has again considered the powers of the appellate court for interference in cases where acquittal is recorded by the trial court. In the said decision it has been held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not. The verdict of the trial court cannot be interdicted and the view of the High Court cannot supplant over the view of the trial court.

[13] The trial court has found that the prosecution has failed to establish its case beyond reasonable doubt. Moving carefully examined the evidence available on record this court does not find any ground to interfere into the reasoning given by the trial court. Accordingly, the instant appeal stands dismissed.

[14] Bail bond stands discharged

2023(1)AIAJ84

HIGH COURT OF ANDHRA PRADESH: AMARAVATI

[Before A V Ravindra Babu]

Criminal Appeal No 1164 of 2009 **dated 16/11/2022**

State of A P

Versus

Sajja Ramakanth; Tammineedi Nageswara Rao; Sajja Venkata Lakshmi; Tammineedi Suryanarayana

APPEAL AGAINST ACQUITTAL

Indian Penal Code, 1860 Sec. 376, Sec. 363, Sec. 34, Sec. 109, Sec. 366A, Sec. 343 - Code of Criminal Procedure, 1973 Sec. 235, Sec. 378, Sec. 313, Sec. 207- Appeal against acquittal - Kidnapping and rape - To prove that abetted the commission of offence of kidnapping and rape of the victim girl - Judgment of the trial Court is sustainable under law or fact - As per entire evidence on record, it is the bounden duty of the Court to look into the entire evidence on record and to come an independent conclusion as to whether the evidence on record would prove the

charges framed against the accused - Prosecution failed to prove that accused kidnapped victim girl had sexual intercourse with her in the manner as alleged by the prosecution - Hence, there are no merits in the appeal - Appeal dismissed

[Paras 30,31,32]

Law Point - Bounden duty of the Court to look into the entire evidence on record and to come an independent conclusion as to whether the evidence on record would prove the charges framed against the accused

Acts Referred:

Indian Penal Code, 1860 Sec. 376, Sec. 363, Sec. 34, Sec. 109, Sec. 366A, Sec. 343

Code of Criminal Procedure, 1973 Sec. 235, Sec. 378, Sec. 313, Sec. 207

Counsel:

K Durga Prasad

JUDGEMENT

A V Ravindra Babu, J.- [1] This is a Criminal Appeal filed on behalf of the State, represented by the Public Prosecutor, High Court of Andhra Pradesh, under Section 378(1) & (3) of the Code of Criminal Procedure ("Cr.P.C." for short), challenging the judgment in Sessions Case No.211 of 2006, on the file of the Assistant Sessions Judge, Narsapuram, dated 27.12.2007, with a prayer to set aside the order of acquittal and to convict the Respondents/Accused for the offences, with which they were charged.

[2] The parties to this appeal will hereinafter be referred as described before the learned Assistant Sessions Judge, Narsapuram, for the sake of convenience.

[3] The State, represented by the Inspector of Police, Palakol Circle, filed a charge sheet in Crime No.47 of 2005 of Achanta Police Station, under Sections 343, 366A, 376 r/w 109 of the Indian Penal Code ("IPC" for short), alleging in substance that the victim is permanent resident of Padamatipalem and she is aged about 14 years. So, she is a minor. L.W.2-Chilukuri Venkata Narayana is the father of the victim and L.W.3-Chilukuri Varalakshmi is the wife of L.W.2. The study record reveals that the date of birth of the victim is 01.07.1991. A.1 to A.4 are the residents of Padamatipalem. A.1 is the son of A.3. A.2 and A.4 are supporters of family of A.1 and A.3. As the victim belonged to a rich family, A.1 wanted to marry her. A.2 to A.4 supported the proposal of A.1. Prior to the offence, A.1 used to follow the victim and used to tell her that he would marry her, for which she could not make out her mind. A.1 used to demand the victim to love him. A.2 used to call victim to his house and compel her to accept the marriage proposal. A.3 and A.4 supported the conduct of A.1.

[4] On 12.06.2005 evening A.1 stopped the victim on her way and asked her to come with him for which she refused. One Chilukuri Srinivas Rao was noticing them together and then A.1 went away. Again on the same day, at 6-00 P.M. A.1 and A.2 went to Ramalayam Temple in Padamatipalem and they found the victim. A.1 asked

her to come with him and he would take her away and marry her. Victim intimated to A.1 to inform her parents, but, he prevailed over her immature mind and made her to believe his words. A.2 instigated A.1 to kidnap her. The victim is made to leave the custody of her parents and to follow A.1. A.1 took her on his motorbike to Bhimavaram, from there to Tirupati and kept her in the house of his uncle, Yenugu Ramaswamy, behind Venkateswara Theatre, near Bus Stand, Tirupati. On 19.06.2005 A.1 took the victim to Razole, took a room in the tiled house of one Yalangi Padma and kept the victim girl there. On 20.06.2005 night A.1 had sexual intercourse with the victim in spite of her objections in the room. On 21.06.2005 A.3 and A.4 came there and learnt that A.1 had sexual intercourse with the victim. A.3, the mother of A.1, advised him to take to Annavaram temple for marriage. As per the directions of A.3 and A.4, A.1 took the victim to Annavaram on 30.06.2005, tied yellow thread in her neck in the temple before Purohit. A.1 affixed toe rings to victim girl and got photographs. A.3 and A.4 supplied money and aided A.1 to commit the offence. She was detained in the rented room at Razole. On 14.06.2005 at 6-00 P.M. on the report of father of the victim, police registered the F.I.R. under Section 363 r/w 34 of IPC in Crime No.47 of 2005 and took up investigation. They visited the scene of offence and prepared observation report and rough sketch. Police collected date of birth certificate of the victim.

[5] Whenever the victim attempted to go home, A.1, A.3 and A.4 threatened her with dire consequences and compelled her to tell to police that she would prefer to be with A.1. Anyhow, on 08.07.2005 A.1 brought the victim from Razole to Achanta Centre and dropped her and went away. She managed to go home and narrated everything to her parents. On 08.07.2002 at 9-00 P.M. the parents of victim brought her to police station where the Sub-Inspector of Police recorded detailed statement of the victim and thereupon the police altered the section of law into 366(A), 376 of IPC r/w 109 of IPC. Sub-Inspector of Police referred the victim to medical examination and obtained the age determination certificate. He examined the house of Yalangi Padma where the accused confined the victim and drafted observation report. On 10.07.2005 the Circle Inspector of Police concerned took up further investigation and verified the investigation done by the Sub-Inspector of Police. He arrested A.3 and A.4 and sent for remand. A.1 and A.2 in fact surrendered before the police when the offence was under Section 363 of IPC and were released on bail by the police. Later, the police got cancelled the bail granted to A.1 and A.2. So, again police arrested A.1 on 26.07.2002 and sent for medical examination and later A.1 and A.2 were released.

[6] The investigation reveals the offences under Sections 366(A), 366(A) r/w 109 of IPC and also Sections 343 and 376 of IPC. Hence, the charge sheet.

[7] The concerned Judicial Magistrate of First Class took cognizance of the offences alleged and numbered the case as Preliminary Register Case and after complying the formalities under Section 207 of Cr.P.C., committed the case to the

Court of Sessions and thereupon the case was numbered as Sessions Case and was made over to Assistant Sessions Judge, Narsapuram.

[8] On appearance of the respondents/accused before the trial Court and by following the procedure, charges under Sections 343, 366A, 376 of IPC against A.1 and Sections 366A r/w 109 of IPC and 376 r/w 109 of IPC against A.2 to A.4 were framed and explained to them in Telugu before the trial Court, for which they denied the offences and claimed to be tried. The prosecution before the trial Court got examined P.Ws.1 to 15 and got marked Exs.P.1 to P.18. Exs.D.1 and D.2 were marked on behalf of the accused. After the closure of evidence of prosecution, the accused were examined under Section 313 of Cr.P.C., for which they denied the incriminating circumstances and reported no defence evidence. The learned Assistant Sessions Judge, on hearing both sides and on considering the evidence on record, found them not guilty of the charges and acquitted under Section 235 (1) of Cr.P.C. Aggrieved of the same, the State, represented by the Public Prosecutor, High Court of Andhra Pradesh, filed the present Criminal Appeal.

[9] Now, in deciding the appeal, the points that arise for consideration are as follows:

(i) Whether the prosecution before the trial Court was able to prove that the A.1 on 12.06.2005 kidnapped the victim girl and on 20.06.2005 subjected her to **rape** as alleged by the prosecution?

(ii) Whether the prosecution before the trial Court was able to prove that A.2 to A.4 abetted the commission of offence of kidnapping and **rape** of the victim girl by A.1?

(iii) Whether the judgment of the trial Court is sustainable under law or fact?

[10] Sri Y. Jagadeeswara Rao, learned counsel, representing the learned Public Prosecutor, would contend that P.Ws.1 to 3, the victim as well as her parents, supported the case of the prosecution. Though P.Ws.4 and 5 turned hostile, but, there is evidence of P.Ws.1 to 3. The trial Court unnecessarily disbelieved the evidence adduced by the prosecution. The learned Assistant Sessions Judge did not appreciate the evidence in proper manner and erred in acquittal of the accused. P.W.9 supported the case of the prosecution. The trial Court ought to have been seen that P.W.1 is a minor girl and accused prevailed over her not to disclose the facts to anybody. The evidence on record would prove that the victim was a minor at the time of offence, as such, the accused are liable for conviction.

[11] Sri K. Raja Sekhar, learned counsel, representing Smt. M. Renuka, learned counsel for the respondent Nos.1 and 3, would contend that the evidence of P.W.1, the victim cannot stand to the test of scrutiny. Her evidence means that forcibly A.1 took away on motorbike and taken her to Bhimavaram and from there to Tirupatiand again brought back to Razole and later she was taken to Annavaram, etc. If really, A.1 kidnapped her by force and if really he married the victim forcibly after commission

of **rape**, there would have been several opportunities to the victim to reveal the incident and the evidence of P.W.1 is totally unnatural. P.Ws.4 and 5, the socalled direct witnesses, did not support the case of the prosecution. The evidence of P.Ws.3 and 4 is interested in nature. The learned Assistant Sessions Judge rightly passed an order of acquittal and that there are no grounds to interfere with the judgment of the trial Court.

[12] There are no arguments advanced on behalf of the other contesting respondents.

[13] P.W.1 is the victim and P.Ws.2 and 3 are the parents of P.W.1. P.Ws.4 and 5, the so-called direct witnesses, admittedly turned hostile to the case of the prosecution. P.W.6 is the person, who issued the age proof of the victim. P.W.7 and P.W.8 are hearsay witnesses and they came to know about the offence at a later stage. The prosecution examined P.W.9 to prove that in her house the accused confined the victim and committed **rape**. The prosecution further examined P.W.10, who is a Photographer to speak to the fact that he took four photos at the house of P.W.9. The prosecution further examined P.W.11, who is a mediator to the observation report at Padamatipalem. The prosecution also examined P.W.12 to prove the age of the victim. P.W.13 is the medical officer, who subjected the victim for physical examination. P.W.14 is the person, who examined A.1 physically as regards his physical structures, etc. P.W.15 is the investigating officer.

[14] The evidence of P.W.1 on material aspects insofar as allegations of kidnap and offence of **rape** is concerned is to the effect that A.1 used to demand her to love him and he used to make proposals to marry her. On one day she went to Ramalayam on 12th June and lit a lamp and was coming back, A.1 and A.2 came there and A.1 informed her that he want to marry her, for which she refused. Then A.1 said to her that if she would not come, he will die. A.2 informed A.1 that to take away the victim and if any galata took place, he will look after it. Still she refused to go with him. Then, A.1 said to her that if she would not come, he will kill her parents. Then, A.1 forcibly took her on his motorbike to Bhimavaram and from there to Tirupati by train. He took her to his relatives' house at Tirupati and confined there for one week. On 18.06.2005 A.1 took her in a taxi to Razole to the house of Yelangi Padma, a tiled house and kept her there. On the next day, on 20.06.2005, A.3 and A.4 came there and gave some cash to A.1 and they went away. On that day night A.1 hugged her and spoiled her life. On 21.06.2005 in the morning when she wake up, A.3 and A.4 were present there. A.4 threatened her that if she reveal to anybody, he will kill her. Then she left to go to her house, A.4 threatened her. On that day completely she was weeping. On 30.06.2005 A.1, A.3 and A.4 took her to Annavaram in a Taxi and outside the temple they called a Purohit and tied tali to her neck. They tied black beads chain also to her neck and they fixed toe rings to her legs. A.1 garlanded her. She was forced to garland to A.1 and they took a photograph. A.1 told her that he married her. From there A.1 took her to Razole. On 05.07.2005 A.1 went out and after A.1 returned

A.4 went out. A.4 returned back and informed A.1 that police are coming. Then A.1 informed her that if police came, she had to tell them that she married A.1. On 08.07.2005 A.1 took her on motorbike and left her at Achanta Center. Then she went to village by foot and informed the incident to her parents. Then she, her father along with village elders went to police station and reported the incident. She was referred to Palakol Government hospital. As there is no lady doctor, she was taken to Tanuku government hospital, from there she was referred to Kakinada Government hospital. This is the substance of the evidence of P.W.1.

[15] The evidence of P.W.2 is to the effect that P.W.1 informed to him about the fact that A.1 used to tease her. Then he questioned A.1. A.2 made a proposal to P.W.2 to give in marriage of P.W.1 with A.1. But, as P.W.1 is aged only 14 years, he postponed her marriage and informed the same to A.1. One year later, P.W.1 was missing. They searched for her for two days and then he lodged Ex.P.1 report. Ultimately, victim was left in the outskirts of Achanta and then she came to the house. When he asked her what happened, she revealed the entire incident. He took her to police station.

[16] Coming to the evidence of P.W.3, her evidence is also same as that of the evidence of P.W.2.

[17] Admittedly, P.Ws.4 and 5 did not support the case of the prosecution in any way.

[18] A close look at the evidence of P.Ws.7 and 8 reveals that they are not the persons, who witnessed the occurrence and that they are the hearsay witnesses only. According to P.W.7, A.1 forcibly took P.W.1 on his motorbike to Bhimavaram and then to Tirupati and then to Annavaram and then to Razole. A.2 and A.3 instigated A.1. A.1 used to demand P.W.2 to perform the marriage of him with P.W.1. The evidence of P.W.8 is also such that he came to know about the offence committed by the accused. So, P.Ws.7 and 8 are not the direct witnesses to the occurrence. The direct witnesses P.Ws.3 and 4 did not support the case of the prosecution.

[19] Now, they remains the solitary evidence of P.W.1 to prove the offences alleged against the accused and P.W.9, who was the owner of the house i.e., Yalangi Padma, in whose house A.1 was alleged to have kept the victim and committed **rape**. Insofar as age of the victim is concerned, she was aged about 14 years as on the time of offence and she was a minor at the time of offence which is evident from the evidence of P.W.12, the Forensic Professor in Rangaraya Medical College coupled with Ex.P.11, age certificate. The medical evidence adduced by the prosecution is such a nature that there was no evidence of recent sexual intercourse. However, the evidence of P.W.13 is that the vegina admitting two fingers easily which means that she was accustomed to sexual intercourse.

[20] Now, the fact remained is that as P.Ws.2 and 3 are not the direct witnesses to the occurrence and as evidence of P.Ws.7 and 8 is the hearsay in nature, this Court has

to scrutinize the evidence of P.W.1, the victim and the P.W.9, the owner of the house where the A.1 was alleged to have confined the victim and committed **rape**. To appreciate the same, it is pertinent to look into the answers spoken by P.W.1 during the cross examination on material aspects.

[21] P.W.1 deposed in cross examination on behalf of A.1 that there are several houses at Ramalayam centre. Nobody will sit at Ramalayam center. Ramalayam center is a busy one between 8-00 P.M. and 9-00 P.M., but not 7-00 P.M. to 9-00 P.M. Nobody would witness what is happening in the street. Nobody was present on the street. She denied a suggestion that she did not state before the police that A.1 threatened her that he would kill her parents. A.1 took her on his motorbike and she cannot say its number. She sits on the motorbike by putting both legs on the one side of the bike. She went with A.1 on motorbike without any intention. She did not raise any alarm on motorbike. She does not remember the time on which she got in on the motorbike. She does not know the distance between her village and Bhimavaram. She does not know the time taken for journey. She did not inform that A.1 is taking her by force in the train as she feared that he would kill her. She passed 10th class examination in first class. She cannot give the door number or the boundaries of the house at Tirupati. At Razole she was detained for 10 days. She cannot identify the Purohit who performed their marriage at Annavaram. Because of thereat of A.1, she could not reveal that she is being taken by force. She cannot give the door number and boundaries of the house in which she was detained at Razole. She does not know the way in which she was brought on Taxi from Tirupati to Razole. When she tried to raise alarm, A.1 pressed her mouth and threatened her that if she raised alarm, he will kill her. She denied that she did not reveal to police about the threats alleged to be given by A.1. She handed over the toe rings, tali and black beads thread to the police.

[22] During the cross examination on behalf of A.4, she deposed that she did not reveal the incident to anybody at Bhimavaram. They went in general compartment to go to Tirupati. She purchased one pair of dress at Tirupati. She did not intimate the taxi owner that A.1 is taking her by force. She does not know how many family members are there in Yelangi Padma house. She did not state before the police as in Ex.D.2. She sustained small bleeding injuries on her hands and legs at the time of **rape**. Her dress is not with any blood. A.1 used to bring food all these days from outside including tiffin also. She did not try to run away from A.1 when he was parking the vehicle at Tirupati. At Tirupati, A.1 took a house of his relatives where wife and husband were there. At Annavaram on the hills they did not go into the temple. Purohit was contacted on the top of the hill. The garlands were purchased on the top of the hill. She does not know how much time was taken to complete the marriage. Photographer was contacted on the hill. They started at Annavaram during the night to go to Razole. She did not take any meal at Annavaram. She denied that she was deposing false.

[23] Turing to the evidence of P.W.9, her evidence is that she got a building at Sompalli and she is residing in up stair portion and the ground floor is being given on lease. She also let out her tiled house. The photos shown to her are her houses. A.1 and P.W.2 came to her and asked to let out her tiled house claiming that they married recently. They stayed in their house for about 10 or 15 days only. During the course of cross examination, she deposed that the houses are on her husband's name, but not on her name. The houses are not in the name of her husband even. Her brother-in-law has got four family members and they occupied the ground floor. Kedida Krupanandam and Lalitha Kumar stayed in the second portion. She saw tali on the neck of P.W.1 and toe rings to the legs. She cannot say the timings, date, month or year on which A.1 and P.W.1 came to her to get the house on rent. Police did not conduct any identification parade with A.1 and P.W.1. She did not observe whether P.W.1 and A.1 came with any luggage or not. Police did not collect any articles from her house. She did not obtain any lease agreement. She did not collect any advance amount. She meet the police at Court today. Police had shown her P.W.1 and A.1. She denied that she deposing false.

[24] Now I would like to deal with as to whether the evidence of P.W.1 is convincing? The crucial evidence as regards the incident that was said to be happened on 12.06.2005 is such that when she refused to marry A.1 when A.1 made such a proposal at Ramalayam, he informed to her that he will die, if she did not come and that he will kill her parents, if she will not accept his proposal. P.W.1 during the course of cross examination denied the said suggestions. Now as seen from the evidence of P.W.15, the investigating officer, he deposed that P.W.1 did not state before him that A.1 threatened her that he will kill her parents and she did not state to him any threats given by A.1. She did not state before him that A.1 forced her to garland him. By virtue of the above, it is quite clear that the evidence of P.W.1 that A.1 informed to her that he would die, if she will not accept the proposal and that he will kill her parents, etc. are material omissions which amounts contradictions.

[25] Apart from this, the very evidence of P.W.1 is that on 12.06.2005 ultimately A.1 forcibly took her on his motorbike to Bhimavaram and from there he took her by train to Tirupati. According to the case of the prosecution, A.1 forcibly took away P.W.1 on motorbike. If that be the case, it is not understandable what prevented from P.W.1 from raising hue and cry when she got down from the motorbike at Bhimavaram. Her evidence is vague as to what was the mode of transport after reaching Bhimavaram to Railway Station, Bhimavaram. It is not known as to how she kept quite throughout journey from Bhimavaram to Tirupati when A.1 was allegedly taking away her with force. Apart from that, it is a case where she deposed that on 19.06.2005 A.1 took her to his relatives house at Tirupati. They were there for one week. According to the evidence of P.W.15, investigating officer, he has not gone to Tirupati where A.1 and P.W.1 stayed there for one week. The investigating officer ought to have probed into the allegations of the prosecution that A.1 confined P.W.1 in

his relatives house for a period of one week to test the bonafides in the case of the prosecution. It is not understandable as to how P.W.1 kept quite when she was allegedly confined in the relatives house of A.1 at Tirupati, who were residing in the said house and how she was there for about one week is shrouded mystery.

[26] Apart from this, according to P.W.1, on 19.06.2005 A.1 took her in a taxi to Razole and took tiled house of Yalangi Padma and kept her there where he committed **rape** against her. When the mode of transport from Tirupati to house of Yelangi Padma at Razole is by a taxi, how she kept quite throughout is not known. The evidence of P.W.1 on the above aspects cannot stand to the test of scrutiny.

[27] Now coming to the evidence of P.W.9, the owner of the house i.e., Yalangi Padma during the course of cross examination she deposed that she was not the owner of the house where A.1 confined P.W.1. At one hand she deposed that they were in the name of her husband and at another hand she deposed that even the houses are not in the name of her husband. So, when the houses claimed by P.W.9 were neither in the name of her nor in the name of her husband, it is not understandable as to how the investigating officer did not ascertain as to who were the owners of the said house. It is material for the reason that it is for the owner of the house to say as to who resided in a particular house as tenants or otherwise. P.W.9 in the chief examination deposed that she let out the house to A.1 and P.W.1 for 10 or 15 days. When she was not the owner and when her husband was not the owner, her evidence is not convincing in this regard. Apart from this, P.W.9 had no prior acquaintance either with P.W.1 or A.1. She deposed in cross examination that police never conducted any test identification parade involving A.1 and P.W.1. Apart from this, she deposed further that police had shown A.1 and P.W.1 on the date of evidence before the Court. Under the circumstances, I am of the considered view that the evidence of P.W.9 is also not convincing. How P.W.1 could stay in the socalled house of Yalangi Padma along with A.1, when A.1 allegedly kidnapped her force, is not convincing.

[28] Apart from this, coming to the incident that was happened at Annavaram i.e., A.1 allegedly tied a tali around the neck of P.W.1 in the presence of a Purohit. The evidence adduced by the prosecution cannot stand to the test of scrutiny. There is no dispute that Annavaram is a pilgrimage center. When it is the evidence of P.W.1 that she was forced to make garlanding A.1, the so-called photographs have not seen the light of the day. The photographs that are marked by the prosecution under the cover of Exs.P.5 to P.8 are only relating to the so-called vacant house where P.W.1 was allegedly confined. They are not relating to the so-called marriage between A.1 and P.W.1 at Annavaram temple. The prosecution did not examine the so-called Purohit in whose presence the marriage was performed. The alleged marriage between P.W.1 and A.1 could not have been done without knowledge to the temple authorities. Except self-serving evidence of P.W.1, which is not at all convincing, they remained nothing on record in support of such an allegation. Apart from this, when it is the evidence of P.W.1 that A.1 enjoyed her sexually at the house of Yelangi Padma at Razole and after

that when she was taken to Annavaram, a woman of reasonable prudence would have ventured to raise hue and cry at Annavaram. The alleged marriage could not have been done in a veil of secrecy. Hence, the evidence of P.W.1 in this regard is not at all convincing.

[29] It is to be noticed that when it was the evidence of P.W.1, during the course of cross examination that nobody would sit at Ramalayam center and it was a busy locality between 8-00 P.M. to 9-00 P.M. and nobody would witness what is happening in the street and nobody were present on the street, the prosecution examined P.Ws.4 and 5 as if they witnessed the occurrence, but, they turned hostile to the case of the prosecution. Leave apart to the fact that the hostility of P.Ws.4 and 5 against the prosecution is proved, but, in the light of the answers spoken by P.W.1 during the course of cross examination there was no chance to anybody to witness the occurrence. The act of the police in citing P.Ws.4 and 5 as prosecution witnesses throws any amount of doubt about the bonafides in the case of the prosecution. It appears that they were planted deliberately as direct witnesses and ultimately they turned hostile to the case of the prosecution.

[30] The serious lacunae in the case of the prosecution is the conduct of P.W.1 is abnormal and if really she was taken away by A.1 with all force, she would have ventured to raise hue and cry atleast one place i.e., at Ramalayam, Bhimavaram, Tirupati, Razole, Annavaram, etc.

[31] When P.W.1 deposed that she handed over black beads chain and tali Bottu, etc., to the investigating officer, during the course of cross examination P.W.15 deposed that he has not seized the tali and black beads chain and toe rings from P.W.1. So, the evidence P.W.1 and P.W.15 in this regard is inconsistent. The investigating officer did not go to the place at Tirupati and even he did not examine the so-called relatives of A.1 at Tirupati in support of the allegations against A.1 that he confined P.W.1 in the relatives house and he did not examine any neighbourers at the house of P.W.9 and he did not examine the temple authorities or Purohit at Annavaram. The investigation was not at all on right lines. The evidence adduced by the prosecution, bristles with inherent, improbabilities and it is absolutely unsafe to believe the evidence of P.W.1.

[32] Though the learned Assistant Sessions Judge, Narsapuram made a cryptic judgment by not looking into the entire evidence on record, but when this Court dealing with an appeal against acquittal, it is the bounden duty of the Court to look into the entire evidence on record and to come an independent conclusion as to whether the evidence on record would prove the charges framed against the accused.

[33] Having considered the facts and circumstances and the evidence on record, I am of the considered view, that the prosecution failed to prove that accused kidnapped P.W.1 and A.1 had sexual intercourse with her in the manner as alleged by the prosecution. Hence, there are no merits in the appeal.

[34] In the result, the Criminal Appeal is dismissed.

Consequently, miscellaneous applications pending, if any, shall stand closed

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2023(1)AIAJ94

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before S H Vora; Rajendra M Sareen]

Criminal Appeal No. 1114 of 1994 **dated 09/12/2022**

State of Gujarat

Versus

Vaghri Govabhai @ Govind Valji & Others

PRESUMPTION OF INNOCENCE

Indian Penal Code, 1860 Sec. 504, Sec. 34, Sec. 302 - Code of Criminal Procedure, 1973 Sec. 378, Sec. 313 - Appeal against acquittal - Double presumption - Dying declaration recorded by the Executive Magistrate does not pass the credibility test - It was alleged that, accused No.2 came and gave carosine to accused No.1 poured kerosine and lighted a matchstick - As a result of which deceased was burnt and she came out of the house shouting for the help - When the deceaed came out of the house she was alone and nobody was found at the time of incident - whatever stated by the deceased before the authorities either doctor, police head constable, executive magistrate or investigating officer was not voluntary at all and the evidence of eye witness falsifies all the allegations against the accused on the basis of false implications at the instance of the husband of the deceased, who was in a burnt condition - Held, Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below - scope in acquittal appeals - An appellate Court has full power to review, re-appreciate and consider the evidence upon which the order of acquittal is founded - However, the Appellate Court must bear in mind that in case of acquittal, there is prejudice in favour of the accused, firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law - Secondly, the accused having secured his acquittal, the presumption of his innocence is further reaffirmed and strengthened by the trial Court - Appeal is dismissed

[Paras 12 to 16]

Law Point: Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below

Acts Referred:

Indian Penal Code, 1860 Sec. 504, Sec. 34, Sec. 302

Code of Criminal Procedure, 1973 Sec. 378, Sec. 313

Counsel:
H K Patel, P T Jasani

JUDGEMENT

Rajendra M. Sareen, J.- [1] The State being prosecuting agency has preferred this appeal under Section 378 of the Criminal Procedure Code against the judgment and order dated 02.07.1994 rendered by the learned Additional Sessions Judge, Mahesana in Sessions Case No.57 of 1994.

[2] The short facts giving rise to the present appeal are that, deaseased was married to Vithalbhai Valjibhai Vaghari and both were residing at Radhanpuriwas, Patan. On the day prior to the incident, there was exchange of words between deceased and her in-laws that the deceased was not giving food to her husband. On the day of the incident, her mother-in-law had come to her house and started quarraling on the flimsy ground that she is not giving food to her son and is often quarraling with her son. Therefore, she should return the golden ornaments, which she was having with her. At that time, accused No.2 Babubhai Valjibhai came and gave carosine to accused No.1 Govabhai @ Govindbhai Valjibhai poured kerosine and lighted a matchstick. As a result of which deceased Geetaben was burnt and she came out of the house shouting for the help. The neighbors gathered and extinguished the fire. At that time three accused were present over there. The father in law of the deceased took her to the hospital, where Medical Offier in charge intimated the incident to the police constable, who was on duty in the hospital about the incident and complaint was registered by the deceaed. Dying declaration was also recorded by the Executive Magistrate. The statements of the witnesesses mainly brother of the deceased was also recorded. The PSI also recorded the statement of the deceased and she succumbed to the burn injuries during her treatment and thereafter, on completion of investigation, charge-sheet was filed for the offences punishable under Sections 302 read with Section 34 and 504 of the Indian Penal Code.

[3] The case was committed to the Sessions Court by the learned Judicial Magistrate, Patan, wherein the Sessions Case was tried against the accused. Witnesses were examined and several documentary evidence were produced by the prosectuion. After the evidence was over, further statements of the accused persons were recorded under Section 313 of the Code of Criminal Procedure and aruguments were heard and after appreciating the oral as well as documentary evidence, the trial Court has delivered the judgment, acquitting the accused persons from the offence as allged against them.

[4] Being aggrieved by the same, the appellant - State has preferred the present Criminal Appeal before this Court.

[5] It is pertinent to note that during the pendency of the appeal, accused respondent Nos. 2 and 3 have expired. As such, appeal stands abated against respondent Nos. 2 and 3. Thereby, appeal has been heard only qua accused respondent No.1.

[6] By way of preferring the present appeal, the appellant has mainly contended that learned trial Court has failed to appreciate the evidence on record and wrongly recorded the order of acquittal. It is further contended that learned trial Judge has erred in evaluating the evidence on record and without appreciating the evidence in its proper perspective acquitted the accused and therefore, the impugned judgment and order of acquittal is required to be reversed, as such.

[7] We have heard learned APP Mr. H. K. Patel appearing for appellant State and learned advocate Mr. P. T. Jasani for respondent accused No.1. Learned advocate has filed written submissions in support of his arguments.

7.1 Learned APP has vehemantally argued that the Sessions Court by the impugned judgment has aquitted the accused. The impugned judgment is contrary to law, facts and evidence on record. The impugned judgment is illegal, improper and bad in law. The learned Sessions Judge has erred in disbelieving the prosecution evidence, which has supported the case of prosecution. It is also submitted that the deceased gave five dying declarations, One before the Doctor, other before the Head Constable in form of the complaint, third one before the Executive Magistrate and oral dying declaration before her brother Jivanbhai and lastly when she was taken to the Civil Hospital, Ahmedabad in form of further statement recorded by the Investigating Officer. All the statements though consistant, are not believed by the learned Sessions Judge and the reasons shown for disbeliving the dying declaration are not proper. Moreover, the learned Sessions Judge has failed to appreciate that there is no material contradictions in evidence of prosecution. The entire evidence though consistant is disbelived by the trial Court. The learned Judge has also failed to appreciate that part played by each accused in the crime is fully corroborated by the witnesses as well as dying declaration of the deceased. As such the learned Judge has failed to appreciate the evidence in its right perspective. Hence, it is prayed to consider the evidence on record and to set aside the impugned judgment and further pass an order of conviction against the accused.

7.2 On the other hand, learned advocate Mr. P. T. Jasani appearing for for the sole surviving respondent No.1 accused No.1 has submitted that in this case, the prosecution has not examined any eye witness and only relied upon dying declarations given by the deceased at different places. The dying declarations which are on record, are in consistance with each other, not confirming the mental status of the deceased at the time of recording of the dying declaration. There are major loop holes coming on record, which are not in consistant with the law relating to the dying declaration. Though dying declarations are recorded by the doctor in the form of history, recorded

by the police constable in the form of complaint, dying declaration before the Executive Magistrate, oral decaration before the brother and further statement before the Investigating Officer, it has not come on record in any manner, that when the statement of the deceased was recorded by the either by the Executive Magistrate or either by the police constable or by the Investigating Officer, deceased was consious and was in mental fit state to give dying declaration. As such, the dying declarations in this case are of such nature, which cannot be fully relied upon.

7.3 Moreover, it is also submitted by leanrned advocate Mr.Jasani that here in this case, the prosecution has examined witness Maheshkumar Ratilal Thakkar, who as per his evidence, is an eyewitness of this incident. In his cross examination, he has supported the case of defence rather than the case of the prosecution and he has not been turned hostile by the prosecution. In his evidence, it has come on record that deceased was instigated by her husband to give the names of present accused to teach them a lesson and therefore, all three accused were implicated by the deceased. Moreover, it is also submitted that as per the evidence of the Investigating Officer himself though statements of neighbors and other witnesses are recorded, they are not examined and as per the admission of Investigating Officer, the statement reveals that accused were not present when the deceased came out of the house in burning condition. It is admitted by the Investigating Officer that the statements of the witnesses revealed that accused Nos. 1 and 2 were 2 to 3 kms away for labour work when the incident has occurred. As such, the case of the prosecution against the accused cannot be believed and the accused were falsely implicated in this case.

7.4 Lastly, it is submitted that the entire evidence on record is rightly appreciated by the learned Sessions Judge and findings to the effect appreciating the dying declaration and appreciating the evidence of other witnesses do not need any interference by this Court. Hence, it is prayed to dismiss the appeal.

[8] Heard learned advocates appearing for the respective parties and going through the impugned judgment as well as the Record and proceedings of the case.

[9] Before adverting to the facts of the case, it would be worthwhile to refer to the scope in acquittal appeals. It is well settled by catena of decisions that an appellate Court has full power to review, re-appreciate and consider the evidence upon which the order of acquittal is founded. However, the Appellate Court must bear in mind that in case of acquittal, there is prejudice in favour of the accused, firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reaffirmed and strengthened by the trial Court.

9.1 Further, if two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal

recorded by the trial Court. Further, while exercising the powers in appeal against the order of acquittal, the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrive at would not be arrived at by any reasonable person, and therefore, the decision is to be characterized as perverse.

9.2 Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record. That the duty is cast upon the the appellate Court, in such circumstances, re-appreciate the evidence to arrive to just decision on the basis of material placed on record to find out whether the accused is connected with the commission of the crime with which he is charged.

9.3 In **Mallikarjun Kodagali (Dead) represented through Legal Representatives v. State of Karnataka and Others**, 2019 2 SCC 752, the Apex Court has observed that,

> "The presumption of innocence which is attached to every accused gets fortified and strengthened when the said accused is acquitted by the trial Court. Probably, for this reason, the law makers felt that when the appeal is to be filed in the High Court it should not be filed as a matter of course or as matter of right but leave of the High Court must be obtained before the appeal is entertained. This would not only prevent the High Court from being flooded with appeals but more importantly would ensure that innocent persons who have already faced the tribulation of a long drawn out criminal trial are not again unnecessarily dragged to the High Court".

9.4 Yet in another decision in **Chaman Lal v. The State of Himachal Pradesh,2020 SCCOnLineSC 988 rendered in Criminal Appeal No. 1229 of 2017 on 03.12.2020**, the Apex Court has observed as under:

> "9.1 In the case of **Babu v. State of Kerala**, 2010 9 SCC 189 , this Court had reiterated the principles to be followed in an appeal against acquittal under Section 378 Cr.P.C. In paragraphs 12 to 19, it is observed and held as under:
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> 12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration

admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide **Balak Ram v. State of U.P**, 1975 3 SCC 219, **Shambhoo Missir v. State of Bihar**, 1990 4 SCC 17, **Shailendra Pratap v. State of U.P**, 2003 1 SCC 761, **Narendra Singh v. State of M.P**, 2004 10 SCC 699, **Budh Singh v. State of U.P**, 2006 9 SCC 731, **State of U.P. v. Ram Veer Singh**, 2007 13 SCC 102, **S. Rama Krishna v. S. Rami Reddy**, 2008 5 SCC 535, **Arulvelu v. State**, 2009 10 SCC 206, **Perla Somasekhara Reddy v. State of A.P**, 2009 16 SCC 98 and **Ram Singh v. State of H.P**, 2010 2 SCC 445)

13. In **Sheo Swarup v. King Emperor**, 1934 AIR(PC) 227, the Privy Council observed as under: (IA p. 404) " the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

14. The aforesaid principle of law has consistently been followed by this Court. (See **Tulsiram Kanu v. State**, 1954 AIR(SC) 1, **Balbir Singh v. State of Punjab**, 1957 AIR(SC) 216, **M.G. Agarwal v. State of Maharashtra**, 1963 AIR(SC) 200, **Khedu Mohton v. State of Bihar**, 1970 2 SCC 450, **Sambasivan v. State of Kerala**, 1998 5 SCC 412, **Bhagwan Singh v. State of M.P**, 2002 4 SCC 85 and **State of Goa v. Sanjay Thakran**, 2007 3 SCC 755)

15. In **Chandrappa v. State of Karnataka**, 2007 4 SCC 415, this Court reiterated the legal position as under: (SCC p. 432, para 42)

"(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

16. In **Ghurey Lal v. State of U.P**, 2008 10 SCC 450, this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In **State of Rajasthan v. Naresh**, 2009 9 SCC 368, the Court again examined the earlier judgments of this Court and laid down that: (SCC p. 374, para 20) "20. an order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused."

18. In **State of U.P. v. Banne**, 2009 4 SCC 271, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include: (SCC p. 286, para 28)

"(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of

acquittal." A similar view has been reiterated by this Court in **Dhanapal v. State**, 2009 10 SCC 401.

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

[10] In the aforesaid backdrop in this case, upon reappreciating the evidecnce the prosecution has examined in all 8 witnesses on record. As here in this case as stated above no eye witnesses are available except one Maheshbhai Thakkar, who is termed to be an eye witness, who was present at the time of the incident when the deceased came out of her house and tried to embarass the witness. However, that witness is not an eyewitness of the actual incident of burning of deceased but the prosecution case has rested entirely upon the dying declaration, which in this case has been recorded by different witnesses, at different time.

10.1 In the present case, it is an admitted fact as per the deposition of PW 1 Dr. V. V. Patil at Exh.14 that the deceased had died due to extensive burns. As such her death was unnatural death which can be termed as homicidal. However, whether the respondent is responsible for the homicidal death of the deceased is to be reappreciated in the light of vaious dying declarations on record.

[11] Here in this case, at the time, when deceased was brought to the hospital, Dr. J. J. Nayak has examined her at 8:05 hrs on 01.09.1993. He had made arrangements for her admission in the hospital and informed the police to arrange for recording dying declaration of the deceased. As per his say at that time, the deceased was consious and was able to answer the questions being asked. As per the history given by the deceased herself before the Doctor, she was harrassed by her mother in law. Her mother in law poured the kerosine and set her on fire who was helpd by accused respondent Nos. 1 and 2. Here, in this evidence, what type of help or aid was given by the accused Nos. 1 and 2 is not on record. The entire act as per the say of the deceased at the first point of time, is by accused No. 3 against whom the case is abated. It is also stated by the doctor that deceased has received 2nd and 3 rd degree burns on her body and he had issued certificate to that effect.

11.1 As per the admission of the Doctor in his cross examination, the deceased was accompanied by two to four person, whom he does't know and. those persons were sitting when her treatment was going on, condition of Geetaben was serious, he treated Geetaben for half an hour and thereafter treatment was taken over by full time surgeon. It is stated by the Doctor in his cross examination that due to the burn injuries

Geetaben was in extreme pain and agony and as and when the Executive Magistrate came for recording dying declaration, he has endorsed that Geetaben was consious and in fit mental condition to give statement on yadi, which is produced at Exh. 17.

11.2 Considering the Record and proceedings, original yadi Exh.17 does not contain any kind of endorsement pertaining to consiousness and mental status of the deceased, which can affirm that at the time of recording dying declaration by the Executive Magistrate, the deceased was in a fit condition of mind to understand and answer the questions. As such the first history given by the deceased which is very first point in time after the incident implicating the name of accused No.3 only as the perperator of the crime, and as per the admission of the doctor, deceased was in extreme agony and pain due to injuries, as such mental status at the time of implicating the name of respondent No.3 and respondent Nos. 1 and 2 helping her in the crime cannot be said to be sound delcaration given before the doctor can be termed as reliable.

11.3 As regardings the second dying declaration of the deceased is concerned, it is before the PW 2 Executive Magistrate, who has been examined at Exh.16 and dying declaration has been produced on record at Exh.18. As per the evidence of the Executive Magistrate, in view of the yadi, he had gone to Patan hospital and Doctor said that Geetaben is consious and can reply the questions and so he recorded the dying declaration and affixed the thumb impression and has taken an endorsement after recording the dying declaration regarding consiousness of the deceased.

11.4 Now considering this aspect whether dying declaration was recorded in fit condition of mind or not, is to be seen. On dying declaration Exh.18 there is an endorsement upon it regarding consiousness and signature of somebody dated 01.09.1993 at 9:35 a.m. In evidence of Dr. Nayak staed that he had endorsed upon the yadi and yadi does not reveal anything regarding endorsement. As regarding edorsement at the end of the dying declaration, the author of the endorsement is not coming on record. No such doctor was examined by the prosecution. Prosecution has not proved this aspect cogently and convincingly that at the time of reording dying declaration the deceased was fully consious, able to speak and was in fit mental state to understand and answer the question. On the contrary it has come on record in the deposition of the Executive Magistrate that as and when questions were asked to the deceased it was repeated more than once before the desesed, which itself specifies that the deceased at the time of recording of dying declaration before the Executive Magistrate was not in a fit condition of mind so as to understand the question, at once. Hence considering the evidence of the Executive Magistrate also on record and in comparison to the evidence of the Dr.Nayak, he has endorsed on the yadi that the patient is consious, whereas on yadi Exh.17 no such endorsement is found and the endorsement on dying declaration at Exh. 18 at the end of the dying declaration does not reveals that as to by whom the endorsement has been made. Hence, the dying declaration recorded by the Executive Magistrate also in absence of cogent and

convencing endorsement and evidence regarding the mental staus of the deceased cannot be relied upon.

11.5 Reference is made to the decision of the Honourable Supreme Court in case of **Kanti Lal vs. State of Rajasthan**, 2009 12 SCC 498, wherein in para 32 it is observed that;

> "32. It is well settled that one of the important tests of the credibility of the dying declaration is that the person, who recorded it, must be satisfied that the deceased was in a fit state of mind. For placing implicit reliance on dying declaration, the court must be satisfied that the deceased was in a fit state of mind to narrate the correct facts of occurrence. If the capacity of the maker of the staement to narrate the facts is found to be impaired, such dying declaration should be rejected, as it is hightly unsafe to place reliance on it. The dying declaration should be coluntary and should not be prompted and physical as well as mental fitness of the maker is to be proved by the prosecution."

11.6 Under these circumstances, the dying declaration recorded by the Executive Magistrate does not pass the credibility test as laiddown by the Honourable Supreme Court.

[12] The third dying declaration made by the deceased is before the PW 5 Head Constable Anwarkhan of City Poice Station, Patan before whom the complaint was lodged, which is produced at Exh.22. Considering the evidence of Head Constable Anwar Khan at Exh.21, it is admitted by the witness that before recording complaint he has not obtained any opinion of doctor regarding consiousness or mental status of the patient. In context of this evidence coupled with evidence of Dr.Nayak at 8:05 a.m. when Dr. Nayak examined the deceased, she was in a serious condition and was in extreme agony and pain. Under this circumstances, it was necessary for Head Constable to ascertain the mental status of the deceased before recording the complaint. As such the complaint recorded by the Head Constable vide Exh.22 also suffers from infirmity regarding the mental status of the deceased and also fails in credibility test. In such complaint being devoid of any merits without there being any endorsement of consiousness of parents. Hence this dying declaration in form of complaint also cannot be relied upon.

[13] It is the case of the prosecution that when the deceased was shifted to the Ahmedabad, during her shifting her brother Jivanbhai Galubhai was accompanying her and she has stated the incident before her brother wherein she has named accused No.2 as the perpetor of the crime pouring kerosine and setting her on fire. It is also to be noted that this oral declaration was made on 01.09.1993 while shifting to Ahmedabad and that is also contradictory to the version stated before Dr. Nayak and Executive Magistrate. However, though on 01.09.1993 the oral declaration was given before the brother, statement of brother was recorded by the Investigating Officer on 21.09.1993.

The brother has not disclosed aspect of this oral declaration by his injured sister before the Investigating Officer. As such evidence of PW 3 Jivanbhai Galubhai brother of the deceased also does not inspire confidence. Considering the condition of the deceased at the time of examination by Dr. Nayak and also considering the agony and pain of the deceased, as stated by Dr. Nayak at the time of first examination the oral declaration before PW 3 Jivanbhai also cannot be relied upon.

[14] It is pertinent to note that though the complaint by the deceased was recorded by the head constable on 01.09.1993 and thereafter she was shifted to Ahmedabad Civil Hospital, further statement of the deceased was recorded by the Investigating Officer Shri B. S. Nathani in Civil Hospital, Ahmedabad. It is surprising as to when the complaint itself is lodged at Patan by the deceased on 01.09.1993 what was the reason to record further statement at Ahmedabad, is not broght on record but considering the evidence of Investigating Officer during this recording of statement the Investigating Officer has not cared to take any kind of opinion of any doctor regarding consiousness and mental status of the deceased and without any kind of opinion of doctor statement has been recorded which cannot be relied upon.

[15] Considering the entire evidence on record in this case wherein the prosecution has relied upon Five different dying declarations, the version of the deceased are inconsistant. In one of the versions she has implicated respondent No.3, in complaint she has implicated respondent No.1 whereaas in oral declaration before her brother, she has implicated respondent No.2. As such, it is on record that the deceased has changed her version on and often implicating different accused and as stated above, all the statements, the dying declarations, the history given to the doctor and the oral declaration and the complaint, nowhere it has come on record that deceased was in a fit mental condition to understand the question and answer accordingly. Per contra, it has come on record that she was in much agony and pain. Endorsement taken by the Executive Magistrate is not cogent and reliable and Police constable before recording the complaint and the investigating officer before recording further statement did not care to ascertain the consciousness and mental status of the deceased. In such circumstances, the trial Court has rightly rejected the reliability of the dying declaration and has given cogent and convencing findings to that effect.

15.1 Here in this case, evidence of PW 4 Maheshkumar Ratilal Thakkar, who has not supported the case of prosecution and who has not been declared hostile by the prosecution, is to be reappreciated. In his evidence, this witness - Maheshkumar Ratilal Thakkar who is termed to be an eyewitness of the incident and owning a shop just opposite the house of the decesed, has tried to bring the real facts of the case, which helps the defence rather than prosecution, wherein, it reveals that when the deceaed came out of the house she was alone and nobody was found at the time of incident. It is also admitted by the witness that due to some dispute regarding theft of one vessel by the deceased and as the accused were supporting the allegations of theft being committed by the deceased, the husband of the deceased was angry and he had

instigated the deceased to name the present accused, at that time, witness Maheshkumar Thakkar was present. This aspect of falsely implicating the accused by instigating the deceased, has not been challenged by declaring the witness hostile. He has admitted that the names of the accused were tutored to the deceased so that accused learnt a lesson and due to that reason the accused have been implicated in the offence by the deceased. Under these circumstances, in light of the evidence of witness Maheshbhai it can be inferred that whatever stated by the deceased before the authorities either doctor, police head constable, executive magistrate or investigating officer was not voluntary at all and the evidence of Maheshbhai falsifies all the allegations against the accused on the basis of false implications at the instance of the husband of the deceased, who was in a burnt condition.

15.2 Here in this case, the evidence of Investigating Officer is also to be noted. No witness neighbouring the place of incident has been examined though the Investigating Officer Shri Nathani in his evidence at Exh.35 has deposed that during his investigation he has recorded the statements of neighbours and many have stated that accused were not present at the time of incident. It is on record that the witnesses whose statements were recorded, were not supporting the case of prosecution. It has come on record through a statement of neighbour that at the time of incident accused Nos. 1 and 2 were 2 to 3 kms away from the place of incident doing labour work. As such admission by the Investigating Officer also falsify the case of the prosecution and false implications of the accused cannot be ruled out.

[16] A beneficial reference of the decision of the Supreme Court in the case of **State of Rajasthan versus Ram Niwas**, 2010 15 SCC 463 be made in this regard. In the said case, it has been observed as under:-

"6. This Court has held in **Kalyan v. State of U.P.**, 2001 9 SCC 632:

> "8. The settled position of law on the powers to be exercised by the High Court in an appeal against an order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is passed, it is equally well settled that the presumption of innocence of the accused persons, as envisaged under the criminal jurisprudence prevalent in our country is further reinforced by his acquittal by the trial court. Normally the views of the trial court, as to the credibility of the witnesses, must be given proper weight and consideration because the trial court is supposed to have watched the demeanour and conduct of the witness and is in a better position to appreciate their testimony. The High Court should be slow in disturbing a finding of fact arrived at by the trial court. In **Kali Ram V. State of Himachal Pradesh**, 1973 2 SCC 808, this Court observed that the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view

which is favourable to the accused should be adopted. The Court further observed:

"27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiration. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice Such a risk can be minimised but not ruled out altogether It may in this connection be apposite to refer to the following observations of Sir Carleton Alien quoted on page 157 of "The Proof of Guilt" by Glanville Williams, second edition:

"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

28. The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of **Shivaji Sahebrao**, 1973 2 SCC 793, as is clear from the following observations:

"Certainly it is a primary principle that the accused must be and not merely, may be guilty before a court, can be convicted and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."

"9. The High Court while dealing with the appeals against the order of acquittal must keep in mind the following propositions laid down by this Court, namely, (i) the slowness of the appellate court to disturb a finding of fact; (ii) the noninterference with the order of acquittal where it is indeed only a case of taking a view different from the one taken by the High Court."

8. In **Arulvelu and another versus State**, 2009 10 SCC 206, the Supreme Court after discussing the earlier judgments, observed in para No. 36 as under:

"36. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshaling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."

[17] In view of the aforesaid discussion and observations, in the considered opinion of this Court, the findings recorded by the learned trial Judge do not call for any interference. The judgment and order dated 02.07.1994 rendered by the learned Additional Sessions Judge, Mahesana in Sessions Case No.57 of 1994 is confirmed. In the result, the appeal fails and the same is dismissed accordingly. Bail bond, if any, stands cancelled. R & P be sent back to the concerned trial Court, forthwith

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2023(1)AIAJ107

IN THE HIGH COURT OF KERALA AT ERNAKULAM

[Before C S Sudha]

Crl A (Criminal Appeal) No 111 of 2006 **dated 25/11/2022**

Suresh Babu

Versus

State of Kerala

CONVICTION BASED ON SUSPICION

Indian Penal Code, 1860 Sec. 304B, Sec. 34, Sec. 306, Sec. 498A - Code of Criminal Procedure, 1973 Sec. 374, Sec. 232, Sec. 313 - Evidence Act, 1872 Sec. 32 - Appeal against conviction - Standard of a reasonable and practical woman as compared to a headstrong or over sensitive one, has to be applied - Moral conviction or conviction based on suspicion is not possible. Though there exists a strong suspicion about the involvement or role of the accused in the incident, suspicion, however strong it may be, cannot take the place of proof - Conviction can only be made on the basis of cogent evidence and materials brought on record by prosecution - Unexplained delay in informing the police - Failure of witness to record the F.I.S. of Rakhi, though she was fit and competent to give one, the discrepancies and inconsistencies in testimony of prosecution witnesses, raise doubts in the mind of court - As per circumstances, possibility of tutoring or

embellishments being made, cannot also be completely ruled out - It may not be safe to convict the accused solely on the basis dying declaration - Accused is entitled to get the benefit of doubt - Conviction and sentence of the appellant/accused for the offences punishable under Sections 304-B and 498-A IPC by the impugned judgment is set aside and the accused is acquitted under Section 235(1) Cr.P.C - Appeal allowed

[Para 29]

Law Point - Dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring / duress / prompting; it can be the sole basis for recording conviction

It is unsafe to record conviction on the basis of a dying declaration alone, in cases where suspicion is raised regarding the correctness of the dying declaration.

Acts Referred:

Indian Penal Code, 1860 Sec. 304B, Sec. 34, Sec. 306, Sec. 498A

Code of Criminal Procedure, 1973 Sec. 374, Sec. 232, Sec. 313

Evidence Act, 1872 Sec. 32

Counsel:

P Vijaya Bhanu, P M Rafiq, Sruthy K K, Vipin Narayan

JUDGEMENT

C.S. Sudha, J.- [1] This appeal under Section 374(2) Cr.P.C. has been filed by the first accused in S.C.No.243/2005 on the file of the Court of Sessions, Thrissur, challenging the conviction entered and sentence passed against him for the offences punishable under Section 304-B and Section 498-A IPC.

[2] The prosecution case as stated in the charge sheet is as followsThe marriage of the first accused with Rakhi, the deceased, was solemnized on 07/05/1998. At the time of marriage, 45 sovereigns of gold ornaments and ?40,000/- had been given to Rakhi by PW1, her father. After marriage Rakhi was residing with her husband, the first accused, in his house along with his family, that is, A2 to A4 who are his parents and brother respectively. After marriage, the gold ornaments and money were taken away by the first accused and utilized for his own needs. The accused demanded the house and property in the name of PW1 to be transferred in the name of the first accused. When the misappropriation of the gold ornaments and money was questioned by Rakhi and as the property as demanded by the accused was not transferred in the name of first accused, Rakhi was subjected to cruelty and harassment. The first accused used to subject her to physical as well as mental harassment. Fed up with the physical and mental torture, Rakhi, on 02/09/2000 poured kerosene and set herself on fire. On 16/09/2000 at 6.30 a.m. Rakhi succumbed to the injuries, due to the severity of the burns sustained. The accused thus abetted her suicide also. Hence the allegation is that

the accused have committed the offences punishable under Section 304-B, 306, 498-A read with Section 34 IPC.

[3] On the basis of Ext.P21 FIS of PW16, Ext.P22 FIR, i.e., Crime No.296/2000 of Town West Police Station, Trissur was registered by PW18, the then S.I. of the aforesaid police station. PW19, the then Additional S.I. conducted the initial investigation. PW20, the then Dy.S.P., Trissur, took over the investigation, completed the investigation and submitted the charge sheet against four accused persons, namely, the husband, the in-laws and brother-in-law of deceased, Rakhi, alleging commission of the offences punishable under the aforementioned Sections.

[4] The third accused died during the pendency of the committal proceedings. Hence the charge against her stood abated. The case against the remaining accused, that is, A1, A2 and A4 was committed to the Sessions court. On appearance of the accused before the court of sessions, they were furnished with copies of all the prosecution records. On 08/11/2005, the court framed a charge for the offences punishable under Sections 304-B, 306, 498-A read with Section 34 IPC, which was read over and explained to the accused, to which they pleaded not guilty. The prosecution examined PWs.1 to 20 and got marked Exts.P1 to P33 and MO.1 and MO.2 in support of their case. After the close of the prosecution evidence, all the accused were questioned under Section 313(1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against them in the evidence of the prosecution. All the accused denied those circumstances and maintained their innocence.

[5] As the Sessions Court did not find it a fit case to **acquit** the accused under Section 232 Cr.P.C., the accused were asked to enter on their defence and adduce evidence in support thereof. No evidence was adduced on behalf of the accused.

[6] On a consideration of the oral and documentary evidence and after hearing both sides, the Sessions Court by the impugned judgment **acquitted** the second and the fourth accused of all the offences charged against them. The first accused was **acquitted** of the offence punishable under Section 306 IPC. The first accused has however been convicted and sentenced for the offences punishable under Sections 304-B and 498A IPC. He has been sentenced to undergo rigorous imprisonment for 7 years for the offence under Section 304-B IPC and to rigorous imprisonment for 3 years and to a fine of ?50,000/- for the offence punishable under Section 498-A IPC with a further direction that the fine amount should be remitted within 6 months and in case of his failure to remit the fine amount, the first accused will have to undergo further rigorous imprisonment for 6 months. It has also been directed that fine amount if realized, shall be paid to deceased Rakhi's child on attaining majority along with interest and that until the child attains majority, the amount shall be deposited in a nationalised bank in the name of the child. It is this judgment which has been assailed in this appeal.

[7] In the appeal memorandum, it is alleged that the court below without properly appreciating the facts, circumstances and evidence, has wrongly convicted the first accused relying solely on the dying declaration of deceased Rakhi and so the judgment is liable to be set aside.

[8] The only point that arises for consideration in this appeal is whether the conviction entered and sentence passed against the first accused by the Sessions Court is sustainable or not.

[9] Heard Adv.Sruthy K.K., the learned counsel for the appellant and Adv. Vipin Narayan, the learned Public Prosecutor for the respondent.

[10] According to the learned counsel for the first accused (hereinafter referred to as the accused), the prosecution has been unable to prove all the ingredients of the offences punishable under Sections 304-B and 498-A IPC, for which he has been convicted and sentenced. The Sessions court after rightly finding that the oral testimony of the witnesses relied on by the prosecution to establish the case suffers from infirmity and inconsistencies and hence unreliable, committed a grave mistake in relying solely on Ext.P14 dying declaration of Rakhi in convicting the accused. The dying declaration was recorded and Ext.P22 F.I.R. registered only on 11/09/2000, though the incident took place on 02/09/2000 @ 8:30 p.m. The inordinate delay of 9 days in recording the F.I.S. and registering the crime has not been explained by the prosecution. The delay has caused serious prejudice to the accused as the possibility of the deceased being tutored by her near relatives and the chances of embellishments being made, cannot be ruled out. In support of this argument, reference is made to the decision **in State of Andhra Pradesh v. M. Madhusudhan Rao**, 2008 15 SCC 582. Referring to the decisions in **Nallapati Sivaiaha v. Sub Divisional officer, Guntur A.P**, 2008 AIR(SC) 19 and **Uttam v. State of Maharashtra**, 2022 8 SCC 576: MANU/SC/0787/2022, it was argued that it is unsafe to record conviction on the basis of a dying declaration alone, in cases where suspicion is raised regarding the correctness of the dying declaration. In such cases, the court will have to look for some corroborative evidence by treating dying declaration only as a piece of evidence. Therefore, the argument is that in the aforesaid circumstances, the accused is entitled to an order of acquittal.

[11] In order to seek a conviction against a person for the offence of dowry death under Section 304-B IPC, the prosecution is obliged to prove that - (a) the death of the woman was caused by burns or bodily injury or had occurred otherwise than under normal circumstances; (b) such death should have occurred within 7 years of her marriage; (c) the deceased was subjected to cruelty or harassment by her husband or by any relative of her husband; (d) such cruelty or harassment should be for or in connection with the demand of dowry; and (e) to such cruelty or harassment, the deceased should have been subjected to soon before her death. The fact that death of Rakhi took place within 7 years of her marriage to the accused, is not disputed. The

fact that Rakhi had set herself ablaze is also not disputed. What is disputed is the reason which prompted her to do the act. An argument was also advanced that Rakhi's death was not caused due to the burns sustained, but due to septicemia or infection. The incident occurred on 02/09/2000. The death occurred after a long gap, that is, on 16/09/2000 only. Therefore, relying on the dictum in **Sukumaran v. State of Kerala**, 2004 2 ILR(Ker) 207, it was submitted that infection may probably have been caused due to lack of proper treatment and had Rakhi been given proper treatment, death might not have occurred.

11.1. **Sukumaran** (Supra) was a case under Section 302 IPC. It has been held that whether the injuries are sufficient in the ordinary course of nature, has to be examined not with reference to the date of death, but with reference to the date on which it was inflicted. There may be other intervening factors to accelerate the death. In the absence of production of details regarding the treatment given to the deceased, it cannot be concluded that death was not due to other intervening factors.

11.2. Here I refer to Explanation 2 to S.299 IPC which says that, where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment, the death might have been prevented. Having regard to Explanation 2 to S.299 IPC, it is not given to the accused to take shelter under a claim that had proper medical attention and treatment been given, the victim would not have died. (See **Pitchai v. State by Inspector of Police Vadamadurai**, 2004 13 SCC 579 and Rajan C.George v. State of Kerala,2018 KHC 703). Further, **Veerla Satyanarayana v. State of A.P**, 2009 16 SCC 316; 2009 KHC 6204, was a case where the victim had suffered 60% burn injuries due to pouring of acid. It has been held that septicaemia was sufficient in the ordinary course of nature to cause death. Even in cases where medical remedies are provided and skilful treatment is given, there is every possibility of septicaemia.

11.3. In the case on hand, Ext.P19 wound certificate issued on 02/09/2000 by CW13-Dr.Somanathan, Lecturer in Surgery, Medical College, Trissur who had first examined Rakhi, says that she had sustained 40% burns. Ext.P19 has been proved through PW14, Assistant Professor of Surgery and Deputy Superintendent, Casualty, Medical College, who deposed that he is familiar with the signature of Dr. Somanathan and also identified the same in the box. When examination of a doctor is impossible for any reason stated in Section 32 of the Evidence Act, the certificate can be proved by proving his handwriting or/and signature as in the case of any document by resorting to Sections 47 and 67 of the Evidence Act (Kochu v. State,1978 KHC 321 and Kurian v. State,2019 KHC 741). The prosecution has apparently resorted to the aforesaid provisions to prove Ext.P19, as CW13 was reported to be abroad (seen recorded so in the proceedings dated 24/02/2006). There is no challenge to this procedure adopted.

11.4. Rakhi was thereafter shifted to the Jubilee Mission Hospital, Trissur on 03/09/2000 where she was examined by PW6, a doctor in the Department of Surgery of the said hospital. PW6 deposed that on examination, he found the patient who was conscious and coherent, to have sustained 40% deep burns over face, both upper and lower limbs and anterior trunk. According to him, treatment and medicines were given from 03/09/2000 till her death on 16/09/2000. The cause of death is septicaemia. PW6, to a question whether the cause of death was the direct result of the burns sustained, answered that burns may produce infection leading to septicaemia. He thereafter deposed that infection caused is the direct result of burns. Ext.P7 case sheet has been marked through PW6, who deposed that he was part of the medical team which had attended Rakhi.

11.5. PW17, Professor, Forensic Medicine, Medical College, Trissur, when examined deposed that he is familiar with the signature of CW15, Dr.Nishad, Lecturer in Forensic Medicine and Assistant Police Surgeon, Medical College, Trissur, seen in the post mortem certificate. PW17 deposed the contents in the post mortem certificate, which reads- "External appearance: Body of a moderately built and well nourished female of height 160 cm and weight 62 kg. Eyes closed; conjunctiva congested; cornea hazy. Finger nails blue. Hymen present as carunculae hymenalis and vagina admitted 2 fingers. Singeing of eyelashes and eyebrows were noted.

Rigor mortis fully established and retained all over the body. Postmortem staining at the back, fixed. No sign of decomposition. (Body not kept in cold room).

Injuries (Ante-mortem): Infected dermoepidermal burn wounds of the face, ears, front and sides of neck, front of chest including both breasts, middle part of the front of abdomen, both upper limbs, lower half of front of both thighs.

Other Findings: Skull intact. Brain congested. Mouth and pharynx congested. Neck structures intact. Trachea and bronchi congested. Lungs congested with numerous subpleural petechiae. Walls, valves chambers, normal and coronary arteries of heart patent. Liver congested. Gall bladder contained multiple stones of one to four mms diameter and biliary studge. Both kidneys swollen and pal with subcapsular hemorrhagic spots. Stomach contained about 200 ml of partially digested boiled egg white and other unidentifiable material without any unusual smell; mucosa congested. Uterus measured 6x4x1 cm; cavity empty; external os transversely slit like. Ovaries normal. Other organs congested, otherwise normal.

OPINION AS TO CAUSE OF DEATH: THE DECEASED DIED DUE TO INFECTION FOLLOWING BURNS".

According to PW17, CW15 is abroad. As PW17 identified the signature of CW15, the post mortem certificate has been marked as Ext.P8. Here again the prosecution has resorted to the provisions of Sections 47 and 67 of the Evidence Act to prove Ext.P8. There is no challenge to the procedure adopted. Nothing has been brought out to

discredit the testimony of the aforesaid medical witnesses and hence the prosecution case that Rakhi died due to the burns sustained, stands proved.

[12] Now what remains is ingredients (c), (d) and (e) of Section 304-B IPC, for which the prosecution relies on Ext.P14 dying declaration and the oral testimony of PWs.1 to 4 and PW16. As noticed earlier, the Sessions court has rejected the testimony of the said witnesses and relied on the dying declaration alone to convict the accused. In **Lakhan v. State of Madhya Pradesh**, 2010 8 SCC 514 relied on by the learned public prosecutor, it has been held that the law on the issue of dying declaration can be summarized to the effect that in case, the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring / duress / prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case, there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case, there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the Court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance.

12.1. It is however pointed out on behalf of the accused that the court should be cautious in convicting the accused on the basis of the dying declaration alone, unless it is found credible. The delay in recording the statement is pointed out as a suspicious circumstance. In support of this argument, reference was made to the decisions reported in **Nallapati Sivaiah** (Supra) and **Uttam** (Supra). It is true, as pointed out on behalf of the accused that the court has to be cautious when there is only the dying declaration to be relied on behalf of the prosecution. As held in **Nallapati Sivaiah** (Supra) it is well settled that dying declaration can form the sole basis for conviction. But at the same time, due care and caution must be exercised in considering the weight to be given to dying declaration in as much as there could be any number of circumstances which may affect the truth. The Courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion. It is also a settled principle of law that dying declaration is a substantive piece of evidence and an order of conviction can be safely recorded on the basis of the declaration, provided, the Court is fully satisfied that the dying declaration made by the deceased was voluntary and reliable and the author recorded the dying declaration as stated by the deceased. It has to be ensured by the Court that the dying declaration was recorded correctly and above all, the maker

was in a fit condition-mentally and physically-to make such statement. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that dying declaration cannot form the sole basis of conviction unless it is corroborated. Rule requiring corroboration is merely a rule of prudence. When the dying declaration is suspicious, it should not be acted upon without corroborative evidence. A dying declaration which suffers from infirmity cannot form the basis of conviction. Normally, the Court in order to satisfy whether the deceased person was in a fit mental condition to make the dying declaration, look up to the medical opinion.

12.2. An argument has been advanced on behalf of the accused that it is doubtful whether Rakhi was in a fit state of mind to give the statement to PW12 because according to PW18, Rakhi was unable to speak properly and so he recorded Ext.P21 F.I.S. of PW16, her aunt, on the basis of which the F.I.R. was registered. Ext.P21 F.I.S. is seen recorded on 11/09/2000 @ 11:00 a.m. On the very same day in the evening at 8:00 p.m., Ext.P14 dying declaration was recorded by PW12. Therefore, the argument is that, when PW18 in the morning found Rakhi to be incoherent and incapable of giving a statement, how is that in the evening she was found capable? This according to the defence, throws/cast doubts on the capability of Rakhi to give the statement.

12.3. PW6, the doctor in the team who treated Rakhi from 03/09/2000, deposed that from the said day till her death, there is nothing in the records to suggest that she was unable to speak. According to PW6, Rakhi's condition became extremely bad from 7 p.m. of 15/09/2000 only. This statement of PW6 given in her chief examination has neither been challenged nor discredited by the accused. Further, PW12, the Judicial Magistrate who recorded the dying declaration deposed that he had taken the opinion of Dr. Murali Harish of the Burns Department, Jubilee hospital before recording the statement. The certificate issued by the said doctor marked as Ext. P13 says that Rakhi was fit to give a statement. It is true that Dr. Murali Harish has neither been arrayed as a witness nor examined by the prosecution. However, there is nothing to disbelieve the version of PW12. He was also convinced that Rakhi was competent to give a statement. Here, what the court is to decide is whether the deceased was in a fit state of mind. Normally, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness states that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise, will suffice, provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is

necessary nor is the presence of a magistrate absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a person about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate, there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor, the declaration can be acted upon, provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise. (**Laxman v. State of Maharashtra**, 2002 6 SCC 710).

12.4. Further, to a question by the defense, PW12 deposed that he did not feel that Rakhi had been brain-washed into giving such a dying declaration. On the other hand, he felt it to be an independent, voluntary statement of Rakhi. The defense has no case that PW12 had made up Ext.P14 dying declaration. As held in **Uttam** (Supra), the Magistrate being an uninterested witness and a respected officer and when there are no circumstances or material to suspect that he would have any animus against the accused or would in any way be interested in fabricating a dying declaration, such a declaration recorded by the Magistrate, need not be doubted. PW12 is seen to have followed all the formalities before recording the statement. Therefore, the procedure adopted for recording Ext.P14 does not suffer from any infirmity. However, the question whether the contents in Ext.P14 are true and whether it can be made the sole basis for conviction is a different matter, to which I will come to shortly.

[13] It was further submitted by the learned defense counsel that, Rakhi had not given the statement in anticipation of death as she had stated to PW12, that henceforth she would not stay with her husband, but would only stay in her house. Therefore, the argument is that the statement was not given in anticipation of death and therefore it is not a dying declaration. I am afraid, I will have to disagree with this argument advanced on behalf of the accused. Under Section 32, when a statement is made by a person, as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. Law does not say that a statement to be a dying declaration, should have been given in anticipation of death. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy.

[14] Coming to the contents of Ext.P14 dying declaration. PW12 has recorded that when he asked Rakhi as to what the incident was, she stated thus her husband had

physically assaulted/abused her severely/badly and so she did the act with the intention of killing herself. She had set herself ablaze in the bedroom. When she ran out of the bed room, her husband and mother-in-law tried to extinguish the fire. Her mother-in-law asked her not to make her son a scapegoat/whipping boy. Her husband and family said that she should only reveal that the burns were caused accidentally by a kerosene lamp falling over her. They changed her dress, covered her in cloth and took her to the hospital. At the hospital, her mother-in-law and husband gave the cause of incident as accidental burns. At the time of marriage, 45 sovereigns and ?40,000/- had been given by her parents. The money and gold were misappropriated/used/taken by her husband. In the end, she was left with only five bangles, out of which two were pawned by him. When she goes out, she wears artificial ornaments. While so, without her knowledge one more bangle was taken by them. She questioned her husband about the bangle who in turn told her that she must have left it at her house and forgotten about it. She refuted his claim and reiterated her query. Then, her husband admitted that he had pawned her bangle and that he would take it back on Monday. She then replied that she has no faith/trust in him and so demanded the bangle to be returned to her then and there/forthwith. Her husband said that he would get back her bangle after selling her thali chain. She took her thali chain and threw it on her husband's face. Her mother-in-law intervened and said that the thali chain need not be sold and that they would somehow get back her bangle. She replied that she was unconcerned with the same and she again demanded the return of the bangle then and there. She has no trust/faith or confidence in her husband or in-laws. She had lost all her ornaments in the like manner, at which time also, they used to say that the ornaments would be returned. Her husband came inside the room and asked her why she was crying, when he had assured her that he would return her bangle. She then told her husband that she wanted her bangle during the said night itself, if not, she would inform her father over phone. Hearing this and asking whether she had become that smart, her husband severely beat and kicked her. He beat her on her head with a rolling pin and kicked her on her back and chest. Her mother-in-law came running and snatched/pulled away her son from her and bolted the bedroom from outside. She cried quite a lot. After sometime, the door was unbolted. She closed the door. At that time, there was power failure. She poured the kerosene in the chimney lamp kept inside the room and set herself ablaze. She then ran outside her bedroom. Her mother-in-law and husband saw her. Her father-in-law asked her what she had done to herself. Her husband and family accused her of being mad. Her father-in-law said that this had happened as they had not heeded the warnings given by him several times earlier that she was mad and required to be hospitalized for treatment. Her husband and mother-in-law told him that she had done this because they had taken her bangle. Water was poured to extinguish the fire. Her mother-in-law asked her father-in-law to bring some soda powder. Her father-in-law replied that she should be left to suffer as she had done the act on her own. Father-in-law brought soda powder which was sprinkled on her body. The younger brother took

away her son. After extinguishing the fire, a car was summoned. However, they still did not inform her parents, who were informed only the next morning at 3 a.m. Her father came and took her to the Jubilee hospital. Her husband and family cautioned her from revealing the actual/true incident to her father or others. Her mother-in-law asked her whether she would get peace of mind/satisfaction only if she implicated her son. She then replied that she is quite annoyed/angry with her son (**[1]**). She revealed everything to her father who complained to the police. Today in the morning, the police had come. The accused should not do anything to her son. She has asked her younger brother to take away her son. They told her that she need not worry about the same. After marriage, she was beaten off and on, due to which she is quite dejected/despondent (**[2]**). Henceforth, she will not stay in her husband's house. She and her son would stay in her house. She was injured and had a bleeding wound when she was beaten with a cradle stick.

[15] The question is, whether the aforesaid statement alone is sufficient to convict the accused especially in the light of the inconsistent statements of the witnesses and the delay in recording Rakhi's statement, as also the delay in registering the crime. As pointed out on behalf of the accused, there is about 9 days' delay in registering the crime and recording the dying declaration. It was pointed out by the learned prosecutor that all delay is not fatal and only in certain cases, like, when the identity of the accused is disputed or some suspicious grounds are brought out, the delay can be considered to be fatal. In the case on hand, no such suspicious circumstances have been brought out and hence there is no reason to disbelieve or reject the prosecution case, argues the Prosecutor. It is true that all delay is not fatal. But when delay of nine days is shown to exist and the prosecution witnesses give differing versions, then it is the duty of the prosecution to explain the delay in registering the crime. As held in **M.Madhusudhan Rao** (Supra), time and again, the object and importance of prompt lodging of the F.I.R. has been highlighted. Delay in lodging the F.I.R., more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of coloured version, exaggerated account of the incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity. Therefore, it is essential that the delay in lodging the report should be satisfactorily explained.

[16] In the case on hand, no reason(s) has/have been shown for the delay. Column no.8 in Ext.P22 F.I.R. which provides for the reasons to be recorded for the delay, if any, in reporting the matter by the informant, has been left blank. The Investigating Officer does not furnish any explanation whatsoever for the delay in registering the crime. In addition to this, there are other circumstances also which raise doubts in the mind of the court.

[17] Rakhi in her dying declaration states that when she was being taken to the hospital, her husband and in-laws had warned/cautioned her from revealing the true

incident and told her that she should only say that the burns were caused accidentally when the chimney lamp fell over her. Rakhi is also seen to have stated in Ext.P14 that, 'they' should not do anything to her son. A reading of the whole statement shows that by 'they', Rakhi meant her husband and in-laws. PW16, her aunt, also has a case in the F.I.S. that Rakhi had told her that the accused had threatened to do away with Rakhi's son in case she revealed the true state of affairs at the hospital. In Ext.P19 wound certificate prepared by PW14, the cause of injury is stated to be accidental burns. Therefore, I will assume for a moment that Rakhi was under fear that the accused would harm her infant son and hence she did not reveal the incident to PW14, the doctor who first examined her. However, it is admitted that PW1, her father came to the hospital on 03/09/2000 and had shifted her to Jubilee hospital. She was taken to Jubilee hospital ignoring the resistance of the accused and his family. Therefore, it can be seen that Rakhi was taken out of the influence or control or custody of the accused and his family on the very the next day of the incident. Still Rakhi does not reveal the reason for the incident to anyone. If PW1, her father is to believed, his daughter had revealed the cause of the incident to him on 04/09/2000 itself. If so, why the delay in not informing the police?

[18] Here, the testimony of PW3 and PW4, close relatives and loyal prosecution witnesses, is relevant and important. PW3 deposed that when he had enquired the reason for the incident to Rakhi, she cried and told him that it was because she was mentally and financially broken. PW3 further deposed that she had however not revealed the persons responsible for the same. According to PW4, another relative, Rakhi had told him that when her husband beat her up, she lost her cool and set herself ablaze. If the prosecution case is to be believed, PWs.3 and 4 on earlier occasions had intervened and had visited the house of the accused along with PW1 to sort out issues when Rakhi had complained of harassment and abuse by her husband. Even after Rakhi was removed from the custody of the accused and his family, and her father enters the scene and takes charge of her treatment, she still does not reveal to him or any of her close relatives, the reason(s) which prompted her to set herself ablaze. Things changed only when PW16, the aunt, enters the scene. PW16 says that she was told by Rakhi about the true state of affairs. It was thereafter everyone seems to have sprung into action. If PW1 is to be believed, he had gone to the police station and given a statement in which he had affixed his signature also. However, the said statement has not come before the court. It is thereafter the police goes to the hospital, finds Rakhi not in a position to give the statement, records the statement of PW16 and registered the crime. The statement of PW18, the Sub Inspector who recorded Ext.P21 F.I.S. of PW16 that Rakhi was not coherent and was unable to give a statement is doubtful in the light of the testimony of PW6, the doctor of the Jubilee hospital who deposed that from 03/09/2000 till the death of the patient on 16/09/2000, there is nothing in the records to show that she was unable to speak and that her condition became bad only in the night of 15/09/2000. Ext.P13 certificate and the testimony of

PW12 also shows that Rakhi was in fact competent to give a statement. If so, what prevented PW18 from recording Rakhi's statement? It is in this background the delay of 9 days assumes importance and raises doubts.

[19] As held in **Uttam** (Supra), it is not necessary that in every case, a dying declaration ought to be corroborated with material evidence, ocular or otherwise. It is more a rule of prudence that courts seek validation of the dying declaration from attending facts and circumstances and other evidence brought on record. There can be no hard and fast rule on evaluation of the evidence brought before the Court, including the surrounding circumstances at the time when the deceased had made the dying declaration. The focus of the Court is of ensuring the voluntariness of the process, of being satisfied that there was no tutoring or prompting, of being convinced that the deceased was in a fit state of mind before making the dying declaration. The dying declaration must inspire confidence so as to make it safe to act upon. Whether it is safe to act upon a dying declaration depends upon not only the testimony of the person recording the dying declaration--be it even a Magistrate but also all the material available on record and the circumstances including the medical evidence. The evidence and the material available on record must be properly weighed in each case to arrive at a proper conclusion. The court must satisfy itself that the person making the dying declaration was conscious and fit to make statement, for which purpose, not only the evidence of persons recording the dying declaration but also cumulative effect of the other evidence including the medical evidence and the circumstances must be taken into consideration.

[20] It is in this background the testimony of the prosecution witnesses also assumes importance. I briefly refer to the testimony of PWs.1, 3, 4 and 16 as well as the allegations in Ext.P21 FIS given by PW16 on the basis of which the crime has been registered. PW16 is the aunt of deceased Rakhi, to be precise, Rakhi is the daughter of PW16's sister Sasikala. According to PW16, she is residing in Bombay with her husband. On 03/09/2000 she was informed over phone that Rakhi had consumed kerosene. On 04/09/2000 she contacted PW1, the father of Rakhi, who informed her that Rakhi has been hospitalised due to burn injuries. She then returned home. When she went to PW1's house, it was found closed. On enquiry with her near relatives, she came to know that Rakhi is on treatment in the Jubilee hospital, Thrissur. PW16 proceeded to the hospital. She asked Rakhi as to the cause of the burn injuries. Rakhi then told her that except two bangles and a ring, the rest of her gold ornaments given to her at the time of marriage had been sold by her husband. She had kept the remaining ornaments in her almirah. On 02/09/2000, she found the two bangles and ring missing. She then questioned her husband who replied that she must have left it at home when she had gone there and forgotten to take it. Rakhi refuted the claim of her husband and reiterated that she had kept the same in her almirah. Then Rakhi's husband Suresh beat her. Rakhi went out saying that she would inform her father over phone. Suresh then dragged her inside the house, took her inside the room and again

beat her. Fed up with the beatings, Rakhi poured kerosene over her body and set fire to herself. According to PW16, Rakhi also told her that her in-laws off and on used to verbally abuse her and used to say that she should be taken to the mental hospital. Her brother-in-law, the fourth accused also used to quarrel with her by saying that she should bring more dowry from her house. Rakhi's husband used to physically assault her demanding the property in the name of PW1, to be transferred to his name. PW16 has also stated that Rakhi had told her that while on her way to the hospital, her in-laws had warned her from naming their son and in case she did that, they would do away with her son. According to PW16, it was because of the mental and physical cruelty meted out by A1 to A4, Rakhi had set fire to herself.

[21] It was on the basis of Ext.P21 FIS recorded on 11/09/2000 at 11 a.m., Ext.P22 FIR was registered and the investigation started. In Ext.P22 FIR, it is stated that the information was received in the police station on 11/09/2000 at 12 noon, on the basis of which the crime has been registered. The FIR is seen to have been received by the JFCM concerned on 11/09/2000 at 8 p.m. Ext.P14 is the dying declaration recorded by PW12, the JFCM concerned, on 11/09/2000 at 8 p.m.

[22] Pw16 when examined, more or less stands by the case stated in Ext.P21 FIS. PW1, Rakhi's father, when examined deposed that ?40,000/- and 45 sovereigns had been given at the time of the marriage. Initially for 21/2 months after the marriage, there were no issues. But after that, 15 sovereigns and ?40,000/- was taken by the first accused purportedly for buying property in the name of his daughter. Property was also purchased. The remaining ornaments were in the possession of Rakhi. Slowly, they were also taken away and sold by the first accused. When Rakhi demanded the ornaments, the first accused did not return them. Instead, he used to beat her, which his daughter used to inform him. He was in Dubai. He returned in March 1999. He has a house and property at Chiyarath. The accused demanding the said property used to beat Rakhi. One day when the accused beat Rakhi, the latter informed him. When he went to the house of the accused, Rakhi told him that the accused had severely physically abused/assaulted her. This incident took place on 18/03/1999. When he went to the house of the accused, he was accompanied by his uncle, PW3 and nephew PW4. He had seen a bruise mark on the face of Rakhi. They had consoled Rakhi and advised the accused. The accused, his parents and brother, that is A2 to A4, then threatened them and told them that they would again beat Rakhi and teach her a lesson. PW1 then asked the reason for beating Rakhi, to which they replied that it was because she had refused to handover the ornaments when demanded by them. When a son was born to Rakhi, he had given 5 sovereigns of gold ornaments to the child, from which, except three bangles and one ring, the remaining were sold by the first accused. Rakhi had told him that there were only three bangles and one ring remaining. Rakhi had later on told him of the incident that took place on 02/09/2000. PW1 then further goes on to describe what happened on the day, which statement more or less tallies with the dying declaration of Rakhi. He further deposed that he came to know about the

incident on the 3rd. After the incident, the accused never informed him. On 3rd he was informed by a nurse of the Medical College Hospital. He and his wife went to the hospital. No treatment worth the name was being given to Rakhi. So, he and his wife decided to take her to Jubilee hospital as the condition of his daughter was quite serious. A1, A2 and A4 did not agree to this attempt because they had earlier worked in the said hospital. He then informed Rakhi and the doctor and shifted his daughter to Jubilee hospital. She was under treatment in the said hospital for 14 days. Thereafter, she died on 16/09/2000. PW1 also deposed that all the gold ornaments given by him had been sold by the first accused. According to him, when he asked the reason for the incident, Rakhi told him that A1 to A4 due to their enmity towards Rakhi, due to her failure to get her father's property transferred in the name of the first accused and because of her failure to bring more money from her home, used to physically and mentally torture her. Due to this continuous mental and physical harassment, Rakhi was dejected and disappointed and so his daughter had attempted suicide. He also deposed that he had given statement to the police on the 11th. According to PW1, only women bystanders were allowed and therefore it was his neighbours, who by taking turns were looking after his daughter. PW16 is his former wife's sister who is permanently residing in Bombay. When PW16 came to know about the incident, she came down on 09/09/2000. She was in the hospital during the night of 10/09/2000 only. PW1 in the cross examination deposed that it was in the morning of 11/09/2000, he had gone to the police station and given his statement. The statement had been taken down in writing, in which he had affixed his signature also. Thereafter he had returned to the hospital. He also deposed that on 04/09/2000 itself, Rakhi had told him everything. In the re-examination, to a leading question he answered that between 3rd and 11th, neither had he informed the police nor had the police taken his statement. To yet another leading question, he answered that as he was dissatisfied with the investigation in the case, he had sent complaints to the Chief Minister, Collector, opposition leader and to the Women's Commission also.

[23] Pw3, the uncle of PW1 deposed that he was the person who had made all arrangements for the marriage. ?40,000/- was handed over by him to the second accused. After the marriage, 15 sovereigns of gold ornaments were sold for the purpose of buying property. However, no property was purchased. Except for 2 or 3 sovereigns, the remaining ornaments were sold by the first accused. On 18th March, he had accompanied PW1 and PW4 to the house of the accused. Rakhi had informed him over phone that she had been beaten up. According to PW3, on the said day they advised the parties not to fight any more. They made a suggestion to take Rakhi home. But the accused did not agree to the suggestion made. After the incident, he had spoken to Rakhi while she was in the Medical College hospital and in Jubilee hospital and had enquired the reason for the incident. Rakhi cried and told him that it was because she was mentally and financially broken. However, she never revealed the persons responsible for the same. In the cross examination PW3 deposed that on the

day he had accompanied PW1 to the home of the accused, the latter had assured them that in future there would be no problems and that they would live happily. PW3 also deposed that it is the truth and the actual incident that had happened on the day when he along with PW1 and PW4 had gone to the house of the accused.

[24] Pw4 when examined deposed that he had accompanied PW1 and PW3 to the house of Rakhi as they were informed of some problems in her house. He had seen Rakhi crying and heard Rakhi telling PW1 that she had been beaten up by the accused. According to PW3, they consoled and advised all of them and told that such incidents should not happen. Thereafter, he came to know of the incident from PW1. One month before the incident, Rakhi had come to his house. The accused thereafter came to take her back home. At that time also, he had advised the first accused that he should live happily with Rakhi and incidents like the earlier one should not be repeated. He also deposed that while Rakhi was in hospital, she had told him that her husband had physically assaulted/beaten her. She had lost her cool and set herself on fire.

[25] The case of PW1 and PW16 that Rakhi had been subjected to both mental and physical cruelty by the accused and his family due to her failure to get the property of her father transferred in the name of her husband and her failure to bring more money, does not find a place in Ext.P14. Rakhi has no such case. The trial court finding inconsistencies in the testimony of the aforesaid witnesses, rightly refused to rely on the same. As stated earlier, to establish ingredient (d) of Section 304-B IPC referred to earlier, the cruelty or harassment that has been meted out to the deceased, should be for or in connection with the demand for dowry. In Ext.P14 dying declaration, Rakhi has no case that there was any demand for dowry. What is made out from her statement is that the main cause for the acrimony between the couple was due to the misappropriation of gold ornaments by the husband and his refusal/failure to return the ornaments when demanded by her. Feeling deeply unhappy/dejected and moved by the loss of her gold ornaments, Rakhi seems to have lost her cool and set herself ablaze. For a dowry death, as defined under S.304-B IPC, the death should have been in connection with any demand of dowry as defined in the Dowry Prohibition Act, 1986. If the death occurred independent of any demand for dowry, that death can under no circumstances be termed a dowry death (State of Kerala v. Jose @ Saju,1994 KHC 268). That being the position, it can only be held that the prosecution has failed to establish all the ingredients of the offence punishable under Section 304-B IPC.

[26] Now coming to the offence under Section 498-A IPC. As per explanation (a) to the Section, any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman, is cruelty. Rakhi in Ext.P14 dying declaration does say that she was beaten up badly by the accused; that she was off and on beaten by the accused and that her in-laws used to verbally abuse her. But the million-dollar question is, can Ext.P14 alone be relied on for entering into an order of

conviction against the accused. If PW1 is to be believed, Rakhi had told him about the incident on the 4th. However, curiously he does not complain to the police or take any action. He, for reasons best known to him, waits till the 11th to give a statement to the police, which statement also is not before the court. Realizing the danger of the said statement made by PW1 in the cross examination and to contain the damage done, a question is seen put to him in the re-examination as to whether he had given any statement to the police or whether the police had taken his statement between 3rd and 11th, to which he answered in the negative. If PW1 had come to know of the incident on the 4th itself, the question that naturally arises is as to why he did not inform the police immediately or at least at the earliest possible opportunity? Why did he wait till the 11th to give the statement? It is true that the matters arising out of a matrimonial dispute are always extremely sensitive and generally it is after serious consideration and debate amongst the victim's family that the FIR is lodged. The delay in such matters cannot be fatal to the prosecution (Rajkumar v. State of Punjab,2010 15 SCC 362). However, PW1 has no such case also. Though he says that unhappy with the investigation in the case, he had preferred complaints to various authorities, he does not say as to why he did not take prompt action when he was informed about the incident by his daughter.

[27] Further, as noticed earlier, in Ext.P14 dying declaration, Rakhi makes it clear that she is extremely annoyed/angry with her husband, the accused. True, any wife if beaten up black and blue would certainly harbour ill-feelings or enmity against her husband, for which she can never be faulted with. But here is a case added to that ill-feeling, several other grounds are existing to suspect the case. It is true that defects in investigation cannot be made a ground to reject the prosecution case. Rakhi cannot be held responsible for the delay in registering the case or of the hospital in not informing the police on time or the failure of the prosecution to explain the delay. The trial court has refused to rely on the evidence of the prosecution witnesses finding them unreliable. The prosecution has not been able to show that this finding suffers from any infirmity. A reading of the deposition of the witnesses, to which I have referred to, shows inconsistencies. This justifies the stand taken by the trial court. PW1 says that dissatisfied with the investigation being conducted, he had preferred complaints to several authorities. However, no material has come on record to substantiate this aspect. Moreover, this is an answer given by PW1 in the re- examination to a leading question put to him. Answers elicited in the chief examination and re-examination by putting leading questions are liable to be eschewed. (**Varkey Joseph v. State of Kerala**, 1993 AIR(SC) 1892 and George v. State of Kerala,1994 KHC 221)

[28] Further, PW1 in his anxiety to get the accused convicted, seems to have slightly exaggerated the events that took place before the incident. One cannot find fault with PW1, a father, who has lost his daughter in such tragic circumstances, for which he holds the accused responsible. Such tendencies are quite normal in any human being. According to PW1, when he along with PW3 and PW4 had gone to

Rakhi's house to mediate in the quarrel between Rakhi, the accused and his family, the latter are alleged to have threatened him and also threatened to continue torturing / harassing Rakhi. Interestingly, PW3 and PW4, loyal prosecution witnesses, have no such case. If they are to be believed, the accused when counseled/advised from repeating such instances, assured them that such instances would not be repeated.

[29] Yet another aspect is Ext.D1, a letter admittedly written by the brother of PW1 to Rakhi and the accused. In Ext.D1 letter, the author writes thus - " . How is Rakhi? Forgive Rakhi in case she commits any mistake. It is the duty of mothers to teach/tell things and advise their daughters. But Rakhi has not got that love and advise. So, she is slightly short tempered. But after five minutes she will forget everything. I am afraid to even crack a joke at Rakhi lest she takes offence .". This letter is not in any way disputed by the prosecution. It appears that Rakhi, quite a sensitive person lost her cool when the last of her ornaments were taken away by her husband. As held in **Assoo v. State of Madhya Pradesh**, 2011 14 SCC 448, the standard of a reasonable and practical woman as compared to a headstrong or over sensitive one, has to be applied. Moral conviction or conviction based on suspicion is not possible. Though there exists a strong suspicion about the involvement or role of the accused in the incident, suspicion, however strong it may be, cannot take the place of proof. Conviction can only be made on the basis of cogent evidence and materials brought on record by the prosecution. The unexplained delay in informing the police, the failure of PW18 to record the F.I.S. of Rakhi, though she was fit and competent to give one, the discrepancies and inconsistencies in the testimony of the prosecution witnesses, raise doubts in the mind of the court. In the aforesaid circumstance, the possibility of tutoring or embellishments being made, cannot also be completely ruled out. That being the position, it may not be safe to convict the accused solely on the basis of Ext.P14 dying declaration. Hence, I find that the accused is entitled to get the benefit of doubt.

In the result, the appeal is allowed. The conviction and sentence of the appellant/accused for the offences punishable under Sections 304-B and 498-A IPC by the impugned judgment is set aside and the accused is **acquitted** under Section 235(1) Cr.P.C. His **bail** bond shall stand cancelled and he shall be set at liberty forthwith.

Pending interlocutory applications, if any pending, shall stand closed

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2023(1)AIAJ124

HIGH COURT FOR THE STATE OF TELANGANA

[Before K Surender]

Criminal Appeal No 1325 of 2009 **dated 27/10/2022**

U V Suresh Kumar

Versus

G Venkata Reddy and Another

INNOCENT TILL PROVED GUILTY

Indian Penal Code, 1860 Sec. 354 - Negotiable Instruments Act, 1881 Sec. 138 - Conviction - Validity of - Acquitting accused for offence under Section 138 of Negotiable Instruments Act - Guilty of offence under Section 138 of Negotiable Instruments Act - Conviction is based on record, reasonable and logical - Indian criminal jurisprudence, accused has two fundamental protections available to him in a criminal trial or investigation - Firstly, he is presumed to be innocent till proved guilty and secondly that he is entitled to a fair trial and investigation - Both these facets attain even greater significance where the accused has a judgment of acquittal in his favour - A judgment of acquittal enhances the presumption of innocence of the accused and in some cases, it may even indicate a false implication - But then, this has to be established on record of the Court - No grounds to interfere with judgment reversing the order of conviction and acquitting - Appeal dismissed

[Para10]

Law Point - A judgment of acquittal enhances the presumption of innocence of the accused and in some cases, it may even indicate a false implication.

Acts Referred:

Indian Penal Code, 1860 Sec. 354

Negotiable Instruments Act, 1881 Sec. 138

Counsel:

G Pedda Babu

JUDGEMENT

K Surender, J.- [1] The appellant, who is the complainant aggrieved by the judgment in Crl.A.No.200 of 2007 dated 05.05.2009 passed by the Additional Metropolitan Sessions Judge, Cyberabad in reversing the order of conviction passed in CC No.529 of 2006 dated 06.12.2007 by the VII Metropolitan Magistrate, Cyberabad and acquitting the accused for the offence under Section 138 of the Negotiable Instruments Act, filed the present appeal.

[2] The appellant filed complaint under Section 138 of the Negotiable Instruments Act against the 1st respondent/accused stating that out of acquaintance, Rs.10.00 lakhs was given towards loan on 12.05.2006. At the time of payment, cheque dated 14.06.2006 was issued for the said amount. Immediately thereafter on 27.07.2006, the 1st respondent issued legal notice denying any debt and the appellant issued reply notice on 07.08.2006. Again rejoinder notice was sent on 20.08.2006 by the 1st respondent. The subject cheque was presented for clearance on 01.08.2006, which was returned unpaid. Notice dated 21.08.2006 was issued to the 1st respondent and thereafter, when the 1st respondent failed to pay the amount covered by the cheque, complaint was filed.

[3] During the course of trial, the complainant examined himself as P.W.1 and marked Exs.P1 to P7. The 1st respondent examined the Branch Manager, UBI, Bowenpally branch as D.W.1 and got marked Exs.D1 and D2.

[4] Considering the evidence adduced during the course of trial, learned Magistrate found that the 1st respondent was guilty of the offence under Section 138 of the Negotiable Instruments Act and accordingly sentenced him to imprisonment for a period of one year and directed to pay compensation of Rs.10.00 lakhs.

[5] Aggrieved by the conviction, the 1st respondent preferred Criminal Appeal No.200 of 2007 before the Additional Metropolitan Sessions Judge, Cyberabad. The learned Sessions Judge, having considered the evidence on record, acquitted the accused on the following grounds; i) P.W.1 is an Advocate and even according to him, the 1st respondent was his client and lorry driver, as such, it is not believable that Rs.10.00 lakhs was given by the Advocate to the client, who is a lorry driver; ii) There were criminal disputes in between the appellant and the 1st respondent and admittedly, the wife of the 1st respondent filed criminal case in Cr.No.452 of 2006 under Section 354 of IPC against P.W.1; iii) Ex.D2 is bank statement produced by D.W.1 Branch Manager during the relevant time, P.W.1 took loan of Rs.7,25,000/- for purchasing a plot, as such, lending Rs.10.00 lakhs after some time cannot be believed; iv) Being an advocate, it is not believable that without any document being executed an amount of Rs.10.00 lakhs was given to the 1st respondent.

[6] Learned counsel for the appellant submits that the learned Sessions Judge had committed error in reversing the well considered judgment of the learned Magistrate. The signatures on the cheque is not disputed and once the cheque belongs to the 1st respondent, there is a presumption which is drawn and since the 1st respondent failed to rebut the presumption, even by preponderance of probability, the conviction has to be maintained and the judgment of the learned Sessions Court has to be reversed.

[7] Learned counsel appearing for the 1st respondent submits that judgment of the learned Sessions Judge is well reasoned order while reversing the judgment of the learned Magistrate and cannot be interfered with.

[8] Admittedly, P.W.1 is an Advocate and the 1st respondent, who was his client was a lorry driver. For the reason of molesting his wife, Crime No.452 of 2006 under Section 354 of IPC was registered against P.W.1. Except the testimony of P.W.1 that the amount of Rs.10.00 lakhs was advanced to the 1st respondent/accused, there is no other evidence either oral or documentary to substantiate that loan was advanced to the 1st respondent. The said corroboration is necessary in the back ground of the case. P.W.1 has taken loan of Rs.7.25 lakhs during 2004 from the Bank for purchase of plot. The case of appellant is that the amount of Rs.10.00 lakhs was advanced during June, 2006 to the 1st respondent, who is a lorry driver, and also his client, is highly improbable and unbelievable.

[9] The finding of the learned Sessions Judge while reversing the judgment of conviction is based on record, reasonable and logical.

[10] The Hon'ble Supreme Court in the case of **Radhakrishna Nagesh v. State of Andhra Pradesh**, 2013 11 SCC 688 held that under the Indian criminal jurisprudence, the accused has two fundamental protections available to him in a criminal trial or investigation. Firstly, he is presumed to be innocent till proved guilty and secondly that he is entitled to a fair trial and investigation. Both these facets attain even greater significance where the accused has a judgment of acquittal in his favour. A judgment of acquittal enhances the presumption of innocence of the accused and in some cases, it may even indicate a false implication. But then, this has to be established on record of the Court.

[11] There are no grounds to interfere with the judgment of the learned Sessions Judge reversing the order of conviction and acquitting the 1st respondent.

[12] For the reasons discussed in the preceding paras, the appeal fails and the same is accordingly dismissed

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2023(1)AIAJ127

IN THE HIGH COURT OF KARNATAKA

[Before Dr H B Prabhakara Sastry]

Criminal Revision Petition No 94 of 2018 **dated 12/10/2022**

Venugopal K R S/o K Radhakrishna

Versus

Riju H Rai

COMPOUNDABLE OFFENCE

Negotiable Instruments Act, 1881 Sec. 147, Sec. 138 - Compounding of offence - Punishable for - Section 147 of N.I. Act has made every offence punishable under N.I. Act as compoundable - There is no bar for parties in proceeding to compound offence - If application for compounding is made before Sessions Court or High Court in revision or appeal, such compounding is permitted to be allowed on common condition that accused pays 15% of cheque amount by way of graded cost - Compound offence under Section 147 of N.I. Act - Matter is settled as per terms mentioned in joint application filed by both side and petitioner herein who was accused in - Acquitted of offence punishable under Section 138 of N.I. Act - Appeal allowed

[Paras 7,8]

Law Point - Section 147 of N.I. Act has made every offence punishable under N.I. Act as compoundable

Acts Referred:

Negotiable Instruments Act, 1881 Sec. 147, Sec. 138

Counsel:

Dharmapal, D Bhuvaneshwari

JUDGEMENT

Dr H B Prabhakara Sastry, J.- [1] The present revision petition has been filed by the accused, challenging the judgment of conviction and order on sentence passed by the learned XIV Additional Chief Metropolitan Magistrate, Mayo Hall Unit, Bengaluru (hereinafter for brevity referred to as "the Trial Court") in C.C.No.50025/2013, holding the accused guilty for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter for brevity referred to as the "N.I. Act"), which was further confirmed by the Court of the learned XXVIII Additional City Civil Judge at Mayohall Unit (CCH-29), Bangalore, (hereinafter for brevity referred to as "the Sessions Judge's Court") in the appeal filed by him. Challenging the impugned judgments of conviction and order on sentence passed by both the Courts, the petitioner has filed the present revision petition.

[2] Learned counsels from both side along with their respective clients, as identified by their learned counsels, are physically present in the Court.

[3] Learned counsels from both side have filed a joint application - I.A.No.1/2022, under Section 147 of the N.I. Act, along with the affidavit of the petitioner. In the joint application filed by both side, the parties have reported that they have settled the matter amicably and have compromised the matter. The respondent has submitted her 'no objection' in allowing the revision petition by setting aside the impugned judgments and acquitting the petitioner of the offence punishable under Section 138 of the N.I. Act.

[4] Learned counsels for the parties also make their submission on the lines of the compromise petition.

[5] The sum and substance of the joint application as well as the affidavit is that, the parties have settled the matter amicably, wherein the petitioner has stated that he has paid a total sum of Rs.2,75,000/- to the respondent, as full and final settlement of the claim in this petition, in the form of a Demand Draft dated 02-08-2022 bearing No.070383 drawn in favour of the respondent, on AXIS Bank Limited, Kalyan Nagar Branch, Bangalore, for a sum of Rs.1,00,000/- and that he has no objection for the respondent to withdraw the amount of Rs.1,75,000/- deposited by him in C.C.No.50025/2013 in the Trial Court.

The respondent, who is physically present and identified by the learned counsel for the respondent acknowledges the receipt of the said Demand Draft for a sum of Rs.1,00,000/- by her from the petitioner.

The petitioner through his counsel submits that he would extend all assistance and execute the necessary papers, application, letter, etc. to enable the present respondent to withdraw the amount of Rs.1,75,000/- said to have been deposited by him in the Trial Court, without causing any inconvenience to the respondent. The respondent submits that she has compromised the matter for a sum of Rs.2,75,000/- as full and final settlement of her claim which is the subject matter of the petition.

[6] The enquiry made with the parties who are physically present convinces the Court that both the parties out of their free consent and volition and in their best interest have settled the matter amicably which is further corroborated by the submissions made by their learned counsels. As such, I am of the view that on the terms of the said joint application, the parties be permitted to compound the offence under Section 147 of the N.I. Act, however, subject to the payment of the graded cost by the petitioner/accused.

[7] Section 147 of the N.I. Act has made every offence punishable under the N.I. Act as compoundable. As such, there is no bar for the parties in the proceeding to compound the offence. However, at the same time, the guidelines laid down by Hon'ble Apex Court in **Damodar S. Prabhu v. Sayed Babalal H**, 2010 AIR(SC) 1907 regarding imposing graded cost on litigant also to be borne in mind. According to the said Judgment in **Damodar S. Prabhu's Case (supra),** if the application for compounding is made before the Sessions Court or High Court in revision or appeal, such compounding is permitted to be allowed on the common condition that the accused pays 15% of the cheque amount by way of graded cost.

[8] Admittedly, in the instant case, the cheque amount is for a sum of Rs.2,50,000/-, as such, the graded cost would be Rs.37,500/-.

[9] The learned counsel for the petitioner submits that, the graded cost payable by the petitioner by virtue of the judgment of the Hon'ble Apex Court in **Damodar S. Prabhu's case (supra),** which comes to a total sum of Rs.37,500/- would be deposited by the petitioner. Accordingly, along with the application, the petitioner has also filed a Demand Draft bearing No.070672 dated 12-10-2022, drawn on AXIS Bank Ltd., Kalyan Nagar, Bangalore [KT], in favour of KSLSA, for a sum of '37,500/- towards graded cost as per the judgment of the Hon'ble Apex Court in **Damodar S. Prabhu's case (supra).** The said demand draft is accepted towards the graded cost payable by the petitioner. Registry to do the needful in the matter.

[10] Accordingly, taking into consideration the joint application- I.A.No.1/2022 filed by both side, the guidelines given by the Hon'ble Apex Court in **Damodar S. Prabhu's case (supra)** and the circumstance of the case on hand, I.A.No.1/2022 is allowed. The parties are permitted to compound the offence under Section 147 of the N.I. Act. The matter is settled as per the terms mentioned in the joint application filed by both side and the petitioner herein who was accused in the Trial Court in

C.C.No.50025/2013 is acquitted of the offence punishable under Section 138 of the N.I. Act. Accordingly, the present revision petition stands disposed of.

Registry to transmit a copy of this order to both the Trial Court and also to the Sessions Judge's Court along with their respective records, immediately

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