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BAIL AND ACQUITTAL JUDGEMENTS

(Supreme Court and Bombay High Court)

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DELAY IN HOLDING THE TIP

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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 [*Gireesan Nair & Ors Etc vs. State of Kerala 2023(1)MBAJ 38*]

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PREVENTIVE DETENTION

Constitution of India Article 22 (5) -- Preventive Detention-- The right of a person, who is preventively detained to make a representation and have it considered by the authority concerned as expeditiously as possible is a constitutional right under Article 22(5). That any unreasonable and unexplainable delay in considering the representation is held to be fatal to the continued detention of the detenu.

Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons and Video Pirates, Sand Smugglers and Persons engaged in Black Marketing of Essential Commodities Act, 1981-- Order of Preventive Detention was under challenge-- petitioner was already arrested and bail was granted by Add. Session Court-- State authorities caused Gross delay in forwarding and considering the representation filed by the petitioner on the order of Preventive Detention. Order of Detention is illegal. [*Devendra Ramlal Bidlan vs. Commissioner of Police, Pune City; State of Maharashtra; Superintendent, Nagpur Central Prison 2023(1)MBAJ 6*]

BAIL AND ACQUITTAL JUDGEMENTS

2023(1)MBAJ1

IN THE SUPREME COURT OF INDIA

[From MADRAS HIGH COURT]

[Before Dinesh Maheshwari; Sudhanshu Dhulia]

Criminal Appeal No. 1972 of 2022 **dated 11/11/2022**

Bhuri Bai

Versus

State of Madhya Pradesh

CANCELLATION OF BAIL

Indian Penal Code, 1860 Sec. 304B, Sec. 34, Sec. 498A - Code of Criminal Procedure, 1973 Sec. 439 - Dowry Prohibition Act, 1961 Sec. 4, Sec. 3 - Power of cancellation of bail - Suo motu powers exercised by the High Court while cancellation the bail granted to the appellant by the First Additional Sessions Judge - Held, unless a strong case based on any supervening event is made out, an order granting bail is not to be lightly interfered with under Section 439(2) CrPC - Power of cancellation of bail should be exercised with extreme care and circumspection; and such cancellation cannot be ordered merely for any perceived indiscipline on the part of the accused before granting bail - Powers of cancellation of bail cannot be approached as if of disciplinary proceedings against the accused and in fact, in a case where bail has already been granted, its upsetting under Section 439(2) CrPC is envisaged only in such cases where the liberty of the accused is going to be counteracting the requirements of a proper trial of the criminal case - Impugned order is set aside - Appeal is allowed

[Paras 16 to 20]

Law Point: Unless a strong case based on any supervening event is made out, an order granting bail is not to be lightly interfered with under Section 439(2) CrPC.

Acts Referred:

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

Code of Criminal Procedure, 1973 Sec. 439

Dowry Prohibition Act, 1961 Sec. 4, Sec. 3

Counsel:

Shishir Kumar Saxena, Praveen Swarup, Yashraj Singh Bundela, Rajesh K Singh, Gopal Jha, Umesh Kumar Yadav

JUDGEMENT

Dinesh Maheshwari, J.

[1] Leave granted.

[2] This appeal is directed against the judgment and order dated 10.02.2022, as passed by the High Court of Madhya Pradesh at Gwalior Bench in M.Cr.C. No. 46653/2021, that was registered under Section 439(2) of the Code of Criminal Procedure, 1973 ('CrPC'), for suo motu powers exercised by the High Court in its order dated 07.09.2021 passed in M.Cr.C. No. 41406/2021.

[3] By the order impugned, the High Court has proceeded to cancel the bail granted to the appellant by the First Additional Sessions Judge, Jaura, District Morena, in the order dated 05.08.2021, as passed in Bail Application No. 357/2021.

[4] Briefly put, the relevant background aspects of the matter are as follows:

The appellant is one of the accused persons in the case arising from FIR No. 96/2020 for offences under Sections 304B, 498A read with Section 34 of the Indian Penal Code, 1860 ('IPC') and Sections 3/4 of the Dowry Prohibition Act, 1961. The accusations have been that the deceased, who was married to the son of the appellant, was being subjected to physical and mental tortures for demand of dowry after the marriage and ultimately, on 11.09.2020, she died by hanging under unusual circumstances; and a suicide note in the handwriting of the deceased was found, implicating her husband and in-laws, including the present appellant the mother-in-law.

[5] The prayer of the appellant for grant of pre-arrest bail was rejected by the Sessions Court on 18.10.2020. However, thereafter, the High Court granted pre-arrest bail to the sister-in-law of the deceased on 02.11.2020 and then, the Trial Court granted pre-arrest bail to the brother-in-law of the deceased on 18.11.2020. It is also noticed that on behalf of the appellant, twice over attempts were again made to seek pre-arrest bail but the applications moved in that regard, being M.Cr.C. No. 48592/2020 and M.Cr.C. No. 7199/2021, were dismissed as withdrawn, respectively on 11.12.2020 and 16.02.2021. Ultimately, the charge-sheet was filed on 13.12.2020. Until that time, the appellant was not apprehended and it was mentioned in the charge-sheet that she was absconding.

[6] In relation to this case, husband of the appellant was also arrested, who was granted regular bail on 23.11.2020. However, the appellant surrendered only on 16.07.2021; and a supplementary chargesheet was also filed on 02.08.2021.

[7] Thereafter, the regular bail application (No. 357/2021) moved on behalf of the appellant was considered by the First Additional Sessions Judge, Jaura, District Morena and was allowed on 05.08.2021, essentially with reference to the facts pertaining to the grant of pre-arrest bail to two of the co-accused persons and regular bail to the other co-accused husband of the appellant.

[8] When the record stood thus, with grant of bail to the co-accused persons including the appellant, the son of the appellant (husband of the deceased) moved a second application for bail before the High Court, being M.Cr.C. No. 41406/2021. The said application was considered by the High Court on 07.09.2021 and one of the submissions made before the High Court had been that the previous bail application of the said accused was rejected on the ground that his mother (the present appellant) was absconding. It was sought to be contended on behalf of the said appellant that his mother had surrendered on 16.07.2021 and was granted bail by the aforesaid order dated 05.08.2021.

[9] The High Court proceeded to examine the said order dated 05.08.2021 and took exception against the same, for the reason that the Trial Court had not adverted to a relevant fact that the present appellant was absconding and was arrested only on 16.07.2021. Though, with reference to the nature of accusations, the High Court proceeded to reject the bail plea of the son of the appellant (husband of the deceased) but at the same time, ordered a separate case to be registered while issuing notice to the present appellant to show-cause as to why the bail order dated 05.08.2021 be not recalled. Hence, the said suo motu case bearing No. 46653/2021 came to be registered and finally came to be decided by the impugned order dated 10.02.2022.

[10] In the impugned order dated 10.02.2022, the High Court took note of the allegations and the fact that the appellant was arrested only on 16.07.2021 i.e., approximately ten months after the death of the deceased and seven months after filing of the charge-sheet against co-accused persons; and in fact, she surrendered only after her husband was granted bail. A submission was made before the High Court on behalf of the appellant that all the members of the family were either on run or were in jail and it was left to the appellant to look after the minor child of the deceased and, therefore, she surrendered only after her husband was released, when she could hand over the child to him. The High Court was not impressed with this submission for the reason that no such fact was mentioned in the application seeking bail, as filed before the Sessions Court.

[11] The High Court, in the impugned order, also took note of the fact that its directions for ensuring service of notice were not adequately complied with and then, even the requisite explanation was not forthcoming and hence, the Director General of Police was required to file his affidavit of explanation. The High Court reproduced all the contents of the affidavit filed by the Director General of Police as regards the steps taken in the matter and other corrective steps being taken on the administrative side.

[12] Having taken note of the assurance stated by the learned Advocate General in the matter for taking corrective steps in the department, the High Court reverted to the facts of the present case and referred to a decision of this Court in the case of Manoj Kumar Khokhar v. State of Rajasthan (Criminal Appeal No.36/2022) as regards the parameters in exercise of power for granting bail. Having reproduced a few passages

from the said decision, the High Court stated its conclusion that in the light of the said judgment, the bail granted to the present appellant could not be given a stamp of judicial approval. Thus, the High Court proceeded to set aside the order dated 05.08.2021 and thereby, cancelled the bail granted to the appellant.

[13] In challenge to the order so passed by the High Court, learned counsel for the appellant has argued that the High Court has taken a too stern a view of the matter but has not considered that there was no question of the appellant absconding or running away from the process of law, which could be seen from the facts that successively, the applications seeking pre-arrest bail were moved on her behalf. It has also been submitted that the appellant could not surrender earlier under the force of circumstances when the other members of the family were either in custody or were on run and that the appellant was the only responsible person to look after the minor child left by the deceased; and all this was coupled with the adversities created by Covid-19 pandemic. Learned counsel would submit that in the given circumstances, the appellant surrendered before the Court after her husband was granted bail and in the distressed condition of the family, her omission to surrender earlier could not have been regarded as an act of absconsion. Learned counsel would also submit that in the circumstances of the case, even the allegations pertaining to the offences under Section 304B IPC are wanting in support by cogent material and in any case, when the Trial Court had granted bail to the appellant, being elderly lady in 55 years of age and when other accused persons, except the husband of the deceased, had also been granted such concession, there was no justification for cancelling the bail already granted.

[14] Learned counsel appearing for the respondent State has duly opposed with the submissions that the Sessions Court had been unjustified in granting bail to the appellant, and in the given set of circumstances, when the appellant was not traceable even until filing of the first charge-sheet on 13.12.2020, the view as taken by the High Court cannot be said to be wholly unjustified so as to call for interference, more particularly looking into the nature of accusations. It has been submitted that the Trial Court had granted bail to the appellant in a rather mechanical manner without considering the material on record and, therefore, the High Court has been justified in disapproving the order so passed by the Trial Court.

[15] We have given anxious consideration to the rival submissions and have examined the material placed on record with reference to the law applicable.

[16] In this matter, where daughter-in-law of the appellant died by committing suicide and with reference to the material on record, charge-sheet for serious offence including Section 304B IPC has been filed, unavailability of the appellant to all the processes of law until 16.07.2021 (the date of surrender/arrest) cannot be appreciated. However, in the peculiar circumstances of the case, particularly for the fact that the deceased left a minor child and none except the appellant was available in the family to look after the child, it is equally difficult to say that the appellant has been an

absconder or a fugitive who had been intentionally running away from the process of law. The challenge thrown at the relevant time by Covid-19 pandemic also remains a factor which cannot be ignored altogether. Further, the fact that the appellant is a lady in 55 years of age cannot be ignored, particularly when examining the question of grant of regular bail.

[17] The order dated 05.08.2021 as passed by the learned First Additional Sessions Judge, Jaura, District Morena, though had not been explicit on all the surrounding factors but then, the facts were indeed taken into consideration that two of the co-accused were granted pre-arrest bail whereas the other co-accused person, husband of the appellant, was granted regular bail. In the given set of facts and circumstances, if the Trial Court was satisfied that the appellant was entitled to be given the concession of bail while putting her to specific terms and conditions, the order so passed had neither been suffering from any fundamental error nor there was any other material factor for which the bail granted to the appellant was to be annulled.

[18] In our view, even if the High Court had its reservations in the order so passed by the Trial Court granting bail to the appellant, particularly when the fact of long absence of the appellant was not adverted to, it was yet required to be taken note of by the High Court that the power being exercised was not that of a regular appeal or revision but, it was that of cancellation of bail under Section 439(2) CrPC.

[19] It remains trite that normally, very cogent and overwhelming circumstances or grounds are required to cancel the bail already granted. Ordinarily, unless a strong case based on any supervening event is made out, an order granting bail is not to be lightly interfered with under Section 439(2) CrPC.

[20] It had not been the case of the prosecution that the appellant had misused the liberty or had comported herself in any manner in violation of the conditions imposed on her. We are impelled to observe that power of cancellation of bail should be exercised with extreme care and circumspection; and such cancellation cannot be ordered merely for any perceived indiscipline on the part of the accused before granting bail. In other words, the powers of cancellation of bail cannot be approached as if of disciplinary proceedings against the accused and in fact, in a case where bail has already been granted, its upsetting under Section 439(2) CrPC is envisaged only in such cases where the liberty of the accused is going to be counteracting the requirements of a proper trial of the criminal case. In the matter of the present nature, in our view, over-expansion of the issue was not required only for one reason that a particular factor was not stated by the Trial Court in its order granting bail.

[21] In totality of the circumstances, we are unable to approve the order impugned setting aside the bail granted to the appellant.

[22] Accordingly, and in view of the above, this appeal succeeds and is allowed; the impugned order dated 10.02.2022 as passed by the High Court is set aside and the

order dated 05.08.2021 as passed by the First Additional Sessions Judge, Jaura, District Morena is restored.

[23] It goes without saying that this order shall have no bearing on the merit consideration of the matter by the Trial Court.

[24] All pending applications stand disposed of

2023(1)MBAJ6

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before A S Gadkari; Milind N Jadhav]

Criminal Writ Petition No 2651 of 2022 **dated 18/11/2022**

Devendra Ramlal Bidlan

Versus

Commissioner of Police, Pune City; State of Maharashtra; Superintendent, Nagpur Central Prison

PREVENTIVE DETENTION

Constitution of India Article 22 (5) -- Preventive Detention-- The right of a person, who is preventively detained to make a representation and have it considered by the authority concerned as expeditiously as possible is a constitutional right under Article 22(5). That any unreasonable and unexplainable delay in considering the representation is held to be fatal to the continued detention of the detenu.

[Para 8]

Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons and Video Pirates, Sand Smugglers and Persons engaged in Black Marketing of Essential Commodities Act, 1981-- Order of Preventive Detention was under challenge-- petitioner was already arrested and bail was granted by Add. Session Court-- State authorities caused Gross delay in forwarding and considering the representation filed by the petitioner on the order of Preventive Detention. Order of Detention is illegal.

Acts Referred:

Indian Penal Code, 1860 Sec. 504, Sec. 34, Sec. 307, Sec. 323

Bombay Police Act, 1951 Sec. 135, Sec. 37

Arms Act, 1959 Sec. 25, Sec. 4

Counsel:

Jayshree Tripathi, J P Yagnik, V N Tripathi

JUDGEMENT

Milind N. Jadhav, J.

[1] By the present Petition, Petitioner has challenged his Order of detention dated 17.05.2022 passed by Respondent No.1 - Commissioner of Police, Pune City under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders, Dangerous Persons and Video Pirates, Sand Smugglers and Persons engaged in Black Marketing of Essential Commodities Act, 1981 (for short **"the said Act"**).

[2] Have heard Ms. Tripathi, learned Advocate appearing for the Petitioner and Mr. Yagnik, learned APP appearing for the Respondents and with their able assistance perused the record of the case.

[3] The learned Advocate for Petitioner has pressed the following two principal grounds for challenge to the Detention Order for our consideration:-

> "b. The petitioner says and submits that a representation of the petitioner dated 26.07.2022 was sent to the Superintendent Nagpur Central Prison, Nagpur for further sending it to the State Government for expeditious consideration, revoke and communication. The petitioner says and submits that so far no communication has been received from the State Government as regards to the consideration of the said representation of the petitioner, thereby the State Government has delayed in considering the representation of the petitioner expeditiously and diligently and communicating the result to the petitioner. The said authority i.e. State Government is called upon to explain the delay, if any, occurred from the date of representation till today to the satisfaction of this Hon'ble Court failing which the continued detention will be held as illegal and bad in law, liable to be quashed and set aside.
>
> c. The petitioner says and submits that the detaining authority has taken into consideration C.R. No.342 of 2021 u/sec. 307, 323, 504, 34 IPC & U/Sec. 4(25) of Arms Act & U/Sec. 37(1)/135 of MPA dated 22.11.2021 against the petitioner to arrive at his subjective satisfaction and pass the detention order. The petitioner submits that in the narration of the said ground in para 5.1 of the grounds of detention it is clearly mentioned that he was arrested on the 26.11.2021, and was released on bail on 25.02.2022. It is to be noted that in the compilation of documents an operative part of the order granting bail by the Addl. Sessions Judge-Pune is placed before the detaining authority and copy furnished to the detenu. The detenu further submits that law is well settle, any said document, more so a Bail Order granting bail to the detenu in the relied on offence which may have influenced/affected the subjective satisfaction of the authorities must be placed in entirety before the authorities and copy of the same has to be furnished to the petitioner to enable him to make an effective representation, in this case there is only a cryptic

order/operative order placed before the detaining authority, hence the detaining authority was not able to apply his mind to the reasons assigned by the Sessions Court while granting bail, thereby vitiating the subjective satisfaction of the detaining authority. In fact there is a bail Order running into 4 pages which is vital and most important document which is neither placed before the detaining authority nor copy furnished to the detenu in the compilation of documents running into 397 pages approx. Law is well settled that non-placement of relied on and relevant documents as vital as Bail Order Vitiates the detention order. This shows total non-application of mind of the authorities and as a result of non-furnishing such vital documents like bail application and bail order the detenu is deprived of making any effective representation guaranteed under Article 22(5) of the Constitution of India. Non placement of vital documents also results in non-communication of grounds of detention. Thus both facts of Article 22(5) of the Constitution of India is violated. The order of detention is illegal and bad in law for non furnishing of relied on and most important documents like bail order, liable to be quashed and set aside."

[4] The Detention Order alongwith the ground of detention was served on the Petitioner on 22.05.2022.

[5] At the outset, Mr. Yagnik would submit that in the present case copy of the report and proceedings of the opinion of the Advisory Board dated 10.06.2022 has not been placed on record. In our opinion, however that may not be necessary for deciding the present Petition in view of the representation of the Petitioner having not been decided by the Respondents to which we have referred to in detail.

[6] Admittedly, it is not in dispute that Petitioner addressed a detailed representation dated 26.07.2022 challenging his Detention Order, inter alia, on the aforementioned grounds and submitted the same to the Government through the Superintendent of Jail, Nagpur Central Prison, Nagpur. The Deputy Superintendent of Nagpur Central Prison, Nagpur (Respondent No.3) has filed her Affidavit-in-Reply dated 26.09.2022 wherein the following averments are made:-

"5. I say that the said detenu has submitted his representation dated 26.07.2022 and same is received on 29.07.2022 through his Advocate Mr. V.N.Tripathi to this office against the order of detention.

6. I say that this office completing the formalities, it was forwarded to the office of Hon. Secretary, Counselling Board (Special-10), Government of Maharashtra, Mantralaya, Mumbai vide this office letter NO. JC/Detenu/DRV/7732/22 dated 30.07.2022 by email and by post also. The copy of forwarding E-mail receipt dated 30.07.2022 is annexed herewith as **Annexure No.R-I.**

7. I say that inadvertently this office forwarding the representation to the office of Hon. Secretary, Counseling Board (Special-10), Government of Maharashtra,

Mantralaya, Mumbai instead of forwarding to the office of Addl. Chief Secretary (Home), Home Department (Special) Government of Maharashtra, Mantralaya, Mumbai."

[7] That apart, perusal of the Affidavit-in-Reply dated 02.09.2022 filed by Ramesh M. Manale, Deputy Secretary, Government of Maharashtra, Home Department (Special) reveals that the representation dated 26.07.2022 (copy of which is annexed at page No.32 and 33) was not received by the designated Competent Authority. This fact is confirmed by the Respondent No.3 in her Affidavit.

[8] Thus it is seen that admittedly there has been a gross delay in forwarding the representation given by the Petitioner to the concerned Authority. In view of the same Petitioner's representation therefore could not be considered by the State Government expeditiously and in accordance with law. It is settled law as held by the Supreme Court in the case of **Rashid Kapadia Vs. Medha Gadgil and Ors.**, 2012 11 SCC 745 , that the right of a person, who is preventively detained to make a representation and have it considered by the authority concerned as expeditiously as possible is a constitutional right under Article 22(5). That any unreasonable and unexplainable delay in considering the representation is held to be fatal to the continued detention of the detenu.

[9] It can be seen from the above extracted portion from the Affidavit filed by the Deputy Superintendent of Nagpur Central Prison, Nagpur that her office had inadvertently committed a gross mistake in forwarding the representation by email and post to the office of Hon. Secretary, Counseling Board (Special-10), Government of Maharashtra instead of forwarding it to the Competent Authority i.e. the Additional Chief Secretary (Home), Home Department (Special), Government of Maharashtra.

[10] In view of the above, we have no option, but to come to the conclusion that the Detention Order dated 17.05.2022 cannot be sustained on the above mentioned ground alone and it is accordingly required to be set aside.

[11] Though the Petitioner has raised several other grounds on merits, in view of the above conclusion, we do not think it necessary to go into the other contentions raised.

[12] In the circumstances, we quash and set aside the impugned Detention Order dated 17.05.2022 bearing No.OW.NO./CRIME PCB/DET/BIDLAN/156/2022 and direct that the detenu be released forthwith unless wanted in some other case.

[13] In view of the above, Writ Petition stands disposed

2023(1)MBAJ10

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before A S Gadkari; Milind N Jadhav]

Criminal Appeal No 676 of 2021 **dated 18/11/2022**

Dr Anand Teltumbde

Versus

National Investigation Agency; State of Maharashtra

BAIL

Indian Penal Code, 1860 - Sections 124-A, 201, 34, 153, 153-A, 121, 117, 505, 121-A, 120-B and 115 - Code of Criminal Procedure, 1973 - Sections 164 and 439 - Unlawful Activities (Prevention) Act, 1967 - Sections 39, 13, 16, 15, 20, 40, 18-B, 17, 43-D, 38 and 18 - National Investigation Agency Act, 2008 - Section 21 - Bail - It was case of NIA that appellant was indulge in terrorist act - It was alleged that he was active member of banned organization - His bail application was rejected - Held - On basis of document on record, no prima facie case is found against appellant - Appellant has no criminal history - Appellant is in jail from two and half year - Appeal allowed.

[Paras 20 to 30]

Acts Referred:

Indian Penal Code, 1860 Sec. 124A, Sec. 201, Sec. 34, Sec. 153, Sec. 153A, Sec. 121, Sec. 117, Sec. 505, Sec. 121A, Sec. 120B, Sec. 115

Code of Criminal Procedure, 1973 Sec. 164, Sec. 439

Unlawful Activities (Prevention) Act, 1967 Sec. 39, Sec. 13, Sec. 16, Sec. 15, Sec. 20, Sec. 40, Sec. 18B, Sec. 17, Sec. 43D, Sec. 38, Sec. 18

National Investigation Agency Act, 2008 Sec. 21

Counsel:

Mihir Desai, Devyani Kulkarni, Sandesh Patil, Chintan Shah, Shrikant Sonakawade, Prithviraj Gole, J S Lohakare, Pradip Bhale

JUDGEMENT

[1] By this Appeal, filed under Section 21(4) of the National Investigation Agency Act, 2008 (for short **"NIA Act"**), Appellant has challenged the Order dated 12.07.2021 passed by the Special Judge, Greater Bombay (for short **"Trial Court"**) below Exh.377 in Special Case No.414 of 2020 alongwith Special Case No.871 of 2020, rejecting the Appellant's application for bail.

[2] Appellant is arraigned as accused No.10 in FIR No. RC01/2020/NIA/MUM registered by National Investigation Agency (for short **"NIA"**) under Sections 120-B, 115, 121, 121-A, 124-A, 153, 201, 505(1)(b) and 34 of the Indian Penal Code, 1860

(for short **"IPC"**) and under Sections 13, 16, 17, 18, 18B, 20, 38 and 39 of Unlawful Activities (Prevention) Act, 1967 (for short **"UAP Act"**).

[3] Facts which emerge from record in the present Appeal are as under:

(i) On 31.12.2017, Bhima Koregaon Shaurya Din Prerana Abhiyan organised an event called 'Elgaar Parishad' in Shaniwarwada, Pune (for short **"Elgar Parishad Program"**). It was decided to celebrate 200th anniversary of the historic battle of Bhima Koregaon on 01.01.2018 by more than 200- 250 Social organisations under the banner of 'Bhima Koregaon Shaurya Din Prerana Abhiyan' . The program was held from 2:30 p.m. to 10:00 p.m. On 01.01.2018, mobs bearing saffron flags attacked persons travelling to and returning from Shaniwarwada Pune. There was large scale violence and one youth lost his life.

(ii) A Zero(0) FIR was registered on 02.01.2018 at Pimpri Chinchwad Police Station, Pune by an eye-witness, Ms. Anita Salve under various provisions of IPC, Arms Act,1959, Maharashtra Police Act, 1951 and Scheduled Castes and Scheduled Tribes (Previsions of Atrocities) Act, 1989) (for short **"SC & ST Act"**) alleging involvement of Sambhaji Bhide, Milind Ekbote and their followers for the attack and violence. A State wide bandh was also called by several Dalit, OBC, Maratha and Muslim organisations against the attacks across Maharashtra State thereafter.

(iii) On 08.01.2018, first informant Mr. Tushar Damgude, registered FIR No. 4 of 2018 under the provisions of Sections 153-A, 505(1)(b), 117 read with 34 of IPC stating that, the Elgar Parishad Program organised at Shaniwarwada, Pune on 31.12.2017 was attended by him at around 2:00 p.m., wherein there were a few speakers, compere, singers and other performers who performed on stage. That the speakers gave provocative speeches, their performances were provocative in nature and had the effect of disrupting columnal harmony. It is stated that banned terrorist organisation Communist Party of India (Maoist) (for short **"CPI(M)"**) had an organisational role to play in arranging the said program. CPI(M) wanted to infiltrate, inculcate and permeate its ideology amongst the masses, mostly impoverished classes and misguide them towards violent unconstitutional activities. According to the complainant Kabir Kala Manch's (for short **"KKM"**) Sudhir Dhawale, other members and activists had performed provocative street plays in different areas of Maharashtra earlier, made malice speeches and spread false history, made disputable statements and objectionable slogans inciting passion and hatred to disrupt communal harmony, sung songs and participated in road dramas. On 31.12.2017, these very activists amongst others performed skit / stage plays at the 'Elgar Parsihad Program'. As a direct result of which, on

01.01.2018 there were incidents of violence, arson, stone pelting and caused death of an innocent person near Bhima Koregaon, Pune.

(iv) Houses of Rona Wilson (Accused No. 2), Surendra Gadling (Accused No. 3), Sudhir Dhawale (Accused No. 1), Harshali Potdar, Sagar Gorkhe (Accused No. 13), Deepak Dhengale, Ramesh Gaichor (Accused No. 14) and Jyoti Jagtap (Accused No. 15) were searched by the police. Articles and incriminating material seized during search was sent to the Forensic Science Laboratory, Pune. Analysis of the seized electronic / digital articles confirmed that accused Surendra Gadling, Rona Wilson, Shoma Sen (Accused No. 4), Mahesh Raut (Accused No. 5), Comrade M. @ Milind Teltumbade (WA-1) (now deceased), Comrade Prakash @ Navin @ Rituprn Goswami (WA-2) (absconding), Comrade Manglu (WA-3) (absconding), Comrade Deepu (WA-4) (absconding) are involved in the crime. During investigation, the investigating officer invoked provisions of Sections 13, 16, 17, 18, 18(B), 20, 38, 39, and 40 of the UAP Act.

(v) Accused Surendra Gadling, Rona Wilson, Smt. Shoma Sen, Mahesh Raut and Sudhir Dhawale were arrested on 06.06.2018. Residences of Smt. Shoma Sen and Mahesh Raut were searched, and Police seized digital devices and other articles. Articles and material seized showed involvement of more accused, viz; Varavara Rao (Accused No. 6), Arun Ferreira (Accused No. 8), Smt. Sudha Bharadwaj (Accused No. 9), Vernon Gonsalves (Accused No. 7), Stan Swamy (Accued No. 16), Gautam Navlakha (Accused No. 11) and Appellant (Accused No.10). Their names were added as accused on 23.08.2018 in present crime.

(vi) Searches were conducted on 28.08.2018 at the residences/workplaces of Varavara Rao, Smt. Sudha Bharadwaj, Arun Ferreira, Gautam Navlakha, Stan Swamy and Vernon Gonsalves. Police arrested Varavara Rao, Smt. Sudha Bharadwaj, Gautam Navlakha, Arun Ferreira and Vernon Gonsalves and put them under house arrest. On 15.11.2018, Pune Police filed chargesheet under Sections 153-A, 505(1)(b), 117, 120-B, 121, 121-A, 124-A and 34 IPC and Sections 13, 16, 17, 18, 18B, 20, 38, 39 and 40 of the UAP Act against Sudhir Dhawale, Surendra Gadling, Shoma Sen, Mahesh Raut, Rona and five absconding accused persons namely Kishan da @ Prashanto Bose (WA-5), Milind Teltumbde, Prakash @ Rituparn Goswami, Deepu and Manglu. Subsequently, on 21.02.2019, Police filed Supplementary Chargesheet under Sections 153-A, 505(1) (b), 117, 120-B, 121, 121-A, 124-A & 34 IPC and Sections 13, 16, 17, 18, 18(B), 20, 38, 39 and 40 of the UAP Act against Varavara Rao, Arun Ferreira, Vernon Gonsalves and Sudha Bharadwaj and one absconding accused namely Ganapathy @ Mupalla Laxman Rao (WA-6).

(vii) Appellant filed Writ Petition No.4596 of 2018 on 17.09.2018 in this Court seeking quashing of FIR No.4 of 2018.

(viii)On 15.11.2018, chargesheet was filed against the first five accused in the above case under various provisions of IPC and UAP Act.

(ix) On 21.12.2018, this Court dismissed Writ Petition No.4596 of 2018, however extending protection of three weeks to the Appellant to approach the Supreme Court.

(x) On 14.01.2019, Supreme Court dismissed SLP (Cri.) No.59 of 2019 filed by the Appellant but extended his protection from arrest for a period of four weeks to enable him to apply for regular pre-arrest bail before the Trial Court.

(xi) Appellant filed Anticipatory Bail Application (ABA) before the Special Court, Pune which was dismissed on 01.12.2019. He approached this Court and filed ABA No.314 of 2019 in which he was granted protection from arrest from time to time.

(xii) On 21.02.2019 a further supplementary Chargesheet was filed against four more accused persons in the above case (but not against Appellant).

(xiii)On 24.01.2020, the Under Secretary to the Government, Ministry of Home Affairs, New Delhi, directed the Respondent No. 1 - NIA to take up the investigation of FIR No. 4/2018 of Vishrambaug Police Station. NIA re-registered FIR RC-01/2020/NIA/Mum u/s. Sections 153-A, 505(1)(b), 117, 34 IPC and Sections 13, 16, 18, 18B, 20 and 39 of UAP Act on 24.01.2020.

(xiv)On 14.02.2020, Appellant's ABA was dismissed by this Court against which he approached the Hon'ble Supreme Court. SLP (Cri.) No.1916 of 2020 against rejection of his ABA was dismissed by the Supreme Court on 08.04.2020.

(xv) Appellant surrendered himself on 14.04.2020 pursuant to the directions passed by the Supreme Court in its Order dated 08.04.2020.

(xvi)On 09.10.2020, NIA filed Chargesheet against Appellant. Appellant filed Regular Bail Application under Section 439 of the Cr.P.C. below exhibit 377 in the Special Court NIA, Greater Bombay. By Order dated 12.07.2021, the learned Special Judge rejected Appellant's Bail Application. Hence, Appellant is before us in Appeal against the Order dated 12.07.2021.

3.1. Respondent No.1 - NIA has filed Affidavit-in-Reply dated 15.11.2021. Appellant has tendered a separate compilation of 21 Judgments on 25.03.2022, some of which have been referred to by the Appellant during the course of arguments. Appellant has also tendered a separate convenience compilation of 169 pages sought to be relied upon by him in support of his case at the time of hearing.

NIA has submitted a separate convenience compilation (without index) of 341 pages at the time of hearing of the present case. NIA has also submitted a compilation of 4 judgments. The aforementioned compilations are taken on record. Most of the documents and judgments sought to be relied upon by both parties are common.

[4] We have heard Mr. Mihir Desai, Senior Advocate for the Appellant, Mr. Sandesh Patil, Special Public Prosecutor for NIA and Ms. J.S. Lohakare, APP for the State of Maharashtra and with their able assistance perused the entire record of the case produced before us.

[5] We have perused the Chargesheet. Charge against the Appellant is contained in paragraph No.17 of the same. Paragraph No.17.1 discloses that Appellant alongwith other co-accused is a member of the CPI(M) and deeply involved in furtherance its agenda through different means. Paragraph Nos.17.2 to 17.7 refer to CPI(M) and its organisational network in great detail. Paragraph No.17.8 lists 10 organisations as frontal organisations of CPI(M) which are used by members of CPI(M) to further its agenda. Specific charge against Appellant, a gist of which is reproduced hereunder for the sake of brevity:

(i) In paragraph No.17.24 it is charged that Appellant had attended a meet organised by RDF at Hyderabad in 2012 and vehemently espoused the cause of reinvention of Dalit Militancy as well revolutionary resurgence under the flag of CPI(M). That RDF is a banned organisation in the State of Andhra Pradesh for its work in furtherance of the CPI(M) agenda;

(ii) paragraph No.17.25 states that the Appellant, working in Goa Institute of Management took active participation in Elgar Parishad Program;

(iii) paragraph No.17.29 states that the Appellant was the General Secretary of CPDR and member of Anuradha Ghandy Memorial Committee, both front organisations of CPI(M);

(iv) paragraph No.17.30 states that Appellant was one of the convenors of Elgar Parishad Program and was present at the venue;

(v) paragraph No.17.31 states that Appellant attended International Conferences under the guise of its academic visits at Canada, Pakistan, USA, France etc. That he used to exchange literature on ideology, training and work strategy of CPI(M) with International Communist Organisations. That he is the real elder brother of wanted accused Milind Teltumbde, CCM and Secretary of Maharashtra Madhya Pradesh Chhattisgarh (MMC) Zone of CPI(M). That he met his brother during his urban area visits and shared literature of Maoist ideology collected by him during International Conferences;

(vi) paragraph No.17.32 states that he took efforts to release one Murugan, a CPI(M) cadre from jail as well as for release of G.N. Saibaba, another

convicted accused in a CPI(M) related case. That he appreciated the work of Shoma Sen (coaccused) in connection with activities of CPDR at Nagpur;

(vii) paragraph No.17.33 states that Appellant's role was appreciated by the Central Committee of CPI(M) in connection with Elgar Parishad Program.

(viii) paragraph No.17.35 states that Appellant delivered a speech in a program organised in the memory of Comrade Naveen Babu, a Senior leader of CPI(M) under the banner of 'Comrade Naveen Babu Memorial Lecture';

(ix) paragraph No.17.37 states that Milind Teltumbde was expanding the Naxal movement of Maoist in urban areas with the help of Appellant and took guidance from him. That he inspired Milind Teltumbde to join CPI(M) movement;

(x) paragraph No.17.38 states that he visited Universities and Institutions in India and abroad to deliver speeches related to the left movement.

[6] Mr. Desai would submit that Appellant is a highly educated academician, author and social scientist who has received may accolades for his works. He has served in the Corporate world and pursuant to his retirement is engaged in academic work with various Institutions. He submitted that Appellant's principal activity is exhibited through his writings on 'Dalits' and the 'Social Structure' of the Society at large.

6.1. That Appellant is 73 years old today. He holds a degree of Bachelor of Engineering in Mechanical Engineering from VNIT, Nagpur; MBA from Indian Institute of Management, Ahmedabad; Doctorate in Management from the University of Mumbai in Cybernetic Modelling for Public Systems and Doctorate of Literature (Honorary) conferred by Karnataka State University, Mysore. He has worked as Executive Director of Bharat Petroleum and Managing Director and CEO of Petronet India Limited until 2010. Thereafter he joined Indian Institute of Technology, Kharagpur as Professor of Management until 2016. He has authored 26 books published nationally and internationally and pioneered a theoretical critique on Neoliberal Globalization vis-a-vis Dalits and other oppressed masses. He has widely travelled across India and the world and was invited by Universities in the USA, Canada and Europe for delivering lectures on Contemporary Social, Economic and Political issues in academics. He has contributed his writings extensively to leading news papers, magazines and booklets. He has participated in numerous fact findings teams over the last three decades which have produced widely acclaimed reports and issues such as Tsunami Rehabilitation efforts, Caste Atrocities, Communal Conflagration etc. He has worked on the editorial boards of Samaj Prabodhan Patrika, Vidrohi and many such other progressive publications and contributes widely to other progressive journals like Economic and Political Weekly, Mainstream, Frontier and Seminar. He is recipient of several prestigious awards and recognition from reputed

Public Institutions / Foundations across the country. He was the President of the last Vichar Vedh Sammelan, a prestigious Forum for Progressive Intellectuals in Maharashtra in 2007. At the time of his arrest he was working in the Goa Institute of Management, Goa as a Senior Professor. He suffers from a number of chronic ailments and age infirmities and was under treatment for Chronic Bronchial Asthma, Cervical Spondylitis, Supraspinatus Tendiriosis and Prostatomegaly at the time of arrest and is under regular medication for control of hypertension or depression. The medical record of Appellant being part of the second supplementary chargesheet are not in dispute.

6.2. He has made the following submissions with a direct reference to the present case:

(i) Considering his credentials, Appellant received a phone call from Justice P.B. Sawant (Retd) through his Secretary, however since he was busy Justice Kolse-Patil (Retd) spoke to him and invited him to attend the Conference which they were planning to celebrate on the occasion of 200th year of the Bhima Koregaon battle in Maharashtra. Since Appellant was busy with a newly started Program at the Goa Institute of Management, he excused himself for attending the meeting. However, he was convinced to be a part of the Convenor Committee to which he agreed considering the above request. Sometime in November December 2017 Appellant received through whats-app a copy of the pamphlet of the Program. Appellant disagreed with the agenda of Elgar Parishad Program printed in the pamphlet and wrote a critical article for The Wire (a digital news portal) titled "The Myth of Bhima Koregaon Reinforces the Identities It Seeks to Transcend". This article received critical condemnation as it angered Dalits across the country.

Mr. Desai submitted that, this instance which is a prelude to the Elgar Parishad Program in the case of Appellant establishes his intellectual independence and thinking as opposed to the Elgar Parishad Program.

(ii) That Appellant has been indicted in the second Supplementary Chargesheet filed by NIA stating that Appellant is one of the Convenor of the Elgar Parishad Program since his name appears in the pamphlet / invitation card.

(iii) That Appellant visited Pune on 30.12.2017 and 31.12.2017 to attend the marriage of son of his close friend, Mr. Joshi. He travelled from Goa to Pune on 30.12.2017 alongwith his wife and two drivers in his personal car. He reached Pune at 7:30 p.m. on 30.12.2017. He and his wife were put up by his friend in Shreyas Hotel. On the following day, he and his wife attended the wedding reception of his friend's son and checked out of Shreyas Hotel at 10:00 a.m. On their way back to Goa they decided to pay a brief visit to Shaniwarwada to meet their relatives which was at a distance of 3 kms. from

Shreyas Hotel. They spent some time between 10:00 a.m. and 12:30 p.m. at Shaniwarwada and thereafter left in their car towards Goa. They reached Goa at 11:00 p.m. with a brief half at Satara where they changed all 4 tyres of their car due to puncture.

Mr. Desai would submit that according to NIA presence of Appellant in Pune on the date of Elgar Parishad Program and his brief visit to Shaniwarwada was indicative of the fact that Appellant being one of the Nimantrak (inviter) had come to oversee the preparation of the program venue and was connected with the Elgar Parishad Program.

(iv) That Appellant did not deliver any speech at the Elgar Parishad Program which commenced from 02:30 p.m. and went until until 10:00 - 10:30 p.m. in the night; That according to NIA and the Supplementary Chargesheet namely paragraph Nos.17.2 to 17.51, incriminating material like books, articles, documents and lengthy quotes, inter alia, pertaining to CPI(M) were seized from accused No. 2 - Rona Wilson which refer to the organisation's policy, formulations of ideological, political and organisational issues and Appellant was instrumental in bringing the aforesaid material in pen-drive and data base while attending International Conferences abroad and disseminating the information to the cadre of CPI(M) and thus was an active member of CPI(M).

For record it needs to be stated here that CPI(M) is a banned terrorist organisation at Serial No.34 under the First Schedule to the UAP Act.

Mr. Desai would submit that as against this allegation the alleged material referred to and relied upon by NIA is readily available on the internet on several security and political websites like security portal www.bannedthought.net and in several books published by reputed publishers and hence without specifying the material and disclosing the same it would be preposterous to charge the Appellant. He submitted that NIA has failed to disclose and put forth the alleged material not only before the Trial Court but even before this Court.

(v) That according to the prosecution several documents have been recovered and seized from the computer of accused No.2 Rona Wilson, and four letters refer to the name 'Anand', 'Comrade Anand' and 'brother Anand' which are indicative of the fact that Appellant is an active member of CPI(M). Appellant is the elder brother of Milind Teltumbde (wanted accused No.1) who was leader of the Central Committee (CC) of CPI(M) overlooking its urban area operations and Appellant was in constant and regular touch with him in supplying the aforementioned incriminating material to the CPI(M) for dis-semination. That Appellant was the think tank of the banned activities of

CPI(M) and intellectually and ideology connected with CPI(M). That therefore Appellant was an active member of CPI(M) and actively coordinated and worked with the various co-accused in the present case in furthering its agenda. He submitted that Milind Teltumbde incidentally has been eliminated in an encounter with the security forces some time last year and is no more alive. Mr. Desai would submit that in so far as this allegation of NIA is concerned, it is far from remote to consider even such a case without any material proof against Appellant. That Appellant being member of the Committee for Protection of Democratic Rights (for short **"CPDR"**) and having attended its meetings since 2002 or having attended International Conferences does not automatically translate into the Appellant being an active member of CPI(M). He submitted that Appellant has produced all details of his visits abroad for attending International Conferences etc. which have either been sponsored by his employers or he has paid for such visits from his own pocket. According to him the allegation that CPI(M) has sponsored his foreign visits is a preposterous allegation as there is no material evidence brought before the Court and on the contrary Appellant has in fact placed every detail of the Conferences / purposes and places visited by him abroad.

(vi) That prosecution has relied upon statements of two key witnesses which have referred to the Appellant as having being in touch with Milind Teltumbde (his younger brother) for strategizing training and influencing the ideology of CPI(M) to its cadres. To this Mr. Desai would submit that Appellant has never met Milind Teltumbde for the last 30 years since Milind went underground and the evidence of the key witnesses is purely hearsay which needs to be tested by this Court prima facie.

(vii) That NIA has heavily relied on a chit of Accounts for 2017 and one specific entry therein which reads as, "Anand T. (===R === 90 T from Surendra (through Milind)". According to NIA this chit is indicative of Appellant having received funds from the CC of CPI(M) from Surendra (Accused No.3 - Surendra Gadling) and through Milind (wanted accused No.1) being brother of Appellant. That these funds were received for carrying out and furthering the anti national agenda of CPI(M).

(viii)Mr. Desai would further submit that there has been no recovery of any incriminating material from Appellant. That his antecedents are spot clean without any blemish and that there is no recovery of any cash or receipt of any monies in his bank account. That he did not play any active role in the Elgar Parishad Program nor does he have any nexus with the CPI(M). That there is no proof or any material brought on record even prima facie to show that Appellant's international visits were sponsored by CPI(M) and he had

brought incriminating material from abroad and thus no prima facie case has made out to incarcerate him in the present case.

[7] Mr. Desai in support of his submissions on behalf of Appellant has referred to the judgments relied upon by NIA and additionally relied upon the following decisions:-

1. Arup Bhuyan Vs. State of Assam, 2011 3 SCC 377;

2. Indra Das Vs. State of Assam, 2011 3 SCC 380;

3. Union of India Vs. K.A. Najeeb, 2021 3 SCC 713;

4. Kamlesh & Anr. Vs. State of Rajasthan & Anr,2019 SCCOnlineSC 1822;

5. Vikram Vinay Bhave Vs. State of Maharashtra, 2021 2 BCR(Cri) 564;

6. Dhan Singh Vs. Union of India,2019 SCCOnlineBom 5721;

7. Thwaha Fasal Vs. Union of India,2021 SCCOnlineSC 1000;

8. Sudesh Kedia Vs. Union of India, 2021 4 SCC 704;

9. Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri & Anr., 2011 2 SCC 532;

10. State of Bihar Vs. Radha Krishna Singh & Ors., 1983 3 SCC 118;

11. H. Siddiqui Vs. A. Ramalingam, 2011 4 SCC 240;

12. Ramji Dayawala & Sons (P) Ltd. Vs. Invest Import,1982 1 SCC 80;

13. Ashim Vs. National Investigation Agency, 2022 1 SCC 695;

14. Konnath Muralidharan Vs. State of Maharashtra, (Cri.BA.No.488/2018);

15. Saidulu Narsimha Singapanga Vs. State of Maharashtra, (Cri.BA.No.3456/2019);

16. Common Cause & Ors. Vs. Union of India & Ors., 2017 11 SCC 731;

17. Gautam Navlakha Vs. National Investigation Agency,2021 SCCOnlineSC 382;

18. Devendar Gupta & Ors. Vs. National Investigation Agency, 2014 2 ALD(Cri) 251;

19. M. Londhoni Devi Vs. National Investigation Agency,2007 4 GauLR 120 (Gau);

20. Union of India Vs. Shiv Shanker Kesari, 2007 7 SCC 798;

21. Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal & Ors., 2020 7 SCC 1

7.1. Thrust of Mr. Desai's submissions while referring to the ratios of the aforesaid judgments is to persuade us to consider the settled legal position about points / criteria to be considered for deciding application for bail on the basis of following parameters:-

(i) whether there is any prima facie or reasonable ground to believe that accused committed the offence;

(ii) nature and gravity of charge;

(iii) severity of punishment in the event of conviction;

(iv) danger of accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being tampered with;

(viii)danger, of course, of justice being thwarted by grant of bail;

(ix) when it comes to offences punishable under special enactments, such as the UAP Act, something more is required to be kept in mind in view of the special provisions contained in Section 43-D of the UAP Act, inserted by Act 35 of 2008 w.e.f. 31.12.2008;

(x) that the doctrine of "guilt by association" does not apply in the present case and mere membership of the banned organisation assuming at the highest will not make a person criminal unless he resorts or incites people to violence or creates public disorder by violence or incitement to violence under the UAP Act; and

(xi) that merely because the Appellant has been arraigned as coaccused in the Supplementary Chargesheet would not lead to the presumption that he is involved in any of the terrorist activities or terrorist act of the banned organisation CPI(M) unless it is prima facie proved to the contrary with cogent material on record.

7.2. He has therefore submitted that the Appellant deserves to be enlarged on bail in the present case.

[8] Per-Contra, Mr. Patil, learned Special Public Prosecutor appearing for NIA has laboriously and vehemently opposed the Appellant's case for enlargement on bail. He has painstakingly taken us through the gamut of NIA's case against the Appellant which is reflected in the second Supplementary Chargesheet filed by NIA. He has made the following submissions to oppose grant of bail to the Appellant.

(i) That Appellant is an active and senior member of CPI(M) working in the urban areas and he was in contact with the other arrested co-accused namely

Sudhir Dhawale, Rona Wilson, Surendra Gadling, Mahesh Raut, Shoma Sen, Varavara Rao, Gautam Navlakha, Smt. Sudha Bharadwaj, Arun Ferriera, Vernon Gonsalves, Stan Swamy & Hany Babu and Harshali Potdar who are members of CPI(M) and has been actively involved in furthering the larger conspiracy and commission of various crimes on behalf of the terrorist organisation.

(ii) That Appellant was the General Secretary of CPDR and a member of Anuradha Ghandy Memorial Committee (for short **"AGMC"**) which are frontal organisations of the CPI(M) and which work on the direction of CPI(M).

(iii) Appellant was one of the Convenor of the Elgar Parishad Program and specifically marked his presence at the venue in Shaniwarwada, Pune on 31.12.2017.

(iv) That Appellant in his capacity as General Secretary of CPDR took efforts for the release of a CPI(M) cadre named Murugan and G.N. Saibaba (another convict) accused in a CPI(M) related case.

(v) That Appellant had appreciated the works and efforts of one of the co-accused namely Shoma Sen in connection with the activity of CPDR at Nagpur.

(vi) That Appellant was instrumental in organising fact finding missions on the direction of CPI(M).

(vii) That Appellant's role in connection with the crime which followed after the Elgar Parishad Program was appreciated by the Central Committee of CPI(M) by giving directions to Appellant and other co-accused to continue with the nefarious activities of CPI(M).

(vii) That CPI(M) has sponsored and allocated Rs.10,00,000/- to the Appellant to pay for his international campaigns and visits for furtherance of CPI(M)'s agenda.

(viii) That the material recovered and seized from one of the coaccused (Rona Wilson) establishes that after the Bhima Koregaon incident on 01.01.2018 wherein one person lost his life, Milind Teltumbde, younger brother and wanted accused of Appellant appreciated the agitation as being very effective and directed Rona Wilson to exploit the death of the youth and to prepare future agitations and propaganda. That while doing so, Appellant's name figured in the letter as "brother Anand".

(ix) That CPI(M) used the platform of Elgar Parishad Program to further its agenda and ideology with the help of members of its frontal organisation like Kabir Kala Manch (KKM) and other underground urban cadres. That Milnd

Teltumbde (wanted co-accused) was deeply inspired by the Appellant for joining the CPI(M) movement and he regularly met Appellant for taking his guidance to further the movement of CPI(M).

(x) That the Appellant during his international campaigns and visits abroad visited Philippines, Peru, Turkey and other countries and brought literature and videos related to Maoist ideology, Maoist tactics, Weapons used by them, Planning of sudden attacks inspite of routine Tactical Counter Offensive Campaign (TCOC) during Naxal weeks, expansion and extension of zones and recruitment of cardres for CPI(M), all of which was used for training and strategic development of party members of CPI(M) after approval in CC meetings in the Abujmaad area.

(xi) That Appellant has delivered speeches on the Left movement in India and abroad and has tried to align "Dalit movement" with the "armed revolutionary movement" as a well thoughtout strategy of CPI(M).

(xii) That the incriminating documents seized from the other coaccused in the present case refer to the Appellant and his role in furthering Maoist ideology in overthrowing the democratically elected government in our country.

(xiii)That Appellant attended a conference of the banned organisation called Revolutionary Democratic Front (RDF) in April 2012 just a few months before it came to be banned. That Appellant and some of the co-accused in the present case are office bearers of the Anuradha Ghandy Memorial Trust and conspired to organize events to celebrate 50th anniversary of Naxalbari movement and involve students in the same to further the ideology and terrorist activities of CPI(M).

8.1. He has referred to and relied upon a compilation of four judgments viz; (i) **National Investigation Agency Vs. Zahoor Ahmad Saha Watali**, 2019 5 SCC 1 , (ii) Hany Babu Vs. National Investigation Agency, (Cri. Appeal. 351 of 2022), (iii) Jyoti Jagtap Vs. National Investigation Agency, (Cri. Appeal. 289 of 2022) and (iv) Anand Teltumbde Vs. State of Maharashtra , (Cri. W.P. 4596 of 2018) and submitted that the role of the Appellant in the present crime has to be considered on a higher footing as he being the think tank and a senior and active member of the CPI(M) than the role played by Hany Babu (Accused No.12) or for that matter even Jyoti Jagtap (Accused No.15) who have been denied bail by this Court in the same case. He submitted that Appellant's role needs to be distinguished critically. He therefore submitted that, the present Appeal be dismissed.

[9] It is to be noted that the UAP Act was brought into existence to meet extraordinary situations and in particular, to deal with the orchestrated crimes through organisations, aimed at destabilisation or causing damage to the country. The UAP Act enables the Government to impose prohibition on the organisations after following the

prescribed procedure. Once an organisation is prohibited under the UAP Act, any person associated with it, becomes amenable for trial, for the offences punishable under the various provisions of the Act, apart from other penal enactments. The provisions of the Act also get attracted, if an individual, though not associated with any prohibited organisation, indulges in disruptive and terrorist activities, in association with other individuals.

[10] Having regard to the gravity of the offences that become triable under the provisions of the Act, the Parliament introduced Section 43-D of the UAP Act, making it some what difficult for a person accused of such offence, to get bail. We have referred to the provisions of Section 43-D(5) and (6) in the present case.

[11] From a perusal of the said provisions, especially the proviso to sub-section (5) of Section 43-D, it becomes clear that the Court dealing with the case shall not grant bail to any person, if, on a perusal of the case diary, or the charge-sheet, it is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true. This is an extraordinary phenomenon and a deviation from the ordinary Criminal Law. Naturally, therefore the approach to such a case is required to be cautious and careful. By its very nature, the exercise to be undertaken by a Court in relation to this provision is therefore somewhat typical and delicate.

[12] The expression of opinion in this behalf must be in such a way that, it does not have any bearing upon the trial. The purpose for which the Parliament employed the expression "reasonable grounds for believing" and "prima facie true" must be clearly borne in mind on the basis of the material placed before the Court. However, the formation of opinion must be, for the limited purpose of considering the application for bail only.

[13] In this context, we may usefully refer to the guidelines laid down by the Division Bench of the High Court of Andhra Pradesh in the decision of Devendra Gupta & Ors. (22 nd supra) which would provide adequate guidance for the Court to form an opinion in respect of accusation in such cases, as to whether the accusation in such cases is "prima facie true". The Court has set down the following parameters:-

(i) Whether the accused is/are associated with any organization, which is prohibited through an order passed under the provisions of the Act;

(ii) Whether the accused was convicted of the offences involving such crimes, or terrorist activities, or though acquitted on technical grounds; was held to be associated with terrorist activities;

(iii) Whether any explosive material, of the category used in the commission of the crime, which gave rise to the prosecution; was recovered from, or at the instance of the accused;

(iv) Whether any eye witness or a mechanical device, such as CC camera, had indicated the involvement, or presence of the accused, at or around the scene of occurrence; and

(v) Whether the accused was/were arrested, soon after the occurrence, on the basis of the information, or clues available with the enforcement or investigating agencies.

[14] It is seen that if the material available with the prosecution, be it the form of case diary, or the chargesheet, reveals existence of any of the factors, referred to above, the Court can form an opinion that there exist reasonable grounds to show that the accusation is "prima facie true". In the absence of such, or other similar factors, formation of opinion may be to the detriment of the Appellant and would make a serious dent into the realm of his personal liberty. In a way, it can be said that the exercise akin to this one is provided for under the Preventive Detention law. What becomes common to both situations is that, the persons are deprived of liberty, without trial. It is too well-known that when a preventive detention is ordered, the Court or authority is placed under obligation to scrutinize the adequacy of the material, apart from compliance with the procedural requirements.

[15] In view of the above settled legal position, we will have to prima facie refer to the material placed before us with caution.

[16] Before we advert to the material, it will be apposite to refer to 3 Supreme Court decisions which are relied upon by both sides specifically in respect of the power of this Court to decide such an application.

[17] Both parties have referred to the case of National Investigation Agency Vs. Zahoor Ahmad Shah Watali (1 st supra) in support of their respective submissions while considering the prayer for bail in relation to offences under UAP Act and Special enactments. It is submitted that Court is required to record its opinion that there are reasonable grounds for believing that the allegations and accusations against such person are "prima facie true" and such recording of satisfaction would mean that the material/evidence recovered, seized and collated by the Investigating Agency in reference to the accusation against accused in the FIR must prevail until contradicted and/or disproved by other evidence and that such material on the face of it shows complicity of accused in the commission of the stated offence. Our attention has been drawn to paragraph Nos.23 and 24 of the decision which is the settled law and it is urged to record a finding on the basis of broad probabilities regarding involvement of Appellant in the crime which according to the Appellant is far from remote. Paragraph No.24 of the said judgment is relevant and read thus:-

"24. A priori, the exercise to be undertaken by the Court at this stage - of giving reasons for grant or non-grant of bail - is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is

merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise."

17.1. In the case of Dhan Singh (10 th Supra) decided by a Coordinate Bench of this Court, the interpretation of the words "prima facie" coupled with the word "true" and the exercise which the Court needs to undertake in this context on the basis of material on record, as also interpretation of the words "reasonable ground" as appearing in Section 43-D(5) of UPA Act is explained and highlighted. We find it useful to reproduce paragraph No.17 and 18 for reference which read thus:

"17. When the word "prima facie" is coupled with the word "true", it implies that the court has to undertake an exercise of cross- checking the truthfulness of the allegations made in the complaint, on the basis of the materials on record. If the court finds, on such analysis, that the accusations are inherently improbable or wholly unbelievable, it may be difficult to say that a case, which is "prima facie true", has been made out. In doing this exercise, the court has no liberty to come to a conclusion, which may virtually amount to an acquittal of the accused. Mere formation of opinion by the court, on the basis of the material placed before it, is sufficient. In the matter of Jayanta Kumar Ghosh (supra) the Hon'ble Division Bench of Gauhati High Court interpreted provisions of Section 41D(5) of the NIA Act and exhaustively dealt with meaning of words "prima facie, true, and reasonable ground". Paragraphs 69, 74, 78 and 82 of the said judgment can be quoted with advantage.

"69 From the meaning, attributed to the word "prima facie", by various dictionaries, as indicated above, and the observations, made by the Supreme Court, in its decisions, in The Management of the Bangalore Woollen Cotton and Silk Mills, (supra) what clearly follows is that prima facie is a Latin word, which means, At first sight or glance or on its face and in common law it is referred to as "the first piece of evidence of fact" i.e., considered true unless revoked or contradicted."

"74 The term "true" would mean a proposition that the accusation brought against the accused person, on the face of the materials collected during investigation, is not false. The terms false again would mean a proposition, the existence of which cannot be a reality. While arriving at a finding whether there are reasonable grounds for believing that the accusation against the accused is prima facie true or false, the court can only look into the materials collected during investigation, and on its bare perusal should come to a finding that the accusation is inherently improbable, however, while so arriving at a finding the court does not have the liberty to come to a conclusion which may virtually amount to acquittal of the accused."

"78 The expression, "reasonable ground", means something more than prima facie ground, which contemplates a substantially probable case for believing that the accused is guilty of the offence(s) alleged. Under Section 437 Cr.P.C. an accused is not to be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence, which is punishable with death or imprisonment for life. Under Section 437 Cr.P.C., the burden is on the prosecution to show existence of reasonable ground for believing that the accused is guilty. Hence, the presumption of innocence, which always runs in favour of the accused, is displaced only on the prosecution showing existence of reasonable ground to believe that the accused is guilty. [See **Union of India v. Tharmssharasi**, 1995 4 SCC 190 and **Union of India v. Shiv Shankar Kesari**, 2007 7 SCC 798.]"

"82 In short, thus, while the Special Court, constituted under the NIA Act, does not suffer from the limitations, which the TADA courts had by virtue of the provisions of Section 20(8), read with Section 20(9) thereof, the fact remains that the Special Court, not being a court of Sessions or of the High Court, cannot exercise the powers of the Court of Sessions or High Court under Section 439 Cr.P.C. Hence, while dealing with the scheduled offences, covered by the proviso to sub-Section (5) of Section 43-D, Special Court, constituted under the NIA Act, would suffer not only from the limitations imposed by clauses (i) and (ii) of subSection (1) of Section 437, but also by the proviso to sub-Section (5) of Section 43D of the UA(P) Act, 1967, wherever the provisions, contained in the proviso to Section 43D(5), would be applicable."

18. In the matter of Bharat Mohan Rateshwar (supra) and Ashringdaw Warisa @ Partha Warisa (supra) while reiterating the similar position of the law in this regard, it is reiterated that in a case, investigated by the agency, if the Special Court forms an opinion that there are reasonable grounds for believing that the accused has committed an offence punishable with death or imprisonment for life, the Special Court would have no jurisdiction to grant bail."

17.2. The next decision is of the Supreme Court in the case of Thwaha Fasal (11 th supra). Paragraph No.23 is relevant and reads thus:-

"23. Therefore, while deciding a bail petition filed by an accused against whom offences under Chapters IV and VI of the 1967 Act have been alleged, the Court has to consider whether there are reasonable grounds for believing that the accusation against the accused is prima facie true. If the Court is satisfied after examining the material on record that there are no reasonable grounds for believing that the accusation against the accused is prima facie true, then the accused is entitled to bail. Thus, the scope of inquiry is to

> decide whether prima facie material is available against the accused of commission of the offences alleged under Chapters IV and VI. The grounds for believing that the accusation against the accused is prima facie true must be reasonable grounds. However, the Court while examining the issue of prima facie case as required by subsection (5) of Section 43D is not expected to hold a mini trial. The Court is not supposed to examine the merits and demerits of the evidence. If a charge sheet is already filed, the Court has to examine the material forming a part of charge sheet for deciding the issue whether there are reasonable grounds for believing that the accusation against such a person is prima facie true. While doing so, the Court has to take the material in the charge sheet as it is."

17.3. As seen, the Supreme Court in the case of Watali (1 st supra) has held that at this stage, as is the Appellant's case, it is not the duty of the Court to weigh the evidence meticulously but to arrive at a finding based on broad probabilities. Therefore we have carefully perused the material available on record relied upon by NIA against the Appellant in the context of the provisions of Section 43-D(5) of the UAP Act.

[18] The material relied by the NIA against the Appellant for his alleged role in the present crime is as under:-

18.1. 1 st document:- Letter at page No.1 of NIA's compilation is addressed by one Prakash to Comrade Anand. This letter states that the Central Committee (CC) is pleased with the progress that (Comrade Anand) has made on the Dalit campaign and it calls upon to explore more opportunities to propagate the issue on the international front. It states that the CC has agreed to allocate additional funds (10L yearly) to organise International Seminars and lectures on Dalit issues. That CC has sent funds for (Comrade Anand's) upcoming (9-10 April) Human Rights convention in Paris. It calls upon for coordination with friends in America and France and reiterates to keep the fire ablaze. This letter is recovered by NIA from the seized computer of Rona Wilson. According to NIA contents of this letter prima facie proved that Appellant addressed as 'dear Comrade Anand' is an active member of CPI(M); the reference 'CC' in the letter to the Central Committee of CPI(M) and Appellant has been congratulated and called upon to organize international seminars and lectures for which funds have been sanctioned by CPI(M).

18.1.1. According to NIA, Appellant therefore is an active member of CPI(M), a banned terrorist organisation under the UAP Act. NIA has contended that the Director of Goa Institute of Management where Appellant is employed has issued letter dated 10.08.2020 and annexed details of all his travel itinerary and expenses which are reimbursed by the Institute in the case of Appellant. This letter is at page 330 of the compilation of NIA. It is contended by NIA that in so far as Appellant's visit to Paris and Budapest on 09.04.2018 is concerned, he was on leave and expenses were not incurred by the Institute and hence it is to be deduced that the expenses were borne by

CPI(M). We have perused the seized letter at page No.1 of the compilation and the letter dated 10.08.2020 issued by the Goa Institute of Management. Prima facie reading of both the letters reveal that Appellant has travelled extensively from 11.07.2016 to 05.03.2020 while on leave and being out of office on his own expenses on at least 64 occasions. All such details of the 64 trips have been given in annexure 2 appended to the letter dated 10.08.2020. It is to be noted that Appellant is employed with the Goa Institute of Management as a Senior Professor. That apart, between 24.08.2016 and 31.03.2020 Appellant has travelled for official work of the Institute with all travel expenses paid by the Institute on at least 26 occasions. It is pertinent to note that when the Appellant has travelled at his own expenses outside Goa he has travelled for delivery of addresses, lectures, speeches, as a resource person etc. to renowned Institutions like the London School of Economics, Harvard University, MIT, Michigan University, Paris, Budapest and various universities and reputed institutes in India like IIT Madras, IIT Hyderabad, IIM Ahmedabad. Letter at page No.1 is not recovered and seized from the custody of Appellant.

18.1.2. Submission of NIA that contents of 1st document prima facie invoke provisions of Section 15 of the UAP Act is not acceptable and palatable to us when we read the letter as it is. It is seen that Appellant is a man of intellectual prominence in the field of Dalit ideology / movement and merely because he is the elder brother of wanted accused Milind Teltumbde who had gone underground 30 years ago to espouse the cause of CPI(M) cannot be a sole ground to indict the Appellant and link him to the activities of CPI(M). On reading the letter as it is we cannot presume that Appellant is an active member of CPI(M) without there been any other material to corroborate and support such a theory.

18.2. 2nd document:- Letter dated 08.06.2017 at page No.2 of NIA's compilation is addressed by Comrade M to Comrade Surendra. Paragraph No.2 of this letter refers to 'Comrade Anand'. The relevant portion relied upon by NIA reads thus:

> "Secondly, we want to put special focus on the upcoming AGM meet in October. This year being 50 th Anniversary of Naxalbari movement at least a day long program should be organised on this theme. Comrade Anand has made a few good suggestion for this programme. The party leadership concurs with it and believes that participation of students in the CPDR must be intensified."

18.2.1. NIA has contended that reference to 'Comrade Anand' in this letter is to Appellant and on reading its contents it is deducible that Appellant is actively involved in CPI(M) party work. This letter is also recovered and seized from the computer of Rona Wilson. It is argued that this letter is typed on the letter head of CPI(M), Central Committee and makes a reference to the AGM meet to be held in October and 'Comrade Anand' having made a few good suggestions. Save and except this there is nothing more in this letter which suggests complicity of Appellant, provided taken at

the highest that the word 'Comrade Anand' refers to Appellant, which is vehemently denied by Appellant. Certainly on reading this letter it prima facie cannot be presumed that Appellant is actively involved in the work of the CIP(M).

18.3. 3rd document:- Letter dated 23.12.2017 at page No. 4 of NIA's compilation addressed by one 'R' to 'Comrade Prakash'. This letters refers to the 'Anand' and it is argued by the NIA that, the name 'Anand' is none other than that of Appellant. The relevant portion of the letter reads thus:

> "In the last few days disturbing reports of encounters have emerged from Gadchiroli. I spoke with Surendra and Arun to constitute a FF team to gauge out the truth above this incident. If possible try to confirm to your side or sent authorized reports / books about these issues. From our side, we are currently in planning stages to finalize the members from Mumbai / Delhi. Shoma will speak to our friend in Nagpur who may join the team. Anand has agreed to coordinate the whole thing. Another prominent issue that we have been trying to raise across the country is political murders of journalists."

18.3.1. It is submitted by the Respondent that contents of this letter are serious and Appellant has taken the responsibility of the fact finding team / committee in Gadchiroli. It is pertinent to note that Appellant has been in Goa since 2016 and prior thereto he was employed with IIT, Kharagpur. Appellant has vehemently denied reference to 'Anand' in the said letter to himself. According to NIA the sentence "Anand has agreed to co-ordinate the whole thing" relating to fact finding team to guage the truth about fake encounters in Gadchiroli is an act committed by Appellant which squarely falls within the provisions of Section 15 of the UPA Act. Prima facie reading of the letter to our mind does not seem so. There is no other material to show nexus of Appellant to the alleged activity stated in the letter.

18.4. 4th document:- Letter dated 2 Jan 2018 at page No.5 of NIA's compilation addressed by 'Comrade M' to 'Comrade Rona'. This letter is addressed on 02.01.2018 i.e. the day after the Bhima Koregaon incident (01.01.2018) which resulted in the death of one person. This letter exalts the party cadres and calls upon them to organize protests across BJP ruled states. This letter states that 'Comrade Shoma and Com. Surendra are authorized to provide funds for future programmes and Bhima Koregaon Event has been very effective and the unfortunate death of the youth must be exploited to prepare future agitations and propaganda material. It calls upon to explore the possibility of a new fact finding team to further highlight the incident. It is also stated that friends in the Congress have assured assistance for release of senior political prisoners including Com. Kobad and Com. Sai'. That the name 'Anand' appears in this letter also. The relevant portion reads thus:-

> "..... please speak with brother Anand, inform him to send reports through Comrade Manoj....."

18.4.1. It will not be out of place to take note of the pamphlet/Invite, which is at page No. 59 of NIA's compilation. It is seen that, there are more than 100 names mentioned as 'Nimantrak' i.e. inviter. We find that, NIA has indicted role of Appellant and some others as accused whose names appear in the pamphlet but not all inviters who are facing similar allegations as that of Appellant, on the basis of this document.

18.4.2. According to NIA this reference to Appellant proves his involvement in the activities of CPI(M). Mr. Patil has emphasized that 'brother Anand' appearing in this letter addressed by 'Comrade M' (Milind Teltumbde, the wanted accused and younger brother of Appellant) clearly drives home the point that it is none other than Appellant. This letter states that they must keep up the presence through simultaneous programmes across many states, as it will undoubtedly help to take down the Modi juggernaut in 2019.

18.4.3. Reading of this letter, prima facie we do not understood as to how the Appellant and his role has been indicted in so far as the present case is concerned. It is NIA's contention that Appellant has being actively involved in the larger conspiracy of CPI(M) which stands proven on reading this letter. However, we do not think so. This letter has not been recovered and seized from Appellant. Assuming at the highest that reference in this letter i.e. 'brother Anand' is to the Appellant himself, prosecution needs to show the nexus and link of Appellant with the present crime or any specific overt act. There is no material save and except calling upon us to presume that the word 'brother Anand' named in the present letter is a reference to Appellant and as such he is directly involved with the activities of CPI(M). It is to be noted here that, this letter refers to names of 17 persons in all, including “brother Anand”. Some names are also with their phone numbers. Not all of these 17 persons have been indicted in the present crime. If NIA's argument is to be accepted, then the statement / sentence referring to some of the said names appears to be more serious. We are afraid that on mere prima facie reading of this letter we can record such a finding.

18.5. 5th document:- The next document referred to and relied upon by NIA is an “account statement” which is at page No.7 of the compilation. This document is the fulcrum of NIA's case against Appellant. We would therefore reproduce the entire account statement as it is, as both sides have advanced submissions painstakingly on this documents. It reads as under:-

“

Accounts2k17

PARTY FUND RECEIVED IN LAST YEAR FROM C.C.

Surendra == R === 2.5 L from Milind

Shoma & Sudhir = R and D == 1 L from Surendra

Amit B == R == 1.5 for CPDR Canvasing

Anand T. === R === 90 T from Surendra (Though Milind)

Myself == R === 1.8 L From Com Manoj

Arun == R ==== 2 L from Com. Darsu

VV == R ==== 5 L from Com. G."

18.5.1. According to NIA the name Anand T. is a reference to Appellant having received Rs.90,000/- from Surendra (Surendra Gadling, Accused No.3) through Milind (wanted accused and younger brother of Appellant). NIA has refereed to one sentence from the earlier letter dated 02.01.2018 wherein it is mentioned that "Com. Shoma and Com. Surendra are authorized to provide funds for future programmes". This is relied by NIA to corroborate alleged receipt of money by the Appellant from co-accused Surendra.

18.5.2. Mr. Patil has vehemently argued that this statement from the earlier letter supports receipt of monies i.e. Rs.90,000/- by Anand T. (Appellant) from Surendra (accused No.3) who was authorized to provide funds for future programmes. On careful reading of the earlier letter dated 02.01.2018 and the aforementioned statement of account it is seen that there is a fallacy in the argument of NIA. Assuming that Anand T. is the Appellant himself and he received Rs.90,000/- from Surendra through Milind, firstly it cannot be linked to the statement in the earlier letter dated 02.01.2018 since this account statement pertains to the year 2016 and or 2017. The document has a heading; viz; Party fund received in last year from C.C. Last year would invariably mean the account of 2016 as the title of this document is "Accounts2K17" which would mean Accounts for 2017". That apart requiring us to presume that Anand T. is the Appellant would require further corroboration and evidence. Prima facie it appears that, the same has not been brought on record. This document is unsigned and has been recovered from the laptop one of the co-accused. Hence, at this prima facie stage we cannot presume that Anand T. i.e. the Appellant received Rs.90,000/- from Surendra Gadling as argued by NIA. We are afraid to state that we cannot agree with NIA's contention.

18.6. In regard to the documents in paragraph 19.1 to 19.5, there is one more reason as to why we cannot prima facie presume and accept the case of NIA on reading these letters and the alleged account statement. One such seized document at page No.149 of Appellant's compilation is the list of Central Committee Members of CPI(M) group alongwith their details and photographs for the year 2017. This document is part of the record at page No.559 to 561 of Vol. II. Appellant is not member of this C.C. However, at Serial No.4 one Katkam Sudarshan @ Anand @ Mahesh @ Bhaskar appears as Central Committee and Polit Bureau Member of CPI(M). Hence, reference to the name 'Anand' can also be to this member as argued by Appellant. Prima facie such a probability cannot be ruled out, unless there is material shown to the contrary.

18.7. In this regards, we would like to draw reference to paragraph No.27 in the case of Watali (1 st supra). It reads thus:-

> "27. For that, the totality of the material gathered by the investigating agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible. For, the issue of admissibility of the document / evidence would be a matter for trial. The Court must look at the contents of the document and take such document into account as it is"

18.7.1. Paragraph No.24 of the judgment (reproduced earlier) states that, at this stage Court is merely expected to record a finding on the basis of broad probabilities regarding involvement of accused in the commission of the stated offence or otherwise. Paragraph No.27 states that no document can be discarded as being inadmissible and it would be a matter for trial. However, Court must look into the contents of the document and take such document into account as it is. Both sides have vehemently pressed their respective submissions on the aforesaid two paragraphs. NIA has submitted that the above documents be seen as they are or as they stand whereas Appellant has submitted that the documents relied upon by NIA need to be seen qua their contents. As stated the aforesaid documents are the fulcrum of NIA's case. NIA has submitted that prima facie reading of these documents reveal that Appellant is an active member of CPI(M) and has been involved in activities to further its ideology to overthrow the state. Hence, Appellant has been rightly charged. However, looking at the contents of the documents the aforesaid submission of NIA would fall in realm of presumption according to us which may need further corroboration.

[19] That apart, NIA has referred to three statements of witnesses recorded in support of its case.

Statement dated 23.12.2018 is at page 56 of its compilation. This statement is given by Kumar Sai @ Ashok @ Ram Mohammed Singh Toppu @ Pahadsingh resident of District Raj Nandgaon, Chhattisgarh. He has worked in CPI(M) as Division Committee Secretary and has referred to role of various co-accused including that of Appellant. He has stated that Appellant has been instrumental in aligning the Dalit movement with the CPI(M). Save and except this statement there is no other reference to Appellant in the statement. We have perused this statement carefully. On reading this statement at the highest it is seen that assuming for the sake of argument that Appellant is associated with CPI(M) then also it would attract the provisions of Sections 38 and 39 and not Section 15 of the UAP Act. This witness does not say that he has seen Appellant at any point of time with any CPI(M) member.

[20] The second statement is at page 140 of the compilation of NIA. This is by KW3 under Section 164 of Cr.P.C. on 17.08.2020. He has deposed that in 2018 he

accompanied Milind Teltumbde to Bhopal and heard him talk that he was supposed to meet his elder brother i.e. Appellant and from his mannerisms he gathered that, in the first instance he was unable to meet Appellant but on the second instance he gathered that he had met the Appellant. He has deposed that on both occasions Milind Teltumbde had left him alone at some acquaintance's place and had gone alone with his sister Nandini Borkar to meet Appellant. Prima facie, after bare reading of this statement, it clearly reveals that this witness has not specifically seen the Appellant having meeting his brother Milind. Further he states that he only gathered this information from Milind Teltumbde's mannerisms. That he was not a witness to any meetings of Appellant or had seen him. Hence prima facie this statement of witnesses qua the Appellant falls within the realm of hearsay evidence.

[21] The next statement referred to and relied upon by NIA is at page No.156 of compilation of KW-4 recorded on 25.08.2020 under Section 164 of Cr.P.C. In this statement KW-4 has stated that Anand Teltumbde has inspired Milind Teltumbde for joining CPI(M). That Milind Teltumbde used to visit various cities from January to June every year at Nagpur, Pune, Chandrapur, Bhopal, Indore, Katni, Amarkantak, Mandala, Dindori, Shahdol etc. to meet Appellant for taking his guidance in advancing CPI(M)'s movement in jungle and urban areas. That Appellant used to attend International Conferences and under the guise of academic visits he visited Philippines, Peru, Turkey and other countries and brought Maoist literature and videos to be shown to CPI(M) members during their training. This is the reference to the Appellant in the statement. Appellant has vehemently denied having visited Philippines, Peru and Turkey. Appellant has stated that his passport can be verified for that matter. NIA has not raised any grievance on this submission. In fact during the course of submissions, we asked NIA to show us the material brought by Appellant from abroad in the pen-drive and memory card i.e. the literature material and videos relating to Maoist ideology, tactics and weapons used by them, attacks and planning of sudden attacks made by them and expansion and recruitment of members. Mr. Patil on taking instructions submitted that such material is not part of the Chargesheet against Appellant nor do they have any such material with them. He submitted that according to NIA such material was given by Appellant to his brother Milind Teltumbde for onward dissemination to CPI(M) cadres and NIA has not laid its hand on the same until now.

[22] There is one more aspect which needs to be highlighted at this prima facie stage. Assuming at the highest that NIA's case is accepted, then also prima facie analysis of the above material on record by NIA at this stage indicates that Appellant is a member of the banned CPI(M) and can at the most the provisions of Sections 13, 38 and Section 39 of the UAP Act are therefore attracted. It is seen that the maximum punishment prescribed under the aforesaid provisions is imprisonment for a term which may extend to five years (Section 13) and for a term not extending 10 years or with fine or both. However, in juxtaposition with the aforesaid provisions punishment

of conspiracy under Section 18 refers to a punishment which may extend to imprisonment for life and is also liable to fine. It is therefore be important for us to refer to the charging Section 18 to understand the nuance of conspiracy as contemplated by the UAP Act. Section 18 of the UAP Act reads thus:-

> "**18. Punishment for conspiracy, etc.--** Whoever conspires or attempts to commit, or advocates, abets, advises or [incites, directs or knowingly facilitates] the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine."

22.1. It is seen that Section 18 refers to a terrorist act or any act preparatory to the commission of a terrorist act. It is therefore pertinent to note Section 15 which defines "Terrorist Act". Section 15 reads thus: -

> "**15. Terrorist Act.**
>
> [1] Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security [economic security] or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,
>
> (a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause-
>
> (i) death of, or injuries to, any person or persons; or
>
> (ii) loss of, or damage to, or destruction of, property; or
>
> (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or
>
> [(iiia) damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or]
>
> (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or
>
> (b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or [an international or intergovernmental organisation of any other person to do or abstain from doing any act; or] commits a terrorist act."

22.2. Section 20 of the UPA Act in this regards pertains to punishment for the terrorist Act and is relevant: Section 20 of the UAP Act reads thus:-

"20. Punishment for being member of terrorist gang or organisation.-

Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine."

22.2.1. Section 20 cannot be interpreted to mean that merely been a member of a terrorist gang would entail such a member for the above punishment. What is important is the terrorist act and what is required for the Court to see is the material before the Court to show that such a person has been involved in or has indulged in a terrorist act. Terrorist act is very widely defined under Section 15. In the present case, seizure of the incriminating material as alluded to hereinabove does not in any manner prima facie leads to draw an inferance that, Appellant has committed or indulged in a 'terrorist act' as contemplated under Section 15 of the UAP Act.

22.3. Punishment for committing terrorist act is prescribed under Section 16 which is punishable with death or imprisonment for life in the event of death of any person due to such act or upto imprisonment for life in any other case. In the present case the offence and crime related to the Bhima Koregaon incident resulted in the death of one person. On reading the draft charges and the chargesheet qua the Appellant, we prima facie find that NIA has not investigated or made any investigation in respect of this aspect. However, it is their case that the banned terrorist organization CPI(M) used the Elgar Parishad Program as a platform to further its larger conspiracy and Appellant being an active member of CPI(M) and being associated with its activities has participated in the larger conspiracy of CPI(M) and therefore does not deserve to be enlarged on bail. However, on prima facie reading of the above documents and statements referred to and relied upon by NIA qua the Appellant, we are afraid to state that to we do not agree with the contention of NIA. On prima facie appreciating the material on record as well as the statements of three key witness against Appellant, we do not think that provisions of Sections 16 and 18 can be invoked at this stage against Appellant for want of better proof and evidence. On reading the chargesheet

and the material placed before us, prima facie it cannot be inferred that Appellant has involved himself in a 'terrorist act'.

[23] It is submitted by NIA that the yardstick and parameters made applicable in the case of Hany Babu (2 nd supra) and Jyoti Jagtap (3 rd supra) while rejecting bail for these co-accused be applied in the case of the Appellant. Mr. Patil has taken us through both the aforesaid judgments at length. He has emphasized on paragraph Nos.49, 52, 53 and 54 of the judgment in the case of Hany Babu and contended that, the role of Appellant cannot be viewed differently than the role of Hany Babu. In fact he contended that since Appellant is a person with intellectual ideology, his case stands on a much higher footing than Hany Babu's case and therefore he cannot be enlarged on bail. We respectfully disagree with this proposition in view of the fact that what weighed with the Court in indictment of Hany Babu and rejection of his Bail Application is the material produced in paragraph Nos.21 and 22 of the said judgment. On reading Hany Babu's judgment, it is seen that 64 documents were seized from the custody of Hany Babu which explained his links with CPI(M), his precise role and network. Further 14 documents were seized from other coaccused which also referred to his role. Such is not the case herein. As alluded to herein above, there are 5 documents (letters) and 3 key witness statements which have been pressed against the Appellant by NIA. We have prima facie analysed the said material and recorded our prima facie findings on the basis of broad probabilities.

Next Mr. Patil has submitted that in view of the findings returned by this Court i.e. by this Bench in the case of Jyoti Jagtap (3 rd supra) it is imperative that the role of Appellant be also viewed in the same manner as being an active member of CPI(M). We are once again afraid to state that the considerations which weighed with us while delivering the judgment in the case of Jyoti Jagtap (3 rd supra) were entirely different. For the sake of brevity, we do not wish to repeat and reiterate those considerations. Our judgment speaks for itself. We do not agree with the submissions of NIA that Appellant's case is identical to the case of Jyoti Jagtap (3 rd supra) and the present Appeal deserves to be dismissed.

[24] This position of law is reiterated by the Supreme Court in the case of Arup Bhuyan (5 th supra) and in an unreported Order of the learned Single Judge of this Court in Criminal Bail Application No.488 of 2018 passed on 25.02.2019 (18 th supra) and another unreported Order passed in Criminal Bail Application No.3456 of 2019 passed on 05.05.2021 by another learned Single Judge of this Court (19 th supra).

[25] In view of the above discussion and findings, we are of the prima facie opinion that on the basis of material placed before us by NIA which has been looked into by us, it cannot be concluded that Appellant has indulged into a terrorist act. The material placed on record prima facie does not inspire confidence to bring the Appellant's act as alleged for the punishment prescribed under Sections 16, 18 and 20 of the UAP Act as they read.

[26] In view of the above discussion and findings and considering the fact that Appellant has no criminal antecedents and he having being behind bars for more than two and half years, in our opinion, a case for grant of bail has been made out.

[27] Hence, the following Order:-

ORDER

(i) The impugned Order dated 12.07.2021 passed by the Special Judge, Greater Bombay below Exh.377 in Special Case No.414 of 2020 alongwith Special Case No.871 of 2020 is quashed and set aside;

(ii) Appellant be released on bail in Special Case No.414 alongwith Special Case No.871 of 2020 arising out of RC-01/2020/NIA/MUM under Sections 120B, 115, 121, 121A, 124A, 153, 201, 505(1)(B) read with 34 of IPC and Sections 13, 16, 17, 18, 18B, 20, 38 and 39 of the UAP Act on his executing PR bond of Rs.1,00,000/- with one or more solvent local sureties in the like amount;

(iii) Appellant shall not tamper with the evidence of prosecution nor influence the prosecution witnesses;

(iv) Before his actual release from jail Appellant shall furnish his contact numbers, both-mobile and landline and permanent residential address to the Investigating Officer and the learned Special Court before which the case of Appellant is pending;

(v) Appellant shall attend the concerned police station where he resides, initially for a period of one year, once in a fortnight i.e. on every 1st and 16th of each English Calendar month and thereafter on every first Monday of the month between 10:00 a.m. to 12:00 noon till conclusion of trial;

(vi) Appellant shall not leave the jurisdiction of State of Goa and if he desires to travel within India he shall seek prior leave and permission of the Trial Court;

(vii) Appellant shall deposit his passport held by him before his actual release from jail, with the designated Special Court.

[28] Criminal Appeal is accordingly allowed in the aforesaid terms.

[29] At this stage, Mr. Desai, learned senior Advocate appearing for the Appellant submitted that, though in the cause title of the present Petition, address of the Appellant has been mentioned as residing at Goa Institute of Management, Sanquelim, Goa 403 505, due to efflux of time, the contract of the Appellant with the said Institute has come to an end and as of today, the residential address of Appellant is at 129, 'Rajgruha', Hindu Colony, Khareghat Road, Dadar, Mumbai-400 014.

[30] In view thereof, the condition stipulated in paragraph No. 27(vi) above is modified and Appellant is directed not to leave the jurisdiction of this Court without

prior permission from the Special Designated Court/ Trial Court, if he desires to travel within India.

[31] Appellant is permitted to furnish cash bail for a period of 8 weeks from today and during the said period, Appellant shall comply with the condition of furnishing solvent local sureties as stipulated in paragraph No. 27(ii).

[32] After pronouncement of the present Judgment, Mr. Patil, learned Special PP appearing for the NIA requested this Court for stay of its operation and implementation to enable NIA to challenge it before the Hon'ble Supreme Court. Though opposed by the learned Senior Advocate for Appellant, considering the fact that Appellant is in jail for more than two and half years, effect of present Judgment and Order granting bail to the Appellant will remain stayed for a period of one week from today

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2023(1)MBAJ38

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] 1 st 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)MBAJ55

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

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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:
>
> "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)MBAJ77

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before A S Gadkari; Milind N Jadhav]

Criminal Appeal No. 777 of 2015 **dated 03/10/2022**

Ramesh Lasha Palva; Kashinath Lasha Palva

Versus

State of Maharashtra

ACT IN A CRUEL OR UNUSUAL MANNER

Indian Penal Code, 1860 Sec. 324, Sec. 504, Sec. 34, Sec. 300, Sec. 302, Sec. 304, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 209, Sec. 313 - Appellants against conviction under Section 302 read with 34 of The Indian Penal Code-Enmity between the deceased and Appellants pertaining to the landed property-. Appellant No.1 except calling the deceased out of his house did not share further common intention as far as assault on deceased by Appellant No.2 is concerned-Benefit of doubt-Appellant No.2 came from behind of deceased and gave a blow on his head and back with 'musal' (wooden pestle)-The evidence on record shows that the appellant did not act in a cruel or unusual manner hence the case would fall under Section 304 (Part II) of IPC-Appeal is partly allowed.

Law Point - When during the course of a sudden quarrel, a person in the heat of moment, attacks the other person and causes injury, one of which proves to be fatal, the accused would be entitled to the benefit of this Exception 4 to Section 300 of IPC.

Acts Referred:

Indian Penal Code, 1860 Sec. 324, Sec. 504, Sec. 34, Sec. 300, Sec. 302, Sec. 304, Sec. 506

Code of Criminal Procedure, 1973 Sec. 209, Sec. 313

Counsel:

Megha Shashi Bajoria, Ajay Patil

JUDGEMENT

A.S. Gadkari, J.

[1] Appellants have questioned the legality and correctness of Judgment and Order dated 12th November 2014 passed by 2nd Additional Sessions Judge, Thane in Sessions Case No.83 of 2011, convicting them under Section 302 read with 34 of The Indian Penal Code (for short, "I.P.C.") and are sentenced to suffer imprisonment for life and also to pay a fine of Rs.1,000/- each, in default of payment of fine to further suffer rigorous imprisonment for 3 months by each of Appellants.

[2] Heard Ms.Megha Bajoria, learned Advocate appointed by Legal Aid Committee to represent Appellants and Mr.Ajay Patil, learned A.P.P. for Respondent-State. Perused entire record.

[3] The facts which are necessary to decide present Appeal can briefly be stated thus:-

(i) The name of deceased is Lahanu Jivya Palva. The date and time of incident is 3rd November 2010 at about 1.00 am.

It is the prosecution case that, there was enmity between the deceased and Appellants pertaining to the landed property. That on an earlier occasion at the time of Ganpati festival, Ramesh Palva (Appellant No.1) had beaten elder brother of the deceased, namely, Janya Jivya Palva (PW-4). Lahanu had therefore questioned Appellant No.1, as to why he assaulted his elder brother and on that count Appellants had a grudge in their mind against him. That on 2nd November 2010 in the afternoon some skirmish took place between Appellant No.1, Lahanu (deceased), Dinesh Janya Palva (PW-5) and Jitendra Lahanu Palva (PW-7). Appellant No.1 therefore had filed N.C. complaint with the local police.

(ii) On 3rd November 2010 at about 1.00 am wife of Lahanu (deceased) namely, Bharati Lahanu Palva (PW-1), Jitendra Lahanu Palva (PW-7), Dinesh Janya Palva (PW-5) along with other family members were chitchatting in the courtyard of the house of Lahanu. Appellant No.1 Ramesh called Lahanu. Lahanu did not respond to the first call and therefore Appellant No.1 again gave another call to Lahanu. Lahanu (deceased) went towards Appellant No.1. At that time, Appellant No.2 Kashinath came from behind of Lahanu and gave a blow on his head and back with 'musal' (wooden pestle). Lahanu fell down on the earth. Appellant No.1 dropped the said wooden pestle at the scene of occurrence and ran away. Lahanu got unconscious on the spot.

(iii) As no vehicle was immediately available in the night at the said place, Dinesh (PW-5) and Jitendra (PW-7) along with other persons in the early morning took Lahanu in the jeep of Sudhir Rawate (PW-9), initially to Vikramgad Rural Hospital, where Lahanu was given first aid.

(iv) On 4th November 2010 Bharati Palva (PW-1), i.e. wife of deceased, lodged a crime with Vikramgad Police Station. It was registered as CR No.86 of 2010, under Sections 324, 504, 506 read with 34 of I.P.C. by Tukaram V. Mor (PW-8), the Police Officer then attached to Vikramgad Police Station. He carried out initial investigation of the said crime. He recorded Spot cum Seizure Panchanama (Exh.32) in presence of panch witnesses PW-2 and PW-

3. He seized the said 'musal' (wooden pestle) from the scene of offence. He also recorded statements of other witnesses.

(v) The Medical Officer from Vikramgad Rural Hospital informed Jitendra (PW-7) and Dinesh (PW-5) to take Lahanu to the Government Hospital at Jawhar. They accordingly admitted Lahanu to a Government Hospital at Jawhar for two days. The Medical Officer at Jawhar subsequently told PW-5 and PW-7 to take Lahanu to a hospital at Nashik. Lahanu was thereafter admitted to Sudarshan Hospital at Nashik owned by Dr.Sanjay H. Dhurjar on 7th November 2010. Dr.Sanjay Dhurjar (PW-10) issued Injury Certificate (Exh.41) on 10th November 2010 to the police.

As per the said Injury Certificate, Lahanu was having cerebral concussion with fracture to right parietal bones. There was large subdural haemotama on the right parietal region with mid line sheet with left sided hemiplegia with facial nerve palsy. There was contusion over right parietal region.

(vi) PW-10 operated Lahanu over his head for having injury thereof. Lahanu died on 14th November 2010 at Sudarshan Hospital while undergoing treatment. Dr. Sanjay Dhurjar (PW-10), Medical Officer issued Medical Certificate (Exh.42) recording cause of death of Lahanu. He also informed Bhadrakali Police Station Nashik about the death of Lahanu.

(vii) Police thereafter sent dead body of Lahanu for conducting postmortem. Dr.Deepak Rajput (PW-12) conducted autopsy on the dead body of Lahanu on 14th November 2010. He noticed that, the dead body was having previous head injury with skull fracture; he was already operated and craniotomy was done, having 26 stitches on the occipital region. He found intra cerebral hemorrhage. He gave opinion as to cause of death was due to hemorrhagic shock due to head injury (intra cerebral hemorrhage). He accordingly prepared Postmortem Report (Exh.55).

(viii) After demise of Lahanu, section 302 of I.P.C. was added to the said crime and investigation was entrusted to Shri Vasantrao M. Jadhav, Assistant Police Inspector (PW-11). He recorded supplementary statement of Smt.Bharati (PW-1). He also recorded statements of other witnesses and after completion of investigation submitted chargesheet against the Appellants in the Court of Judicial Magistrate First Class.

(ix) As the offence under Section 302 is exclusively triable by Court of Sessions, the learned Magistrate committed the said case to the Court of District Judge-3 and Additional Sessions Judge, Thane, as per Section 209 of Cr.P.C.. The Trial Court framed Charge below Exh.7 under Sections 302, 504, 506 read with 34 of I.P.C.. The same was read over and explained to the

Appellants in Marathi vernacular language. They pleaded not guilty and claimed to be tried.

(x) In order to establish the guilt of accused, prosecution examined in all 12 witnesses. The statements of Appellants under Section 313 of Cr.P.C. were recorded. Appellants denied all the incriminating circumstances put to them while recording their said statements. Appellants have also examined one defence witness, namely, Mr.Madhukar G. Vartha (DW-1), the neighbour of Appellants and deceased and also a witness to the incident of beating to Appellant Ramesh by Lahanu (deceased), Jitendra (PW-7) and Dinesh (PW-5). The defence of Appellants as can be gathered from the record was that, Lahanu was under the influence of liquor at the relevant time and fell from raised platform (ota/otala) in a gutter and sustained injury to his head. The defence witness has also claimed to have separated the quarrel. The said incident was reported to Vikramgad Police Station and in order to counter that report, the Appellants had been involved in a false case.

(xi) The Trial Court by its impugned Judgment and Order dated 12th November 2014 has convicted Appellants as noted above.

[4] The abovenoted admitted facts have been deciphered from the evidence on record of the aforestated witnesses.

[5] Ms.Bajoria, learned Advocate for Appellants submitted that, Appellant No.1 Ramesh had filed N.C. Complaint on 3rd November 2010 in the afternoon against Lahanu (deceased), Dinesh (PW-5) and Jitendra (PW-7) which was prior to the incident in-question. That as per the evidence of Madhukar Vartha (DW-1), on 3rd November 2010 at about 3.00 am in the midnight, Lahanu (deceased) was abusing sister of Appellants in presence of Dinesh (PW-5) and Jitendra (PW-7). That Jitendra (PW-7), Dinesh (PW-5) and Lahanu (deceased) were beating Appellant No.1 Ramesh. That Lahanu was under the influence of liquor and fell down from the raised platform (ota/otala) in a gutter and sustained injury to his head. She submitted that, as the Appellants were having dispute with Lahanu over their landed property, with a view to falsely implicate, the present crime is registered against them. She submitted that, even otherwise in the present case, it is an admitted fact on record that, initially a quarrel took place between Lahanu (deceased) and Appellants and it is alleged that, subsequently Appellant No.2 gave a blow on the head of Lahanu. She submitted that, the act of Appellant No.2 falls under Exception 4 of Section 300 and the conviction of Appellants under Section 302 of I.P.C. awarded by the Trial Court is therefore erroneous. She therefore submitted that, present Appeal may be allowed.

[6] Per contra, learned A.P.P. opposed the Appeal and submitted that, both the Appellants were sharing common intention on the date and time of incident and assaulted deceased. That there are three eye witnesses to support the prosecution case. He submitted that, the Trial Court has not committed any error to call for interference

of this Court in the present Appeal and therefore the impugned Judgment and Order may be upheld.

[7] In the present case there are three eye witnesses to the incident in question.

Bharati Lahanu Palva (PW-1) is the wife, Jitendra Lahanu Palva (PW-7) is the son and Dinesh Janya Palva (PW-5) is the nephew of deceased.

[8] PW-1 has deposed that, due to the earlier enmity on the date and time of incident Appellant No.1 gave a call to her husband and when he approached him, Appellant No.2 came from behind and gave a blow with 'musal' (wooden pestle) on the backside of the head of her husband. Her husband fell down. Appellant No.2 left the said 'musal' there only and ran away. She has categorically deposed that, Appellant No.1 did nothing in the entire act. In her cross-examination she has admitted that, the wooden pestle (Article-1) is readily available in everybody's house in the said village. She has admitted that, the police did not read over the contents of the complaint to her.

[9] Dinesh Palva (PW-5) has deposed that, there was enmity between deceased and Appellants over the landed property. That Appellant No.1 Ramesh called Lahanu (deceased) at about 1.00 am in the night of 3rd November 2010. On second call Lahanu approached Appellant No.1. That Appellant No.2 Kashinath approached Lahanu from behind and gave blows from back with wooden pestle (musal). Lahanu fell down and thereafter Appellant No.2 ran away from the spot leaving the said 'musal' (Article 1) at the spot. That he took Lahanu from the vehicle of Mr.Sudhir Rawate (PW-9) to Vikramgad Hospital. That subsequently Lahanu was taken to Government Hospital at Jawhar and thereafter to a Hospital at Nashik.

[10] Jitendra L. Palva (PW-7) has deposed that on 3rd November 2010 at about 1.00 am, he along with his parents and other relatives was chit chatting in the courtyard of his house. That Appellant Ramesh gave a call to his father and called him. On second call Lahanu (deceased) went towards Ramesh. At that time Appellant No.2 came from behind and inflicted a blow on the head and back of his father with wooden pestle (musal). His father fell down and became unconscious. Appellant No.2 ran away leaving behind the said baton at the spot. He thereafter took his father to various hospitals as noted above.

In the cross-examination of this witness a specific suggestion was given that on 3rd November 2010 Appellant No.1 Ramesh had filed N.C. complaint against Lahanu, PW-5 and PW-7 in the afternoon over a skirmish.

[11] It is to be noted here that, the weapon used in the present crime as 'musal' (wooden pestle) was seized from the spot of incident itself by PW-8 Police Officer in presence of PW-2 and PW-3 by effecting Spot Panchanama (Exh.32) dated 4th November 2010. As admitted by the prosecution witnesses, the said tool is available in each and every household in the said village for pounding and grinding purpose. PW-1 has categorically stated that, Appellant No.1 did nothing to the deceased. It appears from the evidence on record that, Appellant No.1 did not share common intention with

Appellant No.2 while assaulting Lahanu (deceased) on the fateful night. It further clearly appears that, as the Appellant No.1 had filed N.C. complaint on 3rd November 2010, with a view to either settle the dispute or question the deceased, PW-5 and PW-7, the Appellant No.2 had prompted Appellant No.1 to call Lahanu out of his courtyard and the Appellant No.2 all of a sudden assaulted Lahanu with musal (wooden pestle) on his head from behind. The evidence on record clearly indicates that, the Appellant No.1 except calling the deceased out of his house did not share further common intention as far as assault on deceased by Appellant No.2 is concerned and therefore is entitled for benefit of doubt in that behalf.

[12] Evidence on record reveals that, Appellant No.2 did not come to the spot with premeditation to commit murder of Lahanu and has not taken undue advantage or acted in a cruel or unusual manner. As noted herein above, as per the medical experts, the deceased had suffered one injury on his head. The evidence on record is silent about the fact that, Appellant No.2 Kashinath came at the scene of offence with the said wooden pestle (musal) and with intention to commit murder of Lahanu. The act of Appellant therefore falls within the purview of Exception 4 of Section 300 of IPC and as he had no intention to commit murder of Lahanu, Section 304 (Part II) of IPC would be attracted to the present crime.

[13] To bring a case within Exception 4 to Section 300 of IPC, all the ingredients mentioned in it must be found. It is to be noted that the word 'fight' occurring in Exception 4 to Section 300 of IPC is not defined in the IPC. It takes two to make a fight. To invoke Exception 4 to Section 300 of IPC, four requirements must be satisfied viz.:-

i. It was a sudden fight;

ii. There was no premeditation;

iii. The act was done in the heat of passion and

iv. The assailant had not taken undue advantage or acted in a cruel or unusual manner.

The cause of the quarrel is not relevant nor it is relevant as to who offered the provocation or started to assault first, but what is important is that the occurrence must have been sudden and not premeditated and the offender must not have acted in a fit of anger and must not have taken any undue advantage or acted in a cruel or unusual manner. When during the course of a sudden quarrel, a person in the heat of moment, attacks the other person and causes injury, one of which proves to be fatal, the accused would be entitled to the benefit of this exception.

The evidence on record shows that the appellant did not act in a cruel or unusual manner. Looking to all these facts, we are of the considered opinion that the case would fall under Section 304 (Part II) of IPC.

[14] In view of the above, Appellant No.1 Ramesh is acquitted from the charges framed against him by giving him benefit of doubt.

As far as Appellant No.2 is concerned, we set-aside his conviction under Section 302 of I.P.C. and convict him under Section 304 (Part II) of IPC and he is sentenced to suffer R.I. for 10 years and to pay a fine of Rs.25,000/-; in default of payment of fine to further suffer R.I. for 1 year.

[15] Hence, the following Order.

(i) Appellant No.1 Ramesh Lasha Palva is acquitted from all the charges framed against him in Sessions Case No.83 of 2011 by extending benefit of doubt.

(ii) Appellant No.2 Kashinath Lasha Palva is convicted under Section 304 (Part II) of I.P.C. and is sentenced to suffer R.I. for 10 years and to pay a fine of Rs.25,000/-; in default of payment of fine to further suffer R.I. for 1 year.

(iii) Record indicates that, Appellant No.2 Kashinath Lasha Palva is in jail since 12th November 2010 and has completed his sentence of 10 years and also the in default sentence. Therefore Appellant No.2 be released from jail immediately on production of present Order, if not required in any other case/cases.

(iv) Appeal is partly allowed in the aforesaid terms.

[16] Learned A.P.P. is directed to communicate this Order to the concerned Jail Authority where the Appellant is lodged.

[17] All the concerned to act on an authenticated copy of this Order.

[18] Before parting with the Judgment, we would like to place on record our appreciation for the efforts put in by Ms. Megha Bajoria, learned Advocate appointed by the High Court Legal Services Committee, Mumbai for espousing the cause of Appellants, as she was thoroughly prepared in the matter and rendered proper assistance to the Court

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2023(1)MBAJ83

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before A S Gadkari; Milind N Jadhav]

Criminal Appeal No 1032 of 2015, 1033 of 2015 **dated 29/09/2022**

Sachin Laxman Dandekar; Laxman Dharma Dandekar

Versus

State of Maharashtra

MURDER PRE-MEDIATED AND PLANNED

Indian Penal Code, 1860 - Sections 302, 299, 34, 300 and 304, Part II - Code of Criminal Procedure, 1973 - Section 235 (2) - Murder - Conviction and sentence - Order passed by Additional Sessions Judge - Legality of - Act of killing 'S' happened on road when he was accosted by Appellant - This cannot be a pre-mediated and planned act - Relationship between 'S' and 'J' were enraged with 'S' for having continued his alliance with 'J' - This was very reason for confronting 'S' - Weapon used by appellant was hammer - Which was not carried in first instance by appellant No. 1 before assaulting 'S' - Act of appellants does not travel beyond offence of culpable homicide not amounting to murder - High Court was of the firm opinion that appellants acted in a sudden spur of moment and heat of passion - Act of appellants falls within ambit of punishment for culpable homicide not amounting to murder prescribed under Part II of Section 304, IPC - Conviction under Section 302, IPC is set aside - Instead appellants are convicted under Section 304, Part II, IPC and sentence to suffer R1 for 10 years and to pay a fine of Rs. 25,000/- each - Appeals partly allowed.

[Paras 18 to 21]

Law Point - Act of appellant's falls within ambit of punishment for culpable homicide not amounting to murder prescribed under Part II of Section 304, IPC.

Acts Referred:

Indian Penal Code, 1860 Sec. 299, Sec. 34, Sec. 300, Sec. 302, Sec. 304

Code of Criminal Procedure, 1973 Sec. 235

Counsel:

P R Arjunwadkar, Prabha U Badadare, S S Hulke

JUDGEMENT

Milind N. Jadhav, J.

[1] Criminal Appeal No. 1032 of 2015 is filed by Original Accused No. 2 and Criminal Appeal No. 1033 of 2015 is filed by Original Accused No. 1. Accused No.1 is the father of Accused No. 2.

[2] Both Appeals question legality of Judgment and Order dated 18.08.2015 passed by learned Additional Sessions Judge, Palghar in Sessions Case No. 31 of 2011, convicting both Appellants under Section 235(2) of the Code of Criminal Procedure Code, 1973 (for short "**Cr.P.C.**") for offence punishable under Section 302 read with 34 of The Indian Penal Code, 1860 (for short "**IPC**") and sentencing both to suffer imprisonment for life with fine of Rs. 1000/- each, in default, to suffer rigorous imprisonment for one month.

[3] Shorn of unnecessary details, facts of prosecution case which emerge from the record are as follows:

3.1. Sakharam (20 years old) was having a love affair with Jyotsna, daughter of Appellant No.1 and sister of Appellant No.2. Appellants' family were against their relationship and alliance since they belonged to different castes. One year prior to incident, Appellant No.1 visited house of PW-1 and informed them that he will not perform marriage of his daughter Joystna with Sakharam and they should search for another bride. Some months prior to the incident, Appellant No.2 assaulted Sakharam and snatched his bicycle near Umbergaon and threatened that he will murder him if he continued his alliance with Jyotsna.

3.2. On 22.01.2011, at about 06:30 p.m. Sakharam Sukhad Kherva (hereinafter to be referred as "Sakharam") was returning home from work on his bicycle He was confronted by Appellants on the road near Karajgaon who came on motorcycle and assaulted him with a blunt object on his head and he was seriously injured. PW-3 Datta Soma Thapad informed PW-1 Ganpat Khevra about the incident. PW-1, along with younger brother Arvind and other villagers proceeded to Karajgaon and found Sakharam lying in a pool of blood.

3.3. PW-1 enquired with bystanders about the incident and learnt that Appellant No.2 and one other person came on motorcycle and assaulted Sakharam; that Appellant No. 2 caught hold of Sakharam from behind and the other person accompanying him gave a blow with hammer on his head leading to bleeding injury; that Appellants continued giving kicks and abused him and only when people gathered around them, they ran away on their motocycle. Sakharam was taken to hospital by PW-1 and others where he was declared dead on admission.

3.4. PW-1 lodged First Information Report (for short "FIR") and criminal law was set into motion. CR No. I-7/2011 came to be registered. PW-10 Dilip S. Pawar Investigating Officer("I.O.") arrested Appellants on the same night at about 09:30 p.m.

3.5. PW-10 conducted inquest panchanama (Exh. 25) of the dead body of Sakharam. He carried out recovery and seizure panchanama (Exh. 38) of blood stained clothes of both accused 'Article Nos. 2, 3, 4 and 5' which they had worn at the time of incident. Clothes worn by deceased Sakharam were seized (Exh. 50) and marked as 'Article Nos. 6, 7 and 8. PW-10 sent the seized articles to the Chemical Analyzer for forensic analysis. C.A. Reports (Exh.52 and Exh.53) vide covering letter dated 06.02.2011 (Exh.51) were produced in evidence. PW- 10 conducted Spot panchanama (Exh.29) and the soil and soil mixed with blood. On 23.01.2011 Appellant no.1 made a voluntary statement to the IO and showed the place where the blood-stained hammer (weapon) and motorcycle were concealed by him. PW-10 prepared seizure memo (Exh.35A) of weapon (hammer) and motorcycle used by Appellants. After investigation charge-sheet was filed in the Court of Judicial Magistrate First Class, (JMFC) Dahanu.

Since the offence under Section 302 IPC is exclusively triable by Court of Sessions, case was committed to the Sessions Court for trial. Charge (Exh.5) was

framed against Appellants and read over and explained to them in vernacular, to which both pleaded not guilty and claimed to be tried.

To bring home the guilt of Appellants, prosecution examined 10 witnesses.

[4] PW-9 - Dr. Pralhad C. Padghane, conducted postmortem examination on the dead body of Sakharam and prepared PM report (Exh.40) which notified the following injuries:

"A. External Injuries

1. Deep and wide CLW looking like blunt object stab obliquely longitudinal and gapping over left parietal region just behind and above post auricular region measuring about 3 cm x 1.5 cm x 1 & half inch deep allowing probe inside with profuse bleeding. There was a depressed fracture piece of skull bone displaced anteriorly inside.

2. Obliquely longitudinal CLW on left side of forehead with crack fracture on skull bone underneath with blood oozing measuring about 2 & — cm. x 0.5 cm. x scalp deep.

3. Vertically oblique CLW with gapping measuring about 1.5 x 0.3 cm. scalp deep present over temporal aspect of left orbit with crack fracture underneath.

4. After scalp dissection there were peripheral scalp hematoma around the scalp wound.

5. Obliquely vertical abrasion measuring about 3 x half cm. brownish black discolouration over left zygomatic region at the level of left ear.

6. Minor abrasion on left knee joint on patelar region measuring about 1 cm x .5 cm.

7. CLW on left leg vertically longitudinal measuring about 1 & half x 0.5 x 2 cm. antero medial aspect and middle of lower half blood oozing.

8. Minor abrasion over right forearm measuring about 2 x.5 cm. dorsally on distal 1/4th radial aspect.

9. Minor bruise dark blue on left forearm dorsally on distal 1/4 radial aspect.

10. Minor abrasion over right knee joint oval shaped, measuring about 2 x half cm.

11. Minor abrasion measuring about 1 x 0.5 cm. on middle knuckle horizontal on right hand. At the places over the above injuries reddish brown scobs present.

12. Longitudinal contusion over right leg measuring about 2.5 x 0.5 cm located over middle of lower half antero medially.

B. Internal Injuries

1. Scalp hematoma one inch in diameter circular shape present over right aspect, frontal region.

2. Peripheral scalp hematoma around the corresponding mentioned in Col.No.17.

C. Injuries on the skull

3. Depress fracture measuring about 4 x 2 cm obliquely longipudinal shape displaced inside anteriorly situated on left parietal bone

4. Crack depress fracture measuring about 1 cm x 0.2 cm elliptical on left temporal bone situated just lateral to left orbit.

5. Cracked depress fracture measuring about 2 x 0.5 cm. obliquely vertically situated over frontal bone on left aspect.

6. Total half brain hematoma was present on 1 hemisphere.

7. Brain substances damaged correspondingly to fracture sites of skull bone.

4.1. PW-9 in PM Report stated "the probable cause of death was hemorrhagic shock due to multiple injuries to head and brain causing internal, external profused bleeding and assault with hard protruding object." In his substantive evidence he has stated that "injuries at Sr. No.1, 2, and 3 mentioned in col. No.17 and injuries mentioned in col.no.19 are possible due to assault by a weapon like hammer. Other injuries mentioned in col. No.17 are possible in scuffle." In his cross examination he has specifically stated that, "it is not true that all these injuries can be caused if a vehicle gives a dash to a person and he falls on a rough kachcha road having gitties and stones."

[5] PW-2, Lakhma Ramu Ambolkar is the sole eye witness to the incident. On 22.01.2011 he was returning from his daily labour job at around 5:30 p.m. and Sakharam was ahead of him on his bicycle. When they reached upto the boundary of village Vasa-Karajgaon, he saw Appellants riding on motorcycle and they stopped and accosted Sakharam on the road and assaulted him. He has deposed that Appellant No.2 held Sakharam from behind and Appellant No.1 removed a hammer from the carrier/boot of the motorcycle and inflicted a blow on his head; further after Sakharam fell to the ground, he was assaulted by kicks by Appellants; that people gathered at the spot and therefore Appellants ran away on their motorcycle from the spot. Prosecution has heavily relied upon the ocular evidence of PW-2.

[6] Mr. P.R. Arjunwadkar, learned Advocate appearing for Appellants vehemently submitted that, prosecution has failed to prove its case beyond reasonable doubt and there are material discrepancies and lacunae in the Judgment passed by the learned Trial Court. He submitted that there is no material brought on record to prove the alleged love affair between deceased and daughter of Appellant No. 1 (Joystna) and

hence motive is not proved by prosecution; that there is no incriminating evidence proved against both Appellants to connect them to the crime in question. He submitted that Appellants had no enmity with Sakharam and are falsely implicated by prosecution. Hence he has prayed for setting aside of the impugned Judgment and Order.

[7] PER CONTRA, Mr. S.S. Hulke, learned APP, appearing on behalf of State has drawn our attention to the deposition of PW- 2, eye witness, to incident and submitted that he witnessed the assault by Appellants; that ocular evidence of PW-2 stands corroborated by medical evidence given by PW-9 pertaining to injuries sustained by Sakharam. He submitted that PW-1 in his evidence has deposed that Sakharam was having a love affair with daughter of Appellant No.1 (Jyostna) which was not disliked by Appellants and their family members; that Appellant No.2, had some months prior to incident assaulted Sakharam and threatened to kill him if he continued his alliance with Jyostna and thus the motive was proven. He has therefore prayed for dismissal of Appeal.

[8] We have heard both the learned advocates appearing for respective parties and with their able assistance perused the entire evidence and record of the case.

It is seen that prosecution case is substantially based on ocular evidence, theory of "motive" and recovery of weapon. In the present case there is a sole eyewitness to the incident.

[9] It is pertinent to note that PW-2 is the eye witness who has witnessed the entire incident from a distance of 30 feet, hence he can be classified as a wholly reliable witness based on his testimony which is not shattered in cross-examination; that he is also not an interested witness; his testimony is corroborated by Medical evidence given by PW-9 and the inquest and recovery panchanama conducted by PW-10.

[10] From perusal of the record of the case it is discernible that testimony of PW-2 is reliable and therefore needs to be accepted without any doubt. His testimony narrates the entire incident as observed by him in close proximity and it stands further corroborated by recovery evidence (Exh.29 and Exh.35A) and medical evidence (Exh.40).

[11] That apart, on minute perusal of the deposition of the PW-1, it is seen that Appellants had a clear motive to harm Sakharam, as he continued his love affair with Joystana (daughter of Appellant No.1), which was not approved by Appellants and their family. Further Appellant No. 2's conduct of assaulting Sakharam a few months before the incident and threatening to kill him if he continued to meet Joystna proves motive for eliminating Sakharam, is one of the strong circumstance indicating motive behind the crime.

[12] However in the context of reappreciation of evidence in the present case, it will be apposite to refer to the provisions of Sections 299 and 300 IPC which define offences of culpable homicide and murder respectively and read thus:

"**299. Culpable homicide.** - Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1.-A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.-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.

Explanation 3.-The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

300. Murder.- Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

2ndly.-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

3rdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

4thly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1.-**When culpable homicide is not murder.-** Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos: -First.-That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.-That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.-That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.-Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2.-Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3.-Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.-It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.-Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

[13] Sections 302 and 304 IPC prescribe the punishment for the offence of murder and that of culpable homicide not amounting to murder respectively and read thus:

"302. Punishment for murder.-Whoever commits murder shall be punished with death or 1[imprisonment for life], and shall also be liable to fine."

"304. Punishment for culpable homicide not amounting to murder.- Whoever commits culpable homicide not amounting to murder, shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it

is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

[emphasis supplied]"

[14] In the present case Trial Court has convicted and sentenced Appellants for the offence of murder (as defined in Section 300 IPC) under Section 302 IPC.

[15] Exception 4 to Section 300 IPC outlines a situation where culpable homicide does not amount to murder. There are three requirements for this exception to apply:

(i) the act of killing is committed without premeditation;

(ii) the act of killing is committed in a sudden fight in the heat of passion upon a sudden quarrel; and

(iii) the offender should not have taken undue advantage or acted in a cruel or unusual manner.

[16] Keeping in mind the aforementioned statutory provisions, on minute perusal of the evidence and record of the present case, it is discernible that Appellant No.1's daughter (Jyostna) had a love affair with Sakharam which was not accepted by his family. It has come on record that both Jyostna (19 years) and Sakharam (21 years) were of tender age and belonged to different castes and hence their alliance was not accepted by Appellants' family. From the deposition of PW-1, it is seen that Appellant No.1 had visited Sakharam's house and informed his family that he will not give Joystna's hand to Sakharam and they should find some other bride for him. It is also important to note that few months prior tot he incident, Appellant No.2 had also confronted Sakharam at Umargaon and threatened to kill him if he continued his lover affair with Jyostna.

[17] From the above mentioned two incidents, it can be evidently seen that Appellants were against their relationship and did everything possible to break the same. This clearly shows that Appellants were enraged with Sakharam as the affair was continuing. In this backdrop, on 22.01.2011 Appellant Nos. 1 and 2 while traveling on their motorcycle saw Sakharam on Karajgaon road ahead of them and accosted him to question him as to why he was still continuing his love affair with Jyostna and abused him profusely. A physical scuffle broke out and it is clearly seen from the evidence of PW-2 that Sakharam was overpowered by both Appellants. Appellant No. 2 held Sakharam's hands and body from behind and Appellant No. 1 in the heat of passion removed the carpenter's hammer from the carrier/boot of his motorcycle and gave a singular blow on Sakharam's forehead and he fell to the ground. Since bystanders including PW-2 gathered at the spot, Appellants ran away on their motorcycle. It is pertinent to note that Appellant No. 1 was a carpenter by profession and it is therefore not unusual on his part to carry a hammer and other equipment related to carpentry in the boot of his motorcycle. Therefore, in view of the provisions of Exception 4 to Section 300, in our opinion, the act of inflicting a singular blow with

the hammer on Sakharam's forehead by Appellant No. 1 can be said to have been inflicted in a heat of passion and on the spur of the moment due to the motive, but certainly cannot be a premeditated and planned act to murder him. We say so for the following reasons.

[18] The act of killing Sakharam happened on the road when he was accosted by Appellants. Certainly this cannot be a premeditated and planned act. Further because of the relationship between Sakharam and Jyostna Appellants were enraged with Sakharam for having continued his alliance with Jyostna and this was the very reason for confronting Sakharam. The weapon used by Appellant was the hammer which was not carried in the first instance by Appellant No. 1 before assaulting Sakharam. It has come in evidence that after the confrontation with Sakharam, Appellant No. 2 overpowered and hled him, there were abuses and kick blows given to him and thereafter Appellant No. 1 reached to his motorcycle took out the hammer (which is the carpenter's principal tool) from the boot of his motorcycle and inflicted its singular blow on Sakharam's forehead. After inflicting the singular blow, Appellants did not take any undue advantage or act in a cruel or unusual manner but were frightened since bystanders gathered at the spot. Hence they left the spot on their motorcycle. Further at the behest and instance of Appellant No.1, the weapon (hammer) and the motorcycle was recovered and seized by the IO. Hence it is discernible that it could not have been the intention of Appellants to kill and murder Sakharam but certainly both Appellants wanted to teach him a lesson and reprimand him for continuing with the said alliance. The injury caused to Sakharam by blow of hammer was however fatal leading to his death.

[19] The discussion and findings alluded to hereinabove, in our considered opinion pertaining to act of the Appellants does not travel beyond the offence of culpable homicide not amounting to murder in the facts and circumstances of the present case. Act of Appellants due to the motive proved by the prosecution was an act committed in the heat of passion and on the sudden spur of moment whereby the singular blow of hammer was inflicted by Appellant No. 1 on Sakharam's forehead. The Trial Court has therefore certainly erred in convicting and sentencing the Appellants for offence punishable under Section 302 IPC when the Appellants deserve to be given the benefit of doubt. The act of the Appellants' falls within the ambit of punishment for culpable homicide not amounting to murder prescribed under Part-II of Section 304 IPC.

[20] In view of the above discussion and findings, we are of the firm opinion that Appellants acted in a sudden spur of the moment and heat of passion. By such act they acted in a manner that, they knew is likely to cause death of Sakharam but without the intention to kill him.

[21] Hence the following order:-

(i) The conviction of the Appellants in both Criminal Appeal under Section 302 IPC is set aside; instead Appellants are convicted under Section 304 Part-II IPC and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 25,000/- each, and in default thereof to suffer further rigorous imprisonment for six months;

(ii) Appellants were arrested on 22.01.2011. Since both have undergone the sentence awarded above, they shall be released from prison forthwith unless required in any other case/cases.

[22] Both Criminal Appeals are partly allowed in the aforesaid terms.

[23] All the concerned to act on an authenticated copy of this Judgment and Order

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2023(1)MBAJ93

IN THE SUPREME COURT OF INDIA

[From MADRAS HIGH COURT]

[Before A S Bopanna; Pamidighantam Sri Narasimha]

Criminal Appeal No. 1603 of 2022, 1604 of 2022 **dated 19/09/2022**

Selvakumar

Versus

Manjula & Anr

APPEAL AGAINST CONVICTION

Code of Criminal Procedure, 1973 - Section 357 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3 - Bonded Labour System (Abolition) Act, 1976 - Sections 16 and 17 - Appeal - Conviction - Held - In the FIR, though the name of the Appellant is shown as the second accused, with the first accused being his deceased father, there is nothing as to how and in what manner the Appellant is involved in the commission of the offence - There is no evidence to establish the culpability of the Appellant so as to find him guilty - Appeal allowed.

[Paras 13 and 14]

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 357

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 Sec. 3

Bonded Labour System (Abolition) Act, 1976 Sec. 16, Sec. 17

Counsel:

M N Rao, Promila Thananjayan, Jaswanthi Anbuselvan, Aaina Verma, S Thananjayan, David Sundar Singh, Gaichangpou Gangmei, Dr Joseph Aristotle S, Nupur Sharma, Shobhit Dwivedi, Sanjeev Kumar Mahara

JUDGEMENT

[1] Leave granted.

[2] This appeal by Accused No. 2 is against the judgment and order of the High Court of Judicature at Madras (In Crl. Appeal No. 335 of 2013 dated 22.08.2019 and 27.08.2019) convicting him under Sections 16 and 17 of the Bonded Labour System (Abolition) Act, 1976 (hereinafter referred to as 'the Act'.). By the said judgment, the High Court reversed the decision of the Principal Sessions Judge (In Sessions Case No. 51 of 2007 dated 30.07.2012) , Kancheepuram at Chengalpattu, by which the Appellant was acquitted under the Act as well under the Scheduled Castes and the Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the 1989 Act).

[3] The Appellant/Accused No. 2 is the son of Accused No. 1 who expired during the pendency of the matter before the Trial Court itself. The case of the prosecution is that upon a complaint received at his office on 03.03.2006, the District Revenue Officer, Chengalpattu (hereinafter referred to as PW-8), raided M/s Murugesa Naicker Selvakumar Rice Mill, Paramasivam Nagar, Thirukazhukundram, Tamil Nadu, along with other officers and found PW's 1 to 6 working in the Rice Mill as bonded labourers. He issued necessary order under exhibit P-4 to P-10 to release the labourers. Following the raid, an FIR came to be filed on 16.03.2006 against Accused No. 1, the father of the Appellant herein, and also against the Appellant as Accused No. 2.

[4] After completing the formalities, the Sessions Judge framed charges against Accused Nos. 1 and 2 for offences under Section 16 and 17 of the Act and also under Section 3(1)(x) of the 1989 Act. During the trial, the prosecution examined PW-1 to PW-13 and marked documents being Ex. P-1 to P-12.

[5] Prosecution against Accused No. 1 having abated due to his death during Trial, the Sessions Court proceeded against the Appellant. At the outset, the Sessions Court held that the prosecution could not prove that the victims were members of any Schedule Caste or Schedule Tribe and therefore, charge under the 1989 Act did not lie. In so far as the prosecution under the Act is concerned, the Trial Court held that the prosecution could not prove the case against the Appellant for having committed the crime under Section 16 of the Act. The Sessions Court held that there is no evidence to link the Appellant to the Rice Mill business run by his deceased father. The relevant portion of the order is as under: -

> "... The Defence Counsel denied that there is no connection between the A2 and the Rice Mill and A2 Selvakumar is residing at Chengalpattu. In this regard, while perusing the evidence of PW 13 Investigating Officer, he has

clearly deposed that he has not examined whether the A2 was residing along with his father at Thirukazhukundram or whether A2 is residing at Chengalpattu. Hence without proper investigation and proof A2 has been implicated as accused in this case. If we peruse Ex. P4 to Ex. P10 Release Certificates issued by PW 8 Tmt. Karthika Revenue Divisional Officer, Chengalpattu it is stated specially that Murugesa Naicker is the owner of the above Rice Mill and not A2 Selvakumar. Hence the evidence adduced by the prosecution is not sufficient to link A2 with the functioning of Rice Mill and the participation of A2 in the day today affairs of the Rice Mill. Under such circumstances it cannot be believed that the A2 gave Rs. 3000/- as advance to PW1 and A2 and compelled to work and PW1 Mani, PW3 Kuppan, PW4 Ramesh, PW5 Anbu, PW6 Manjula, Vanitha, Kumaresan without giving sufficient wages and they have been treated as bonded labours."

[6] In view of the above referred finding of the Sessions Court, that there is no evidence connecting the Appellant to the Rice Mill, the Sessions Court acquitted him of all the charges.

[7] There is no appeal by the State against the judgment of acquittal by the Sessions Court. However, Mrs. Manjula (PW-6) preferred an appeal to the High Court being Crl. Appeal No. 335 of 2013. As stated earlier, the High Court reversed the judgment of the Principal Sessions Judge and convicted the Appellant under Sections 16 and 17 of the Act and sentenced him to undergo rigorous imprisonment for a period of 3 years and also directed him to pay compensation of Rs. 50,000/- to each of the victims.

[8] The High Court came to the conclusion that there is sufficient evidence that 'Bonded Labourers' were working at the Rice Mill and also that, they have been denied their due wages. The High Court also concluded that the 'Bonded Labourers' were ill-treated and prohibited from seeking alternative employment by use of force. As regards the contention of the Appellant that he is not connected with the running of the Mill, the High Court rejected this submission and held as under:-

"15. On a reading the evidence of P.Ws. 1 to 6, they have clearly stated that they were working as bonded labourers in the 1st respondent Rice Mill. Though the 1st respondent denied that he is not owner of the Mill and he is no way connected with the said Mill and the Mill is not under his management, but the evidence of P.Ws.1 to 6 clearly shows that they were working in the Rice Mill belong to the 1st respondent. The name of the Rice Mill itself shows that M/s Selvakumar Rice Mill. He has not denied the fact that he is not the son of A1 and he admitted the name of the Mill that it is M/s Selvakumar Rice Mill...."

[9]

9.1 Shri M.N Rao, learned senior counsel assisted by Ms. Promila, Advocate and Shri S. Thananjayan, AOR, submitted that the High Court simply presumed that the Appellant was the employer and that he was in control of the workmen. He further submitted that there is no evidence establishing that the Appellant had compelled any person to render any bonded labour. He has taken us through the evidences of witnesses including that of the Investigation officer and the District Revenue Officer.

9.2 We have heard Shri Aristotle, standing counsel for the State of Tamil Nadu as well as Shri David Sundar Singh, Advocate and Shri Gaichangpou Gangmei, AOR appearing on behalf of Respondent No. 1.

[10] The only question for consideration is whether there was any involvement of the Appellant in the commission of the offences under Sections 16 and 17 of the Act.

> **"16. Punishment for enforcement of bonded labour-** Whoever, after the commencement of this Act, compels any person to render any bonded labour shall be punishable with imprisonment for a term which may extend to three years and also with fine which may extend to two thousand rupees.
>
> **17. Punishment for advancement of bonded debt-**Whoever advances, after the commencement of this Act, any bonded debt shall be punishable with imprisonment for a term which may extend to three years and also with fine which may extend to two thousand rupees."

[11] For attracting the provision of Section 16 of the Act, the prosecution must establish that an accused has forced and compelled the victim to render bonded labour. This force and compulsion must be at the instance of the accused and the prosecution must establish the same beyond reasonable doubt. Similarly, under Section 17 of the Act, there is an obligation on the prosecution to establish that the accused has advanced a bonded debt to the victim.

[12] We will now examine the FIR as well as other documentary evidences coupled with the oral evidence produced by the prosecution to examine if there is any relationship between the Appellant and the victims to either enforce bonded labour, or if he had advanced any bonded debt.

[13] In the FIR, though the name of the Appellant is shown as the second accused, with the first accused being his deceased father, there is nothing as to how and in what manner the Appellant is involved in the commission of the offence. All the allegations in the FIR are relatable to the Appellant's father and there is no allegation towards the Appellant compelling any person to render any bonded labour or having advanced any bonded debt. In fact, nothing is attributed to the Appellant except for mentioning his name in the list of accused. The absence of any allegations against him must be seen in the context of his submission from the very beginning that he is not residing with his father. It is his case that he is residing at Chengalpattu.

[14] We proceeded further and examined the evidence of PW-1, the Complainant. This witness made specific allegations against the father of the Appellant for his abusive behaviour. Here again, there is no reference to the Appellant for having compelled bonded labour or advanced any bonded debt. PW-3, Kuppan made a general observation that the Rice Mill belongs to the Appellant and his father. We will shortly be dealing with the evidence of the Investigating Officer in this regard in the context of his obligation to establish the co-ownership of the Appellant. Before that, we may note that PW-3 also, fails to mention as to when the Appellant compelled him to render bonded labour or any such forceful labour. The witness makes general allegations and uses the expression 'they', which is an ominous reference. At one place, the witness also stated that the Appellant beat his father-in-law, PW-1, with a stick. The other witnesses do not corroborate the same, neither have they levelled any other allegation against him.

[15] So far as the District Revenue Officer examined as PW-8 is concerned, he only mentions the raid conducted at the Rice Mill on the basis of a complaint, but does not mention anything about the Appellant. Even the Investigation Officer examined as PW-13 has nothing to say against the Appellant.

[16] The reasoning adopted by the High Court that the Rice Mill belongs to the Appellant's father and also that it also bears the name of Appellant by itself cannot be the basis for convicting the Appellant for commission of the offence under Sections 16 and 17 of the Act. The conviction is a non sequitur and the name of his Rice Mill certainly cannot be a proof beyond reasonable doubt to convict and sentence him for three years. The High Court was examining an appeal against the acquittal. The principles governing consideration in cases of appeals against acquittals is well entrenched in our criminal jurisprudence [**Sheo Swarup v. King Emperor**, 1934 AIR(PC) 227; **Anwar Ali and Anr. vs. State of Himachal Pradesh**, 2020 10 SCC 166; **Dhanapal vs. State by Public Prosecutor, Madras**, 2009 10 SCC 401; **Chandrappa and Ors. vs. State of Karnataka**, 2007 4 SCC 415].

[17] For the reason stated above, we are of the opinion that the High Court is not justified in reversing the judgment of acquittal of the Appellant and convicting and sentencing him under Sections 16 and 17 of the Act.

[18] We have no doubt concluded that there is no evidence to establish the culpability of the Appellant so as to find him guilty. But regarding the incident having occurred in the factory owned by the deceased Accused No. 1, there is certain evidence to show that the incident has in fact occurred. The evidence of PW-7 and PW-8 indicates that the labourers concerned were working in the factory. Unfortunately, Accused No. 1 father of the Appellant is no more, to that extent the offence alleged against him has abated and therefore the finding recorded about his culpability cannot be examined. Though culpability of this Appellant in the offence alleged has not been established and he cannot be held guilty in a criminal proceeding

merely for being the son of the deceased Accused No.1, there is however another dimension to this matter in this peculiar circumstance.

[19] The allegation is that the labourers concerned were employed in the Rice Mill and the liability of fine under Sections 16 and 17 of the Act must be attached to the estate (the Rice Mill). Notwithstanding the Appellant not being culpable, he being the son of Accused No. 1, has succeeded to the business. Hence, he can be burdened with the financial liability even though the concept of vicarious liability does not arise in criminal prosecution and even if it be dehors the requirement of Section 357 of Cr.P.C. Accused No. 1 though not available at this juncture, had in the course of the trial taken the defence that there was no restraint on the workers, moving out to the market etc. so as to contend that they were not bonded labourers. Therefore, what becomes evident according to deceased Accused No. 1 is that the said workers had worked in the factory but not as bonded labourers. However, neither has Accused No. 1 placed any material to show that the notified wages were paid nor has he disproved the existence of the bonded debt of Rs. 3000/-.

[20] Further, the enactment under which the proceedings were initiated being a social welfare legislation and in view of the peculiar facts and to meet the ends of justice, we deem it appropriate not to interfere with the direction given to the Appellant by the High Court to pay a compensation of Rs. 50,000/- to each of the workmen. This direction shall remain payable notwithstanding the acquittal of the Appellant for the conviction under Sections 16 and 17 of the Act.

[21] For the reasons stated above: -

(a) Criminal Appeals arising out of SLP (Crl.) Nos. 8683-8684 of 2019 are hereby allowed and the judgment and order of the High Court of Judicature at Madras in Crl. Appeal No. 335 of 2013 dated 22.08.2019 and 27.08.2019 are hereby set aside. The Appellant is acquitted of all the charges, bail bonds if any stand discharged,

(b) We direct the Appellant to pay an amount of Rs. 50,000/- to each of the workmen within a period of three months from today.

(c) Parties shall bear their own costs

2023(1)MBAJ99

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.

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)MBAJ106

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before Sarang V Kotwal]

Criminal Appeal No. 202 of 2019 **dated 10/10/2022**

Shaukatali Abdulsalem Shaikh

Versus

State of Maharashtra

APPEAL AGAINST CONVECTION

Indian Penal Code, 1860 - Sections 392, 34 and 397 - Code of Criminal Procedure, 1973 - Sections 428 and 313 - Appeal - Convection - Held - The first informant had highly exaggerated the incident - The evidence regarding identification of the appellant is also doubtful - The prosecution has proved this recovery evidence against the appellant beyond reasonable doubt - The recovery of articles and the mobile phone connects the appellant with the crime - The appellant was in custody for more than four years - Therefore, interest of justice would meet if the sentence imposed on him is reduced to a period of four years under Section 392 of IPC - Appeal partly allowed.

[Paras 17,20,21 and 23]

Acts Referred:

Indian Penal Code, 1860 Sec. 392, Sec. 34, Sec. 397

Code of Criminal Procedure, 1973 Sec. 428, Sec. 313

Counsel:

Vinay Bhanushali, P K Sanghrajka, Sanmit Vaze, S R Agarkar

JUDGEMENT

Sarang V Kotwal, J.

[1] The appellant has challenged the judgment and order dated 17.1.2019 passed by the Additional Sessions Judge, Thane in Sessions Case No.37/2011. The appellant was convicted for commission of offence punishable under Section 392 read with 34 of the Indian Penal Code and was sentenced to suffer RI for seven years and to pay fine of Rs.1,000/- and in default of payment of fine to suffer RI for three months. He was also convicted for commission of offence punishable under Section 397 read with 34 of IPC and was sentenced to suffer RI for seven years and to pay fine of Rs.1,000/- and in default of payment of fine to suffer RI for three months. Both the sentences were directed to run concurrently. He was granted set off under Section 428 of Cr.P.C. for the period of detention undergone as under-trial prisoner.

[2] Initially, there were two accused in the case. However, accused No.2 Mhammaad Mehtabli was absconding and, therefore, the trial was conducted only against the present appellant.

[3] The prosecution case is that on 14.9.2009 after midnight i.e. between the intervening night of 13.9.2009 and 14.9.2009, the first informant was waiting to go home after reaching Thane. Two persons came in Indigo car, offered him lift and when he sat in the car, he was taken to a distant place. He was shown knife by one of them. He was assaulted by the same person. Both the persons then took away his golden ornaments and mobile phone. The prosecution case is that the appellant was driving the car when his companion showed knife and took away the ornaments and mobile phone. The first informant was allowed to go. Thereafter, he lodged his FIR on 15.9.2009 vide C. R. No.I-163/2009 at Rabodi police station, Thane. The appellant was arrested on 3.10.2019 by laying a trap because there were allegations of commission of similar offences. At that time, the informant's mobile phone was found on his person. The appellant was arrested on 3.10.2009. In the meantime, the investigation was commenced. There was recovery of ornaments at the instance of the appellant. At the conclusion of the investigation, the charge-sheet was filed and the case was tried before the Sessions Court.

[4] During trial, the prosecution examined seven witnesses including the first informant, the Medical Officer who examined him, the panchas for recovery, a jeweller to whom the appellant had sold the golden ornaments, the Special Executive Magistrate who conducted test identification parade and the investigating officer. The defence of the appellant was of total denial.

[5] Heard Shri Vinay Bhanushali, learned counsel for the appellant and Shri S.R. Agarkar, learned APP for the State.

[6] The prosecution case naturally depends on the evidence of PW-1 Rakesh Kanwade the victim. He has deposed that on 12.9.2009 he had gone to Sangamner. He returned from there on 13.9.2009. He reached Thane at around midnight. He wanted to go to his residence at Sawarkar Nagar in a rickshaw. At that time, one Indigo car came there. There were two persons in the car. The driver offered him lift till Nitin Company. They showed willingness to drop him there for Rs.10/-. He sat in the car. The other person, who was described as a 'slim person', sat besides the informant on the back seat. The car reached Cadbury junction. The informant entertained some doubt and, therefore, asked the driver to stop the car there. However, the car was taken in high speed beyond Nitin Company and it was driven towards Nashik. The 'slim person', who was sitting next to the informant, showed a knife to him. It was pointed to the chest of the informant. It was also kept on the right knee of the informant. He demanded payment of money that the informant possessed. The informant resisted. That person then gave a punch with an iron fighter on the informant's nose. According to the informant, he became semi-conscious. The car was stopped near a temple below the bridge. The person carrying knife then forcibly took away the informant's golden chain, bracelet, three golden rings, a mobile phone and Rs.2,000/-. The informant was pushed outside the car; and then both those persons went towards Kasarvadavali. The informant's shirt was stained with blood. He threw it in a dustbin. On 15.9.2009, he lodged his FIR with Rabodi police station. According to the first informant, because of the assault, he had sustained fracture of his neck. He was scared and, therefore, till the afternoon of 15.9.2009 he had not lodged the FIR. The FIR is produced on record and marked as Exhibit-62. The FIR describes the incident in similar manner as was deposed by him. It also describes the stolen property which included a mobile phone of Nokia company being Model No.5130 IMEI No.356944030516552 with a SIM-card. The FIR also mentions description of those two persons.

On 24.10.2009, the police called him to the office of Thane Crime Branch. They showed him golden ornaments and a mobile phone. He identified those. He received back his mobile phone and golden ornaments under the orders of the Court. On 9.12.2009, he was called for test identification parade. He identified the 'slim person' but that accused was not before the Court.

In the cross-examination, he has admitted that he had attended the court on 10-15 occasions for giving evidence. He also admitted that he had seen the accused in the Court and he had also admitted that he was shown the accused in the office of Thane Crime Branch for the first time. Thereafter he was cross-examined on the conduct of test identification parade.

[7] PW-7 Dr. Prashant Male has deposed that he had examined PW-1 on 15.9.2009 and he had found following two injuries:

(i) CLW on the right side chest below nipple, &

(ii) CLW on right babck.

The first injury was of the size 2 x 1 x 1 cm and other was of the size 2 x 2 x 1 cm.. The injuries were simple and they could have been caused by a sharp weapon. He admitted that there was a possibility of using any other object to cause these injuries.

[8] PW-5 Smt. Jyoti Wagh was the Naib Tahsildar who had conducted the test identification parade on 8.12.2009. She used twelve dummy persons provided by the jail authorities. Both the accused were asked to stand in the parade. According to her, PW-1 identified the present appellant but did not identify the other accused. She produced memorandum of panchnama of test identification at Exhibit-102.

This evidence will not be of any help to the prosecution in this particular case because PW-1 has admitted that the accused were shown to him for the first time in the office of the Crime Branch. Moreover, he has not identified the appellant before the Court. He has deposed that he had identified other accused in the test identification parade. He had not even deposed that he had identified the present appellant at the time of test identification parade. Therefore, the evidence of test identification and identification of the appellant by PW-1 is not sufficiently proved beyond reasonable doubt by the prosecution and, therefore, the evidence regarding the identification of the appellant will have to be ignored.

[9] PW-2 Sanjay Ghole was the pancha, in whose presence, the appellant had given memorandum statement pursuant to which the ornaments were recovered from a jeweller PW-4 Hiralal Jain. PW-2 has deposed that the appellant had made a statement showing willingness to produce those ornaments. He then led the police and the panchas to Madhuri Jewellers, Antop Hill, Wadala. A gold-chain and a bracelet were produced by the shop-keeper who informed that the appellant had come to his shop with a lady to sell these articles. The memorandum of the statement is produced on record at Exhibit-85 and the panchnama is produced at Exhibit-86.

[10] PW-4 the jeweller Hiralal Jain was examined on the same point and he has deposed that the appellant had come to his shop on 15.9.2009 to sell a golden chain and a bracelet. He was his old customer and, therefore, the jeweller purchased those articles for Rs.46,000/-. After about 20-22 days, the police officers came to his shop with the appellant and on that day the recovery was effected as was deposed by PW-2 Sanjay Ghole.

[11] PW-3 Ashok Satam was another pancha. In his presence the appellant showed willingness to produce the golden rings. The memorandum of this statement is produced on record at Exhibit-88. The panchnama carried out pursuant to that statement is produced on record at Exhibit-89. Those golden rings were recovered at the appellant's instance from his hut.

[12] PW-6 P.I. Ghosalkar is an important witness. He was the investigating officer. He has deposed that there were two offences registered at Rabodi police station i.e. C.R. No. I-163/2009 which is the present subject matter of this appeal and

the other offence registered vide C.R. No.I-160/2009. The modus operandi in both these offences was the same. In both these cases, the accused had given lift to the passengers in the night and had robbed them. The police, therefore, arranged to lay a trap. On 3.10.2009 accordingly the Indigo car was intercepted. It was driven by the appellant. There were two other persons in the car. All of them were searched in presence of the panchas. The appellant was having a steel fighter on his fingers. He was also carrying a mobile phone and cash amount. One knife was recovered from Mehtabali. The mobile phone belonging to the informant in this case i.e. in C.R. No.I-163/2009 was found in possession of the appellant. He has then deposed about recovery effected at the instance of the present appellant of the golden ornaments and rings from the jeweller and from his own house. He requested the Executive Magistrate to conduct test identification parade which was accordingly conducted. He obtained the injury certificate and then filed the charge-sheet.

In the cross-examination, he admitted that the articles were not produced before the Court during trial. They were returned to the complainant but no such panchnama was prepared or produced before the Court when the ornaments were returned to the complainant. He also admitted that the appellant was acquitted in connection with C.R. No.I-160/2009.

[13] Learned Judge recorded the statement of the appellant under Section 313 of Cr.P.C.. There, his only defence was that he was innocent and had not committed the offence. The trial Court relied on the evidence of the prosecution case and held that the case was proved beyond reasonable doubt and, therefore, convicted the appellant, as mentioned earlier.

[14] Learned counsel for the appellant submitted that the recovery evidence is doubtful. The PW-6 investigating officer as well as PW-1 have not deposed about the IMEI number of the mobile phone and, therefore, recovery of that mobile phone cannot be held against the appellant. He submitted that since admittedly the accused were shown to PW-1 in the Crime Branch office at the first instance, the test identification parade loses its significance. Moreover, the appellant has not been identified by PW-1 during the course of trial. PW-1 has not even deposed that he had identified the appellant during the test identification parade.

[15] He submitted that the medical evidence does not support the ocular evidence of PW-1 and there is clear exaggeration. It in fact falsifies the story of PW-1 and, therefore, benefit of doubt must go the appellant. Neither the ornaments nor the weapon nor the mobile phone was shown to the witness PW-1 in the court; and this lacuna in the prosecution case goes to the root of the matter.

[16] Learned APP, on the other hand, submitted that the evidence of recovery is not seriously challenged by the appellant in the cross-examination. The IMEI number in the FIR tallies with IMEI number mentioned in the arrest panchnama which is a significant factor. He submitted that slight exaggeration in describing the injury and

the incident will have to be ignored. He submitted that the test identification memo does show that the appellant was identified by PW-1 during that parade.

[17] I have considered these submissions. As far as PW-1 Rakesh Kanwade is concerned, there are some definite improvements and exaggeration in his evidence. He has deposed that a knife was put on the right side of chest and on his right knee. He was also punched on his nose. He has further explained that he had suffered fracture of his neck and a lot of blood was oozing out. All this is exaggeration as in the evidence of the doctor PW-7 Dr. Male there are only two injuries - one was on the back and other on the chest. Both these injuries were minor injuries. There was no fighter punch injury on the nose and there was no injury to his right knee. There, certainly, was no fracture of the neck. All these show that the first informant had highly exaggerated the incident. And, therefore, use of knife or fighter punch or causing hurt to the complainant by the appellant is extremely doubtful and to that extent the appellant deserves to be given benefit of doubt.

[18] As discussed earlier, the evidence regarding identification of the appellant is also doubtful. Therefore, even that circumstance will have to be left out of consideration. The only main consideration which is in favour of the prosecution beyond reasonable doubt is that of recovery evidence. The golden ornaments which were stolen from PW-1 were sold by the appellant to a jeweller on that very day i.e. on 15.9.2009. There is no reason to disbelieve the evidence of PW-4 Hiralal Jain. A bracelet and a golden-chain were recovered from him, which were sold by the appellant to him. Those ornaments were not produced during trial. Those articles were returned to PW-1 during the investigation phase itself. There is no serious challenge in the cross-examination about the identity of those stolen articles. Similarly PW-1's golden rings were also recovered at the instance of the appellant from his own house. Even that evidence has remained unchallenged.

[19] PW-1 has also not produced the blood-stained shirt, which according to him was stained with blood during the offence because of assault on him. This also is a circumstance in favour of the appellant.

[20] What weighs in faovur of the prosecution in particular is the recovery of mobile phone. The first informant at the very first instance while lodging the FIR had given the IMEI number of his mobile phone. When the appellant was arrested on 3.10.2009 a mobile phone was recovered from his person bearing the same IMEI number. This is seriously an incriminating circumstance against the appellant. The appellant was found in a Indigo car and the modus operandi was the same. This particular evidence also has remained unchallenged and, therefore, the prosecution has proved this recovery evidence against the appellant beyond reasonable doubt.

[21] Thus, from the above discussion it is established that on that night PW-1 was robbed of his articles inside the car. The appellant was driving the car according to the prosecution, though, identification is not established. But the recovery of articles and the mobile phone connects the appellant with the crime.

[22] The next question is whether the offence would fall within the meaning of Section 397 of IPC. Section 397 of IPC reads thus:

> **"397. Robbery, or dacoity, with attempt to cause death or grievous hurt.** - If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years."

In this case, as discussed earlier, to that extent PW-1 has exaggerated his case and it will not be safe to hold that either of the accused had caused or attempted to cause grievous hurt or had even used a deadly weapon because the doctor has opined that those two minor injuries could have been caused by any other means. Therefore, the ingredients of Section 397 of IPC are not fulfilled in this case. Therefore, at the highest the offence would fall within the provisions of Section 392 of IPC.

[23] The appellant is already in custody since the date of the impugned judgment and order i.e. from 17.1.2019. The appellant is in custody continuously after his conviction. During trial he was in custody from 3.10.2009 to 5.5.2010, as pointed out by learned APP. Thus, the appellant was in custody for more than four years. Therefore, interest of justice would meet if the sentence imposed on him is reduced to a period of four years under Section 392 of IPC.

[24] Hence, the following order:

ORDER

i. The appeal is partly allowed.

ii. The conviction and sentence of the appellant recorded under Section 397 read with 34 of IPC is set aside.

iii. The conviction of the appellant under Section 392 read with 34 of IPC is maintained. However, the sentence imposed on him for that offence is modified and instead of seven years, the appellant is sentenced to suffer RI for four years and to pay fine of Rs.1,000/- (Rupees One Thousand Only) and in default to suffer RI for three months.

iv. The appellant is entitled to get set-off under Section 428 of Cr.P.C. for the period he has undergone in detention during investigation and trial.

v. The articles returned to PW-1 can be retained by him.

vi. Criminal Appeal is disposed of accordingly
