THE HIGH COURT OF ORISSA : CUTTACK

No.XI-16/2023/15262(30)**/ Dated**26/09/2023

From

Pratap Kumar Patra,
Registrar General

To

The District & Sessions Judge,..... (All)

Sub:- **Judgment dated 4th September, 2023 passed in Criminal Appeal Nos.1271-1272 of 2018 (Munna Pandey Vrs. State of Bihar) by Hon'ble the Supreme Court of India.**

Sir,

I am directed to forward herewith a copy of the judgment dated 4th September, 2023 passed by Hon'ble the Supreme Court of India in Criminal Appeal Nos.1271-1272 of 2018 (Munna Pandey Vrs. State of Bihar) for your information and request you to circulate the same amongst all the Trial Courts functioning within your jurisdiction for their information and strict adherence.

Yours faithfully,

26/09/2023

REGISTRAR GENERAL

Encl:- As above

2023INSC793

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1271-1272 OF 2018

MUNNA PANDEY **...APPELLANT**

VERSUS

STATE OF BIHAR **...RESPONDENT**

J U D G M E N T

J.B. PARDIWALA, J. :

"A fair trial is one in which the rules of evidence are honored, the accused has competent counsel, and the judge enforces the proper court room procedures - a trial in which every assumption can be challenged."

— Harry Browne

1. These appeals are at the instance of a convict accused sentenced to death for the offence of rape and murder of a 10-year old girl named "X" and are directed against a common

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Date: 2023.09.04 17:09:27 IST
Reason:

judgment and order passed by the High Court of Judicature at Patna dated 10.04.2018 in the Death Reference No. 4 of 2017 with Criminal Appeal (DB) No. 358 of 2017 by which the High Court dismissed the Criminal Appeal filed by the appellant convict herein and thereby confirmed the judgment of conviction and sentence of death passed by the Additional Sessions Judge-I, Bhagalpur in the Sessions Trial No. 581 of 2015 for the offence punishable under Sections 302 and 376 resply of the Indian Penal Code (for short, 'IPC') and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act').

2. Before we proceed to give a fair idea as regards the prosecution case, it has to be mentioned that the High Court had before it not only the appeal filed by the accused but also a reference made by the Sessions Court for confirmation of the capital sentence under Section 366 of the Code of Criminal Procedure, 1973 (CrPC). Time and again this Court has pointed out that on a reference for confirmation of the sentence of death, the High Court is under an obligation to proceed in accordance with the provisions of Sections 367 and 368 resply of the CrPC. Under these Sections the High Court must not only see whether the order passed by the Sessions Court is correct but it is under an obligation to examine the entire evidence for itself, apart from

and independently of the Sessions Court's appraisal and assessment of that evidence. From the long line of decisions which have taken this view it would be enough to refer to the decisions in ***Jumman v. State of Punjab***, AIR 1957 SC 469; ***Rama Shankar Singh @ Ram Shankar Roy v. State of West Bengal***, AIR 1962 SC 1239; and ***Bhupendra Singh v. State of Punjab***, AIR 1968 SC 1438.

FACTS OF THE CASE

3. The facts of the case as recorded by the High Court in its impugned judgment are stated hereinbelow:-

> *"3. Short fact of the case is that on 01.06.2015 at about 12:45 PM, fardbeyan of Kiran Devi (P.W.2) wife of Arvind Sah and mother of the victim was recorded by Sub-Inspector of Police-cum-S.H.O. Smt. Rita Kumari of Sabour Police Station. The fardbeyan was recorded in the house of Nawal Kishore Ojha @ Fuchan Pandey. Nawal Kishore Ojha @ Fuchan Pandey is the own brother of the appellant and in the said house, there were two rooms and one room, from where dead body was recovered, was in possession of the appellant. In the fardbeyan, the informant/P.W.2 stated that on preceding date i.e. 31.05.2015, she was in the house of her late sister Shakila Devi in the village Jamunia Parbatta. On the same date at about 12:00 noon, her elder daughter namely Priya Kumari (P.W.3) telephonically informed her that her younger sister (victim) was missing. Thereafter, she immediately moved for Sabour. After arrival in her house in village Sabour, her elder daughter Priya informed her that the victim had gone to watch television in the house of Munna Pandey (appellant). When she did not return till 11:00 AM, only thereafter, she (Priya) informed the informant. While the informant went to the house of Munna Pandey (appellant) in search of her daughter, she found that the house of Munna Pandey*

(appellant) was locked. Thereafter, with some villagers, the informant vigorously searched her daughter, but she (victim) could not be traced. When Munna Pandey (appellant) was asked to open the lock, he told that key was not with him. Thereafter, she telephoned Fuchan Pandey (brother of appellant Munna Pandey), who at the relevant time was staying in his in-laws' house. On 01-06-2015, Nawal Kishore Ojha @ Fuchan Pandey at about 12:00 noon came to his house and opened the lock of his room. In the said room, Pritam Tiwary son of Dilip Tiwary, resident of village Shobhapur, P.S. Rajmahal, District – Sahebganj had concealed himself. The lock of the room was opened from the outside. When lock of the room of Munna Pandey (appellant) was opened, dead body of the daughter of the informant was found beneath the bed. The informant claimed that Pritam Tiwary and Munna Pandey (appellant) both after committing rape with her 11 years old daughter by way of throttling had killed her and the dead body was concealed in his room. The fardbeyan was read over to the informant and after finding it correct, she, in presence of Babloo Sao (P.W.1), son of informant's sister of village Jamunia, P.S. Parbatta, Naugachia, put her signature."

4. On the basis of the complaint (*Fardbeyan*) lodged by the mother of the victim PW 2 – Kiran Devi, the police registered a formal First Information Report (FIR) on the very same day i.e. on 01.06.2015 at 3.00 pm at the Sabour Police Station as Case No. 106 of 2015 for the offence punishable under Sections 376(D), 302, 201 read with Section 34 of the IPC and Section 4 of the POCSO Act against the appellant herein and co-accused Pritam Tiwari (brother-in-law of the elder brother of the appellant namely Naval Kishore Ojha @ Fuchan Pandey).

5. On conclusion of the investigation, charge sheet was filed against the appellant herein and the co-accused named above. As the offence was exclusively trialable by a Sessions Judge, the case stood committed by the Magistrate to the Court of Sessions under the provisions of Section 209 of the CrPC and upon committal, the same came to be registered as the Sessions Trial No. 581 of 2015 in the Court of the First Additional District and Sessions Judge, Bhagalpur.

6. The Trial Court framed charge vide order dated 04.11.2015 against the appellant and the co-accused for the offence punishable under Sections 376(2)(g), 302 read with Section 34, 120B of the IPC and Section 4 of the POCSO Act.

7. After framing of the charge, the co-accused namely Pritam Tiwari raised the plea of being a juvenile. In such circumstances, his case was separated vide order dated 03.02.2016 passed by the Trial Court and was referred to the Juvenile Justice Board, Bhagalpur. The Trial Court proceeded only against the appellant convict herein.

8. In the course of the trial, the prosecution led the following oral evidence:-

(a) PW 1 Babloo Saw is the cousin brother of the deceased and son of sister of the First Informant at

whose place, the informant had gone on 31.05.2015. This witness proved his signature on the *fardbeyan*, which was marked as Ext. 1 and he also proved the signature of Kiran Devi/P.W.2 (informant) of the case, which was marked as Ext. 1/1.

(b) PW 2 Kiran Devi is the informant and mother of the deceased.

(c) PW 3 Priya Kumari is the elder daughter of the informant and also the elder sister of the deceased.

(d) PW 4 Dr. Sandeep Lal, who at the relevant time, was posted in the Jawaharlal Nehru Medical College and Hospital, Bhagalpur conducted the post-mortem examination on the dead body of the deceased.

(e) PW 5 Rita Kumari is the investigating officer and she recorded the *fardbeyan* of the informant.

(f) PW 6 Vijay Prasad Sah is a co-villager and he deposed that in his presence, the dead body was recovered from the room of the appellant.

9. Upon conclusion of recording of the oral evidence, the further statement of the appellant convict was recorded by the

Trial Court under Section 313 of the CrPC. The appellant convict stated as under:-

> *"I am innocent. I have been falsely implicated. I was not living in the house from where the dead body was recovered. I was residing in a rented house situated in Mali Tola. I executed a deed in favour of my brother Fuchan Pandey relating to an parental house situated at Thatheri Tola and my brother Fuchan Pandey was living in the house from where the dead body was recovered."*

10. Upon appreciation of the oral and documentary evidence on record, the Trial Court recorded a finding that the appellant herein was guilty of the offence he was charged with. The Trial Court treated the case as one falling under the category of "rarest of the rare cases" and sentenced the appellant to death.

11. The appellant herein being aggrieved with the judgment and order of conviction and capital sentence passed by the Trial Court went in appeal before the High Court. The High Court dismissed the appeal filed by the appellant convict and confirmed the capital sentence imposed by the Trial Court in the Death Reference No. 4 of 2017.

12. In such circumstances referred to above, the appellant convict is here before this Court with the present appeals.

SUBMISSIONS OF THE APPELLANT

13. Dr. Aditya Sondhi, the learned senior counsel appearing for the appellant convict, made the following submissions:-

> ***"1 . Case purely of circumstantial evidence***
> *1.1 The case against the Appellant, Munna Pandey is based only on the last seen evidence and the conduct of the Appellant and hence entirely circumstantial in nature. It is a well established principle settled by this Hon'ble Court that in cases of circumstantial evidence, the circumstances against the accused ought to be conclusive in nature and 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.*
>
> ***2. Failure to conduct medical examination u/s 53A CrPC is fatal to the case of the prosecution.***
> *2.1 Medical examination of the accused u/s 53A of CrPC is required in cases of rape. Even though the Appellant was taken to the hospital for the treatment of his injuries incurred during the time of arrest, he was not subjected to any such medical examination where his samples were collected for the purpose of DNA examination.*
> *2.2 In cases of rape where the victim is dead and the offence is sought to be established only by circumstantial evidence, medical evidence assumes great importance. The failure of the prosecution to subject the appellant to medical examination is fatal to the prosecution's case. (Chotkau v State of Uttar Pradesh 2022 SCCOnline SC 1313 para 81,82)*
> *2.3 If no DNA examination is conducted and if no reasonable explanation is provided by the prosecution for not conducting a DNA examination, adverse consequences would fall on the prosecution. Moreover, if reasonable grounds for believing that an examination of the accused will not afford evidence as to the commission of an offence, it is quite unlikely that a charge-sheet would even be filed against the accused for committing an offence of rape. (Rajendra Prahladrao Wasnik v State*

of Maharashtra (2019) 12 SCC 495 para49-57; Prakash Nishad @Kewat v State of Maharashtra 2023 SCCOnline SC 666 para 57,58.59)

3. Prosecution did not place on record the exculpatory evidence against the Appellant

3.1 The underwear of the Appellant was seized by the police on 01.06.2023 at 11:45 pm ***[Ex 6 (Seizure memo)]****, and the underwear of the deceased was seized on 01.06.2015 at 11:00 pm* ***[Ex 6/1 (Seizure memo)].*** *However, the prosecution failed to prove if they were sent to the Forensic Science Laboratory for examination.*

3.2 As per the order dated 29.06.2015, a letter on behalf of the officer in-charge of PS Sabour was filed before the Ld Trial Court seeking permission to send the articles to FSL Patna for examination. However PW5, Reeta Kumari, the IO in her cross examination before the Trial Court on 24.10.2016admitted that she followed the instructions of her seniorpolice officer and did not receive any FSL report. ***[PW5 para 8]***

3.3 Further the vaginal swab of the deceased collected at the time of post-mortem was sent by PW 4, Dr Sandeep Lal to the pathology lab for examination. ***[Ex 2 (Post-mortem report)].*** *However, the pathological report which states that 'spermatozoa not found' was not produced by the prosecution as evidenceat the time of trial.*

4. Last seen evidence not conclusively proved against the Appellant

4.1 All the witnesses in their 161 statement stated that the victim was last seen with Pritam Tiwari. However, PW1, PW2 and PW3 in their Court testimony, which was recorded 3 months after Pritam Tiwari was declared a Juvenile by the Juvenile Justice Board ***[Ex A (order of the JJB)]*** *improved their statement and said that it was Munna Pandey and not Pritam Tiwari. However, this was not corroborated by the independent witness Vijay Sah (PW6). The said improvement on the part of the interested witnesses could be motivated by the fact that Pritam Tiwari (who was caught red handed) was now only going to be subjected to a lenient punishment under the Juvenile Justice Act, 2000 and therefore the Appellant alone remained accused in the subject case.*

4.2 There are material contradictions in PW3's court testimony and her 161 statement. In her 161 statement she states that Pritam Tiwari came to her house at 09:00 am and took the victim along with him to watch TV and after 2 hours she saw Pritam Tiwari locking thegrill of the verandah. Whereas in her Court testimony, she states that Munna Pandey was last seen with the victim. PW3 was confronted with this particular contradiction by the defense counsel during her cross- examination but PW3 does not provide any reason for the said contradiction.

4.3 PW2 in her Fardbeyan ***[Ex 1]*** *which was recorded right after the victim's body was recovered does not mention anything about the Appellant in the context of a last seen evidence but improves her testimony in Court to state that the Appellant was last seen with the victim. PW2 was confronted with this improvement in her cross examination, where she merely stated that she had told that Munna Pandey had spoken to her daughter PW3 and that she did not state in her fardbeyan that PW3 saw Munna Pandey locking the door. This Hon'ble Court has held that especially in cases involving heinous crimes, where there is inadequate cross-examination by the defense counsel, the Trial Courts cannot be a mute spectator and they have the power and duty under Section 165 of the Evidence Act,1872 to discover relevant facts when witnesses are not properly cross-examined.(Rahul v State of NCT of Delhi (2023) 1 SCC 83 para 42-45)*

4.4 As per the case of the prosecution, on 31.05.2015 at 09:00 when the Appellant came to the house of PW3 to take the victim, the following persons were in the house - the victim, PW3 and Kushboo Devi (her aunt). However Kushboo Devi, the aunt was not examined as a last seen witness but only PW3 (a minor) was examined by the prosecution to prove its case.

4.5 In cases where the child witness's testimony regarding last seen evidence is inconsistent and when the materialwitnesses are not examined by the prosecution, the Court has rightly disbelieved the last seen evidence. (Digamber Vaishnav v State of Chhatisgarh (2019) 4 SCC 522 para 40-43)

5. Conduct of the accused at the relevant time

5.1 Frequent quarrels used to take place between Naval Kishore Ojha @ Fucchan Pandey and Munna Pandey and hence they have been residing separately. Munna Pandey was residing separately in a different house in Mali Tola. Fuchhan Pandey handed over the key to his house to Pritam Tiwari and Pritam Tiwari was residing in the house of FucchanPandey for the past 2 to 3 months. Further, Munna Pandey was called from elsewhere by the villagers every time, indicating that he did not reside in the said house.

5.2 As per the spot map and the spot mahazar, the building consists of an outer iron grill door, a verandah, 1 room in the north and 1 in the south. The room in the north belongs to Fuchhan Pandey and the room in the south belongs to Munna Pandey. Pritam was foundinside the room of Fucchan Pandey and the victim was found in the room of Munna Pandey. The room of Munna Pandey also had 2 windows without any iron grill but only an outer wooden panel which was open. One window opened to the verandah and the otherwindow opened towards the main road. The TV was in the room of Fucchan Pandey where Pritam was admittedly residing.

5.3 The lock of the outer iron grill was broken open by the villagers. The room of Fuchhan Pandey, where Pritam Tiwari was present waslocked from inside. The door of Munna Pandey's room was opened by the keys brought by Fuchhan Pandey on 01.06.2015 ***[Ex 1].***

5.4 As per the case of the prosecution, the door of Munna Pandey's room was opened by the villagers after they snatched the keys from Munna Pandey although he claimed that he did not have the keys to the house on the previous day. As per the prosecution, this raised serious doubts regarding his conduct. It is pertinent to note that this suspicious conduct is not corroborated by the independent witness PW6. Further, thevillagers Manoj, Anil and Murrai who allegedly snatched the keys from Munna Pandey were not examined by the prosecution. It is pertinent to note that Munna Pandey did not flee from the village overnight or on the next day when the dead body of the victim was recovered. Further this particular circumstance that the Appellant refused to give the keys to the villagers and threatened them with a case of dacoity was not put to him during his 313 statement. This Hon'ble Court has repeatedly held that the circumstances

not put to the accused in his313 examination cannot be relied upon.(Sharad Birdichand Sarda v State of Maharashtra (1984) 4 SCC 116 para 145)

6. Alleged Confession of Pritam Tiwari implicating Munna Pandey cannot be relied upon

6.1 As per the prosecution, right after Pritam Tiwari was found in the house of Fucchan Pandey by the villagers; he confessed to his crime and stated that he along with Munna Pandey committed the offence against the deceased. However, the said confession was made after he was beaten by the police officers and was made in the presence of police officers. Due to the bar u/s 26 of the Evidence Act, the said confession cannot be relied upon the Courts. Further this alleged confession is not corroborated by the testimony of the independent witness Vijay Sah (PW6). Pritam Tiwari was also not deposed as a witness in this regard.

7. 313 examination of the Appellant was not conducted in a proper manner

7.1 Many crucial circumstances were not put to the Appellant in his 313 examination, though were considered as incriminating for the purpose of holding the appellant guilty of the offence. Those are as under:-

- *The circumstance of PW3 seeing the Appellant lock the grill and the door of his room*
- *The circumstance that the Appellant gave false information to PW3 that the victim had already left after watching TV*
- *The circumstance of the accused refusing to open the door as he did not have the key*
- *The circumstance of the Appellant giving the keysto the villagers after he was assaulted*
- *The circumstance of the alleged extra-judicial confession made by the co-accused Pritam Tiwari implicating the Appellant*

7.2 This Hon'ble Court has consistently held that the circumstances not put to the Appellant cannot be relied upon to convict an accused

8. Flaws in the judgment of the Trial Court and the High Court

8.1 The Trial Court in its judgment makes only a brief discussion of the evidence and erroneously records that Pritam Tiwari and Munna Pandey were found inside the house.

8.2 The High of Judicature at Patna, in the impugned judgment ***[at para 9];*** *observes that it is prima facie satisfied that the Trial Court has not committed any error in both convicting the Appellant and sentencing him to death. In its said prima facie opinion on the matter it heavily relies on the deposition of interested witnesses PW1, PW2 and PW3 all of whom improved their versions. The High Court has disregarded the evidence of the independent witness and also the absence of material evidence, compliance with section 53A requirements, the absence of FSL report and pathological report. Hence the said judgment suffers from perversity and is contrary to the law*

9. Mitigation

9.1 Without prejudice to the above submissions on merits, the Courts below have incorrectly sentenced the Appellant to undergo the sentence of death.

9.2 The Appellant has filed a mitigation report along with the affidavits of the family members and the villagers before this Hon'ble Court vide IA No 172211 of 2022. The following are the mitigating circumstances of the Appellant:

(i) *No criminal antecedents;*

(ii) Satisfactory jail conduct as certified by the Superintendent of Shahid Jubba Sahni Central Jail, Bhagalpur;

(iii) *Family impact - since his arrest, his family including his wife Sangeeta and his 2 sons - Krishna (18 years at the time of incident)and Balram (12 years at the time of incident) were ostracized from the village and they have been residing with Sangeeta's parents in village Panchkathiya, Bihar*

(iv) *Continued family ties*

(v) *Strong community links - Munna Pandey's wife Sangeeta was elected as the ward councilor in 2010. As per the affidavit of Mohd. Aktar @ Pairu Miyan (resident of village Sabour) the Appellant worked actively for the community alongside his wife. He was considered resourceful and many villagers approached him with their problems in the village.*

(vi) *Age of the Appellant - he is currently 56 years old*

(vii) *Strong probability of reformation"*

(Emphasis supplied)

14. In such circumstances, referred to above, the learned counsel prayed that there being merit in his appeals, the same be allowed and the judgment and order of conviction and capital sentence be set aside and the appellant may be acquitted of all the charges.

SUBMISSIONS ON BEHALF OF THE PROSECUTION

15. On the other hand, these appeals were vehemently opposed by Mr. Samir Ali Khan, the learned counsel appearing on behalf of the State. He submitted that no error, not to speak of any error of law, could be said to have been committed by the Courts below in holding the appellant guilty of the offence charged with and treating the case to be one falling under the category of "rarest of the rare cases".

16. The learned counsel laid much stress on the fact that it was the appellant who visited the house of the victim at 9 o'clock in the morning of 31.05.2015 and lured the victim to come to his house to watch TV. It was argued that all the witnesses have deposed that the victim went to the house of the appellant in the morning on 31.05.2015 to watch TV and thereafter she went missing. He submitted that the sister of the victim namely Priya Kumari (PW 3) immediately informed her mother Kiran Devi (PW 2) who at the relevant point of time was at the house of her sister at a different village. No sooner the mother of the victim came to know that her daughter was missing, then she immediately rushed back to her house and started enquiring as regards the whereabouts of her minor daughter. It was argued that the victim could be said to have been last seen with the appellant. It was also argued that when the house was opened, the dead body of the victim was recovered beneath a cot and the room from where the dead body was recovered was of the ownership of the appellant. He submitted that it was for the appellant to explain, how the dead body of the victim was recovered from the room of his house over which he had full control. It was also argued that the PW 3 Priya Kumari in her deposition stated that she had seen the appellant locking the door of his room. This is suggestive of the fact that the keys of the room were with the

appellant. The learned counsel submitted that the facts established are consistent only with the hypothesis of the guilt of the appellant convict and are of a conclusive nature and tendency. He submitted that the chain of evidence is so complete that it does not leave any reasonable ground for the conclusion consistent with the innocence of the accused.

17. In such circumstances referred to above, the learned counsel prayed that there being no merit in these appeals, those may be dismissed.

ANALYSIS

18. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned judgment?

19. The case on hand is one of a very gruesome rape and murder of a 10-year old girl. It is the case of the prosecution that on the fateful day the victim had gone to the house of the appellant to watch TV. According to the prosecution, it is the appellant who came to the house of the victim and persuaded her to come at his house to watch TV. The elder sister of the victim, PW 3 Priya Kumari was at home when her younger sister left for the house of the appellant to watch TV. When the younger

sister did not come back to her house, Priya Kumari started searching for her and as her efforts failed to know the whereabouts of her younger sister, she immediately informed her mother Kiran Devi (the first informant). At the relevant time, Kiran Devi was at the house of her elder sister namely Shakila Devi at Jamunia Parbatta. The PW1 Babloo Saw is the son of Shakila Devi. The PW 2 Kiran Devi happens to be the *mousi* of PW 1 Babloo Saw. It is the case of the prosecution that while Kiran Devi was at the house of her elder sister Shakila Devi, she was informed by Priya Kumari on telephone that the victim had gone to the house of the appellant in the morning to watch TV and thereafter she went missing. It was PW 1 Babloo Saw who brought Kiran Devi on his motorcycle back to her village i.e. her house.

20. We shall now look into the findings recorded by the High Court in its impugned judgment. To put it in other words, the circumstances relied upon by the High Court and the line of reasoning to hold the appellant herein guilty of the alleged crime is as follows:-

> *"9 . … To start with, it would be firstly necessary to examine the first hand information, which has come from the mouth of elder daughter of the informant i.e. P.W.3 namely Priya Kumari. She was the main witness, who had seen that appellant had persuaded and*

enticed the victim to go with him on the pretext of witnessing T.V. serial.

10. … Munna Pandey (appellant) carried the victim, at that time, it was about 9:00 AM (morning). After preparing food, she went to call the victim to the house of Munna Pandey (appellant), then she saw that Munna Pandey (appellant) was putting lock on his door. She saw that Munna Pandey (appellant), after putting lock on his room, was coming out. When she reached near the gate, till that time, Munna Pandey (appellant), after putting lock on gate also, was trying to move, then she asked Munna Pandey as to where is the victim, Munna Pandey (appellant) replied that she, after witnessing T.V., had already gone. P.W.3 thereafter returned back to her house and tried to search nearby. When she did not find the victim then she made telephone call to her mother (P.W.2, Kiran Devi) and informed her. Her mother on the same date came back with her (Priya) cousin brother Babloo (P.W.1). Again, this witness narrated everything to her mother. Thereafter, she, her mother, aunt and cousin brother Babloo, all jointly started to search, but the victim was not traced, then they went to the house of Munna Pandey (appellant), where it was noticed that there was lock on the room of Munna Pandey (appellant). Outer gate was also locked. Thereafter, she inquired from other villagers, on which, villagers called Munna Pandey, then he came. The appellant was inquired by villagers and her mother (P.W.2) also regarding the victim. The appellant said that he was not having the key of the room. After noticing this fact, the villagers said that if he was not having key, they will break the lock. On which, the appellant threatened them for implicating in dacoity case, if lock is broken. Munna Pandey (appellant) also stated that Pritam (co-accused) was also not being located and he said that it appears that he had gone somewhere with the victim. On the strength of such statement of Munna Pandey (appellant), they started to search Pritam also, however; he could not be traced and thereafter, they returned back to their house and again they went to the house of Munna Pandey (appellant), where she noticed that some light was coming from inside the house of Fuchan Pandey. Thereafter, the villagers raised some suspicion, as if, in the room, there was someone. Munna Pandey (appellant) was again asked to break the lock,

then he said that key was lying with Fuchan Pandey. Villagers thereafter telephoned Fuchan, at that very time, he was in his in-laws' house. Fuchan over telephone informed that in the morning, he would come. Since by 8:00 AM, Fuchan did not arrive, P.W.3 with her mother went to Sabour Police Station, however; in the meanwhile, Fuchan reached to his house. Villagers by using force also pushed Munna and carried him to the said place. Thereafter, police also arrived there. Lock of outer gate was broken. Thereafter, the key of the room was provided by Munna Pandey (appellant). From the room of Fuchan, Pritam Tiwary came out. In presence of the Police and villagers, Pritam was inquired as to where was the victim, then he explained that victim was in the room of Munna Pandey (appellant). Pritam also said that he and Munna Pandey both had jointly raped the victim and thereafter, killed her. Dead body of the victim was found beneath the bed of Munna Pandey (appellant). Her body was undressed. Her urinal portion was swollen and blood had come out. She had also dispersed her waste (potty) and it was also swollen. Police carried the dead body. She claimed to identify both accused persons, which includes appellant. In cross-examination in paragraph – 2, she stated that her father was living in Gujarat. She further stated that Fuchan Pandey is also known as Nawal Kishore Ojha. In paragraph – 7 of her cross-examination, she claimed that she had seen television in the room, where there was a bed, almirah including fan. In paragraph – 8, she further stated that she was visiting the said room and stated that Munna Pandey (appellant) was her neighbour. In paragraph – 9, she explained that in search of the victim, they had gone to several places including block, chowk, station Sabour etc. In paragraph 12, she stated that Fuchan Pandey and Munna Pandey (appellant) were the full brothers and both brothers were having one room each in their share. She stated in paragraph 12 that Munna Pandey (appellant) was virtually residing somewhere else and usually he was visiting to his room (place of occurrence). She further stated that she was not knowing about the rented house of Munna Pandey (appellant). Again, in paragraph 12 itself, she deposed that earlier there was no complaint against Munna Pandey (appellant). It is necessary to indicate that there was no complaint against the appellant prior to the

occurrence, which suggests that it was not a case of false implication due to any old animosity. Of course, her attention to her previous statement was drawn in paragraph 13 of her cross-examination, but while the investigating officer was being examined, no contradiction was drawn and as such, there is no need to take note of such so called minor inconsistencies. She denied the suggestion that she had given false evidence and falsely implicated the appellant. On examination of entire evidence of P.W.3, it is evident that though this witness was cross-examined at length, nothing could be extracted to create any doubt on her evidence.

11. … Munna Pandey (appellant) was also called by villagers. When the villagers asked Fuchan to open lock, Fuchan replied that he was not having key. Villagers thereafter started to assault Munna Pandey and asked him to break the lock. When villagers broke one of the lock, then Munna Pandey (appellant) took out the key and from that key, lock of Fuchan's door was opened, however; the room was closed from inside. When the door was pushed, it was opened by Pritam and he concealed himself. All villagers entered into the house. Police also arrived. Pritam was apprehended. When Pritam was being assaulted, police had arrived there. Lock of room of Munna was also opened by the villagers. From the room of Munna Pandey (appellant), dead body of the victim was recovered. Age of victim was 11 years old and dead body was kept beneath the bed and police took out the dead body from beneath the bed. The informant started crying. She further stated that the cloth of her daughter from lower portion was removed. She noticed that urinal portion of her daughter was ruptured and she also noticed potty there. She stated that the anus was also ruptured. The face was swollen and on cheek also, there was sign of injury. Villagers thereafter started to assault Munna, Pritam and Fuchan. Pritam, in presence of the Police, stated that he and Munna Pandey both jointly had committed the crime. This witness stated that her fardbeyan was recorded by the police at the place of occurrence itself and she identified her signature as well as signature of Babloo (P.W.1) on the fardbeyan. Signature was identified as Ext. 1/1. she claimed to identify Pritam and Munna Pandey (appellant). At the time of cross-examination, it was noticed by the Trial Judge that this witness was

very much nervous and also she was repeatedly weeping and this was the reason that cross-examination on the date i.e. 21.06.2016 was deferred. This reflects regarding the agony suffered by the mother of the victim. In paragraph 8 of her cross-examination, she stated that Priya (P.W.3) had informed on telephone that the victim was traceless. She further deposed in paragraph - 8 of her cross-examination that family members of the informant were in visiting term with Munna Pandey and he was also visiting to the house of the informant. In paragraph -10 of her cross-examination, she stated that she was not knowing anything about the criminal nature of the appellant. She stated that the appellant was her neighbour and this was the reason regarding their conversance. In paragraph - 11 of her cross-examination, she stated that the room, in which, Pritam was present was opened. The lock of room of Munna Pandey (appellant) was opened. Munna Pandey (appellant) and Fuchan Pandey were residing separately. One room was of Fuchan and one room was of Munna Pandey (appellant). She clarified in paragraph - 12 that 10-15 days prior to the occurrence, Fuchan had already gone to his in-laws' house situated at village Shobhapur. In paragraph – 17 of her cross-examination, she reiterated that dead body of her victim daughter was found in the room of Munna Pandey, whereas, Pritam Tiwary had concealed himself in the room of Fuchan. In paragraph 19 and 20 of her cross-examination, P.W.2 denied the suggestion that lock of two rooms were opened by Fuchan Pandey and denied the suggestion that lock of the room of the Munna Pandey (appellant) was also opened by Fuchan Pandey. In paragraph - 23 of her cross-examination, she said that she may not say exact date of recording fardbeyan, however; she said that she can say the day on which it was recorded. She stated that Rita Madam i.e. P.W.5 had recorded fardbeyan and it was read over to her, however; she was not recollecting exactly what was the time. In paragraph 26 and 27 of her cross-examination, she stated that after arrival of Fuchan, when he denied regarding possession of the key, then the villagers started assaulting Munna Pandey (appellant). She stated that Pritam was apprehended by Vijay (P.W.6) Babloo (P.W.1) and other villagers and they also slapped Pritam. Again in paragraph - 28 of her cross-

examination, she stated that the dead body of her daughter was found in the house of Munna Pandey (appellant). On examination of her entire evidence, including cross-examination, it is evident that every fact relating to the occurrence was reiterated in the cross examination, but nothing could be doubted on her evidence.

xxx xxx xxx

16. On examination of entire evidence, it is established that the learned Trial Judge has rightly held the appellant guilty for commission of offence under Sections 302 and 376 of the Indian Penal Code. The learned Trial Judge, after convicting the appellant by its judgment dated 02.02.2017, deferred the date of sentence and after reasonable time, on 23.02.2017, the learned Trial Judge, after hearing both the parties and balancing the aggravating and mitigating circumstances, had come to the conclusion that it was a fit case for imposing death sentence and thereafter, death sentence was imposed and it was referred to this Court under Section 366 of the Cr.P.C. for its confirmation.

17. The evidence of P.W.3 is very much specific that on the date of occurrence in the morning, this appellant had reached the house of the informant, whereas, at that very time, P.W.3 was preparing food. In her presence, this appellant asked, rather lured the victim to accompany him for witnessing T.V. programme inside his house. At first instance, P.W.3, elder sister of the victim, asked that she can go only after taking meal, but that too was prevented by the appellant and he (appellant) insisted and only thereafter, the victim, who was aged about 11 years, had gone with the appellant in the garb of witnessing T.V. programme in his house. In the evidence of P.W.2 informant/mother of the victim, this fact has come that appellant was neighbour of the informant and they were on visiting term. Meaning thereby that at the time, when the appellant had called the victim, there was nothing in the mind of the elder sister that her younger sister aged about 11 years will be raped by the appellant, who obviously on the date of occurrence was neither young nor very old. From the judgment of conviction and sentence, it appears that his (appellant) age was assessed as 50 years. Meaning thereby that beyond stretch of imagination, the elder

sister was not having any apprehension that her minor sister can be raped by a person, who was neighbour and aged about approaching 50 years. This was the reason that victim was allowed to move with the appellant. The victim, who was aged about 11 years, was also oblivious of the fact that as to what was occurring in the mind of the appellant. After she was carried to the room and within few hours, when P.W.3 (elder sister of the victim) went to the house of the appellant, she noticed that this appellant after locking the door was coming out. This was not the end, even on inquiry, this appellant gave false declaration that victim had already left after witnessing T.V. programme. Again the criminal mind of the appellant was operating and this was the reason that even though, he had already committed rape and murder of 11 years old girl and concealed the dead body inside his room, he gave false information to the elder sister of the victim (P.W.3). Since the victim could not be traced by P.W.3 (Priya), the P.W.3 who was aged about 15-16 years old, and this was the reason that she was not in a position to take any further decision and she immediately ranged her mother (informant), who had gone to village Jamunia, which was about 22 km. away from the village Sabour. She informed her mother regarding missing of the victim and she also explained regarding other circumstances, which were sufficient to raise suspicion on the appellant. Thereafter, the informant from Jamunia came on a motorcycle with son of her late sister P.W.1 (Babloo Saw) and all of them again went to the house of the appellant and this time they noticed that house as well as outer gate of the appellant was locked and there was none, then the search was made for the victim. Subsequently, villagers called the appellant, who disclosed that he was not having the key and he pretended, as if, key was left with his brother Fuchan Pandey, who was away and staying in his in-laws house. This time again this appellant gave false information. By way of searching, day time had come to end of the day and in the evening, informant side and villagers noticed some light coming from the house of the appellant, then suspicion got strengthened. Thereafter, again the villagers called the appellant for opening the door. On his denial, the villagers told that they will break the lock of the door, in that event, this appellant threatened the villagers that if lock is broken,

he will file a case of dacoity against them. All those things depict about the criminal mind of the appellant. Only in the next morning, when his brother Fuchan arrived, who was telephonically asked to come, and he disclosed that he was not having the key, the villagers started to assault the appellant and one lock was broken and only thereafter, this appellant took out the key. Ofcourse subsequently, the room, which was said to be in possession of the appellant, was opened and beneath the bed of the appellant, dead body in ruptured condition of the victim was found. Everything has already been discussed hereinabove, as was explained by the informant/P.W.2, P.W.3/Priya and P.W.1/Babloo."

(Emphasis supplied)

21. Thus, all throughout, the High Court proceeded on the footing that it was the appellant convict who came to the house of the victim in the morning of 31.05.2015 and lured her to come to his house to watch TV. The High Court took the view that since the dead body of the victim was recovered from the room owned by the appellant and he was seen by the PW 3 Priya Kumari locking the door attached to his house, it could be none other than the appellant who could be said to have committed the crime. The High Court completely forgot that there was a co-accused also namely Pritam Tiwari in the picture. Pritam Tiwari being a juvenile was tried in accordance with the provisions of the Juvenile Justice Act, 2015 and was held guilty and sentenced to three years imprisonment.

FSL REPORT NOT OBTAINED:

22. We noticed few very serious lapses in the entire investigation and, more particularly, the oral evidence of the investigating officer PW 5 Rita Kumari disturbed us a lot. The investigating officer in her cross examination deposed that in accordance with the order dated 29.06.2015 a letter on behalf of the officer-in-charge of the Police Station, Sabour, was filed before the Trial Court seeking permission to send the *muddamal* articles to the Forensic Science Laboratory (FSL), Patna for examination. However, the PW 5 Rita Kumari in her cross examination before the Trial Court admitted that following the instructions of her senior officers, she did not take any steps to procure FSL report. Who are these senior officers of PW 5 and why they instructed the PW 5 not to procure the FSL report should have been a subject matter of inquiry by both, the State as well as the trial court.

23. The aforesaid lapse is just a tip of the iceberg. We are at pains to state that it is a very serious flaw on the part of the investigating officer and that too in such a serious matter.

FAILURE TO CONDUCT MEDICAL EXAMINATION

24. One another serious flaw in the present case on the part of the investigating officer that has come to our notice is the failure to subject the appellant to medical examination by a

medical practitioner. No explanation, much less any reasonable explanation, has been offered for such a serious flaw on the part of the investigating officer.

25. Section 53(1) of the CrPC enables a police officer not below the rank of sub-inspector to request a registered medical practitioner, to make such an examination of the person arrested, as is reasonably necessary to ascertain the facts which may afford such evidence, whenever a person is arrested on a charge of committing an offence of such a nature that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence. Section 53(1) reads as follows:-

> *"**Section 53. Examination of accused by medical practitioner at the request of police officer**.—(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose."*

26. By Act 25 of 2005, a new Explanation was substituted under Section 53, in the place of the original Explanation. The

Explanation so substituted under Section 53 by Act 25 of 2005 reads as follows:-

> *"Explanation.—In this section and in Sections 53A and 54—*
> *(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;*
> *(b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register."*

27. Simultaneously with the substitution of a new Explanation under Section 53, Act 25 of 2005 also inserted a new provision i.e. Section 53A. Section 53A reads as follows:-

> *"**Section 53A. Examination of person accused of rape by medical practitioner**.—(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner acting at the request of a police officer not below the rank of a Sub-Inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.*

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely—

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section."

28. A three-Judge Bench of this Court in ***Chotkau v. State of Uttar Pradesh***, (2023) 6 SCC 742, had the occasion to consider Sections 53, 53A and 164 of the CrPC in details. This Court observed in para 80 to 83 as under:-

"80. After saying that Section 53-A is not mandatory, this Court found in para 54 of the said decision that the failure of the prosecution to produce DNA evidence, warranted an adverse inference to be drawn. Para 54 reads as follows : (Rajendra Pralhadrao Wasnik case [Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2019) 12 SCC 460 : (2019) 4 SCC (Cri) 420], SCC p. 485)

"54. For the prosecution to decline to produce DNA evidence would be a little unfortunate particularly when the facility of DNA profiling is available in the country. The prosecution would be well advised to take advantage of this, particularly in view of the provisions

of Section 53-A and Section 164-ACrPC. We are not going to the extent of suggesting that if there is no DNA profiling, the prosecution case cannot be proved but we are certainly of the view that where DNA profiling has not been done or it is held back from the trial court, an adverse consequence would follow for the prosecution."

81. It is necessary at this stage to note that by the very same Amendment Act 25 of 2005, by which Section 53-A was inserted, Section 164-A was also inserted in the Code. While Section 53-A enables the medical examination of the person accused of rape, Section 164-A enables medical examination of the victim of rape. Both these provisions are somewhat similar and can be said approximately to be a mirror image of each other. But there are three distinguishing features. They are:

81.1 Section 164-A requires the prior consent of the woman who is the victim of rape. Alternatively, the consent of a person competent to give such consent on her behalf should have been obtained before subjecting the victim to medical examination. Section 53-A does not speak about any such consent.

81.2 Section 164-A requires the report of the medical practitioner to contain among other things, the general mental condition of the woman. This is absent in Section 53-A.

81.3 Under Section 164-A(1), the medical examination by a registered medical practitioner is mandatory when, "it is proposed to get the person of the woman examined by a medical expert" during the course of investigation. This is borne out by the use of the words, "such examination shall be conducted". In contrast, Section 53-A(1) merely makes it lawful for a registered medical practitioner to make an examination of the arrested person if "there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence".

82. In cases where the victim of rape is alive and is in a position to testify in court, it may be possible for the prosecution to take a chance by not medically examining the accused. But in cases where the victim is dead and the offence is sought to be established only by

circumstantial evidence, medical evidence assumes great importance. The failure of the prosecution to produce such evidence, despite there being no obstacle from the accused or anyone, will certainly create a gaping hole in the case of the prosecution and give rise to a serious doubt on the case of the prosecution. We do not wish to go into the question whether Section 53-A is mandatory or not. Section 53-A enables the prosecution to obtain a significant piece of evidence to prove the charge. The failure of the prosecution in this case to subject the appellant to medical examination is certainly fatal to the prosecution case especially when the ocular evidence is found to be not trustworthy.

83. Their failure to obtain the report of the Forensic Science Laboratory on the blood/semen stain on the salwar worn by the victim, compounds the failure of the prosecution."

29. Thus, medical examination of an accused assumes great importance in cases where the victim of rape is dead and the offence is sought to be established only by circumstantial evidence.

FURTHER STATEMENT UNDER SECTION 313 CrPC

30. The further statement of the appellant convict was recorded under Section 313 CrPC. We were shocked to see the manner in which the Trial Court recorded the further statement of the appellant convict under Section 313 CrPC. In all, four questions were put to the appellant convict to enable him to explain the incriminating circumstances pointing towards his complicity in the alleged crime. The questions are as under:-

"(1) Question :- Have you heard the evidence of the witnesses?

Answer :- Yes

(2) Question :- There is evidence against you that on 31.5.15, you took away X to your house by calling her, on pretext of watching TV. What have you got to say?

Answer :- No Sir.

(3) Question :- There is also evidence against you that you escaped after locking your house and later on the lock was broken and then the dead body of X was recovered lying under the wooden cot. What have you got to say in this regard?

Answer :- No Sir.

(4) Question :- It has also come in evidence against you that you in association with Preetam committed murder of X after raping her. What have you got to say?

Answer :- No sir, it is wrong."

31. However, for the purpose of holding the appellant herein guilty of the alleged crime, the Trial Court looked into the following additional circumstances:-

(a) The circumstance of PW 3 seeing the Appellant lock the grill and the door of his room.

(b) The circumstance that the Appellant gave false information to PW 3 that the victim had already left after watching TV.

(c) The circumstance of the accused refusing to open the door as he did not have the key.

(d) The circumstance of the Appellant giving the keys to the villagers after he was assaulted.

(e) The circumstance of the alleged extra-judicial confession made by the co-accused Pritam Tiwari implicating the Appellant.

32. Indisputably, none of the aforesaid circumstances relied upon by the Trial Court were put to the appellant convict so that he could offer a proper explanation to the same.

33. Having regard to the fact that an innocent girl of 10 years was lured, raped and brutally murdered, we looked into the entire record very closely. Our mind got clouded with suspicion. Ultimately, we noticed something very shocking. The shocking aspect, we shall discuss about hereinafter, if would have gone unnoticed at our end too, then it would have led to a serious miscarriage of justice.

34. We thought fit to call for the papers of the charge sheet and look into the FIR lodged by PW 2 Kiran Devi; the further statement of PW 2 recorded under Section 161 of the CrPC in furtherance of the FIR lodged by her and the police statements of PW 1 Babloo Saw, and PW 3 Priya Kumari, the elder sister of

the victim and elder daughter of PW 2 (first informant). Reading the FIR and the police statements of the aforesaid witnesses left us aghast.

35. We first start with the FIR lodged by PW 2 which reads thus:-

> *"Fardbayan of Kiran Devi aged about 40 years w/o Arvind Sah, at Thateri Tola, Police Station- Sabour, District Bhagalpur recorded by S.I. cum S.H.O. Rita Kumari Sabour P.S. in house of Naval Kishore Ojha @ Fuchan Pandey dated 01-06-15 at 12:45 P.M.*
>
> *My name is Kiran Devi, aged about 40 years old, w/o Arvind Sah, Rio Thateri Tola Sabour Police Station- Saber, District- Bhagalpur. I am giving this statement without any pressure, in presence of the In-charge of Sabour Police Station today on 01 June, 2015 at the house of Naval Kishore (Fucchan Pandey) that yesterday on 31st May, 2015, I went to my late elder sister Sakila Devi's home situated in Jamunia Parbatta. In the meantime, at about 12 pm, my elder daughter Priya Kumari informed me through telephone that my younger daughter, X is nowhere to be found. Then I left for Sabour immediately. When I reached home, my elder daughter Priya informed me that X went to watch TV at Munna Pandey's home. When she didn't come back till 11 am then my elder daughter called me. When I went to Munna Pandey's home to find X, I found that Munna Pandey's house was locked. We started searching for X along with our relatives but X was nowhere to be found. When Munna Pandey was asked to open the lock, he said that he docs not have the keys. Then I called Munna Pandey's brother Fucchan Pandey who was at his in-law's house (sasural).*
>
> *Today on 1st June, 2015, Naval Kishore Pandey @ Fucchan Pandey came at around 12 pm and opened the lock of the room where it was found that Pritam Tiwari, S/o Dilip Tiwari R/o Shobhapur, Police Station: Rajmahal, District was hiding inside the room. The room was locked from outside. When Munna Pandey's room was opened, the dead body of my daughter was found*

under the bed. I am certain that Pritam Tiwari, s/o Dilip Tiwari, r/o Shobhapur, Police Station: Rajmahal District Sahebanj and Munna Pandey s/o Late Bir Bahadur Pandey r/o Thatcri Tola, Police Station: Sabour, District Bhagalpur, jointly conspired and had committed rape on my 11 y/o daughter (X) and after that strangulated her and killed her and then hid her dead body in the room.

This is my statement which I heard and understood after reading them I found the above statements correct and I am putting my signature by my own will in the presence of my sister's son, Bablu Sah s/o Satish Sah r/o Jamunia, Toana Parvata (Navaghchiya) Bhagalpur."

(Emphasis supplied)

36. The further statement of Kiran Devi recorded by the police under Section 161 CrPC reads thus:-

"Further investigation of this case, the police re-recorded the statement of complainant of this case - Kiran Devi, aged about 40 years, W/o - Arvind Sah, R/o - Thatheri Tola, PS - Sabour, District - Bhagalpur. Concurring with the FIR, she stated in her statement that in the neighborhood in front of her house lived two brothers - Munna Pandey and Naval Kishore Ojha @ Fucchan Pandey. They both have share in one room each. Frequent quarrels used to take place between the two brothers, due to which Naval Kishore Ojha @ Fucchan Pandey used to live at his in-law's place (sasuraal) and Munna Pandey, Sabour used to live near Kali Sthan in a rented house. Fucchan Pandey had handed over his room to his brother-in-law (wife's brother) for its maintenance. Pritam Tiwary worked in a cloth shop. People from the cloth shop also used to visit the house of Fucchan Pandey occasionally. There was a TV in the house of Fucchan Pandey. Children from the neighborhood also used to visit his house to watch the TV. On date 31.05.15, I (Kiran Devi) had gone to the house of my late sister, Shakila Devi in Jamunia Parvatta. On date 31.05.15 at about 12:00, her elder daughter Priya Kumari informed her on telephone that her younger daughter X was nowhere to be found. She immediately left from there. After her arrival at Sabour in her house, her elder daughter informed that her younger daughter X had stated that she was going to the house

of Pritam Tiwary to watch TV. Pritam Tiwary had called X to watch TV at his home at around 9 o'clock. When X did not come home till eleven o'clock, her elder daughter Priya went to the house of Pritam Tiwary to search for her. At that time Pritam Tiwary was locking the door. When she asked the whereabouts of X from Pritam Tiwary, he told that she was not there. After that she went to a mango orchard to look for her. She was not found there also. Then Priya called all her relatives and went to search her, but could not find her anywhere. Even after such a hectic search, X was nowhere to be found. So we all collectively decided to find Pritam Tiwary who was also not to be found. The villagers became suspicious so they all called Munna Pandey and asked him to open the gate. But Munna Pandey declined to open the gates and said that he did not have the keys to the lock. The local villagers then telephoned Naval Pandey @ Fucchan Pandey. At that time he was at his in-law's place at Shobhapur. When Munna Pandey declined to hand over the keys, everybody became suspicious that Pritam Tiwary was not there and it was very much possible that he (Pritam Tiwary) did some occurrence with her daughter. On 01-06-2015, Naval Kishore Ojha @Fucchan Pandey came with his wife and children and opened the locks of the grill at about 12:00 noon. When lock was opened, all the villagers entered the verandah and when looked through the window in the room of Fucchan Pandey, found Pritam Tiwary sleeping on the palang (wooden cot) in the room. When Fucchan Pandey opened the lock of his room, Pritam Tiwary started hiding himself under the wooden bed. The villagers took him out from the bed and started to ask the whereabouts of X. Initially he refused to give any information. But when all the people asked him strictly, he said that X (deceased) was in the house of Munna Pandey. And when all the people looked inside the room after breaking the locks of the doors of Munna Pandey, they found the dead body of eleven year old daughter X lying below the palang (wooden cot) in the room. When I looked at my daughter, she was already dead. We found her face extremely swollen, both the lips swollen, blood stained wound was seen on her right cheek. Her clothes were in (illegible) manner. The private parts of deceased X were swollen and blood stained wound and anus swollen with stool sticking to it, were found. He further informed that both

the accused persons named in the FIR - (1) Pritam Tiwary, S/o - Dilip Tiwary, R/o - Shobhapur, PS - Raj Mahal, District - Sahebganj, State - Jharkhand, present address Naval Kishore Ojha, Thatheri Toal - Sabour, PS - Sabour, District - Bhagalpur, (2) Munna Pandey, S/o Late Bir Bahadur Pandey, R/o - Thatheri, Toal - Sabour, PS - Sabour, District - Bhagalpur raped her eleven year daughter X (deceased) and with a view to remove the evidence. strangled her and killed her and had hid the dead body below the palang (wooden cot). The villagers informed the police station. On receiving the information police came and began their investigation. Besides this, she did not tell any other important facts."

(Emphasis supplied)

37. The police statement of PW 1 Babloo Saw reads thus:-

"In further investigation of this case recorded the witness statement of Babloo Sah, s/o Satish Sah, r/o Jamunia, PS - Parvatta, District - Khagaria, with complete support to the occurrence in his statement informed that deceased X is his aunt's (her mother's sister) daughter. On date 31.05.15 mother of the deceased came to his house. Priya, the elder sister of the deceased X, informed her mother over telephone that Pritam Tiwary, brother-in-law (wife's brother) of her neighbor Naval Kishore Ojha called X to watch television at his house and that she had not returned home. On information, he along with his mausi (mother's sister), Kiran Devi came to Sabour and along with family members and with the help of local villagers did exhaustive search in the nearby places, but could not find X anywhere. During the course of search, when I went to the house of Naval Kishore Ojha, I saw that his house is locked. Few people suspected that Pritam Tiwary had taken her somewhere or is inside the room, because the light of bulb was emitting light from his house. Then all the people called Munna Pandey and asked him to open the lock to which he declined and made an excuse that he does not possess the key. Then the suspicion of all the people grew more. Then villagers informed Naval Kishore Ojha @ Fucchan Pandey, brother of Munna Pandey about the occurrence of the incident on telephone. At that time of call Fuchchan Pandey was at his in-laws house at Shobhapur. He was not living here since last two months. On date 01.06.15 at about 12:00 noon, Fucchan

Pandey came along with his family and opened the lock of the house and saw Pritam Tiwary hiding in his house. When local people strictly enquired about the deceased girl X, he informed that X (deceased) was in Munna Pandey's house and then he tried to escape. Then all the people broke the lock on the door of Munna Pandey's room and when they looked inside they found the dead body of X lying under the bed (wooden cot). The clothes on her body were in haphazard condition. The women of the village told that a lot of blood stained injury and swelling was found around the private parts of X (deceased). The face of deceased X was extremely swollen, blood stained injury on both the lips which was hanging after being swollen. He further stated that both accused persons. named in the FIR called the girl on the pretext to watch TV and raped her and with a view to hide the evidence strangled her and killed her and hid the dead body below the palang (wooden cot). The local police station was then informed about the incident. Police came and started its proceeding. He did not inform any important thing further." (Emphasis supplied)

38. The police statement of PW 3 Priya Kumari, the elder sister of the victim, reads thus:-

"In further investigation of this case I recorded the statement of witness Priya Kumari, aged about 15 years, s/o - Arvind Sah, R/o - Thatheri, tola PS - Sabour, District Bhagalpur. After certifying the FIR, she informed in her statement that on dated 31.05.15 she was cooking in her house. Her mother Kiran Devi had gone to the house of her aunt (her mother's sister) in Parvatta. Her father works as a laborer in Gujarat. There was no one else in the house. At about 09:00 am her younger sister deceased X had gone to the house of Fucchan Pandey to watch TV. Pritam Tiwary, brother in law of (wife's sister) Phuchchan Pandey lived in that house. He had called X to watch TV at his house. When X did not return even after two hours, Priya (elder sister) went to the room of Pritam Tiwary to call her. On asking Pritam Tiwary about the whereabouts of X, he told that X had not come there. At that time Pritam was locking the grills of the verandah. Then she went to the nearby mango orchard to look for

her. She did not find her there also. Finally the she telephone her mother and informed her that X was missing. On arrival of Kiran Devi everybody started looking for X at all their relatives' place, but could not find her anywhere. Some people suspected that X was with Pritam Tiwary. Then everybody started searching for Pritam Tiwary. He was also not found anywhere. Then all the villagers and their relatives asked Munna Pandey to open the house but Munna Pandey refused to do so and made an excuse that he does not possess the keys. Then the villagers telephoned Fucchan Pandey who is the brother of Munna Pandey but they found that Fucchan Pandey was living at his in law's place (sasuraal) at Rajmahal since the last two months. On date 01.06.15 at about 12:00 o'clock Naval Kishore Ojha @ Fucchan Pandey came and opened the lock of his investigation."

(Emphasis supplied)

39. Thus, the case of all the witnesses before the police was that it was Pritam Tiwari who had come to the house of the victim on the fateful day and date and had taken the victim along with him to his house to watch TV. All the statements further reveal that it was Pritam Tiwari who was found locking the door when the witnesses enquired with Pritam Tiwari about the whereabouts of the victim.

40. Neither the defence counsel nor the public prosecutor nor the presiding officer of the Trial Court and unfortunately even the High Court thought fit to look into the aforesaid aspect of the matter and try to reach to the truth.

41. It was the duty of the defence counsel to confront the witnesses with their police statements so as to prove the

contradictions in the form of material omissions and bring them on record. We are sorry to say that the learned defence counsel had no idea how to contradict a witness with his or her police statements in accordance with Section 145 of the Evidence Act, 1872 (for short, 'Evidence Act').

42. The lapse on the part of public prosecutor is also something very unfortunate. The public prosecutor knew that the witnesses were deposing something contrary to what they had stated before the police in their statements recorded under Section 161 of the CrPC. It was his duty to bring to the notice of the witnesses and confront them with the same even without declaring them as hostile.

43. The presiding officer of the Trial Court also remained a mute spectator. It was the duty of the presiding officer to put relevant questions to these witnesses in exercise of his powers under Section 165 of the Evidence Act. Section 162 of the CrPC does not prevent a Judge from looking into the record of the police investigation. Being a case of rape and murder and as the evidence was not free from doubt, the Trial Judge ought to have acquainted himself, in the interest of justice, with the important material and also with what the only important witnesses of the prosecution had said during the police investigation. Had he done so, he could without any impropriety have caught the

discrepancies between the statements made by these witnesses to the investigating officer and their evidence at the trial, to be brought on the record by himself putting questions to the witnesses under Section 165 of the Evidence Act. There is, in our opinion, nothing in Section 162 CrPC to prevent a Trial Judge, as distinct from the prosecution or the defence, from putting to prosecution witnesses the questions otherwise permissible, if the justice obviously demands such a course. In the present case, we are strongly of the opinion that is what, in the interests of justice, the Trial Judge should have done but he did not look at the record of the police investigation until after the investigating officer had been examined and discharged as a witness. Even at this stage, the Trial Judge could have recalled the officer and other witnesses and questioned them in the manner provided by Section 165 of the Evidence Act. It is regrettable that he did not do so.

44. We take this opportunity of explaining the aforesaid a little more explicitly.

45. Section 162 of the CrPC reads thus:-

> *"**Section 162. Statements to police not to be signed : Use of statements in evidence.**—(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police*

diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act , 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872); or to affect the provisions of section 27 of that Act.

Explanation.--An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

46. Section 162 CrPC says that no statement made by any person to a police officer in the course of an investigation, whether it be recorded or not, shall be used for the purpose save as provided in the first proviso to the Section. The first proviso says that when any witness, whose statement has been reduced into writing by the police in accordance with the provisions of the CrPC, is called for the prosecution in inquiry or trial the accused with the permission of the court may contradict the

witnesses in the manner provided by Section 145 of the Evidence Act. It could be argued that, as the first part of Section 162 prohibits the use of the statement of a witness to a police officer for any purpose, other than that subsequently provided for in the proviso, and as the proviso says that the Court may permit the accused to contradict the witness with his previous statement, the Court has no power to do anything *suo motu*. In our opinion, this would be a misreading of the Section. The first part of Section 162 says that the statement made by a person to a police officer during investigation cannot be used for any purpose other than that mentioned in the proviso. We lay stress on the word "purpose". The purpose mentioned in the proviso is the purpose of contradicting the evidence given in favour of the State by a prosecution witness in Court by the use of the previous statement made by such witness to the police officer. The purpose is to discredit the evidence given in favour of the prosecution by a witness for the State. The Section prohibits the use of the statement for any other purpose than this. It does not say that the statement can only be used at the request of the accused. The limitation or restriction imposed in the first part of Section 162 CrPC relates to this purpose for which the statement may be used; it does not relate to the procedure which may be adopted to effect this purpose. The proviso which sets

out the limited purpose also mentions the way in which an accused person may contradict the witness with his previous statement made to the Police, but it does not in any way purport to take away the power that lies in the Court to look into any document, that it considers necessary to look into for the ends of justice and to put such questions to a witness as it may consider necessary to elicit the truth. We realise that the proviso would prevent the Court from using statements made by a person to a police officer in the course of investigation for any other purpose than that mentioned in the proviso but it does not in any other way affect the power that lies in the Court to look into documents or put questions to witnesses *suo motu*. It seems to us to be absurd to suggest that a Judge cannot put a question to a witness which a party may put. In this connection we would refer to the provisions of Section 165 of the Evidence Act, where the necessity of clothing the Judge with very wide powers to put questions to witnesses and to look into documents is recognised and provided for. This is what Section 165 of the Evidence Act says:—

> ***"Section 165. Judge's power to put questions or order production.—*** The *Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be*

entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question: …"

47. There is in our opinion nothing in Section 162 of the CrPC which prevents a Trial Judge from looking into the papers of the chargesheet *suo motu* and himself using the statement of a person examined by the police recorded therein for the purpose of contradicting such person when he gives evidence in favour of the State as a prosecution witness. The Judge may do this or he may make over the recorded statement to the lawyer for the accused so that he may use it for this purpose. We also wish to emphasise that in many sessions cases when an advocate appointed by the Court appears and particularly when a junior advocate, who has not much experience of the procedure of the Court, has been appointed to conduct the defence of an accused person, it is the duty of the Presiding Judge to draw his attention to the statutory provisions of Section 145 of the Evidence Act, as explained in ***Tara Singh v. State*** reported in AIR 1951 SC 441 and no Court should allow a witness to be contradicted by reference to the previous statement in writing or reduced to writing unless the procedure set out in Section 145 of the Evidence Act has been followed. It is possible that if the attention of the witness is drawn to these portions with reference to which

it is proposed to contradict him, he may be able to give a perfectly satisfactory explanation and in that event the portion in the previous statement which would otherwise be contradictory would no longer go to contradict or challenge the testimony of the witness.

48. In our opinion, in a case of the present description where the evidence given in a Court implicates persons who are not mentioned in the first information report or police statements, it is always advisable and far more important for the Trial Judge to look into the police papers in order to ascertain whether the persons implicated by witnesses, at the trial had been implicated by them during the investigation.

49. In the aforesaid context, we may refer to and rely on a three-Judge Bench decision in the case of ***V.K. Mishra v. State of Uttarakhand***, (2015) 9 SCC 588, wherein this Court, after due consideration of Section 161 of the CrPC and Section 145 of the Evidence Act, observed as under:-

> *"16. Section 162 CrPC bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police under Section 161(1) CrPC can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162(1) CrPC. The statements under Section 161 CrPC recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose: (i) of*

contradicting such witness by an accused under Section 145 of the Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and (iii) the re-examination of the witness if necessary.

17. The court cannot suo motu make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 CrPC "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. The statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of the Evidence Act that is by drawing attention to the parts intended for contradiction.

18. Section 145 of the Evidence Act reads as under:

> *"145.Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."*

19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction

and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction."

(Emphasis supplied)

50. What is important to note in the aforesaid decision of this Court is the principle of law that if the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the Court cannot *suo motu* make use of statements to police not proved in compliance with Section 145 of the Evidence Act. Therefore, it is of utmost importance to prove all major contradictions in the form of material omissions in accordance with the procedure as established under Section 145 of the Evidence Act and bring them on record. It is the duty of the defence counsel to do so.

51. This Court in ***Raghunandan v. State of U.P.*** reported in (1974) 4 SCC 186, it was observed:-(SCC p. 191, para 16)

"16. We are inclined to accept the argument of the appellant that the language of Section 162, Criminal Procedure Code, though wide, is not explicit or specific enough to extend the prohibition to the use of the wide and special powers of the Court to question a witness, expressly and explicitly given by Section 165 of the Indian Evidence Act in order to secure the ends of justice. ....Therefore, we hold that Section 162, Criminal Procedure Code, does not impair the special powers of the Court under Section 165, Indian Evidence Act. ..."

(Emphasis supplied)

52. This Court in ***Dandu Lakshmi Reddy v. State of A.P.***, (1999) 7 SCC 69, it was held:-

"20. It must now be remembered that the said procedure can be followed only when a witness is in the box. Barring the above two modes, a statement recorded under Section 161 of the Code can only remain fastened up at all stages of the trial in respect of that offence. In other words, if the court has not put any question to the witness with reference to his statement recorded under Section 161 of the Code, it is impermissible for the court to use that statement later even for drawing any adverse impression regarding the evidence of that witness. What is interdicted by Parliament in direct terms cannot be obviated in any indirect manner." (Emphasis supplied)

53. Sarkar (1999, 15th pp. 2319 etc.) says that a Judge is entitled to take a proactive role in putting questions to ascertain the truth and to fill up doubts, if any, arising out of inept examination of witnesses. But, as stated by Lord Denning in ***Jones v. National Coal Board***, 1957 (2) All ER 155 (CA), the Judge cannot "drop the mantle of a Judge and assume the robe of an advocate".

54. Of course, the Judge should not be a passive spectator but should take a proactive role as emphasized by Phipson (Evidence, 1999, 15th Ed, para 1.21 as under:-

> *"When the form of the English trial assumed its modern institutional form, the role of the judge was that of a neutral umpire. This is still broadly the position in criminal cases. In civil cases, the abandonment of jury trial except in a few exceptional cases led to some dilution of this principle. The wholesale changes in 1999 of the rules governing civil procedure has emphasized the interventionist role of the modern judge. Whereas formally the tribunal was a 'reactive judge (for centuries past at the heart of the English Common Law -- concept of the independent judiciary) instead we shall have a proactive judge whose task will be to take charge of the action at an early stage and manage its conduit."*
>
> (Emphasis supplied)

55. This Court in ***State of Rajasthan v. Ani @ Hanif and Ors.*** (1997) 6 SCC 162, made very relevant and important observations as under:-

> *"11. … 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 cross-examination 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." (Emphasis supplied)

56. In the above context, it is apposite to quote the observations of Chinnappa Reddy, J. in ***Ram Chander v. State of Haryana***, (1981) 3 SCC 191:-

"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 element 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. …"

(Emphasis supplied)

ROLE AND DUTY OF THE HIGH COURT IN CONFIRMATION CASES

57. We regret to state that the High Court completely overlooked the aforesaid aspects as discussed above. What was expected of the High Court to do in such circumstances? If the High Court would have taken little pains to look into the record, then immediately it could have taken recourse to Section 367 of the CrPC. We invite the attention of the High Court to the provisions of Chapter XXVIII (Section 366 to Section 371) and Chapter XXIX (Section 372 to Section 394). The provisions of Section 366 to Section 368 and Sections 386 and Section 391 are quoted here for ready reference:-

> *"**Section 366. Sentence of death to be submitted by Court of Session for confirmation.—(**1) When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.*
> *(2) The Court passing the sentence shall commit the convicted person to jail custody under a warrant.*
>
> ***Section 367. Power to direct further inquiry to be made or additional evidence to be taken.—**(1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.*

(2) Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.

(3) When the inquiry or evidence (if any) is not made or taken by the High Court, the result of such inquiry or evidence shall be certified to such Court.

Section 368. Power of High Court to confirm sentence or annual conviction.—*In any case submitted under Section 366, the High Court—*

(a) may confirm the sentence, or pass any other sentence warranted by law, or

(b) may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or an amended charge, or

(c) may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

x x x x

Section 386. Powers of the appellate court.—*After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—*

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction—

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a

court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence—

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the court passing the order or sentence under appeal.

x x x x

Section 391. Appellate Court may take further evidence or direct it to be taken.—*(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.*

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.
(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

(Emphasis supplied)

58. According to Section 366 when a Court of Session passes a sentence of death, the proceedings must be submitted to the High Court and the sentence of death is not to be executed unless it is confirmed by the High Court. Section 367 then proceeds to lay down the power of the High Court to direct further enquiry to be made or additional evidence to be taken. Section 368, thereafter, lays down the power of the High Court to confirm the sentence so imposed or annul the conviction. One of the powers which the High Court can exercise is one under Section 368(c) of the CrPC and that is to "acquit the accused person". Pertinently, the power to acquit the person can be exercised by the High Court even without there being any substantive appeal on the part of the accused challenging his conviction. To that extent, the proceedings under Chapter XXVIII which deal with "submission of death sentences for confirmation" is a proceeding in continuation of the trial. These provisions thus entitle the High Court to direct further enquiry or to take additional evidence and the High Court may, in a given case, even acquit the accused person. The scope of the chapter is wider. Chapter XXIX of the

CrPC deals with “Appeals”. Section 391 also entitles the appellate court to take further evidence or direct such further evidence to be taken. Section 386 then enumerates powers of the appellate court which *inter alia* includes the power to “reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial”. The powers of the appellate court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the CrPC.

59. Ordinarily, in a criminal appeal against conviction, the appellate court, under Section 384 of the CrPC, can dismiss the appeal, if the Court is of the opinion that there is no sufficient ground for interference, after examining all the grounds urged before it for challenging the correctness of the decision given by the Trial Court. It is not necessary for the appellate court to examine the entire record for the purpose of arriving at an independent decision of its own whether the conviction of the appellant is fully justified. The position is, however, different where the appeal is by an accused who is sentenced to death, so that the High Court dealing with the appeal has before it, simultaneously with the appeal, a reference for confirmation of the capital sentence under Section 366 of the CrPC. On a

reference for confirmation of sentence of death, the High Court is required to proceed in accordance with Sections 367 and 368 respectively of the CrPC and the provisions of these Sections make it clear that the duty of the High Court, in dealing with the reference, is not only to see whether the order passed by the Sessions Judge is correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considers it desirable in order to ascertain the guilt or the innocence of the convicted person. It is true that, under the proviso to Section 368, no order of confirmation is to be made until the period allowed for preferring the appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of, so that, if an appeal is filed by a condemned prisoner, that appeal has to be disposed of before any order is made in the reference confirming the sentence of death. In disposing of such an appeal, however, it is necessary that the High Court should keep in view its duty under Section 367 CrPC and, consequently, the Court must examine the appeal record for itself, arrive at a view whether a further enquiry or taking of additional evidence is desirable or not, and then come to its own conclusion on the entire material on record whether conviction of the condemned prisoner is justified and the sentence of death should be confirmed. [See: ***Bhupendra Singh*** (supra)]

60. In ***Jumman*** (supra), this Court explained the aforestated position in the following words:-

> *"10. … but there is a difference when a reference is made under Section 374 of the Criminal Procedure Code (Section 366 of the Code of Criminal Procedure, 1973), and when disposing of an appeal under Section 423 of the Criminal Procedure Code (Section 386 of the Code of Criminal Procedure, 1973) and that is that the High Court has to satisfy itself as to whether a case beyond reasonable doubt has been made out against the accused persons for the infliction of the penalty of death. In fact the proceedings before the High Court are a reappraisal and the reassessment of the entire facts and law in order that the High Court should be satisfied on the materials about the guilt or innocence of the accused persons. Such being the case, it is the duty of the High Court to consider the proceedings in all their aspects and come to an independent conclusion on the materials, apart from the view expressed by the Sessions Judge. In so doing, the High Court will be assisted by the opinion expressed by the Sessions Judge, but under the provisions of the law above-mentioned it is for the High Court to come to an independent conclusion of its own."*

61. The same principle was recognised in ***Ram Shankar Singh*** (supra):-

> *"12. … The High Court had also to consider what order should be passed on the reference under Section 374, and to decide on an appraisal of the evidence, whether the order of conviction for the offences for which the accused were convicted was justified and whether, having regard to the circumstances, the sentence of death was the appropriate sentence. …"*

62. In ***Masalti v. State of U.P.***, (1964) 8 SCR 133, this Court was dealing with an appeal under Article 136 of the Constitution and, in that appeal, on behalf of the persons who were under

sentence of death, a point was sought to be urged which was taken before the trial court and was rejected by it, but was not repeated before the High Court. This Court held:-

> *"11. …it may, in a proper case, be permissible to the appellants to ask this Court to consider that point in an appeal under Article 136 of the Constitution; after all in criminal proceedings of this character where sentences of death are imposed on the appellants, it may not be appropriate to refuse to consider relevant and material pleas of fact and law only on the ground that they were not urged before the High Court. If it is shown that the pleas were actually urged before the High Court and had not been considered by it, then, of course the party is entitled as a matter of right to obtain a decision on those pleas from this Court. But even otherwise no hard and fast Rule can be laid down prohibiting such pleas being raised in appeals under Article 136."*

63. In ***Kunal Majumdar v. State of Rajasthan***, (2012) 9 SCC 320, this Court was dealing with an appeal filed by a convict sentenced to death. It was noted that the High Court had dealt with the reference in a very casual and callous manner by merely stating that the counsel for the appellant therein pleaded for sympathetic consideration in commuting the death sentence into sentence for life. This Court noticed that there was absolutely no consideration of the relative merits and demerits of the conviction and the sentence imposed in the reference under Section 366(1) CrPC in the manner in which it was required to be considered. This Court while remitting the matter back to the High Court observed thus:-

"16. In a case for consideration for confirmation of death sentence under Section 366(1) CrPC, the High Court is bound to examine the reference with particular reference to the provisions contained in Sections 367 to 371 CrPC. Under Section 367 CrPC, when reference is submitted before the High Court, the High Court, if satisfied that a further enquiry should be made or additional evidence should be taken upon, any point bearing upon the guilt or innocence of the convict person, it can make such enquiry or take such evidence itself or direct it to be made or taken by the Court of Session. The ancillary powers as regards the presence of the accused in such circumstances have been provided under sub-sections (2) and (3) of Section 367 CrPC. Under Section 368, while dealing with the reference under Section 366, it inter alia provides for confirmation of the sentence or pass any other sentence warranted by law or may annul the conviction itself and in its place convict the accused for any other offence of which the Court of Session might have convicted the accused or order a new trial on the same or an amended charge. It may also acquit the accused person. Under Section 370, when such reference is heard by a Bench of Judges and if they are divided in their opinion, the case should be decided in the manner provided under Section 392 as per which the case should be laid before another Judge of that Court who should deliver his opinion and the judgment or order should follow that opinion. Here again, under the proviso to Section 392, it is stipulated that if one of the Judges constituting the Bench or where the appeal is laid before another Judge, either of them, if so required, direct for rehearing of the appeal for a decision to be rendered by a larger Bench of Judges.

17. When such a special and onerous responsibility has been imposed on the High Court while dealing with a reference under Section 366(1) CrPC, we are shocked to note that in the order [Criminal Murder Reference No. 1 of 2007 under S. 366(1) CrPC, decided on 11-7-2007 (Raj)] impugned herein, the Division Bench merely recorded to the effect that the counsel for the appellant pleaded for sympathy to commute the death sentence into one for life for the offence falling under Section 302 IPC while praying for maintaining the sentence imposed for the offence under Sections 376/511 IPC and that there was no

opposition from the learned Public Prosecutor. The Division Bench on that sole ground and by merely stating that there was no use of force of severe nature on the victim at the hands of the appellant and that the commission of offence of murder cannot be held to be brutal or inhuman and consequently the death sentence was liable to be altered as one for life for the offence under Section 302 IPC. The Division Bench of the High Court did not bother to exercise its jurisdiction vested in it under Section 366(1) CrPC read with Sections 368 to 370 and 392 CrPC in letter and spirit and thereby, in our opinion, shirked its responsibility while deciding the reference in the manner it ought to have been otherwise decided under the Code of Criminal Procedure. We feel that less said is better while commenting upon the cursory manner in which the judgment came to be pronounced by the Division Bench while dealing with the reference under Section 366(1) while passing the impugned judgment [Criminal Murder Reference No. 1 of 2007 under S. 366(1) CrPC, decided on 11-7-2007 (Raj)].

18. We are however duty-bound to state and record that in a reference made under Section 366(1) CrPC, there is no question of the High Court short-circuiting the process of reference by merely relying upon any concession made by the counsel for the convict or that of the counsel for the State. A duty is cast upon the High Court to examine the nature and the manner in which the offence was committed, the mens rea if any, of the culprit, the plight of the victim as noted by the trial court, the diabolic manner in which the offence was alleged to have been performed, the ill-effects it had on the victim as well as the society at large, the mindset of the culprit vis-à-vis the public interest, the conduct of the convict immediately after the commission of the offence and thereafter, the past history of the culprit, the magnitude of the crime and also the consequences it had on the dependants or the custodians of the victim. There should be very wide range of consideration to be made by the High Court dealing with the reference in order to ensure that the ultimate outcome of the reference would instill confidence in the minds of peace-loving citizens and also achieve the object of acting as a deterrent for others from indulging in such crimes."

(Emphasis supplied)

CONCEPT OF FAIR TRAIL

64. All fair trials are necessarily legally valid, but is the reverse necessarily true? What then is the genesis of the concept of a fair trial? The concept of a fair trial has a very impressive ancestry, is rooted in history, enshrined in the Constitution, sanctified by religious philosophy and juristic doctrines and embodied in the statute intended to regulate the course of a criminal trial. Its broad features and ingredients have, in course of time, been concretised into well recognised principles, even though there are grey areas, which call for further legal thought and research.

65. Truth is the cherished principle and is the guiding star of the Indian criminal justice system. For justice to be done truth must prevail. Truth is the soul of justice. The sole idea of criminal justice system is to see that justice is done. Justice will be said to be done when no innocent person is punished and the guilty person is not allowed to go scot free.

66. For the dispensation of criminal justice, India follows the accusatorial or adversarial system of common law. In the accusatorial or adversarial system the accused is presumed to be innocent; prosecution and defence each put their case; judge acts

as an impartial umpire and while acting as a neutral umpire sees whether the prosecution has been able to prove its case beyond reasonable doubt or not.

67. Free and fair trial is *sine-qua-non* of Article 21 of the Constitution of India. If the criminal trial is not free and fair, then the confidence of the public in the judicial fairness of a judge and the justice delivery system would be shaken. Denial to fair trial is as much injustice to the accused as to the victim and the society. No trial can be treated as a fair trial unless there is an impartial judge conducting the trial, an honest, able and fair defence counsel and equally honest, able and fair public prosecutor. A fair trial necessarily includes fair and proper opportunity to the prosecutor to prove the guilt of the accused and opportunity to the accused to prove his innocence.

68. The role of a judge in dispensation of justice after ascertaining the true facts no doubt is very difficult one. In the pious process of unravelling the truth so as to achieve the ultimate goal of dispensing justice between the parties the judge cannot keep himself unconcerned and oblivious to the various happenings taking place during the progress of trial of any case. No doubt he has to remain very vigilant, cautious, fair and impartial, and not to give even a slightest of impression that he

is biased or prejudiced either due to his own personal convictions or views in favour of one or the other party. This, however, would not mean that the Judge will simply shut his own eyes and be a mute spectator, acting like a robot or a recording machine to just deliver what stands feeded by the parties.

69. **Malimath Committee on Judicial Reforms** discussed the paramount duty of Courts to search for truth. The relevant observations of the Committee are as under:-

(a) The Indian ethos accords the highest importance to truth. The motto ***"Satyameva Jayate"*** (Truth alone succeeds) is inscribed in our National Emblem *"Ashoka Sthambha".* Our epics extol the virtue of truth.

(b) For the common man truth and justice are synonymous. So when truth fails, justice fails. Those who know that the acquitted accused was in fact the offender, lose faith in the system.

(c) In practice however we find that the Judge, in his anxiety to demonstrate his neutrality opts to remain passive and truth often becomes a casualty.

(d) Truth being the cherished ideal and ethos of India, pursuit of truth should be the guiding star of the Justice System. For justice to be done truth must prevail. It is truth that must

protect the innocent and it is truth that must be the basis to punish the guilty. Truth is the very soul of justice. Therefore, truth should become the ideal to inspire the courts to pursue.

(e) Many countries which have Inquisitorial model have inscribed in their Parliamentary Acts a duty to find the truth in the case. In Germany Section 139 of the so called '*Majna Charta*', a breach of the Judges' duty to actively discover truth would promulgate a procedural error which may provide grounds for an appeal.

(f) For Courts of justice there cannot be any better or higher ideal than quest for truth.

70. This Court has condemned the passive role played by the Judges and emphasized the importance and legal duty of a Judge to take an active role in the proceedings in order to find the truth to administer justice and to prevent the truth from becoming a casualty. A Judge is also duty bound to act with impartiality and before he gives an opinion or sits to decide the issues between the parties, he should be sure that there is no bias against or for either of the parties to the *lis*. For a judge to properly discharge this duty the concept of independence of judiciary is in existence and it includes ability and duty of a Judge to decide each case

according to an objective evaluation and application of the law, without the influence of outside factors.

71. If the Courts are to impart justice in a free, fair and effective manner, then the presiding judge cannot afford to remain a mute spectator totally oblivious to the various happenings taking place around him, more particularly, concerning a particular case being tried by him. The fair trial is possible only when the court takes active interest and elicit all relevant information and material necessary so as to find out the truth for achieving the ultimate goal of dispensing justice with all fairness and impartiality to both the parties.

72. In ***Ram Chander*** (supra), while speaking about the presiding judge in a criminal trial, Chinnappa Reddy, J. observed that 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. The learned Judge reproduced a passage from ***Sessions Judge, Nellore v. Intha Ramana Reddy***, 1972 Cri.L.J. 1485, which reads as follows:—

> *"Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to*

explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Section 172(2) of the Code of Criminal Procedure enables the court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the Committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial."

73. For all the foregoing reasons, we are left with no other alternative but to set aside the impugned judgment of the High Court and remit the matter back to the High Court for deciding the reference under Section 366 of the CrPC in the manner it ought to have been decided, more particularly keeping in mind the serious lapses on the part of the defence in not proving major contradictions in the form of material omissions surfacing from the oral evidence of the prosecution witnesses.

74. If anyone would ask us the question, "What is the ratio of this Judgment?" The answer to the same would be very simple and plain, in the words of Clarence Darrow;

"Justice has nothing to do with what goes on in the courtroom; Justice is what comes out of a courtroom."

75. In the result, the impugned judgment of the High Court is set aside and the matter is remitted back to the High Court for

reconsideration of the Death Reference No. 4 of 2017 and Criminal Appeal (DB) No. 358 of 2017. The Death Reference No. 4 of 2017 and Criminal Appeal (DB) No. 358 of 2017 stand restored for reconsideration of the High Court in accordance with law.

76. The appellant is in jail past more than nine years. In such circumstances, the Death Reference referred to above on being restored to the file of the High Court shall be taken up for hearing expeditiously. The learned Chief Justice of the High Court is requested to notify the Death Reference along with the Criminal Appeal for hearing before a Bench which he may deem fit to constitute. We also request the learned Judges who would be hearing the matter to give priority and dispose of the same at the earliest in accordance with law.

77. As the appellant convict is in jail past more than nine years, his family might be in dire straits. He may not be in a position to engage a lawyer of his choice. Probably, he may not be in a position to even understand what is said in this judgment. In such circumstances, the High Court may request a seasoned criminal side lawyer to appear on behalf of the appellant and assist the Court.

78. The Registry shall forward one copy each of this judgment to all the High Courts with a further request to each of the High Courts to circulate the same in its respective district judiciary.

79. The appeals are disposed of accordingly.

.....J.
(B.R. GAVAI)

.....J.
(J.B. PARDIWALA)

.....J.
(PRASHANT KUMAR MISHRA)

NEW DELHI;
SEPTEMBER 4, 2023