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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Order: 29th January, 2009

+ **CRL.A. 666/2004**

PRAKASH Appellant
Through: Mr. Rajesh Mahajan, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

: **PRADEEP NANDRAJOG, J.** (Oral)

1. Since the last 15 days, while hearing criminal appeals, we have noticed a good number of disturbing features pertaining to Sessions Trial. The instant case has compelled us to pen down our experiences, which needless to state, are not reflective of a healthy and a vibrant criminal justice delivery mechanism in the District Courts.

2. The warm and the living hands of a Judge are the best reassurance to an accused that his fundamental right, of life and liberty, enshrined under the Constitution is preserved

and protected. When these hand turn cold, the first casualty is Article 21 of the Constitution.

3. From the framing of the charge; recording evidence; examining the accused under Section 313 Cr.P.C.; hearing final submissions made by counsel for the accused, and dealing with the same with reference to the evidence and the circumstances of the case, till final judgment is pronounced; at each stage the Presiding Judge has to be in charge of the case.

4. We have been coming across cases where witnesses to the recovery, without stating that the accused led the police party to the place and without stating that the accused pointed out the place wherefrom he could get recovered a particular weapon of offence, simply state that accompanied by the police he went to the site and recovery memo Ex.--- was prepared in his presence. The objection of counsel for the accused is immediately recorded to the effect that the recovery memo has not been proved as per law and hence cannot be exhibited. We have been noticing that in all such cases the objection has been noted by the Presiding Judge with a further note that it would be decided at the final stage. In each and every final decision we find that the learned Judge has not dealt with the objection.

5. Indeed, the damages of this kind can never be undone unless the witness is recalled for re-examination and made to depose, as required by law, that he was present at the

spot when the accused got recovered a particular object from a particular place and that it was seized by the police in his presence and that the recovery memo was drawn up in his presence and was thereafter signed by him.

6. Evidence recorded in such manner obviously shows that the Judge who recorded the evidence was not live to what was happening in his Court.

7. We have been noticing that a witness of the prosecution suffers from a momentary memory loss and is not correctly answering a question put to him by the public prosecutor. The witness is immediately declared hostile.

8. It is elementary knowledge of law that with the permission of the Court, even during examination-in-chief, a suggestion or a leading question can be put to a witness.

9. We have been noticing cases where the witness wrongly names an accused and is immediately declared hostile. Otherwise, the witness is fully supportive of the prosecution. On being declared hostile, the witness immediately corrects himself that he had made a mistake in referring to A as B and vice-versa. This has to be avoided for the reason once a witness is declared hostile the defence immediately pounces upon the argument that the witness lacks credibility.

10. We have come across a few instances where a charge was amended mid-trial, but the witnesses on basis of

whose deposition the charge was amended were not re-summoned for cross examination. It is elementary law that where, mid-trial, a charge is amended, the relevant witnesses have to be re-summoned for further cross examination.

11. We have come across at least 3 instances where incriminating circumstances and in particular the reports of Forensic Science Laboratories have not been put to the accused persons; prohibiting the use of said evidence against the accused.

12. Instant case has revealed another sloppy conduct of trial. A child witness Kalicharan PW-4, aged eight years when he deposed has been examined without any Court questions being put to him to ascertain whether he understood the questions being put to him. Further, he has been examined after administering an oath. We wonder how.

13. Prakash who is facing a charge of raping and there after murdering Jayanti, as also of destroying evidence has been convicted for the offences punishable for destruction of evidence and murder of Jayanti.

14. The deposition of PW-15 recorded on 6.3.2003 and Ex.PW-15/B proved by the witnesses on said date has been liberally used by the learned Judge who has penned the decision to convict the appellant. Similarly, the deposition of PW-16 on 29.7.2003 has also been taken into account.

15. The file reveals that PW-15 and PW-16 were examined on 14.1.2002 and their cross examination was deferred.

16. The next date was 31.1.2002. The witnesses were not present. The learned Judge forgot what was he/she to do on the next date. The matter lingered on.

17. Further witnesses of the prosecution were examined and cross examined. PW-15 and PW-16 never appeared in Court and never subjected themselves to be cross examined.

18. On 9.8.2002 learned APP closed the prosecution evidence. Statement of the accused under Section 313 Cr.P.C. was recorded on 23.8.2002. Thereafter, DW-1 was examined on 1.10.2002 and matter was adjourned for final arguments. On 1.10.2002 learned Trial Judge noted that PW-15 and PW-16 have not been cross examined. It was directed that said witnesses be summoned for cross examination.

19. Surprisingly enough, on 6.3.2003 PW-15 was further examined by way of examination-in-chief notwithstanding that on 14.1.2002 her examination-in-chief was complete and matter was adjourned for cross examination.

20. On 6.3.2003 PW-15 proved Ex.PW-15/B, a document which is highly inculpatory of the involvement of the appellant, of course, if proved as per law.

21. PW-16 was cross examined on 29.7.2003.

22. The incriminating circumstances brought on record after 23.8.2002 had to be put to the appellant; who as per law was required to be further examined under Section 313 Cr.P.C. with reference to material brought on record after 23.8.2002.

23. This is elementary law.

24. We note that Ex.PW-15/B proved by PW-15 on 6.3.2000 is an information received at the PCR van naming the appellant as the person who has committed the offending act. Indeed, the learned Trial Judge has made a liberal use thereof while convicting the appellant.

25. This is impermissible in law.

26. We are left with no option but to set aside the impugned judgment and order dated 22.5.2004. The order of sentence dated 31.5.2004 is also set aside.

27. Matter is remanded for taking corrective action in view of this order.

28. A copy of this order is directed to be forwarded by the Registry to the District and Sessions Judge Delhi Tis Hazari who shall bring this to the notice of all the Judges of the Higher Judicial Service and in particular those who are presiding over the Sessions Division.

29. Noting that the appellant has been in judicial custody for nearly 8 years we direct that pending trial the appellant shall be released on bail by the learned Trial Judge on the appellant

furnishing a personal bond in sum of Rs.10,000/- (Rupees Ten Thousand Only) with two sureties in the like amount to the satisfaction of the learned Trial Judge.

30. Trial Court Record be returned to the District and Sessions Judge within 3 days by the Registry through a special messenger.

31. Since the matter has been delayed enough, the learned Judge before whom the case shall be revived is directed to complete the proceedings and pronounce decision within 4 months of the receipt of file by him/her.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

JANUARY 29, 2009
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