

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

+ **CRIMINAL APPEAL NO. 486 OF 2002**

% **Reserved on : 20th April, 2010.**
Date of Decision 6th July, 2010.

PREMWATI W/O KHICHCHU Appellant.
Through Mr.Anup Bhambani, Ms.Nisha Bhambani,
advocates.

VERSUS

STATE OF NCT OF DELHI & ANOTHER Respondents.
Through Ms. Fizani Hussain, advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

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 the judgment should be reported in the Digest ? YES

SANJIV KHANNA, J.:

1. The appellant-Premwati by the impugned judgment dated 12th December, 2001 has been convicted under Section 109 read with Section 376 and Section 366A of the Indian Penal Code, 1860 (hereinafter referred to as IPC, for short) and by the order dated 13th December, 2001 has been sentenced to rigorous imprisonment of 7 years for the offence under Section 109 read with Section 376 IPC with a fine of Rs.1,000/- and in default to suffer simple imprisonment of 3 months. The appellant has been sentenced to rigorous imprisonment of 5 years and a fine of Rs.1,000/- and in default thereof to suffer simple imprisonment for 3 months for the offence under Section 366A of IPC.

2. Learned trial court has held that the appellant had abetted the commission of offence of rape on the prosecutrix by one Mr. Shiv Kumar in furtherance of their common intention during the period 7th to 30th August, 2000 in the house of the appellant. The trial Court has also held that the appellant had connived with Mr. Shiv Kumar to induce the prosecutrix, a minor girl, with the intent or knowing that it was likely that she would be forced into an illicit intercourse with another person. The said Mr. Shiv kumar could not be arrested and has been declared a proclaimed offender. The appellant was acquitted from the charge of gang rape under Section 376(2)(g) readwith Section 34 IPC, charge of kidnapping, concealment/abduction of a kidnapped person under Sections 363 and 368 and charge under section 506 Part II readwith 34 IPC.

3. To prove and establish the prosecution case, 11 witnesses were examined. There is no eye witness but the prosecutrix was examined as PW-2. The first question is whether the statement of prosecutrix is trustworthy, whether it inspires confidence and justifies conviction of the appellant. The prosecutrix is a minor girl, who was aged around 13 years when she was examined in the court on 30th April, 2001. She belongs to a very poor and a humble background. She was working in a bangle factory and was also employed as a domestic help in a house and used to reside in the said house at night. Her mother Salma, who is also known as Yasmin, sometime before 7th August, 2000 had got re-married to one Alam. The prosecutrix was the eldest amongst her brothers and sisters. All of them, except the prosecutrix were residing with Salma even after she got married to Alam. The prosecutrix in her statement has stated that about 7/8 months back she had gone to the house of her aunt (khala) Shabnam to enquire about the new residence of her mother. Her Uncle, Shabnam's husband gave her details of the new residence of the prosecutrix's mother. Thereafter, she went searching for her mother's new house. On the way, she saw Alam and changed her route and went into another street. She met Premwati at the entrance of her house and enquired if she was aware of the new premises of Salma (Yasmin). Premwati replied in negative and on prosecutrix's request, she gave her a glass of water. The prosecutrix sat with Premwati and told her that she was searching for the house of her

mother and father. On a suggestion made by Premwati, the prosecutrix agreed to stay with her. It may be relevant to reproduce here what happened thereafter in the words of the prosecutrix herself, in the statement recorded in the trial court:-

“On the same day when I went to the bathroom for taking bath. Premwati touched my abdomen and said that I was pregnant. I denied said suggestion by her.

At around (sic) 5/6 pm Premwati sent me to the house of Shiv Kr. alongwith some child. Shiv Kr. was not available at his house. Thereafter I came back to the house of Premwati. After sometime Shiv Kr. came to the house of Premwati and enquired from me if I had visited his house. I told him that I was sent there by aunty, Prem Wati. On this Premwati said that I had visited the house of Shiv Kr. of my own and not on her instance. On this Shiv Kr. started reprimanding me. He told me that I should not visit his house to call him because on seeing me his mother would get angry. After some time Shiv Kr. enquired from me if I wanted to eat something but I refused. Thereafter Shiv Kr. made a pass on me by moving his hands on my body. On this Premwati said, “INHE HATH PIRANE KI ADAT HA”. Shiv Kr. then requested Premwati to go the fetch, PANI BETASA”. Premwati left and came back with pears. We all had nashpati. Thereafter Shiv Kr. left. but I stayed at the house of Premwati.

Late in the night at around 11/12, Shiv Kr. again came to the house of Premwati. After sometime Shiv Kr. asked, “WHO DEGI”. When I told him that I could not get his meaning he made a gesture with his hand. Thereafter Premwati close the door of said room from inside. and she caught hold of my hands. Accused Shiv Kr. untied narra of my salwar and removed my salwar. When I shouted accused Premwati cubbed my faced with her hands. Thereafter accused Shiv Kr. forcibly had sexual intercourse with me. Accused Shiv Kr. kept on raping me for the next 5/6 days. He rapped me on all those days. During said period whenever accused Premwati use to leave her house she use to lock me inside.”

4. The aforesaid statement speaks for itself. The young prosecutrix, who was barely in her teens, has been able to narrate and state the horrid time she went through. Her courage and determination are praiseworthy.

5. Learned counsel appearing for the appellant had submitted that there was no reason and cause for the prosecutrix to stay in the house of Ms. Premwati after her alleged initial conduct when she touched prosecutrix's abdomen and when Mr. Shiv Kumar had made a pass on her in the evening by moving his hands on her body. It was submitted that the prosecutrix did not make any attempt to run away or protest during the period from 7th to 30th August, 2000 and in her cross-examination she has admitted that she had gone for a bhandara for 3 to 4 days to a 'registan' but did not narrate the allegation of rape or complain to anyone. It was pointed out that the prosecutrix had admitted that in the house of the appellant there was another occupant who was the owner of the building, who had a wife and two children. It was submitted that the facts stated by the prosecutrix should not be believed because the prosecutrix did not make any attempt to talk/protest to the other occupants, or inform anyone else or third parties though she had opportunity and could have easily communicated with them.

6. The fact that the prosecutrix was taken to a bhandara is also mentioned and stated by the prosecutrix in her statement under Section 164 of the Code of Criminal Procedure, 1973(Code, for short), Exhibit PW11/B, which was recorded on 25th September, 2001 before Mr. M.K Nagpal, Metropolitan Magistrate, PW -11. In her cross-examination, the prosecutrix stated that she did not inform about the rape and the mistreatment met out to her as the persons present at the bhandara were relatives and friends of the appellant.

7. While examining the contentions raised by the counsel for the appellant, one has to keep in mind the mental condition of the prosecutrix and the factual background of the case when she was with the appellant. She was a young, simple girl barely in her teens already working in a bangle making factory and also working as a domestic help. She had

small brothers and sisters. Her mother had got remarried to one Alam, someone she disliked. The mother had shifted her house with her brothers and sisters, without informing the prosecutrix about her new house number. The prosecutrix was yearning for love and affection which a child of her age requires and craves for, from parents and elders. Her vulnerability and helplessness are easy to appreciate and visualize in case we read following statement made before the court:-

“.....My uncle had told me that my mother was residing at 36 Berha, therefore, I proceeded for 36 Berha to meet my mother, when I reached at the gali near dispensary Gamli road, I met Alam who was previously known to me. On seeing him I changed my route and went into other Gali. In that gali I met Premwati who was sitting at the entrance of her house. I enquired from said Premwati if Yasmin has recently taken any premises in rent in the area. On this Premwati replied in the negative. Thereafter I requested Premwati for a glass of water Prem Wati made me to sit and give me water. On enquiry by Premwati I told her that I was searching for the house of my mother and father. Premwati asked me as to where I would go. I told her that nobody would keep me. On this Premwati offered that I should stay with her. I agreed to the proposal. “

8. The appellant Premwati obviously took advantage of the situation by tempting the prosecutrix, by talking to her, showing concern, by giving her a place to reside, a place to wash and clean herself, and providing her with food. It is also easy to appreciate the reason why prosecutrix did not protest or talk between 7th to 30th August, 2000, even when she was at a bhandara for 3 to 4 days. Apparently, she was well provided for and looked after during this period. Her innocence, poverty and destitution made her vulnerable and were fully exploited. Deprivation and denial of love and affection and basic material needs made her gullible. In any case, question of consent is immaterial in view of the age of the prosecutrix. Moreover, she was afraid as she did not know the persons who were present at the bhandara. In her statement the prosecutrix has stated that the said persons were either relatives or friends of Premwati. She would

have been nervous and frightened to make allegations lest she was harmed or dumped somewhere. She has stated that she managed to escape at the first opportunity after Premwati had taken her to a house of an old man who sells milk. Thereafter, she ran to the house of her aunt (khala) Shabnam and narrated the entire story. The aunt (khala) Shabnam, PW-6, was declared hostile and was cross-examined by the public prosecutor. In her cross-examination, she admitted that her niece had gone missing/untraceable after she had come to her house and reappeared on 30th August, 2000, when she narrated the entire story. Shabnam's husband Nizamuddin was examined as PW4. He reiterated that the prosecutrix had gone missing after she had come to their house asking for her mother's new address, which he had given to her. On 30.8.2000 the prosecutrix suddenly reappeared after 20/22 days and was taken to the police station. PW-5, Salma, the mother, has stated that she had gone to her native place in Dist. Bijnor, but her daughter, the prosecutrix had stayed back and was residing at night in the house of one Dr. Shajad. She has stated that the prosecutrix had gone missing and after she returned she had narrated the entire story. In her initial complaint to the police about disappearance of the prosecutrix, she had suspected involvement of PW-6, Shabnam and her husband Mr. Nizamuddin, PW-4. This was natural for her when the police asked her whether she suspected anyone, as the prosecutrix had gone to their house just before her disappearance. This does not make the case of the prosecution weak or untrustworthy. The contention of the appellant that she has been wrongly implicated as she had sold her plot to Mr. Shiv Kumar and because of the sale, Ms. Salma, PW-5, mother of the prosecutrix wanted to extract money, hardly requires any reference and has to be rejected as nothing but a sham and an unsubstantiated allegation. Statement of the prosecutrix, PW-2 before Mr. M.K. Nagpal, Metropolitan Magistrate under Section 164 of the Code, Exhibit PW-11/B is identical in all material aspects to the statement recorded before the court when the prosecutrix had appeared for examination.

9. Dr. Rashmi, Pool Officer, GTB Hospital, PW10, has proved the MLC of the prosecutrix, which was prepared and signed by Dr. Chanchal and is

marked Exhibit PW-10/A. The X- ray of the prosecutrix is PW-10/B and as per the X- ray report, the prosecutrix was between the ages of 12 to 14 years. In the MLC, PW-10/A, it is mentioned that no wounds were visible but the same records that the patient, i.e., prosecutrix had disclosed alleged history of sexual assault by one Mr. Shiv Kumar. The hymen was found to be old torn and healed.

10. It was submitted by the counsel for the appellant that the trial court had framed charges under Section 363/34, 368, 506 part II read with Section 34 IPC and Section 376(2)(g)/34 IPC but the conviction is under different sections, i.e., Section 109 read with Section 376 and 366A of the IPC. It was pointed out that no charges were framed under the said sections. Attention was drawn to the findings in the impugned judgment wherein it is recorded that no case of kidnapping etc. under Section 366/368 IPC is made out. Learned counsel had drawn my attention to the fact that charge under Section 376(2)(g) of the IPC cannot be sustained in view of the decision of the Supreme Court in ***Priya Patel v State of M.P*** AIR 2006 SC 2639. Lastly, my attention was drawn to the finding recorded by the trial court that the appellant has not been convicted under Section 506 II of the IPC by giving her benefit of doubt/no evidence.

11. It may be relevant to reproduce below the charges, which were framed against the appellant vide order dated 15th March, 2001:-

“ That you Premwati alongwith you co-accused Shiv Kr. (Proclaimed Offender) infurtherance of your common intention on or about 7-8-2000, sometime after 1pm, at Gali No. 2, Jai Parkash Ngr. Usman Pur, Delhi, Kidnapped a minor girl (prosecutrix) D/o Furkan age about 12 to 14 yrs. from the lawful guardianship of her mother Salma and thereby you committed an offence punishable U/s 363/34 IPC, within my cognizance.

Secondly, you Premwati on the aforesaid place for a period of 5 or 6 days from 7-8-2000 concealed and confined prosecutrix having knowledge that she had

been kidnapped from the lawful custody of her mother Salma and thereby you committed an offence punishable U/s 368 IPC, within my cognizance.

Thirdly, you during the aforesaid period and on the aforesaid place in furtherance of your common intention with your co-accused Shiv Kr. (Proclaimed Offender) criminally intimidated prosecutrix by threatening her that if she resisted the rape and wept, her brother and sisters would be killed and you thereby committed an offence punishable U/s 506 part II read with Section 34 IPC, within my cognizance.

Fourthly, you Prem Wati during the aforesaid period and at the aforesaid place in furtherance of your common intention with your co-accused Shiv kr. (Proclaimed Offender) was party to gang rape committed on minor by your co-accused Shiv Kumar and thereby you committed an offence punishable U/s 376 (g)/34 IPC and within my cognizance.

And I hereby direct that you be tried by this court for the above charges. ”

12. The Supreme Court in ***Willie (William) Slaney versus State of Madhya Pradesh***, AIR 1956 SC 116 observed that the Code is a procedural law and, therefore, has to be interpreted in a manner that does not frustrate ends of justice by introduction of needless technicalities. The object of the Code is to ensure that the accused gets a full and a fair trial as per certain well established and well understood principles that accord with our notions of natural justice. Vivan Bose J. observed that in procedural laws disregard of provisions of certain nature can be fatal to trial and at once can invalidate the conviction but certain other procedural aspects may not be fatal and the irregularities can be cured and in that event conviction must stand unless the court is satisfied that there was

prejudice. Further, the Code has dealt with some aspects and full effect must be given to these provisions. The courts have to administer justice and justice requires punishment of the guilty as much as protection of the innocent and this essence of the Code should not be lost in technicalities. Principles of natural justice and fair play must be brought to bear, when determining a matter of prejudice as in indulging guilt. The courts are concerned to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. If all these elements are there and no prejudice is shown, the conviction must stand whatever the irregularities be, whether traceable to charge or want of one.

Vivan Bose J. held:

“17. This, we feel, is the true intent and purpose of Section 537(a) which covers *every* proceeding taken *with jurisdiction* in the general phrase “or other proceedings under this Code”. It is for the Court in all these cases to determine whether there has been prejudice to the accused; and in doing so to bear in mind that some violations are so obviously opposed to natural justice and the true intendment of the Code that on the face of them and without anything else they must be struck down, while in other cases a closer examination of all the circumstances will be called for in order to discover whether the accused has been prejudiced.

18. We now proceed to examine the relevant sections of the Code, Chapter XLV deals generally with irregular proceedings. There are certain irregularities which do not vitiate the proceedings. They are set out in Section 529. No question of prejudice arises in this class of case because the section states categorically that they shall not vitiate the proceedings. Certain other irregularities are treated as vital and there the proceedings are void irrespective of prejudice. These are set out in Section 530. A third class is dealt with in Sections 531, 532, 533, 535, 536(2) and 537. There, broadly speaking, the question is whether the error has caused prejudice to the accused or, as some of the

sections put it, has occasioned a failure of justice. The examples we have given are illustrative and not exhaustive. What we are seeking to demonstrate is that the Code has carefully classified certain kinds of error and expressly indicates how they are to be dealt with. In every such case the Court is bound to give effect to the express commands of the legislature: there is no scope for further speculation. The only class of case in which the Courts are free to reach a decision is that for which no express provision is made.”

13. In a subsequent paragraphs Vivan Bose J. has opined

“**43.** Now, as we have said, Sections 225, 232, 535 and 537(a) between them, cover every conceivable type of error and irregularity referable to a charge that can possibly arise, ranging from cases in which there is a conviction with no charge at all from start to finish down to cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that *whatever* the irregularity it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction. Every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done, what we are concerned to see is whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. If all these elements are there and no prejudice is shown, the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one.

44. In adjudging the question of prejudice the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been, misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the facts, prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand; also it will always be

material to consider whether objection to the nature of the charge, or a total want of one, was taken at an early stage. If it was not, and particularly where the accused is defended by counsel (*Atta Mohammad v. King-Emperor*) it may in a given case be proper to conclude that the accused was satisfied and knew just what he was being tried for and knew what was being alleged against him and wanted no further particulars, provided it is always borne in mind that “no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused” (*Abdul Rahman v. King-Emperor*). But these are matters of fact which will be special to each different case and no conclusion on these questions of fact in any one case can ever be regarded as a precedent or a guide for a conclusion of fact in another, because the facts can never be alike in any two cases “however” alike they may seem. There is no such thing as a judicial precedent on facts though counsel, and even Judges, are sometimes prone to argue and to act as if there were.”

14. Drawing out distinction between various provisions of the earlier Code of Criminal Procedure, 1878, relating to charge, defects and omission to frame charge, Vivan Bose, J. has explained the scope and ambit of the provisions as under:-

“54. It is to be observed that Section 535 of the Code is mandatory in its terms, just as mandatory as Section 233. If it be accepted that an absence of a charge would, but for its provisions, render a conviction invalid, this section cures such an invalidity when there is, in fact, not in theory but in fact, no failure of justice. The section is just as mandatory as Section 233 and we can see no justification for giving it less weight than Section 237. If Section 237 validates a departure from Section 233 and saves it from the stigma of an irregularity, then so does Section 535, for it says very expressly that no conviction shall be deemed *invalid* merely on the ground that no charge was framed unless that *in fact* occasioned a failure of justice; and if Section 535 is held not to apply to cases covered by Sections 237 and 238, then it must apply to cases that lie outside the scope of those sections and the only kind of case left is a case in which there is a total absence of a charge, for any other type of case would be excluded because of misjoinder. If Section 233 is mandatory, that part of it which prohibits misjoinder except in the cases mentioned in Sections 234, 235, 236 and 239 is just as mandatory as the portion that requires a separate charge for each offence. It is unfortunate that we have no definition of the

terms “illegality”, “irregularity” and “invalidity” because they can be used in differing senses, but however that may be, the decision we are now examining and the remarks made in that case must be read in the light of this background. We agree that some of the expressions used in the judgment appear to travel wider than this but in order to dispel misconception, we would now hold that the true view is the one we have propounded at length in the present judgment.”

15. Chandrasekhara Aiyar J. in his concurrent judgment has observed

“76. A case of complete absence of a charge is covered by Section 535, whereas an error or omission in a charge is dealt with by Section 537. The consequences seem to be slightly different. Where there is no charge, it is for the court to determine whether there is any failure of justice. But in the latter, where there is mere error or omission in the charge, the court is also bound to have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

77. The sections referred to indicate that in the generality of cases the omission to frame a charge is not per se fatal. We are unable, therefore, to accept as sound the very broad proposition advanced for the appellants by Mr Umrigar that where there is no charge, the conviction would be illegal, prejudice or no prejudice. On the other hand, it is suggested that the wording of Section 535 of the Code of Criminal Procedure is sufficiently wide to cover every case of no charge. It is said that it applies also to the case of a trial in which there has been no charge of any kind even from the very outset. We are unable to agree that Section 535 of the Code of Criminal Procedure is to be construed in such an unlimited sense. It may be noticed that this group of sections relating to absence of a charge, namely, Sections 225, 226 and 232 and the powers exercisable thereunder, are with reference to a trial which has already commenced or taken place. They would, therefore, normally relate to errors of omissions which occur in a trial that has validly commenced. There is no reason to think that Section 535 of the Code of Criminal Procedure is not also to be understood with reference to the same context. There may be cases where, a trial which proceeds without any kind of charge at the outset can be said to be a trial wholly contrary to what is prescribed by the Code. In such cases, the trial would be illegal without the necessity of a positive finding of prejudice. By way of illustration the following classes of cases may be mentioned: (a) Where there is no charge at all as required by the Code from start to finish — from the Committing Magistrate’s court to the end of the Sessions trial; the Code contemplates in Section 226 the possibility of a committal without any charge and it is not impossible to conceive of an extreme case where the

Sessions trial also proceeds without any formal charge which has to be in writing and read out and explained to the accused (Section 210(2) and Section 251(A)(4) and Section 227). The Code requires that there should be a charge and it should be in writing. A deliberate breach of this basic requirement cannot be cured by the assertion that everything was orally explained to the accused and the assessors or jurors, and there was no possible or probable prejudice, (b) Where the conviction is for a totally different offence from the one charged and not covered by Sections 236 and 237 of the Code. On a charge for a minor offence, there can be no conviction for a major offence, e.g., grievous hurt or rioting and murder. The omission to frame a separate and specific charge in such cases will be an incurable irregularity amounting to an illegality.”

16. In a subsequent paragraph the scope and ambit of sections 535 and 537 of the Code of Criminal Procedure, 1878 was explained as under :

“87. As I understand the provisions of the Code of Criminal Procedure, a separate procedure is set out for various class of cases triable by a court exercising powers under the Code. So far as the framing of a charge is concerned, the Code expressly states the kind of cases in which no charge is to be framed. In trial of warrant cases, cases before a Court of Session and a High Court, a charge must be framed. Failure to frame a charge in such cases would be a contravention of the mandatory provisions of the Code. Would such contravention amount to an illegality? Prima facie a conviction of an accused person for an offence with which he had not been charged but for which he ought to have been charged, is invalid. It is said that by virtue of the provisions of Sections 535 and 537 of the Code failure to frame a charge or an omission or irregularity in a charge, which is framed, does not by itself invalidate the conviction, unless the Court is satisfied that in fact a failure of justice has resulted. It is, therefore, necessary to examine how far these provisions of the Code override its provisions relating to the framing of charges.”

17. The trial courts were, however, cautioned and it was observed that the said provisions do not give a licence to proceed with trials without appropriate charge and omission to frame charge is a grave defect and trial courts should be vigilant.

18. In ***Lakhjit Singh versus State of Punjab***, 1994 Supp (1) SCC 173, charge was framed under Section 302 IPC but the conviction was sustained under Section 306 after observing that the facts and circumstances of the case had been put to the accused under Section 313

of the Code and the accused had a notice of all the allegations and no prejudice was caused. In ***Dalbir Singh versus State of U.P.***, (2004) 5 SCC 334 the Supreme Court viewed and examined conflict of opinion in ***Lakhjit Singh*** (supra) and ***Sangaraboina Sreenu versus State of A.P.***, (1997) 5 SCC 348. In the said case, the accused had been charged under Sections 302, 304B and 498A of IPC for murder of wife and two daughters. The High Court, however, upheld the conviction under Section 306 for having abetted the offence for suicide by the mother by setting herself on fire wherein her two daughters also died, though no charge under Section 306 was framed. The Supreme Court did not agree with the ratio laid down in ***Sangaraboina Sreenu (supra)*** and it was observed as under:-

“14. Here the Court proceeded to examine the question that if the accused has been charged under Section 302 IPC and the said charge is not established by evidence, would it be possible to convict him under Section 306 IPC having regard to Section 222 CrPC? Sub-section (1) of Section 222 lays down that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. Sub-section (2) of the same section lays down that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. Section 222 CrPC is in the nature of a general provision which empowers the court to convict for a minor offence even though charge has been framed for a major offence. Illustrations (a) and (b) to the said section also make the position clear. However, there is a separate chapter in the Code of Criminal Procedure, namely, Chapter XXXV which deals with *irregular proceedings* and their effect. This chapter enumerates various kinds of irregularities which have the effect of either vitiating or not vitiating the proceedings. Section 464 of the Code deals with the effect of omission to frame, or absence of, or error in, charge. Sub-section (1) of this section provides that no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. This clearly shows that any error, omission or irregularity in the

charge including any misjoinder of charges shall not result in invalidating the conviction or order of a competent court unless the appellate or revisional court comes to the conclusion that a failure of justice has in fact been occasioned thereby. In *Lakhjit Singh* though Section 464 CrPC has not been specifically referred to but the Court altered the conviction from Section 302 to Section 306 IPC having regard to the principles underlying in the said section. In *Sangaraboina Sreenu* the Court completely ignored to consider the provisions of Section 464 CrPC and keeping in view Section 222 CrPC alone, the conviction of the appellant therein under Section 306 IPC was set aside.”

19. Conviction of the appellant was upheld under Section 306 as the same would not result in failure of justice in any manner, after observing as under:-

“18. Therefore, the basic ingredients of the offence under Section 306 IPC have been established by the prosecution. These features of the prosecution case were sought to be established by the prosecution in order to substantiate the charge under Section 498-A IPC and also for showing that the accused had a motive to commit the crime of murder for which he was actually charged. The cross-examination of the witnesses shows that every effort was made to demolish the aforesaid aspect of the prosecution case, namely, that neither was any demand of dowry made nor were any gifts or presents or money received by the accused at a subsequent stage and that Vimla had not been subjected to any kind of harassment or ill-treatment. The next question to be seen is whether the accused was confronted with the aforesaid features of the prosecution case in his statement under Section 313 CrPC. His statement runs into six pages where every aspect of the prosecution case referred to above was put to him. He also gave a long written statement in accordance with Section 233(2) CrPC wherein he admitted that Vimla committed suicide. He also admitted that the scooter and colour TV were subsequently given to him by his in-laws but came out with a plea that he had paid money and purchased the same from his in-laws. There is no aspect of the prosecution which may not have been put to him. We are, therefore, of the opinion that in view of the material on record,

the conviction under Section 306 IPC can safely be recorded and the same would not result in failure of justice in any manner. The record shows that the accused was taken into custody on 29-3-1991 and was released from jail after the decision of the High Court on 20-3-1997 and thus he has undergone nearly six years of imprisonment. In our opinion, the period already undergone (as undertrial and after conviction) would meet the ends of justice.”

20. It is, therefore, clear that Section 464 is an independent provision and will apply if the conditions mentioned therein are satisfied. The Section is applied and followed to meet ends of justice as has been explained in **Willie (William) Slaney** (supra). Reference in this regard can also be made to the recent decision of the Supreme Court in **Annareddy Sambasiva Reddy and Others versus State of Andhra Pradesh**, (2009) 12 SCC 546, wherein it has been observed:-

“**55.** In unmistakable terms, Section 464 specifies that a finding or sentence of a court shall not be set aside merely on the ground that a charge was not framed or that charge was defective unless it has occasioned in prejudice. Because of a mere defect in language or in the narration or in form of the charge, the conviction would not be rendered bad if the accused has not been adversely affected thereby. If the ingredients of the section are obvious or implicit, conviction in regard thereto can be sustained irrespective of the fact that the said section has not been mentioned.

56. A fair trial to the accused is a sine qua non in our criminal justice system but at the same time procedural law contained in the Code of Criminal Procedure is designed to further the ends of justice and not to frustrate them by introduction of hyper-technicalities. Every case must depend on its own merits and no straitjacket formula can be applied; the essential and important aspect to be kept in mind is: has omission to frame a specific charge resulted in prejudice to the accused.”

21. Reference can also be made to the judgment of the Supreme Court in ***Anil Alias Raju Namdev Patil versus Administration of Daman & Diu, Daman and Another*** (2006) 13 SCC 36.

22. Learned counsel for the appellant had relied upon a Division Bench decision of the Delhi High Court in ***Geeta versus State***, 2009 (163) DLT 268. In the said case, the appellant had been charged with Section 302/32, IPC but was convicted under Section 302 read with Section 109 IPC. It was noticed that Section 109 IPC cannot be regarded as a minor offence so as to apply Section 222 of the Code. The Division Bench accordingly observed as under:-

“37. Normally, when a person is charged with a higher offence and convicted for a lesser offence, no grievance can be made in respect thereof, particularly in view of Section 222 Cr. P.C. However, where the offence for which a person is convicted is a substantive offence and is different from the species of the other offence, the situation is different. Section 109 IPC has been regarded as an offence by itself by various decisions of the Supreme Court. In such an eventuality, since no charge was framed under Section 109 IPC, the appellant Geeta ought not to have been convicted under Section 302 read with Section 109 IPC. If Section 109 IPC is removed, insofar the appellant Geeta is concerned, conviction under Section 302 IPC could not be possible because even as per the statement Exhibit PW 10/A, no specific role has been ascribed to the appellant Geeta and the only allegation is that she also assisted her mother Dropti and Ghanshyam. It is clear that even if the statement Exhibit PW 10/A were to be regarded as the authentic and truthful dying declaration of Madan Lal, the appellant Geeta cannot be convicted under Section 302 IPC simpliciter. She could not have been convicted under Section 302 IPC read with Section 109 IPC because no charge under Section 109 had been framed against her. This proposition is clear from the following decisions of the Supreme Court:

1. Kishori Lal v. State of M.P. : (2007) 10 SCC 797:

2. Wakil Yadav and Anr. v. State of Bihar: (2000) 10 SCC 500; and
3. Joseph Kurian Philip Jose v. State of Kerala: (1994) 6 SCC 535.

It is, therefore, clear that in any event, insofar as the appellant Geeta is concerned in spite of the statement Exhibit PW 10/A, she could not have been convicted under Section 302 read with Section 109 IPC.”

23. My attention was also drawn to ***Sohan Lal Alias Sohan Singh and Others versus State of Punjab***, (2003) 11 SCC 534, wherein it has been observed as under:-

“7. Section 211 of the Code of Criminal Procedure requires that the charge against the accused be precisely stated. Sub-section (4) of Section 211 of the Code of Criminal Procedure specifically requires that the law and section of the law against which the offence is said to have been committed shall be mentioned in the charge. The learned counsel for the respondent State, relying on Section 464 of the Code of Criminal Procedure, urged that failure to specify Section 109 in the charge-sheet against Sohan Lal was a mere irregularity which would not vitiate the trial without proof of prejudice to the accused. We cannot agree. The learned counsel for the accused is fully justified in his submission that failure to frame a charge with regard to the substantive offence of Section 109 IPC has certainly prejudiced the accused in the trial court. The accused Sohan Lal @ Sohan Singh was called upon to face trial only for the charge under Section 304-B IPC. Neither a charge under Section 302 IPC nor under Section 109 IPC was leveled against him in the charge sheet. In the absence of a charge being framed against the accused Sohan Lal under Section 302 or 109 IPC, it would certainly cause prejudice to him, if he is convicted under either of these offences at the end of the trial. In our view, it was not permissible for the trial court to convict the first accused Sohan Lal for the offence under Section 302 read with Section 109 IPC. His conviction under Section 302 read with Section 109 IPC is, therefore, illegal and is liable to be set aside. The High Court erred in upholding the conviction of

Sohan Lal @ Sohan Singh under Section 302 read with Section 109 IPC and dismissing his appeal.”

24. There are judgments in which the Supreme Court has held that Section 109 IPC is a substantive offence by itself and these judgments have been referred to in **Geeta’s** case (supra). To this extent, there cannot be any dispute. However, the question raised in the present case is whether Section 464 of the Code is applicable in view of the fourth charge framed against the appellant, which has been reproduced above. The said charge states that the appellant during the aforesaid period, i.e., on or after 7th August, 2001 for 5-6 days was a party to rape committed on the minor by the co-accused Mr. Shiv Kumar and this was in furtherance of the common intention of the rape committed by Mr. Shiv Kumar. The appellant herein because of her gender cannot be held liable for raping the prosecutrix. It is clear from the charge itself that the rape was committed by Mr. Shiv Kumar, the co-accused. The allegation against the appellant is that she was a party to the said rape and the rape was committed in furtherance of their common intention, i.e., the common intention of the appellant and Mr. Shiv Kumar and this amounted to a gang rape as defined under Section 376(2)(g) read with Section 34 of the IPC.

25. As stated above, in view of the decision of the Supreme Court in **Priya Patel (supra)** the appellant because of her gender cannot be convicted under Section 376(2)(g) of the IPC. In the present case, as noticed above, the charges as framed are elaborate and indicate and state with clarity and detail the role played by and allegations against, the appellant. For the purpose of Section 464, the contents of the charge as framed in the factual matrix of each case has to be seen and examined to decide whether any prejudice has been caused to the accused. Contents of the charge have to be examined in the factual background of a particular trial. In the present case, in view of the charges framed, cross-examination of the accused and other witnesses, it is apparent that there has been no miscarriage of justice and the appellant was fully aware and conscious of the facts and allegations made against and her role in the

rape of the prosecutrix. The charge is that rape was committed by Mr. Shiv Kumar and the role of the appellant, as alleged by the prosecution, was that she was a party and had connived and allowed Mr. Shiv Kumar to commit rape with her active participation. The appellant had cross-examined the prosecutrix and other witnesses on the said aspects. There was no confusion or doubt in the mind of the appellant as to the nature of charge levelled against her that she has to meet and defend. Cross examination of the witnesses including the prosecutrix unmistakably shows that the defence had made a concerted effort to discredit the testimony of the witnesses and the role assigned to the appellant on the basis of which conviction has been made under Section 109 r/w Section 376, IPC. Further the appellant in her statement recorded under Section 313, of the Code was confronted with the facts and allegations which are necessary for conviction under Section 109 r/w Section 376, IPC. Reference in this regard can be made to question nos. 4, 5 and 6 of the statement recorded under Section 313 of the Code. All the ingredients of Section 109 r/w S.376, IPC were clearly indicated and mentioned. The appellant was fully aware and conscious of the role assigned and her participation in the crime. She understood the charges and the allegations made against her and was not in doubt or prejudiced. It cannot be said that the appellant has been denied fair trial and full chance to defend herself from the charge under Section 109 r/w Section 376, IPC. While examining the question of prejudice and failure of justice, a broad vision has to be taken. One has to look for substance and not technicalities to be satisfied that there was fair trial and the accused was made aware and had knowledge of what he or she is being tried for and the main allegation against the accused was brought to his/her notice and explained. The objective is to ensure that the accused is given a fair and full chance to defend. Therefore, in the facts of the present case, it cannot be said that conviction under Section 109 read with Section 376 is vitiated. The said conviction is protected in view of Section 464 of the Code.

26. The charges as framed do not show or suggest allegation of inducement by the appellant of the prosecutrix, which made the prosecutrix to go from any place or to do any act. The appellant did not

cross examine any of the witnesses or tried to discredit the witnesses on the question of inducement. The prosecutrix did not make any direct averment or statement alleging inducement but the said fact can be inferred from her conduct and keeping in view her mental, social and economic background, her vulnerability as a minor girl, whose mother has got remarried to a person she dislikes. Some of these aspects have been referred to in paragraph 8 above to explain the conduct of the prosecutrix in the context of the argument/defence of the appellant but the conviction of the appellant for inducement under Section 366A IPC stands on a different footing. The appellant was not confronted with specific allegation of inducement in the statement recorded under Section 313 of the Code. It was not put to her that there was any evidence or material that she has induced the prosecutrix. Offence of inducement under Section 366A, IPC is quite distinct and separate from the offence of kidnapping under Section 363, IPC or concealment of a kidnapped or abducted person under Section 368, IPC. In these circumstances, the conviction of the appellant under Section 366A, IPC is set aside. I am not inclined to remand the matter back to the Trial Court to frame a fresh charge under Section 366 A, IPC, as the appellant's conviction under Section 109 r/w Section 376, IPC has been sustained and upheld. Even as per the judgment of the Trial Court, both sentences under Section 109 r/w Sections 376 and 366A, IPC were to run concurrently.

27. In view of the aforesaid discussion, the Appeal is partly allowed and conviction under Section 366A, IPC is set aside for failure to frame charge, but conviction and sentence under Section 109 r/w. Section 376, IPC are upheld.

(SANJIV KHANNA)
JUDGE

JULY 6, 2010
VKR/P