

A.F.R.

Neutral Citation No. - 2023:AHC:209130-DB

Court No. - 67

Case :- CRIMINAL APPEAL No. - 4982 of 2019

Appellant :- Rajesh Kumar @ Pappu

Respondent :- State Of U.P. And Anr.

Counsel for Appellant :- Vatsala,Dharmendra Singhal(Senior Adv.),Lav
Srivastava,Santosh Kumar Rai

Counsel for Respondent :- G.A.,Anurag Vajpeyi,Praveen Kumar Singh

ALONG WITH

Case :- CRIMINAL APPEAL No. - 5346 of 2019

Appellant :- Radhey Shyam Lal

Respondent :- State Of U.P. And Anr.

Counsel for Appellant :- Vatsala,Santosh Kumar Rai

Counsel for Respondent :- G.A.,Anurag Vajpeyi,Praveen Kumar Singh

AND

Case :- CRIMINAL APPEAL No. - 5347 of 2019

Appellant :- Pratap And Anr.

Respondent :- State Of U.P. And Anr.

Counsel for Appellant :- Vatsala,Lal Mani Singh,Praveen Kumar
Singh,Rajendra Kumar Rathore,Santosh Kumar Rai

Counsel for Respondent :- G.A.,Anurag Vajpeyi,Praveen Kumar
Singh

Hon'ble Rahul Chaturvedi,J.

Hon'ble Mohd. Azhar Husain Idrisi,J.

(Delivered by Hon'ble Mohd. Azhar Husain Idrisi,J.)

(1). Heard Shri V.P. Srivastava, learned Senior Counsel assisted by Shri Santosh Kumar Rai and Shri L.M. Singh, learned counsel for the appellants and Shri Praveen Kumar Singh, learned counsel for the informant as well as Shri Ghanshyam Kumar, learned A.G.A.-I for the State of U.P. Perused the record of the case.

(2). Since all the three appeals were admitted on 20.2.2020 and the lower court record is available. Learned counsel for contesting parties are ready and willing to argue the case finally on the merit of

the case. They have furnished the summary of the case, moot issues to be raised during arguments and have also supplied the citations on which they want to rely upon. Thus, the Court has got no option or even objection to decide all the three appeals finally with the help and aid of respective counsels for the parties as well as learned counsel for the State.

(3). After the arguments and the judgment was reserved, the Court has lay its hand over a very valuable quotation which gives an insight about the issue involve and plays a pivotal role in deciding these appeals. It reads thus :-

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

By Clarence Darrow

Aforementioned lines would act as beacon light for us while deciding aforementioned appeals. Elaborating these golden lines, it is evident that courtroom proceeding is an arena whereby two legal opponents representing their respective clients, muster their legal acumen to impress upon the Judge. But it is the Judge and his verdict on the issue and his endeavour to search out the truth by using his robust legal sense, come out his final verdict on the issue.

Thus, from aforesaid, it is established that answer of the aforesaid gobbet is the litmus test for any judgment and deciding the ‘issue’ between the parties.

INTRODUCTORY :-

(4). The learned Special Judge (SC/ST Act), Varanasi vide judgment and order dated 15/16.7.2019 while deciding S.S.T. No.212 of 1999 (State vs. (i) Radhey Shyam Lal s/o Ghorahu Srivastava, (ii)

Pratap s/o Ram Awadh (iii) Jagannath s/o Ram Awadh and (iv) Rajesh Kumar @ Pappu @ Gandhi s/o Mohan Srivastava), who were convicted for offence u/s 302/34, 201 of I.P.C. and Section 3(2)(5) of SC/ST Act and were sentenced for life imprisonment and a fine of Rs.50,000/- for the offence u/s 201 I.P.C. for seven years rigorous imprisonment and a fine of Rs.20,000/- and u/s 3(2)(5) SC/ST Act for life sentence and a fine of Rs.50,000/- were awarded and in the case of default in paying the fine amount the additional duration of simple imprisonment were also awarded. All the sentences would run concurrently.

(5). Aggrieved by the aforesaid judgment and order of sentence Rajesh Kumar @ Pappu has filed Criminal Appeal No.4982 of 2021, Radhey Shyam Lal has filed Criminal Appeal No.5346 of 2019 and Pratap and Jagannath have filed Criminal Appeal No.5347 of 2019. For the sake of brevity and convenience, all the three appeals are being jointly decided by a common judgment.

(6). After having the marathon arguments advanced by the counsels for the rival parties, it is imperative to give a bird's eye view to the prosecution story as mentioned in the F.I.R. and other undisputed facts.

(7) **FACTUAL MATRIX :**

(I) Shri Shyam Narayan Ram on 22.4.1998 around 5.30 in the morning have succeeded in lodging the F.I.R. for the incident said to have been taken place on 21/22.4.1998 itself around 01.00 in the night, under Sections 302/34 and Section 3(2)(5) of SC/ST Act against (i) Radhey Shyam Lal, (ii) Pratap Kumhar, (iii) Pappu @ Gandhi and (iv) Jagannath for the alleged killing of his parent Mohan

Ram and Smt. Bodha Devi. The distance between the place of occurrence and the police station is hardly six kilometres.

(II) The First Informant is permanent resident of Police Station Dhanapur, Chandauli. The parent of the informant Mohan Ram and Bodha Devi (parent of informant) used to sleep in the shade of a pumping set belonging to one Kamla Singh.

On the fateful day, both of them went to the agriculture field, near the pumping set. From the FIR itself, it is admitted that there was some dispute regarding the landed property between the rival groups i.e. deceased and appellants. In addition to this, about two days back Pratap Kumhar was taking out some nut and bolts from the trolley belonging to Panna Lal, and when objected by Panna Lal, then Pratap Kumhar started hurling filthy abuses and have extended threats. On this score, the named accused persons (i) Radhey Shyam Lal, (ii) Pratap Kumhar, (iii) Jagannath and (iv) Pappu @ Gandhi came on the place of incident around 01.00 in the pitch dark of night and they jointly have committed the offence by giving a gun shot injury to his parent Mohan Ram and Bodha Devi (the deceased persons). After hearing the noise of gun shot, the Informant; Ram Dular (PW-2) and Dashmi who were also harvesting the agriculture crop of Kamla Singh at nearby place from pumping station, have seen/heard the incident in the moonlight and also when they came to the tubewell in the light of the bulb having sufficient lights, have seen that Radhey Shyam Lal was carrying a gun, Pratap Kumhar was having a country made pistol (Katta) and Jagannath and Pappu were dragging the informant's parent Mohan Ram and Bodha Devi and thereafter thrown their body into the Well. The informant and others got horrified as the assailants were carrying guns with them. They

hide themselves and only after the resale of the assailants, informant came on the spot and have seen the parent inside the Well. They have raised the alarm and the co-villagers came on the spot. They were scared, resultantly they could not inform the police in the night itself. They came to police station early in the morning at 5.30 of 22.4.1998 to lodge the FIR.

(8). From the aforesaid factual matrix as culled out from F.I.R., it is clear that it was the pitch dark, around midnight when the parent of the informant were murdered by the name accused persons by using their firearms. The informant and other witnesses have seen that assailants were dragging the corpus of Moham Ram and Bodha Devi to the Well and they have thrown their body into the Well. Previous animosity on account of some landed property and an incident two days prior are the trigger points for alleged offence by the appellants against the parent of the first informant.

(9). After lodging of FIR, (i) on 22.4.1998 the police has recovered a blood soaked '*Sitarami*' (scarf), allegedly belongs to appellant Pratap, from the place of occurrence. A 'Fard' of alleged blood soaked Gamchha/*Sitarami*/scarf belonging to Pratap was prepared by the police (Exb-5). (ii) on 22.4.1998 at 10.30 p.m. the police has recovered a SBBL licensee gun belonging to Radhey Shyam. The police has recovered SBBL licensee gun and one empty cartridge of 12 bore. The barrel of the gun was smelling 'gun powder', which was marked as (Exb.-6). (iii) On the same day, during investigation, the police after approaching the place of incident under the shade of pumping set, the police has recovered the three empty cartridges of 12 bore, one live cartridge of 12 bore of KF Special brand, dot, *tikli* and pallets were also recovered and a fard of which was prepared and

exhibited as (Exb.-7). (iv) During investigation the police has also recovered blood soaked earth and plain soil from the place of occurrence (Exb.Ka-8), suggestive of the fact that incident took place under the shade. All these exercises/recoveries were done by the police on 22.4.1998 during investigation.

(10). In addition to this, after lodging of the FIR, an inquest proceeding was initiated of Bodha Devi and Mohan Ram @ Fazihat. The proceeding of inquest of Bodha Devi was started on 8.05 a.m. on 22.4.1998 and concluded at 9.45 a.m., whereas the inquest of Mohan Ram @ Fazihat was started at 06.45 a.m. on the same day and ended at 08.00 a.m.

We have perused the contents of the inquest reports as well as contents of F.I.R., the information was given to the police that the deceased were murdered by giving a gun shot injury ‘(*goli mar kar hatya kar di gayi hai*).’

In addition to this, one of the startling feature of this inquest report was that after taking out the dead body from the Well, the dead bodies of the deceased persons were absolutely ‘naked’, except the lady Bodha Devi was covering her breasts by the blouse. Not a single clothe was over their persons. In the inquest report all the Panch have observed that none of the deceased persons have sustained any gun shot injury over their persons. After conclusion of the inquest, dead body of Bodha Devi was handed over to constables on 22.4.1998 at 9.45 a.m., whereas the dead body of Mohan Ram was handed over on 22.4.1998 at 08.00 a.m. to same set of constables for further formalities of postmortem. Both these inquest reports were marked as Exb.Ka-9 and Exb. Ka-10 on 28.4.2005.

(11). Autopsy report of Bodha Devi is of 24.4.1998, though her dead body was handed over to the constables to carry out her postmortem on 22.4.1998 at 09.45 a.m. It is interesting to mention that the postmortem report of Mohan Ram @ Fazihat too, is of 23/24.4.1998 by the Medical Officer, SSPG Hospital, Varanasi. It is worthwhile to mention here, that from Chandauli Police Station to SSPG Hospital, Varanasi is barely 76 kms far. This unwarranted delay in bringing the dead body to the SSPG Hospital, Varanasi goes to the core of the prosecution case and remain unexplained by the prosecutor. No probable justification coming forward for this serious lapse in the prosecution case, which was unfortunately ignored by the learned trial Judge in his impugned judgment.

(12). The postmortem report of the deceased Bodha Devi dated 22/24.4.1998 at 2.30 p.m. indicates that she has sustained 7 injuries over her person, but none of the injuries were caused by any firearm. As per opinion of the doctor, the cause of death is serious damage in the spinal cord and fracture over the vertebrae. Similarly, the autopsy report of Mohan Ram @ Fazihat dated 24.4.1998 indicates that he has sustained 16 injuries over his person, but none of them are caused by the firearm and cause of death is the same i.e. serious damage in the spinal cord causing his death. At this juncture, the prosecution has to bridge, the alleged recovery of blood soaked scarf of Pratap from the place of occurrence, blood soaked earth from the shade of pumping set where they used to sleep, empty and live cartridges, tickli, pallets, suggesting that two persons have died by gun shot. But the postmortem report totally belies the prosecution story that the alleged named accused persons gave gun shot to the deceased persons under the shed of pumping set and thereafter dragged their cadavers to the 'Well' and thrown them into it.

(13). Yet another aspect of the issue which deserve attention of the Court is that though the postmortem of Mohan Ram @ Fazihat was initiated on 23.4.1998 itself, but there was serious dispute regarding the fact that there is no firearm injury found over his person and on this issue a dispute arose, as such, the C.M.O., Varanasi postponed the postmortem and on 24.4.1998 the S.O., Dhanapur was called for and the postmortem was concluded on 24.4.1998 at 2.00 p.m.

(14). During investigation, the police has concluded all the necessary formalities viz; sending the recovered cartridges to the FSL for its examination, preparing the site plan, sending the alleged Sitarami/Angauchha to the FSL and concluding the investigation have submitted its report u/s 173(2) Cr.P.C. against all the named accused persons namely; (i) Radhey Shyam Lal, (ii) Pratap, (iii) Jagannnath and (iv) Rajesh Kumar @ Pappu @ Gandhi u/s 302, 201 I.P.C. and 3(2)(5) of SC/ST Act and on 30.6.1998 the cognizance of the offence was taken by the concerned Magistrate.

(15). Being a cognizable offence, the case was remitted to the court of Sessions on 18.02.1999, and thereafter, the learned Session Judge, after framing the charge and explaining to accused persons, have framed the charge u/s 302/34, 201 I.P.C. and Section 3(2)(5) of SC/ST Act and the accused persons declined to admit their guilt and have insisted to be tried.

(16). The prosecution has produced the following documents to establish their case. Surprisingly, the counsel for the defence without calling their respective authors, have abruptly and blindly admitted the genuineness of those documents as a result thereof the learned trial Judge by one stroke of pen on one and same day have exhibited the following documents:-

(i) Tehrir Report (Exb Ka-1), (ii) Chik FIR (Exb Ka-2), (iii) GD Entry (Exb Ka-3), (iv) Site plan (Exb Ka-4), (v) Fard recovery of blood soaked Sitarami/scarf (Exb Ka-5), (vi) Fard recovery of the gun (Exb Ka-6), (vii) Fard empty cartridges/miss cartridge/live cartridge (Exb Ka-7), (viii) blood stained earth and plain soil (Exb Ka-8), (ix) Panchnama/inquest report (Exb Ka-9 and Ka-10), (x) police form 13 (Exb Ka-11 and Ka-12), (xi) Photonash (Exb Ka-13 and Ka-14), (xii) report by SHO, PS. Lanka (Exb Ka-15), (xiii) report by Dhanapur police station (Exb Ka-16), (xiv) Chemical examination report (Exb Ka-19), (xv) postmortem reports (Exb Ka-21 & 22), (xvi) charge sheet (Exb Ka-23), (xvii) FSL reports (Exb Ka-24 & 25). These are the documentary evidences which were placed by the prosecution to establish their case. In addition to this the oral testimony of P.W.-1 Shyam Narayan Ram and P.W.-2 Ram Dular (witnesses of fact) were examined.

(17). Shri V.P. Srivastava, learned Senior counsel has urged that this is the most startling feature of the entire prosecution is that an extraordinary strange and suicidal attempt was made by the counsel for the defence that without bringing the respective authors of the aforesaid documents and cross-examining them, the counsel for the defence abruptly and strangely have accepted the genuineness of the aforesaid documents. This indeed was a Judicial Harakiri by the defence counsel, who for the reasons best known to him, without calling these witnesses have accepted the genuineness, and accordingly, the learned Trial Judge in a most mechanical fashion exhibited all the documents as an admitted one.

Not only this, defence counsel has never produced any defenct witness to establish the innocence of the appellants. In addition to it, scholars have embraced by their experience that- multa exercitatione facilius quam regulis percipies: (A seasoned law practitioner perceive many things more easily by experience than by rules). Because knowing rules is one thing, but knowing how they are enforced and how they apply to a specific case is quite another.

(18). At this juncture, the Court has laid his hands to a famous quotation of Harry Browne :

“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.”

There is also proverb in this regard that "Non in legendo sed in intelligendo leges consistent" which make us understand that laws depend not on being read but on being understood.

(19). Shri V.P. Srivastava, learned counsel for the appellants have submitted that on 12.01.2000 the two affidavits carrying the thumb impression/signature of Shyam Narayan Ram and Ram Dular s/o Buddhu Harijan, were filed in the court of Special Judge, SC/ST Act, Varanasi. Shyam Narayan Ram, the informant, in his affidavit dated 12.01.2000 states as under :

“समक्ष- न्यायालय स्पेशल जज एस.सी.एस.टी. वाराणसी

सत्र परीक्षण संख्या 212 सन् 99

शपथ पत्र श्याम नारायण उम्र 25 वर्ष पुत्र स्व० मोहन उर्फ फजिहत हरिजन निवासी मीरापुर थाना-धानापुर जनपद चन्दौली बहलफ निम्नलिखित बयान करता है:-

1. यह कि शपथकर्ता बहलफ बयान करता है कि मुकदमा में वह वादी है उसके पिता व माता का मर्डर किया गया है न्यायालय के आदेशानुसार वह न्यायालय हाजिर हो रहा है।

2. यह कि दिनांक 21.04.98/22.04.98 वह कमला सिंह के खेत में गेहूँ काट रहा था रात में करीब 1 बजे फायर हुआ था वह शोर सुनकर कमला सिंह के पम्पिंगसेट पर आया। वहाँ पर हमने नहीं देखा कि अभियुक्त गण राधेश्याम लाल, पप्पू उर्फ गांधी, प्रताप, जगरनाथ जो हमारे गांव के हैं मौजूद हैं। रात में करीब तीन बजे माता पिता को खोजा गया था। एफ०आई०आर० की सूचना मेरे बहनोई ने दिया एवं जहां कहा अंगूठा निशान लगा दिया। जब हम लोग रात में पम्पिंग सेट पर गये थे उस समय वहां अंधेरा था।

3. यह कि शपथकर्ता बहलफ बयान करता है कि वास्तव में पुलिस ने उससे कोई बयान नहीं लिया है।

यह कि शपथकर्ता बहलफ बयान करता है कि वह जो कुछ हलफनामा दे रहा है वह सब सही है।

नि०अं० श्याम नारायण

सत्यापन

मैं, मुजहिर बहलफ सत्यापित करता हूँ कि हलफनामा हाजा दफा 1 ता 4 सब सच व सही है कोई बात इसमें असत्य नहीं है और न छिपायी गई है। इबारत तसदीक दीवानी कचहरी वाराणसी।

दिनांक: 12.01.2000

शपथ कर्ता

नि०अं० श्याम नारायण"

Ram Dular, in his affidavit dated 12.01.2000 states as under :

“समक्ष- न्यायालय स्पेशल जज एस.सी.एस.टी. वाराणसी

मुकदमा नं० 212 सन् 99

सरकार बनाम राधेश्याम वगै०

शपथ पत्र

शपथ पत्र राम दुलार पुत्र बुद्धू हरिजन निवासी मीरापुर थाना-धानापुर जिला-चन्दौली बहलफ निम्नलिखित बयान करता है:-

1. यह कि शपथ कर्ता बहलफ बयान करता है कि वह मुकदमा हाजा में अभियोजन पक्ष का गवाह नं० 2 है।

2. यह कि शपथ कर्ता बहलफ बयान करता है कि दिनांक 22.04.98/21.04.98 ई० की रात को वह घर पर सोया हुआ था। रात करीब तीन बजे गांव में हल्ला हुआ, शोर सुनकर कमला सिंह के पम्पिंग सेट पर हम लोग गये। बोधा देबी व मोहन की लाश कुएँ में थी हम खेत में कटाई नहीं कर रहे थे न ही मेरे साथ श्याम नारायण थे। हमने किसी को गोली मारते हुए या बन्दूक के बटों से अथवा लाठी से नहीं देखा है न ही हमने पुलिस के सामने

बयान दिया है न ही पुलिस हमसे कुछ पूछी है। न्यायालय द्वारा सम्मन मिलने पर प्रार्थी हाजिर अदालत हुआ है।

3. यह कि शपथ कर्ता बहलफ बयान करता है कि घटना के विषय में वह कुछ देखा नहीं है बल्कि लाश को रात में 3.30 बजे के करीब जब श्यामनारायण टार्च जलाकर देख रहे थे तब हमने भी लाश को कुएं के अन्दर पड़ा हुआ देखा था।

सत्यापन

मैं मुजहिर बहलफ सत्यापित करता हूँ शपथपत्र हाजा दफा 1 ता 3 मेरी निजी जानकारी में सत्य सच व सही है कोई बात न तो असत्य है और न छिपायी गई है। इबारत तसदीक अन्दर अहाता दीवानी कचहरी वाराणसी में किया।

दिनांक:12.01.2000

शपथ कर्ता
रामदुलारे"

(20). In continuation of the same, in the year 2019 the learned DGC (Crl) have moved three applications u/s 29 ख, 30 ख and 31 ख u/s 311 Cr.P.C.. Vide order dated 20.5.2019 all these three applications were disposed of by the court concerned, whereby the application No.29 ख and 30 ख were rejected on the ground that since the matter is of oldest category, and therefore, there is no need of summoning the desired prosecution witnesses for re-examining them. Order dated 20.5.2019 while disposing of all three applications by the Special Judge, SC/ST Act, Varanasi is quoted herein below :

"20-05-2019

पत्रावली पेश हुई। पुकार करायी गयी। अभियुक्तगण अनुपस्थित है, जिनकी हाजिरी जरिये अधिवक्ता आज के लिये माफ की गयी।

पत्रावली वास्ते आदेश प्रार्थनापत्र संख्या 29 ख, 30 ख, व 31 ख नियत है।

दिनांक 17.05.2019 को पत्रावली वास्ते बहस नियत थी। दौरान बहस विद्वान विशेष अभियोजक द्वारा यह अवगत कराया गया कि पूर्व में दिनांक 12.05.2005 को अभियोजन द्वारा प्रस्तुत उपरोक्त प्रार्थनापत्र का निस्तारण नहीं किया गया अतः मामले में निर्णय से पूर्व उक्त प्रार्थनापत्रों का निस्तारण

आवश्यक है अतः न्यायालय द्वारा पूर्व तिथि पर उपरोक्त प्रार्थनापत्रों पर बहस सुनी गयी।

प्रार्थनापत्र 29 ख इस आशय का प्रस्तुत किया गया है कि मामले में मृतकों की पोस्ट मार्टम आख्या मे अंकित मृत्यु का कारण स्पष्ट करने के लिये चिकित्सक एस०के० श्रीवास्तव को तलब किया जाय।

प्रार्थनापत्र 30 ख इस याचना के साथ अंकित किया गया है कि फर्द खून लगा गमछा, फर्द एस०बी०बी०एल० बन्दूक, फर्द कारतूस, फर्द खून आलूदा मिट्टी व सादी मिट्टी एवं नक्शा नजरी को साबित करने के लिये विवेचक को तलब किया जाय।

प्रार्थनापत्र 31 ख इस याचना के साथ दिया गया है कि धारा 313 द०प्र०सं० के बयान में कुछ प्रश्न पूछने से रह गये हैं अतः उन प्रश्नों को पूछने के लिये दौबारा 313 द०प्र०सं का बयान कराया जाय।

उपरोक्त प्रार्थनापत्र के समर्थन में विशेष अभियोजक द्वारा यह तर्क दिया गया कि मामले में दो व्यक्तियों की हत्या की गयी है और अभियोजन का वाद साबित करने के लिये उपरोक्त साक्ष्यों की आवश्यकता है अतः समस्त प्रार्थनापत्र स्वीकार किया जाय।

बचाव पक्ष के विद्वान अधिवक्ता द्वारा उपरोक्त प्रार्थनापत्रों का विरोध इस आधार पर किया गया कि मामला अतिप्राचीन है। प्रार्थनापत्र सन् 2005 में प्रस्तुत किये गये थे, जबकि उससे पूर्व औपचारिक साक्षी तलब किये जाने के स्तर पर बचाव पक्ष द्वारा समस्त अभियोजन प्रपत्रों की औपचारिक प्रमाणिकता को स्वीकार कर लिया गया है, इसलिये साक्षीगण को मात्र प्रपत्र साबित करने के लिये तलब किये जाने की आवश्यकता नहीं है और ऐसा किये जाने पर मामले में अनावश्यक विलम्ब कारित होगा। अतिरिक्त बयान 313 द०प्र०सं० के सन्दर्भ में बचाव पक्ष का कथन है कि यदि न्यायालय उचित पाती है तो कभी भी व किसी भी स्तर पर अभियुक्तगण के अतिरिक्त परीक्षा कर सकती है।

उभय पक्षों के तर्कों को सुना एवं पत्रावली का परिशीलन किया।

वर्तमान वाद की घटना 22-04-1998 की है जिसमें आरोप दिनांक 01-10-1999 को विरचित किया गया। मामले में दो साक्षी पी०डब्लू०-1 श्याम नरायन व पी०डब्लू०-2 राम दुलार को परीक्षित किया जा चुका है। अंतिम साक्षी दिनांक 28-04-2005 को परीक्षित किया गया। उसके पश्चात् दिनांक 28-04-2005 को ही बचाव पक्ष के विद्वान अधिवक्ता द्वारा अभियोजन प्रपत्रों के औपचारिक प्रमाणिकता को स्वीकार किया गया। तत्पश्चात् दिनांक 04-05-2005 को धारा 313 द०प्र०सं के अन्तर्गत अभियुक्तगण के बयान दर्ज किये गये।

उपरोक्त प्रक्रिया समाप्त होने के उपरान्त दिनांक 12-05-2005 को प्रश्नगत प्रार्थनापत्र अभियोजन की ओर से प्रस्तुत किया गया। दिनांक 24-

05-2005 को धारा 311 द०प्र०सं के अन्तर्गत अभियोजन द्वारा प्रार्थनापत्र प्रस्तुत कर पन्नालाल को परीक्षित किये जाने की याचना की गयी। उक्त प्रार्थनापत्र निरस्त करने के आदेश दिनांकित 24-04-2005 के विरुद्ध अभियोजन द्वारा माननीय उच्च न्यायालय के समक्ष याचिका संख्या 5560/2005 योजित की गयी जिसमें आदेश दिनांकित 16-05-2005 पारित कर अभियोजन को एक अवसर दिया गया। तत्कालीन पीठासीन अधिकारी द्वारा माननीय उच्च न्यायालय के आदेश के अनुपालन में अभियोजन को अवसर दिया गया और अभियोजन द्वारा साक्षी के परीक्षित न करने के कारण अवसर दिनांक 26-05-2005 को समाप्त कर दिया गया। उक्त आदेश के विरुद्ध वादी की तरफ से प्रकीर्ण वाद अन्तर्गत धारा 482 द०प्र०सं संख्या 6421/2005 योजित किया गया और याचिका सूचीबद्ध होने तक वाद की कार्यवाही स्थगित कर दी गयी। उक्त आदेश के माध्यम से याचिका को जुलाई सन् 2005 के अंतिम सप्ताह में सूची बद्ध करने का आदेश पारित किया गया और आदेश के अनुपालन के सम्बन्ध में न्यायालय से आख्या आहूत की गयी। तत्कालीन पीठासीन अधिकारी द्वारा आख्या 05-07-2005 को प्रेषित की जा चुकी है।

वर्तमान में माननीय उच्चतम न्यायालय द्वारा एशियन रिसफेसिंग आफ रोड एजेन्सी प्राईवेट लिमिटेड बनाम सी०बी०आई० में पारित आदेश के अनुपालन में आदेश दिनांक 14-02-2019, 26-02-2019 एवं 11-03-2019 पारित कर स्थगन आदेश के समाप्त होने की अवधारणा करते हुए पत्रावली वास्ते बहस नियत की गयी।

निस्तारण प्रार्थनापत्र 29 ख व 30 ख:-

उपरोक्त दोनों प्रार्थनापत्रों में अभियोजन द्वारा अभियोजन प्रपत्रों व उनमें उल्लिखित तथ्यों को साबित करने के लिये साक्षी को तलब करने की याचना की गयी। जबकि बचाव पक्ष द्वारा अभियोजन प्रपत्रों की औपचारिक प्रमाणिकता को स्वीकार किया गया और तथ्यों से इन्कार किया गया। उल्लेखनीय है कि औपचारिक प्रमाणिकता अर्थात् प्रपत्रों का निष्पादन स्वीकार करने के उपरान्त उसके तथ्यों की प्रमाणिकता को अभियोजन द्वारा प्रस्तुत मौखिक साक्ष्य के आधार पर परखा जा सकता है। ऐसी दशा में मामले की प्राचीनता को ध्यान में रखते हुए औपचारिक साक्षियों को तलब किये जाने की आवश्यकता यह न्यायालय नहीं पाती है।

तदनुसार प्रार्थनापत्र 29 ख व 30 ख निरस्त किया जाता है।

प्रार्थनापत्र 31 ख का निस्तारण:-

उक्त प्रार्थनापत्र के माध्यम से हेतुक परिस्थिति एवं रोशनी आदि के बावत अतिरिक्त बयान अन्तर्गत धारा 313 द०प्र०सं की याचना की गयी। उल्लेखनीय है कि उक्त प्रार्थनापत्र दिनांक 12-05-2012 को योजित किया गया था। पत्रावली के परिशीलन से यह परिलक्षित होता है कि दिनांक 16-

05-2005 को उपरोक्त बिन्दुओं के सन्दर्भ में अतिरिक्त बयान अन्तर्गत धारा 313 द०प्र०सं दर्ज किया जा चुका है। अर्थात् यह उपधारणा की जायेगी कि दिनांक 16-05-2005 को प्रार्थनापत्र स्वीकार करते हुए बयान अन्तर्गत धारा 313 द०प्र०सं दर्ज किया जा चुका है। दूसरे शब्दों में कहा जाय तो प्रार्थनापत्र 31 ख स्वतः निस्तारित हो चुका है।

उपरोक्तानुसार प्रार्थनापत्र के निस्तारण के उपरान्त इस न्यायालय के समक्ष पत्रावली में बहस सुनकर निर्णय पारित करने के अलावा अन्य कोई विकल्प शेष नहीं है।

अतः पत्रावली दिनांक 22-05-2019 को वास्ते बहस पेश हो।

विशेष न्यायाधीश (एस०सी०/एस०टी०) एक्ट
वाराणसी”

(21). The aforesaid affidavits were taken on record, finds reference in para 19 of the judgment, but it seems from the judgment that, Dashmi who is one of the eye-witness along with the informant and Ram Dular have allegedly managed to extract the aforesaid affidavits from the respective deponents taking the advantage of their illiteracy and on very next date when they came to know about this affidavit, they have filed yet another affidavit on 19.2.2000 denying the contents of earlier affidavit as clarified by P.W.-1 and P.W.-2 in their respective depositions. On similar lines, P.W.-2 has also given his testimony denying the contents of paper No.10 ख, their alleged affidavit. It has been contended that both of the witnesses have not given their affidavits on their own sweet wills. When they came to know about the fraud by own man and an eye-witness Dashmi, they have rectified their mistake by giving yet another affidavit 16-ख/1. But there is no denial of the fact that the informant and Ram Dular has given two affidavits which finds reference in para 19 of the instant judgment.

(22). Shri Srivastava, learned counsel for the appellants, have contended that it is just possible that there might be some genuine

confusion that the informant does not want to prosecute the appellants and that is why they have given their affidavits on 12.2.2000, though which was later on withdrawn by the P.W.-1 and P.W.-2.

In this backdrop of the case, the defence counsel might have given this concession, while admitting the genuineness and authenticity of the documents produced by the prosecution, otherwise there could not be any conceivable good reason that the defence counsel without looking to the papers gave a sweeping nod, while admitting the genuineness of those papers. This indeed an extraordinary situation rather a judicial hara-kiri by the defence counsel, which normally no defence counsel would do. It's true that accepting and admitting the genuineness of those documents is now admissible under Section 294 of Cr.P.C. It is a settled proposition of law that if genuineness of any document filed by a party is not disputed by the opposite party, it can be read as substantive evidence as per provisions of sub-section (3) of Section 294 of Cr.P.C. Accordingly, the postmortem report and other documents, if its genuineness is not disputed by the defence counsel, the said postmortem report can be read as a substantive evidence to prove the correctness of its contents without summoning its author. The order dated 28.4.2005 passed by the Special Judge, SC/ST Act in S.T. No.212 of 1999 reads thus :

“Case called out.

Accused persons Radhey Shyam Lal, Pratap Jagannath and Rajesh Kumar @ Pappu @ Gandhi are present in persons on bail with their learned defence counsel Sri P.N. Tripathi.

Remaining cross examination of P.W.-2 Ram Dulare is concluded today.

Learned prosecution counsel Sri Ajai Kumar Singh assisting through public prosecutor Sri Suresh Singh, learned ADGC (Crl.) for State, refused to produce and examine any more witness of fact and prayed for summoning formal witnesses.

Learned defence counsel Sri P.N. Tripathi examined the record of the case in the light of statement of examined fact witnesses and proposed to admit genuineness of prosecution papers sought to be formally proved by the formal witnesses with the prayer for not to summon formal witnesses by dispensing formal proof of the prosecution papers by summoning the formal witnesses. Accordingly, he was allowed. Learned defence counsel admitted genuineness of all prosecution papers, not proved by examined fact witnesses P.W.-1 and P.W.-2. Accordingly, summoning of formal witness is dispensed with and the prosecution papers, of which genuineness is admitted by defence, are exhibited. Accordingly, prosecution evidence is closed. Fix 4.5.05 for recording statement of accused persons u/s 313 Cr.P.C.

Sd.-Ill.

Spl. J. (SC & ST) Act.”

DISPOSAL OF APPLICATION U/S 391 Cr.P.C. FILED BY THE APPELLANT :

(23). After reading of aforesaid order dated 28.4.2005, it speaks volumes about Sri P.N. Tripathi, learned counsel for the defence, who allegedly declined to cross-examine the prosecution witnesses. Not only this for the reasons best known to the concerned counsel, without summoning the remaining formal or witnesses of fact and insist them to establish the genuineness of documents and their contents, abruptly and strangely foregone his valuable right to cross-examine the remaining witnesses. Consequently, the learned trial Judge by one stroke of pen, Exhibited all the prosecution documents. This order by itself smacks foul. Under the normal circumstances, acceptance of the genuineness of the prosecution documents is only a rare and exceptional case, but the way and the manner the defence

counsel has accepted was never before and detrimental to the interest of his party, to whom he is representing in the court of law. The court should have raised his eyebrows immediately on this extraordinary, uncommon behaviour of the learned defence counsel. The court is not helpless or it cannot dance on the tune of the counsels.

(24). It is urged by learned senior counsel Shri Srivastava, for the appellants that this would be extremely harsh and heavy upon the appellants. No doubt that the counsel for the defence has shown his ‘professional incompetence’ or he was under some mistaken conception that the parties are coming to truce and summoning of the evidence/author of the document may cause unwarranted dragging of the case, as such, he has accepted their genuineness. But fact remains that this has caused a bundle load of complication in the matter, resultantly the appellants were condemned and convicted for the offences, which they have never done or might have falsely implicated by the prosecution.

(25). While pendency of instant appeals, an application u/s 391 Cr.P.C. was filed by the counsel for the appellants on 07.10.2020 with the prayer to *allow this application for additional evidence and summon the Investigation Officer Sri Rajiv Ranjan Maurya, then posted at Police Station Dhanapur, District Chandauli and Dr. A.K. Srivastava, Medical Officer, SSPG Hospital Kabirchaura, Varanasi for examination and recording of their statements as additional evidence.*

In the affidavit filed in support of application u/s 391 Cr.P.C., it has been mentioned that :-

“4. That along with the appeal appellant also filed bail application but the same has been rejected vide order dated

30.7.2020 and appeal has been directed to be placed for hearing after preparation of paper book.

5. That in the above noted case only first informant Shyam narayan was examined as P.W.-1 whereas alleged eye witness Ram Dular was examined as P.W.-2 and except these two witnesses no other prosecution witnesses have been examined.

6. That at the time of submission of chargesheet in the case, prosecution has shown 30 witnesses including Investigating Officer Sri Rajiv Ranjan Maurya, then posted at Police Station Dhanapur District Chandauli, Dr. A.K. Srivastava Medical Officer, S.S.P.G. Hospital Kabirchaura Varanasi and Dr.S.K. Srivastava Medical Officer, S.S.P.G. Hospital Kabirchaura, Varanasi.

7. That in the first information report it has been said tht both deceased namely Mohan @ Manmohan and Bodha Devi were done to death by causing fire arm injury but surprising enough there were no fire arm injury on the body of deceased.

8. That in the circumstances testimony of Sri Rajiv Ranjan Maurya, then posted at police Station Dhanapur District Chandauli who was Investigating officer, Dr. A.K. Srivastava Medical Officer, S.S.P.G. Hospital Kabirchaura Varanasi who conducted postmortem on the body of deceased Mohan as well as testimony of Dr. S.K. Srivastava Medical Officer SSPG Hospital, Kabirchaura, Varanasi who conducted postmortem on the body of deceased Bodha Devi was necessary but they could not be examined during trial.

9. That in this view of the matter availability of evidence by these three witnesses are necessary for proper adjudication of case.”

(26). The courts are not supposed to sit as a mute and silent spectator. The role of a Judge in dispensation of justice after ascertaining the true facts, no doubt is a very difficult one. In the pious process of unrevealing the truth as to achieve the ultimate goal of dispensing the 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 a slightest impression that he is a bias or prejudice due to own personal conventions or views in favour of one or other party. This however would not mean that a 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. (Munna Pandey vs. State of Bihar, Criminal Appeal no.1271-1272 of 2018) dated 04th September, 2023.

(27). Taking strength from the above observation of Hon'ble Apex Court, we feel proper and justified while deciding the application u/s 391 Cr.P.C. moved by the appellant Rajesh Kumar @ Pappu. Before deciding the matter on merits, it is imperative to spell out the provisions of Section 391 Cr.P.C., which reads thus :

“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.”

(28). The intention of legislation in enacting this section is to empower the appellate court to see that the justice is done between the prosecutor and the person prosecuted, and if the appellate court finds that certain evidence is necessary in order to enable it to give a

correct finding, it would be justified in taking action under this section. The primary object of Section 391 Cr.P.C. is the prevention of guiltyman's escape through some careless or ignorance proceeding before the court or vindication of an innocent person who has been wrongfully made accused. Where the appellate court thought, some carelessness or ignorance have omitted to record the circumstances essential to elucidation of truth, the exercise of power u/s 391 is desirable. If the appellate court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to the cases where has been merely some formal defect. The matter is of discretion of the appellate court. The High court can exercise the power suo-mottu in exercise of power 391 Cr.P.C. in the interest of justice, where the defence counsel has given up to cross-examine the prosecution witnesses admitting the genuineness of the prosecution documents blindly. This indeed was to the detrimental to the interest of accused persons. It would amount to sending the accused-appellants to gallows without any fault on their part. The appellate court may summon the witnesses exercising the power u/s 391 Cr.P.C. to discover the truth in the prosecution story especially when there is glaring latches which could be perceived by naked eyes.

(29). In the celebrated judgment in the case of ***Sessions Judge, Nellore vs. Intha Ramana Reddy, 1972 CrLJ 1485***, which reads follows :

“Every criminal trial is a voyage of its discovery in which the truth is quest. It is a duty of presiding judge to explore every avenue open to him in order to discover the truth and to advantage the cause of justice for that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put question to the witnesses. Indeed the right given to the judge is so wide that he may ask any question he pleases, in any form, at any time, of any witness, of the parties about any fact, relevant or irrelevant.

Section 172 (2) Cr.P.C. enables the court to send the police diary to use them to aid in a 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.”

(30). Learned counsel for the appellants Shri V.P. Srivastava has relied upon yet another judgment of Hon’ble Apex Court ***Brigadier Sukhjit Singh (Retd) MVC vs. State of U.P. and others, 2019 (16) SCC 172***, where the Hon’ble Apex Court has observed thus :

“23. The key words in [Section 391\(1\)](#) are “if it thinks additional evidence to be necessary”. The word “necessary” used in [Section 391\(1\)](#) is to mean necessary for deciding the appeal. The appeal has been filed by the accused, who have been convicted. The powers of Appellate Court are contained in [Section 386](#). In an appeal from a conviction, an Appellate Court can exercise power under [Section 386\(b\)](#), which is to the following effect:-

“386 (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;”

*24. Power to take additional evidence under [Section 391](#) is, thus, with an object to appropriately decide the appeal by the Appellate Court to secure ends of justice. The scope and ambit of [Section 391](#) Cr.P.C. has come up for consideration before this Court in ***Rajeswar Prasad Misra Vs. State of West Bengal and Another, AIR 1965 SC 1887***. Justice Hidayatullah, speaking for the Bench held that a wide discretion is conferred on the Appellate Courts and the additional evidence may be necessary for a variety of reasons. He held that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. Following guidelines were laid down in Paragraph Nos. 8 and 9:-*

“8. Since a wide discretion is conferred on appellate courts, the limits of that courts’ jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.

9. Additional evidence may be necessary for a variety of reasons which it is hardly proper to construe one section with the aid of observations made to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise

25. This Court again in Rambhau and Another Vs. State of Maharashtra, (2001) 4 SCC 759 had noted the power under [Section 391](#) Cr.P.C. of the Appellate Court. Following was stated in Paragraph Nos. 1 and 2:-

“1. There is available a very wide discretion in the matter of obtaining additional evidence in terms of [Section 391](#) of the Code of Criminal Procedure. A plain look at the statutory provisions (Section 391) would reveal the same.....

2. A word of caution however, ought to be introduced for guidance, to wit: that this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. This Court in the case of **Rajeswar Prasad Misra Vs. State of West Bengal** in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in the event, the same dictates exercise

of power as conferred by the Code, there ought not to be any hesitation in that regard.”

26. From the law laid down by this Court as noted above, it is clear that there are no fetters on the power under Section 391 Cr.P.C. of the Appellate Court. All powers are conferred on the Court to secure ends of justice. The ultimate object of judicial administration is to secure ends of justice. Court exists for rendering justice to the people.”

(31). In ***Zahira Habibullah H. Sheikh and another vs. State of Gujrat, AIR 2004 (SC) 3114***, the Hon’ble Apex Court has made the following observations :

“50. Section 391 of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, specially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the Court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

52. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the

provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court. As re-iterated supra the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the public prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions.”

(32). In the latest judgment of ***Munna Pandey vs. State of Bihar in Criminal Appeal No.1271-1272 of 2018 decided on 4th September, 2023***, the Hon’ble Apex Court has made the following observations :

“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.

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.

(33). Per contra, Shri P.K. Singh, learned counsel for the informant have relied upon a judgment of Hon'ble Apex Court in the case of ***Akhtar and others vs. State of Uttaranchal, Criminal Appeal No.1590 of 2007 decided on 9th April, 2009*** and its paragraph 16 is quoted herein below :

“16. It has been argued that non-examination of the concerned medical officers is fatal for the prosecution. However, there is no denial of the fact that the defence admitted the genuineness of the injury reports and the post mortem examination reports before the trial court. So the genuineness and authenticity of the documents stands proved and shall be treated as valid evidence under [Section 294](#) of the CrPC. It is settled position of law that if the genuineness of any document filed by a party is not disputed by the opposite party it can be read as substantive evidence under sub-Section (3) of [Section 294](#) CrPC. Accordingly, the post-mortem report, if its genuineness is not disputed by the opposite party, the said post-mortem report can be read as substantive evidence to prove the correctness of its contents without the doctor concerned being examined.”

(34). Shri Singh, learned counsel for the informant has further relied upon yet another judgment ***State of Rajasthan vs. Asharam @ Anshumal, 2023 SCC Online SC 423***, paragraph 16 & 17 of which is quoted herein below :

“16. Both Sections 311 and 391 of the Cr.P.C. relate to power of the court to take additional evidence; the former at the stage of trial and before the judgment is pronounced; and the latter at the appellate stage after judgment by the trial court has been

pronounced. It may not be totally correct to state that the same considerations would apply to both situations as there is a difference in the stages. Section 311 of the Cr.P.C. consists of two parts; the first gives power to the court to summon any witness at any stage of inquiry, trial or other proceedings, whether the person is listed as a witness, or is in attendance though not summoned as a witness. Secondly, the trial court has the power to recall and re-examine any person already examined if his evidence appears to be essential to the just decision of the case. On the other hand, the discretion under Section 391 of the Cr.P.C. should be read as somewhat more restricted in comparison to Section 311 of the Cr.P.C., as the appellate court is dealing with an appeal, after the trial court has come to the conclusion with regard to the guilt or otherwise of the person being prosecuted. The appellate court can examine the evidence in depth and in detail, yet it does not possess all the powers of the trial court as it deals with cases wherein the decision has already been pronounced.

17. *State (NCT of Delhi) v. Shiv Kumar Yadav and Another* emphasises that Recall is certainly permitted if essential for the just decision and for which there should be a tangible reason that fair trial would suffer without it. The discretion is to be exercised judiciously to prevent failure of justice, and must not be exercised arbitrarily. In our opinion, the appellate court must be equally, if not more cautious, of the desire to delay the hearing of the appeal, or the attempt to lead additional evidence to explore a chance of contradictory evidence. While the prayer for leading additional evidence should be permitted to correct a bona fide error or otherwise, and a party may be entitled to further opportunity without any fault on the part of the opposite party, the request for recall should be bona fide and is to be balanced carefully with relevant considerations, including hardship to the witness and delay of the proceedings. Right to speedy trial, including speedy disposal of an appeal, is not the exclusive right of an accused, but an obligation of the court towards the society in general, and the victim in particular. Balance between the rights of an accused and the interests and rights of an individual victim and the society, without compromising the right of the accused to a fair trial, has been highlighted by this Court in *Girish Kumar Suneja v. Central Bureau of Investigation*¹⁶, *P. Ponnusamy v. State of Tamil Nadu*¹⁷ and *State of West Bengal v. Amiya Kumar Biswas*¹⁸. Every criminal case, it is stated, is a ¹⁵ (2016) 2 SCC 402. ¹⁶ (2017) 14 SCC 809. ¹⁷ 2022 SCC Online SC 1543. ¹⁸ (2004) 13 SCC 671. ⁸ voyage of discovery in which the truth is the quest.¹⁹ The process of ascertaining the truth requires compliance of procedures and rules of evidence. In a well-designed system, judicial findings of formal legal truth should coincide with substantive truth. This happens when the facts contested are

skillfully explored in accordance with the procedure prescribed by law. Further, in a criminal trial, burden of proof to establish the fact, which has to be proven beyond reasonable doubt, is on the prosecution. The power to take additional evidence in an appeal is to be exercised to prevent injustice and failure of justice, and thus, must be exercised for good and valid reasons necessitating the acceptance of the prayer.”

(35). Thus taking into account the ratio laid down by Hon’ble Apex Court in the case of ***Munna Pandey vs. State of Bihar***, by which the role of a Judge was emphasized while holding a fair trial. Article 21 of the Constitution of India envisages that there shall be a speedy trial but at the same time the Judge should act to explore the truth of the case. In the name of speedy trial the merit of the case should not be butchered. We are running against the time keeping in view the piling of the cases, in this rat race we are disposing of the cases instead of deciding them on merit. In this connection the earlier quotation occupies significance that “Justice has nothing to do what goes on in the courtroom, Justice is what come out from the courtroom.” The cherished principle and the guiding star of the Indian Criminal Justice System that justice must be done and truth must prevail. The truth is the soul of justice. The litmus test provided that no innocent person is sent to gallows and the guilty person is not allowed to go scot-free. If the criminal trial is not free and fair, then the confidence of public in judicial fairness of a Judge and the justice delivery system would be shaken. No trial can be treated as fair trial, unless there is 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 a fair and proper opportunity to the prosecutor to prove the guilt of the accused and opportunity to accused to prove his innocence.

(36). On the other hand, Shri P.K. Singh, who cited the judgment of *State of Rajasthan vs. Asharam @ Ashumal* (*supra*), the Hon'ble Apex Court without mincing any words have distinguished the powers of 311 and 391 Cr.P.C., though in both the sections the court is empowered to take additional evidence, but in the former it is at the stage of trial and before the judgment, whereas in the latter at appellate stage after judgment by the trial court has been pronounced. It may not be totally correct to state that same consideration would apply in both the situation as there is difference in the stages. Section 311 Cr.P.C. consists of two parts, first gives the power to the court to summon any witness at any stage of inquiry or trial or other proceeding, whether the person is listed as a witness or is in attendance through or is in attendance though not summoned as a witness and secondly the trial court has power to recall or re-examine to any person already examined, if his evidence appears to be essential to the just decision of the case. ON THE OTHER HAND Section 391 Cr.P.C. should be read in somewhat more restricted in comparison to Section 311 Cr.P.C. As appellate court is dealing with appeal, after the trial court has come to the conclusion with regard to the guilt or otherwise of the person being prosecuted. The appellate court can examine the evidence in depth and in detail, yet it does not possess all the power of the trial court as it deals with cases wherein the decision has already been pronounced. Recall is certainly permitted if it essential for the just decision, for which there should be a tangible reason that fair trial would suffer without it. This discretion has to be exercised judiciously to prevent the failure of justice and must not exercise arbitrarily or whimsically. As mentioned above, right to speedy trial including speedy disposal of an appeal is not an exclusive right of an accused but an obligation of

the court towards the society in general and victim in particular. A perfect balance between the rights of an accused and the interest and the rights of the individual victim and the society, without compromising the right of accused to a fair trial are supplementing factors of each other and they are not on crossroad or objective.

(37). In this backdrop of the case the Court have to assess the impugned judgment of the learned Special Judge SC/ST Act for a limited purpose as to whether the alleged acceptance of the genuineness of prosecution document, which were later on exhibited by the court and relied upon during the trial, has caused a serious prejudice to the appellants or not? In this regard we have already mentioned the application u/s 391 Cr.P.C. by the appellant pending the present appeal. Let's examine the judgment impugned whereby the appellants were convicted for life u/s 302, 201 IPC and Section 3(2)(5) of SC/ST Act for limited purpose i.e. the acceptance of the genuineness of the prosecution documents has caused any serious prejudice to the accused-appellants or not?

(38). The court has gone through the entire judgment under judicial scrutiny and *prima facie* we are of the considered opinion that on account of immense professional incompetence by the counsel for defence whereby he has accepted the genuineness of every document by a single stroke has caused a serious miscarriage of justice qua the appellants. For this reason this Court wants to highlight those portion of the judgment which are irking and bothering this Court.

(39). Let's examine those portion of judgment one by one. It is made clear that the Court is deliberately shunning away from giving a detailed finding on the issue. It is a conscious attempt by the Court not to examine the judgment critically and leaving it up to the trial

court to summon the prosecution witnesses to establish the genuineness of those documents which were already admitted as genuine one by the erstwhile counsel for the defence for the reasons best known to him. Not only this, the learned trial Judge have rejected the Application Nos.29 ख, 30 ख and 31 ख u/s 311 Cr.P.C. It means it goes to show that even DGC (CrI) was conscious enough that this is an extraordinary and strange step taken by the counsel for defence, detrimental to the interest of the accused-appellants.

(40). In the judgment itself the learned Trial Judge while dealing with this aspect of the issue that the genuineness of the prosecution documents were already admitted, what would be its impact. From the discussion in the judgment, from the FIR till the charge sheet including the site plan, inquest report, the recovery memo of the various articles, SBBL gun allegedly used in commission of offence, recovery of pallets, tikli and empty and live cartridges from the place of occurrence, the post-mortem reports, FLS reports, their genuineness was accepted and admitted by the counsel for the defence on behalf of accused-appellants. The author of these documents were not summoned to prove its contents on the ground that the counsel for the defence has accepted its genuineness. It does not mean that the defence counsel have accepted and admitted its contents also. Both of them are in two different and distinct spheres to operate.

(41). It is contended by learned counsel for appellants it is the prosecution has to establish his case beyond any reasonable of doubt and stand on his own foot. In this regard Shri Srivastava contends that from the FIR it is a positive case of the prosecution that the parent of informant in the pitch dark around 01.00 in the night were

brutally assassinated by named accused persons on account of some previous animosity. In the FIR it is clearly mentioned that :

“रात लगभग एक बजे एक राय होकर गोली मारकर हत्या कर दिये। गोली की आवाज सुनकर हम तथा हमारे गाँव के राम दुलार पुत्र बुद्धु हरिजन दशमी पुत्र किशुन हरिजन वहीं ट्यूबवेल के सामने कमला सिंह के ही खेत में उजाली रात होने के कारण हम लोग कटिया कर रहे थे। हम लोग ट्यूबवेल की तरफ आये ट्यूबवेल पर बल्ब जल रहा था। काफी रोशनी थी उसी रोशनी में हम लोगो ने देखा कि राधे श्याम लाल अपनी हाथ में बन्दुक लिए थे तथा प्रताप कुम्हार अपने हाथ में कड़ा लिए हुए थे। जगन्नाथ व पप्पू दोनो लोग मिलकर मेरे पिता व माँ को घसीटकर कुँए में फेंक दिये।”

(42). From the aforesaid, it is a positive case that the deceased has been done to death by firearm and thereafter their body was dragged and thrown into nearby well/tubewell. Not only this, the police has recovered one empty cartridges, two live cartridges, tikli, pallets from the place of occurrence. In addition to this, the police has also recovered blood from the place of occurrence, suggestive of the fact that there was use of firearm at the place of occurrence. But the post-mortem reports belies the prosecution case to the core that there was no firearm injury over the person of both the deceased and the cause of death of both the deceased is on account of serious damage in spinal cord and fracture of vertebra. But while deciding this issue the learned trial Judge has conveniently changed the texture of the case by giving a positive finding that the accused-appellants have assaulted the deceased by lathi and butt of the gun. There is a mark deviation in the prosecution case and the finding recorded by the learned trial Judge.

(43). Moreover there is positive case of the prosecution that at the time of incident around 01.00 in the night they have seen the accused persons in the moonlight and the bulb was giving a sufficient light so as to identify the assailants. In this regard, Shri Srivastava, learned counsel for appellants has shown Hindi Calender (*Panchang*) that on

21/22.4.1998 on the fateful night, it was Dashmi, Krishna Paksha, Chaitra and on that day the “*Chandrodaya*” (moonrise) was at 02.46 a.m. and “*Chandrast*” (moon set) was at 2.35 p.m. Thus, there was no moonlight on the date and time of incident. So far as electricity bulb is concerned, since the counsel for the defence has already accepted the genuineness, it can’t be said with certainty that at the relevant point of time there was uninterrupted power supply.

(44). Shri Srivastava, learned counsel for appellants has drawn attention of the court to yet another strange feature of the case that the dead body of both the deceased were found absolutely in a naked condition. The lady was wearing only one blouse, except this both of them are completely naked and the learned trial Judge has given a very innocent reasoning that in the rural areas the villagers often untie their clothes while sleeping. This reasoning by itself seems to be an unswallowable moreover there is no recovery of their clothes in nearby.

(45). Similarly, the motive attributed for commission of crime is that there is an old animosity between them on account of some landed property and two days prior Pratap was taking out the nut bolts from the trolley belonging to one Panna Lal. So far as the dispute with regard to land is concerned, this issue was duly addressed and S.D.M. Sakaldiha Varanasi vide order dated 18th October, 1998 the dispute was duly resolved after identifying the land and resolving the dispute between them, permitting Radhey Shyam Srivastava to carry out boring over his land. Neither Panna Lal nor Dashmi the alleged eye-witness was ever produced as prosecution witness.

(46). As mentioned above, the Court does not want to scrutinise the impugned judgment and order of conviction in-depth on merits as we

are of the confirmed opinion that the interest of accused-appellants was literally butchered by the hand of their counsel who have strangely admitted the genuineness of the documents produced by the prosecution. Neither its author was examined to establish its contents nor the circumstances in which that document was authored. Unless and until the genuineness of any document is not put under the crucible and thoroughly examined by the counsel for defence so as to elucidate and establish its authenticity, a concession given by the counsel for defence would certainly come into the purview of gross injustice to the accused-appellants. It is the binding duty of the presiding officer to observe that there is a level play ground for both the parties and no one should be at advantageous position. In fact this is the undercurrent of Section 391 Cr.P.C. which empowers the appellate Court to examine the entire gamut of facts and circumstances of the case and reach to a conclusion as to whether the counsel for either of the parties are assisting the court in a fair and judicious way and manner. As soon as the appellants have admitted the genuineness of documents, immediately the eyebrows of the presiding Judge ought to have been raised and he should try to lift the veil so as to unearth the truth of the case by summoning the various witnesses on its own.

Admission of any document without additional evidence to support is nothing but empty vessel of no use. Admission is not a confession as confession is made by a person who is indicted in the offence i.e. accused, unlike admission.

The opinion of famous law stalwart Mr. Fredrick Douglas seems befitting on the prevailing situation where he categorically opined that ".....where ignorance prevails and where any one class

is made to feel that society is an organised conspiracy to oppress, rob and degrades them, neither persons nor property, will be safe"

(47). For all foregoing reasons, the appeals are partly allowed. We are left with no other alternative but to set aside the impugned judgment dated 15/16.7.2019 passed by the Special Judge, SC/ST Act, Varanasi while deciding S.S.T. No.212 of 1999 and remit and remand the matter back in exercise of power u/s 391/386(b)(i) of Cr.P.C. in the manner the sessions trial ought to have been decided, more particularly keeping in view the serious lapses on the part of defence, whose professional incompetence is absolutely glaring and could be felt by naked eyes. The matter shall be re-tried from the stage of the testimony of P.W.-2 onwards by the court of competent jurisdiction (Special Judge, SC/ST Act), Varanasi. The authors of the 'exhibited documents' who shall establish the authenticity with regard to its contents, shall be cross-examined by the counsel for the defence. This exercise shall go on day to day basis and shall conclude on or before 31st May, 2024 positively.

(48). Since the appellants are in jail, pursuant to aforesaid impugned judgment and order, but in the fitness of circumstances, this Court is of the considered opinion, that keeping in view the aforesaid facts and circumstances when we have directed to have re-trial of accused-appellants, it would be unjust and improper to keep them behind the bars for another 7-8 months. The appellants ***Rajesh Kumar @ Pappu, Radhey Shyam Lal, Pratap and Jagannath***, shall be released on bail in aforementioned sessions trial by furnishing a personal bond and two heavy sureties each of the like amount to the satisfaction of the court concerned. After the release they shall give a personal affidavit to the court concerned that they would remain

present on every date or as and when required by the court. The fine amount imposed by the trial court under the impugned judgment shall remain stayed during this period and shall be subject to final verdict to be pronounced by the trial court till 31.5.2024.

(49). Let a copy of this order be transmitted to the trial court concerned which have passed the impugned judgment of conviction, through the Registrar (Compliance) forthwith.

Order Date :- 01.11.2023

M. Kumar