

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.151 of 2015**

Arising Out of PS.Case No. -97 Year- 2013 Thana -MAHILA PS District- JEHANABAD

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Lalan Kumar, age 25 years, son of Ramanuj Yadav, resident of village-
Gulamichak, P.S. Kako, District Jehanabad

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. S. K. Lal-Advocate
Mr. Raghvendra Pratap Singh-Advocate
Mr. Birendra Kumar-Advocate
For the Respondent/s : Mr. S. A. Ahmad-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 8-04-2017

Sole appellant, Lalan Kumar has been found guilty for an offence punishable under Section 304B of the I.P.C. as well as Section 201 of the I.P.C. and accordingly been sentenced to undergo rigorous imprisonment for 10 years under Section 304B of I.P.C. and rigorous imprisonment for three years under Section 201 of I.P.C. as well as a composite fine appertaining to Rs.25,000/- has been inflicted against both heads of conviction and in default thereof, to undergo S.I. for three months additionally with a further direction to run the sentences concurrently with a further event of set off against the period already undergone during course of trial in terms of Section 428 of the Cr.P.C. by the Adhoc Additional Sessions Judge-1st, Jehanabad vide judgment of conviction dated 12.02.2015 and order of



sentence dated 20.02.2015 relating to Sessions Trial No.334 of 2014/92 of 2014.

2. Suresh Yadav, PW-4, had filed written report on 14.11.2013 alleging inter alia that his third daughter Simpi Kumari was married with Lalan Kumar (appellant), S/o Ramanuj Yadav of village-Gulamichak in the month of Fagun in Year 2012 as per Hindu rites and customs. At the time of marriage, he had gifted according to his means. Soon after marriage, his daughter was being tortured by her husband, Dewar, Bhainsur, Gotni, Sasur on the pretext of demand of motorcycle and further, threatened that in case of non-availability of the same, they will not allow her to stay at sasural and in the aforesaid background, on 13.11.2013, his sister, who happens to be married in Gulamichak itself has telephonically informed him that his daughter Simpi Kumar has been murdered by her husband Lalan Kumar, father in-law Ramanuj Yadav, Gotni Rinki Kumari, brother in-law Raj Kishore Yadav, Bhainsur Lal Babu Yadav, Babu Chand Yadav and wife of Babu Chand Yadav namely Gulabo Devi and further, concealed the dead body. Soon after receiving aforesaid information, he along with his family members came to Gulamichak and found all the accused persons absent. Lock was hanging. They made hectic effort to search out the dead body, but failed and on account thereof, came to police station and informed the police. Then thereafter, with the help of police personnel, the dead body of Simpi



Kumari was traced out in the drain East to Chhotki Murari Village.

3. On the basis of the aforesaid written report, Jehanabad Mahila P. S. Case No.97 of 2013 was registered under Section 304B/34 of the I.P.C. whereunder chargesheet was also submitted against the appellant, who was apprehended, keeping the investigation pending against others who were absconding and accordingly, cognizance of the offences so indicated were taken facilitating the trial which concluded in a manner, the subject matter of instant appeal.

4. Defence case as pleaded by the appellant as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial of occurrence. Furthermore, it has been pleaded that deceased was of weak mental state and on account thereof, she used to slip from the house and during course thereof, met with unfortunate incidence and for that, none of them were responsible. Furthermore, it has also been pleaded that family members of *Naiharwala* were informed. They came and joined along with them in search of alleged victim. After recovery of dead body, *Naiharwala* of deceased demanded Rs. One Lac, which was declined on account thereof, this false case has been registered. To substantiate the same, two DWs have also been examined namely DW-1 Daroga Prasad and DW-2 Umesh Prasad.

5. In order to substantiate its case, the prosecution had examined altogether six PWs, out of whom, PW-1 Rameshwar Yadav,



PW-2 Pyari Devi, PW-3 Surendra Paswan, PW-4 Suresh Yadav, PW-5 Dr. Dinesh Kumar and PW-6 Priti Kumar. Side by side, had also exhibited the document as Exhibit-1 written report, Exhibit-2 F.S.L. Report, Exhibit-3 post mortem report, Exhibit-4 endorsement over written report, Exhibit-5 formal F.I.R. As stated above, two DWs have been examined, however, no document has been exhibited from their side.

6. While assailing the judgment of conviction and sentence, it has been submitted on behalf of appellant that the learned lower Court misread the evidences and on account thereof, did not justify its finding. To substantiate the same, it has been submitted on behalf of learned counsel for the appellant that for conviction under the banner of dowry death, certain ingredients are to be fulfilled that is:-

(a) the death should be within seven years of marriage, (b) death should be other than the normal circumstance, (c) there should be demand of dowry by husband or his relative, (d) soon before her death the deceased was tortured with regard to demand of dowry by her husband or his family members.

7. From the evidence on record, it is evident that apart from exaggeration having from the initial version as is evident from evidence of the PWs, the witnesses are completely silent over torture inflicted upon the deceased soon before her death on account of demand of dowry and so, the major ingredient for constituting the



dowry death became absent. That being so, no offence under the banner of dowry death could be attracted. In similar circumstance, on account of absence of positive evidence to satisfy the death as a dowry death, the presumption in terms of Section 113B of the Evidence Act would not be attracted.

8. Learned counsel for the appellant also submitted that while appreciating the evidence, the learned lower Court failed to identify the aforesaid mandatory requirements of law. Although, those requirements have been perceived under Para-16 of the judgment, but failed to scrutinize the evidence on that very score. Consequent thereupon, there happens to be serious lacuna persisting on the record nullifying the legal propriety of the judgment impugned. Consequent thereupon, the judgment impugned is fit to be set aside.

9. Furthermore, there happens to be complete silence at the end of prosecution over delay in dispatching the F.I.R. to Magistrate, as F.I.R. was registered on 15.11.2013 while it reached at the Court on 18.11.2013, in utter violation of Section 157 Cr.P.C., although PW-5, I.O. in Para-16 was specifically cross-examined, which probabilities the defence version regarding institution of instant case in ante-dated manner, when appellant declined to accept demand of prosecution, whereupon whole prosecution case is liable to be rejected.

10. Apart from this, it has also been submitted that none



of the co-villagers of the appellant, who could have been examined during course of investigation, ought to be cited as chargesheet witness, who could have divulged the actual affair contrary to it, whoever been examined, are own kith & kin. Therefore, evidence of interested witness should not be accepted in symbolic manner, rather should pass test of close scrutiny over reliability. The learned lower Court completely by-passed the same during course of appreciation, hence the judgment impugned suffers from serious legal infirmity. Consequent thereupon, it fit to be set aside.

11. Furthermore, it has been submitted that once it is found that no offence under Section 304-B of the I.P.C. is made out, then in that event, no offence under Section 201 I.P.C. could be held to be made out as in that event, there would not be an occasion to conceal the dead body for screening themselves. Therefore, no offence under Section 201 I.P.C. is found legally substantiated.

12. Per contra, it has been submitted on behalf of learned Additional Public Prosecutor that after perceiving the necessary ingredients for constituting a dowry death as well as concealing the evidence, the learned lower Court had dealt with the evidences having been adduced on behalf of prosecution in detail and on account thereof, the finding recorded by the learned lower Court is fit to be confirmed.

13. Though, during course of statement recorded under



Section 313 Cr.P.C., the appellant alveate the situation, but by way of examination of two DWs, apart from having been substantiated by the PWs, has uncontroverted the issue regarding staying of deceased at her sasural during fateful day, recovery of the dead body of Simpi Kumari, from a drain, and further, marriage was solemnized just about two-two and half years before the incidence. That means to say, death within seven years of marriage as well as death otherwise than normal circumstance goes out of controversy. However, it looks prudent to identify the cause of death of deceased Simpi Kumari along with other evidences.

14. From the evidence of Doctor, PW-5, it is evident that he conducted post mortem over the dead body of Simpi Kumari on 14.11.2013 and found the following findings:-

(1) Rigor mourtis present

(2) Froth from nose and mouth

(3) No external injury present

On dissection- Heart both chamber full liver, spleen, kidney, lungs are normal/ NAD. Stomach-some liquid timid present. Urinary bladder empty.

Time of death- within 24 hours, cause of death-All viscera preserved and final cause of death would be declared after turmeric lab diagnosis.



15. So, from his evidence, it is abundantly clear that though no cause of death was identified by him, but time elapsed since death happens to be within 24 hours. Post mortem was conducted on 14.11.2013 at 4.30 p.m., hence death should have occurred in between 13.11.2013 at 4.30 p.m. to 14.11.2013 at 4.30 p.m. approximately. As stated above, Doctor could not opine regarding cause of death, as a result of which, viscera was sent for chemical examination. F.S.L. Report happens to be Exhibit-2 under Section 293 Cr.P.C. wherefrom it is evident that aluminum phosphate commercially known as sulfas was found, which have been a grain preservative as well as highly poisonous. That being so, the death other than the normal circumstance is found duly substantiated.

16. Giving a pause before proceeding ahead, certain salient features, which is visualizing after perusal of the L.C. Record is also to be taken note of. From the format of the charge, it is evident that neither same has been framed in accordance of Section 304B of the I.P.C. nor, an alternative charge under Section 302 of the I.P.C. is found. Charge is a major incident of the trial. Virtually, it happens to be an accusation against an accused and further, acknowledging him that he is going to be tried for the offences, which has been so alleged, so that accused be in a position to properly defend the same. Consequent thereupon, there should not be an ambiguity on that very score. That means to say, written accusation specifying a definite



criminal offence is of the essence of Criminal Procedure. Therefore, all the ingredients based upon material facts which constitute an offence must be stated in the charge. In sum and substance, a charge is not an accusation in abstract, but a concrete accusation of an offence alleged to have been committed by a person with an objective to inform the accused on that very score, so that the accused be in a position to defend the same. Though, in terms of Section 464 of the Cr.P.C. any irregularity having on that very score, would not record annulment of the finding of the Court, but that does not mean that incompetency should be ignored. Moreover, when an accused had faced trial, then in that event, the nature of accusation levelled by the prosecution witnesses is found duly perceived by him, enabling the accused to properly defend himself, and in the aforesaid background, some sort of relaxation is found under Section 464 Cr.P.C.

17. Whether alternative charge when the matter relating to dowry death comes for adjudication is to be framed or not has been subject to consideration before the Hon'ble Apex Court in ***Rajvir alias Raju and another vs. State of Haryana reported in (2010) 15 SCC 116*** wherein it has been directed under:-

“7. We further direct all trial Courts in India to ordinarily add Section 302 to the charge of section 304B, so that death sentences can be imposed in such heinous and barbaric crimes against women.



*Copy of this order be sent to Registrar
Generals/Registrars of all High Courts, which will
circulate it to all trial Courts.”*

18. The aforesaid pronouncement came under consideration in ***Jasvinder Saini & others v. State (Government of NCT of Delhi) reported in (2013) 7 SCC 256***, wherein it has been held:-

“14. Be that as it may the common thread running through both the orders is that this Court had in Rajbir’s case (2010)15 SCC 116 directed the addition of a charge under [Section 302](#) IPC to every case in which the accused are charged with [Section 304-B](#). That was not, in our opinion, the true purport of the order passed by this Court. The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under [Section 302](#) can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court.

15. It is common ground that a charge under



Section 304B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial Court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the Court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial Court in that view of the matter acted mechanically for it framed an



additional charge under [Section 302](#) IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir's case (supra). The High Court no doubt made a half hearted attempt to justify the framing of the charge independent of the directions in Rajbir's case (supra), but it would have been more appropriate to remit the matter back to the trial Court for fresh orders rather than lending support to it in the manner done by the High Court.

16. In the light of what we have said above, the order passed by the trial Court and so also that passed by the High Court are clearly untenable and shall have to be set aside. That would not, however, prevent the trial Court from re-examining the question of framing a charge under [Section 302](#) IPC against the appellant and passing an appropriate order if upon a prima facie appraisal of the evidence adduced before it, the trial Court comes to the conclusion that there is any room for doing so. The trial Court would in that regard keep in view the decision of this Court in [Hasanbhai](#)



Valibhai Qureshi v. State of Gujarat and Ors. (2004) 5 SCC 347 where this Court has recognized the principle that in cases where “the trial Court [upon] a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced, is satisfied that any addition or alteration of the charge is necessary, it is free to do so”.

17. Reference may also be made to the decisions of this Court in Ishwarchand Amichand Govadia and Ors. v. State of Maharashtra and Anr. (2006) 10 SCC 322 and the decision of the Calcutta High Court in Rajendra Singh Sethia v. State and Ors. 1989 Cri.L.J. 255 and that delivered by the Allahabad High Court in Shiv Nandan and Ors. v. State of U.P. 2005 Cri. L.J 3047 which too are to the same effect. In any such fresh exercise which the trial Court may undertake, it shall remain uninfluenced by the observations made by the High Court on merits of the case including those touching the probative value of the autopsy surgeon’s opinion.

19. In ***Vijay Pal Singh and others vs. State of***



Uttarakhand reported in (2014) 15 SCC 163, it has been held:-

*“18. However, it is generally seen that in cases where a married woman dies within seven years of marriage, otherwise than under normal circumstances, no inquiry is usually conducted to see whether there is evidence, direct or circumstantial, as to whether the offence falls under Section 302 of IPC. Sometimes, Section 302 of IPC is put as an alternate charge. In cases where there is evidence, direct or circumstantial, to show that the offence falls under Section 302 of IPC, the trial court should frame the charge under Section 302 of IPC even if the police has not expressed any opinion in that regard in the report under Section 173(2) of the Cr.PC. Section 304B of IPC can be put as an alternate charge if the trial court so feels. In the course of trial, if the court finds that there is no evidence, direct or circumstantial, and proof beyond reasonable doubt is not available to establish that the same is not homicide, in such a situation, if the ingredients under Section 304B of IPC are available, the trial court should proceed under the said provision. In **Muthu Kutty and another v. State (2005) 9 SCC 113** by **Inspector of Police, T.N.I**, this Court addressed the issue and held as follows:*



“20. A reading of Section 304-B IPC and Section 113-B, Evidence Act together makes it clear that law authorises a presumption that the husband or any other relative of the husband has caused the death of a woman if she happens to die in circumstances not normal and that there was evidence to show that she was treated with cruelty or harassed before her death in connection with any demand for dowry. It, therefore, follows that the husband or the relative, as the case may be, need not be the actual or direct participant in the commission of the offence of death. For those that are direct participants in the commission of the offence of death there are already provisions incorporated in Sections 300, 302 and 304. The provisions contained in Section 304-B IPC and Section 113-B of the Evidence Act were incorporated on the anvil of the Dowry Prohibition (Amendment) Act, 1984, the main object of which is to curb the evil of dowry in the society and to make it severely punitive in nature and not to extricate husbands or their relatives from the clutches of Section 302 IPC if they directly cause death. This conceptual difference was not kept in view by the courts below. But that cannot bring any relief if the conviction is altered to Section 304 Part II. No prejudice is caused to the accused-appellants as



they were originally charged for offence punishable under Section 302 IPC along with Section 304-B IPC.”

19. *In a recent decision, this Court in **Jasvinder Saini and others v. State (Government of NCT of Delhi) (2013) 7 SCC 256**, observed thus:*

“15. It is common ground that a charge under Section 304-B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304-B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304-B is established. The ingredients constituting the two offences are different, thereby demanding



appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir case. The High Court no doubt made a halfhearted attempt to justify the framing of the charge independent of the directions in Rajbir case, but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by the High Court.”

20. *Though in the instant case the accused were charged by the Sessions Court under Section 302 of IPC, it is seen that the trial court has not made any serious attempt to make an inquiry in that regard. If there is evidence available on homicide in a case of dowry death, it is the duty of the investigating officer to investigate the case under Section 302 of IPC and the prosecution to proceed in that regard and the court to approach the case in that perspective. Merely because the victim is a married woman suffering an unnatural death within seven years of marriage and there is evidence that she was subjected to cruelty or harassment on account of demand for dowry, the prosecution and the court*



cannot close its eyes on the culpable homicide and refrain from punishing its author, if there is evidence in that regard, direct or circumstantial.

21. In the instant case, the prosecution has not made any attempt to explain the ante-mortem injuries which conclusively point to the cause of death as asphyxia caused by strangulation. Yet, no serious attempt, it is disturbing to note, was done to connect the murder to its author(s).

22. No doubt, nothing prevents this Court from putting the appellants on notice as to why the punishment should not be appropriately enhanced but why we reluctantly decline to do so, we shall explain in the later part of the judgment.

*23. In two of the early decisions of this Court, after the introduction of Section 304B of IPC, the ingredients of the offence and the interplay of Section 304B of IPC with Sections 498A, 302, 306 of IPC have also been discussed. In **State of Punjab v. Iqbal Singh and others (1991) 3 SCC 1**, the Court in paragraph-8 stated that:*

“8. ... The legislative intent is clear to curb the menace of dowry deaths, etc., with a firm hand. We must keep in mind this legislative intent. It must be remembered that since crimes are generally committed in the privacy of residential homes and in secrecy, independent and direct evidence is not



easy to get. That is why the legislature has by introducing Sections 113-A and 113-B in the Evidence Act tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundational facts are established and the unfortunate event has taken place within seven years of marriage. This period of seven years is considered to be the turbulent one after which the legislature assumes that the couple would have settled down in life. If a married women is subjected to cruelty or harassment by her husband or his family members Section 498-A, IPC would be attracted. If such cruelty or harassment was inflicted by the husband or his relative for, or in connection with, any demand for dowry immediately preceding death by burns and bodily injury or in abnormal circumstances within seven years of marriage, such husband or relative is deemed to have caused her death and is liable to be punished under Section 304-B, IPC. When the question at issue is whether a person is guilty of dowry death of a woman and the evidence discloses that immediately before her death she was subjected by such person to cruelty and/or harassment for, or in connection with, any demand for dowry, Section 113-B, Evidence Act provides that the court shall presume that such person had caused the dowry



death. Of course if there is proof of the person having intentionally caused her death that would attract Section 302, IPC. Then we have a situation where the husband or his relative by his willful conduct creates a situation which he knows will drive the woman to commit suicide and she actually does so, the case would squarely fall within the ambit of Section 306, IPC. In such a case the conduct of the person would tantamount to inciting or provoking or virtually pushing the woman into a desperate situation of no return which would compel her to put an end to her miseries by committing suicide. ...”

20. From the aforesaid citations, it is manifest that in Rajdev Singh Case, the Hon’ble Apex Court had directed to frame charge of murder in an alternative with regard to the offences attracting dowry death invariably, which is found properly explained in Jasvinder Saini Case (Supra). However, the intention of the Hon’ble Apex Court happens to be not that there should not be a charge under Section 302 of the I.P.C. rather the Court has been entrusted to perceive from the materials available on the record to find out whether alternative charge is warranted or not and if so, was very much permissible.

21. In the present context, it would be better to incorporate relevant Sections i.e. 227 and 228 of the Cr.P.C. which



deals with the event of framing of charge before the Court of Sessions:-

“227.Discharge.-

If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

228.Framing of charge.-

(1) If, after such consideration and hearing as aforesaid, the Judge, is of opinion that there is ground for presuming that the accused has committed an offence which -

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to



the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

22. Considering the prospect of relevant provisions of law as well as principle enunciated by the Hon’ble Apex Court, as referred above, it happens to be incumbent upon the trial court to look into the materials having available on the record in order to search and whether charge under Section 304-B I.P.C. is attracted or fragrance of Section 302 I.P.C. is also being felt. The order dated 08.08.2014 passed by the lower Court has been gone through, it is apparent that no such exercise was ever adopted. In other words, the process followed by the lower Court at the relevant stage was not judicious rather mechanical by observing that “charge has been framed against the accused for an offences punishable under Section 304B, 201 of I.P.C., which has been read over to the accused in Hindi which he does not plead guilty and on account thereof, claimed to be tried.” The aforesaid order dated 08.08.2014, is completely silent over the activity taken up in pursuance of direction of the Hon’ble Apex Court coupled with the fact that the learned lower Court had also failed to look into the material having on the record. It is needless to say that trial Court has got power to amend the charge up till pronouncement of judgment and further, giving an opportunity to the accused in appropriate case, in terms of Section 217 of Cr.P.C., however is found washed away. Furthermore, the Appellate Court has got power to correct error or



omission in charge as has been observed by the Hon'ble Apex Court in *State of Karnataka v. Kumari Gowri Narayana Ambiga Etc. reported in (1995) 2 SCR 1135*, but such exercise is to be seen in the background of Section 216 as well as Section 217 of the Cr.P.C. and in case, the opportunity to accused is found appropriate, then in that event, it will be a Herculean task to the Appellate Court by way of keeping appeal pending for years together and allowing the learned lower Court to proceed and then, receive the evidence, with a direction to transmit the same, which will ultimately be a guiding factor for passing judgment, away from whatever been adjudicated upon by the lower Court, a worthless, fragile event. Furthermore, the whole exercise, as it depicts, will not be under garb of Section 391 Cr.P.C. by way of collecting additional evidence rather it will be under banner of Section 216, 217 Cr.P.C. whereunder an accused has absolute right to ask for summon to witnesses already examined for cross-examination on account of addition of charge.

23. While dealing with the power of the Appellate Court so vested under Section 386 of the Cr.P.C., apart from others, retrial has also been vested without having any kind of classification and so, it happens to be within the wisdom of the Appellate Court to perceive the nature of the proceeding having conducted by the learned lower Court and would direct in appropriate cases, for retrial. Basically retrial is warranted when there happens to be glaring legal



defect of a serious nature which has resulted in grave failure of justice. Furthermore, on account of lapses on the part of the lower Court, there should be some violation of fundamental principle of law during course of trial which the Appellate Court perceived and on account thereof, an order for retrial could be granted. So, in sum and substance for the purpose of directing to retrial by the Appellate Court, there should be some glaring defects in the procedure or there should be manifest error on a point of law and consequent thereupon, has been a flagrant miscarriage of justice.

24. Question of retrial has come up before the Constitution Bench of the Hon'ble Apex Court in ***Ukha Kolhe-Appellant v. the State of Maharashtra-Respondent reported in A.I.R. 1963 (SC) 1531*** wherein the majority view has held:-

“11. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in



the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C. J., in [Ramanlal Rath v. The State](#), AIR 1951 Cal 305 observed :

"If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that, the prosecution did not produce the proper evidence and did not know how



to prove their case."

In the present case, undoubtedly the trial before the Magistrate suffered from irregularities which we have already set out. The evidence, such as was led, was deficient in important respects; but that could not be a sufficient ground for directing a retrial. If the Sessions judge thought that in the interests of justice and for a just and proper decision of the case it was necessary that additional evidence should be brought on the record he should have, instead of directing a retrial and reopening the entire proceedings resorted to the procedure prescribed by s. 428 (i) or the Code of Criminal Procedure. There is no doubt that if the ends of justice require, the appellate Court should exercise its power under the said section.

25. The aforesaid ratio has further been magnified in ***Rajeswar Prasad Misra, Appellant v. the State of West Bengal and another, Respondents reported in A.I.R. 1965 SC 1887***, wherein it has been held:-

"8. These arguments disclose a tendency to read the observations of this Court as statutory enactments. No doubt, the law declared by this Court binds Courts in India but it should always be remembered that this Court does not enact. The two cases of this



Court point out that in criminal jurisdiction the guiding principle is that a person must not be vexed twice for the same offence. That principle is embodied in S. 403 of the Code and is now included as a Fundamental Right in Art. 20(2) of the Constitution. The protection, however, is only as long as the conviction or acquittal stands. But the Code contemplates that a retrial may be ordered after setting aside the conviction or acquittal (as the case may be) if the trial already held is found to be unsatisfactory or leads to a failure of justice. In the same way, the Code gives a power to the appellate Court to take additional evidence, which, for reasons to be recorded, it considers necessary. The Code thus gives power to the appellate Court to order one or the other as the circumstances may require leaving a wide discretion to it to deal appropriately with different cases. The two cases of this Court deal with situations in which a retrial was considered necessary by the appellate Court. In the case of Abinash Chandra Bose, AIR 1963 SC 316 this Court held that the order for retrial was not justified. In Ukha Kolhe's case, AIR 1963 SC 1531 too the order for retrial was considered unnecessary because the end could have been achieved equally well by taking additional evidence. This Court mentioned, by way of illustration, some



of the circumstances which frequently occur and in which retrial may properly be ordered. It is not to be imagined that the list there given was exhaustive or that this Court was making a clean cut between those cases where retrial rather than the taking of additional evidence was the proper course. It is easy to contemplate other circumstances where retrial may be necessary as for example where a conviction or an acquittal was obtained by fraud, or a trial for a wrong offence was held or abettors were tried as principal offenders and vice versa. Many other instances can be imagined. The Legislature has not chosen to indicate the limits of the power and this Court must not be understood to have laid them down. Cases may arise where either of the two courses may appear equally appropriate. Since a wide discretion is conferred on appellate Courts, the limits of that Court's 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 approximately 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.

26. In ***Ajay Kumar Ghoshal and others vs. State of Bihar and another reported in 2017(1) P.L.J.R. 458 (SC)***, it has been observed:-

“10. [Section 386](#) Cr.P.C. deals with the powers of the appellate court. As per [Section 386 \(b\) Cr.P.C.](#), in an appeal from a conviction, the appellate court may:- (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.

11. Though the word “retrial” is used under [Section 386\(b\)\(i\) Cr.P.C.](#), the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the



trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the Court refused to hear certain witnesses who were supposed to be heard.

12. 'De novo' trial means a "new trial" ordered by an appellate court in exceptional cases when the original trial failed to make a determination in a manner dictated by law. The trial is conducted afresh by the court as if there had not been a trial in first instance. Undoubtedly, the appellate court has power to direct the lower court to hold 'de novo' trial. But the question is when such power should be exercised. As stated in [Pandit Ukha Kolhe vs. State of Maharashtra](#) (1964) SCR 926, the Court held that: "An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the



nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons.”

13. This Court, while dealing with the question whether the High Court should have quashed the trial proceedings only on account of declaration of the legal position made by the Supreme Court concerning the procedural aspect about the cases involving offences under the SC/ST Act, this Court stated, “a de novo trial should be the last resort and that too only when such a course becomes so



desperately indispensable; it should be limited to the extreme exigency to avert 'a failure of justice'. Observing that any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial". In State of M.P. vs. Bhooraji and Ors. (2001) 7 SCC 679, the Court went on to say further as follows:

"8....This is because the appellate court has plenary powers for revaluating and reappraising the evidence and even to take additional evidence by the appellate court itself or to direct such additional evidence to be collected by the trial court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence, the said course can be resorted to when it becomes unpreventable for the purpose of averting "a failure of justice". The superior court which orders a de novo trial cannot afford to overlook the realities and the serious impact on the pending cases in trial courts which are crammed with dockets, and how much that



order would inflict hardship on many innocent persons who once took all the trouble to reach the court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation.”

14. In Bhooraji’s case, the Court referred to Chapter XXXV of the Code and, particularly, Sections 461, 462 and 465 (1). After noticing the above provisions, the Court observed in paragraphs (15) and (16) of the order as follows:

“15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned “a failure of justice” the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity.



16. What is meant by a failure of justice occasioned on account of such error, omission or irregularity?

This Court has observed in *Shamnsaheb M. Multtani vs. State of Karnataka* {2001 (2) SCC 577} thus:

“23. We often hear about failure of justice and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression failure of justice would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd. v. Deptt. of the Environment*, 1977 (1) All E.R. 813). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.”

15. In *Gopi Chand vs. Delhi Administration* AIR 1959 SC 609, a Constitution Bench of this Court was concerned with the criminal appeals wherein plea of the validity of the trial and of the orders of conviction and sentence was raised by the appellant. That was a case where the appellant was charged for three offences which were required to be tried as a warrant case by following the



procedure prescribed in the Code of Criminal Procedure, 1860 but he was tried under the procedure prescribed for the trial of a summons case. The procedure for summons case and warrants case was materially different. The Constitution Bench held that having regard to the nature of the charges framed and the character and volume of evidence led, the appellant was prejudiced; accordingly, set aside the orders of conviction and sentence and the Constitution Bench held as under:-

“29.the offences with which the Appellant stands charged are of a very serious nature; and though it is true that he has had to undergo the ordeal of a trial and has suffered rigorous imprisonment for some time that would not justify his prayer that we should not order his retrial. In our opinion, having regard to the gravity of the offences charged against the Appellant, the ends of justice require that we should direct that he should be tried for the said offences de novo according to law. We also direct that the proceedings to be taken against the Appellant hereafter should be commenced without delay and should be disposed as expeditiously as possible.”

16. In Zahira Habibulla H. Sheikh and Anr. vs.



State of Gujarat and Ors. (2004) 4 SCC 158, [Best Bakery case] being an extraordinary case, the Supreme Court was convinced that the witnesses were threatened to keep themselves away from the Court and in such facts and circumstances of the case, not only the Court directed a 'de novo' trial but made further direction for appointment of the new prosecutor and retrial was directed to be held out of the State of Gujarat. The law laid down in Best Bakery case for retrial was in the extraordinary circumstances and cannot be applied for all cases.

17. After considering the question a "speedy trial" and "fair trial" to a person accused of a crime and after referring to a catena of decisions and observing that guiding factor for retrial must always be demand of justice, in Mohd. Hussain @ Julfikar Ali vs. State (Govt. of NCT of Delhi) (2012) 9 SCC 408, this Court held as under:-

"41. 'Speedy trial' and 'fair trial' to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The



right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of an accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.



42. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A 'de novo trial' or retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no strait jacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked."

27. Then thereafter, coming to another event, it is evident from the statement of accused recorded under Section 313 Cr.P.C., that the learned lower Court was very much confused as, instead of collecting incriminating materials available on record, against the appellant, and further confronting the same to the accused (appellant), the lower Court, proceeded to record statement under



casual manner. Although, as perceived, the judgment impugned did not deal with the parallel scrutiny of the material to trace out whether it happens to be a murder trial or dowry death trial and further, whether charge was needed to be amended on that score and in likewise manner, the event of statement recorded under Section 313 Cr.P.C. For better appreciation, same is quoted below in verbatim:-

Q. Kya Aapne Gawahon ki Gawahi Suna hai?

A. Ji Han.

Q. Aapke Virudh Sachya hai ki Aapki Shadi Sipi Kumari ke sath do warsh purv 2012 me hui thi. 13.11.2013 ke raat me hatya kar diya?

A. Ji nahi.

Q. Aapke virudh sachya hai ki roshgaddi me dubara gai to 50,000/- rupya avam motorcycle ki mang karte the nahi dene par jahar pilakar hatya kar diya?

A. Ji nahi.

Q. Aapke virudh yah bhi sachya hai ki aapki patni ki mirtyu jahar pilane ke karan hui?

A. Ji nahi.

Q. Aapke virudh yah bhi sachya hai ki aapki patni ka lash murari pain se baramad hua jo mitti me chhipakar rakha tha aur ladki ke pita ko khabar bhi nahi kiya. Kya kahna hai?

A. Ji nahi main ladki ke pita ko khabar kiya tha.

Q. Aapke virudh sachya hai ki jab Sipi ke pita aapke ghar aai to aaplog sabhi farar the. Kya kahna hai?

A. Ji nahi Main ghar par tha.

Q. Safai me kya kahna hai?



A. Meri Patni dimag se kamjor thi. Ghar se chali gayee thi.

28. That being so, it is abundantly clear that the learned lower Court virtually frustrated the purpose of the recording statement under Section 313 Cr.P.C. and that being so, the same suffers from deficiency. The Apex Court, confronted with such situation, while remitting the matter to lower Court, in ***Nar Singh vs. State of Haryana reported in (2015) 1 SCC 496*** has observed:-

“30. Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:-

30.1. Whenever a plea of non-compliance of [Section 313 Cr.P.C.](#) is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer;

30.2 In the facts and circumstances of the case, if the appellate court comes to the conclusion that no



prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.

30.3. If the appellate court is of the opinion that non-compliance with the provisions of [Section 313 Cr.P.C.](#) has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under [Section 313 Cr.P.C.](#) and the trial Judge may be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh;

30.4 The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.

31. On the question of remitting the matter back to the trial court on the ground of non-compliance of mandatory provisions of [Section 313 Cr.P.C.](#), learned counsel for the appellant contended that in



the present case, the accused is in custody for more than eight years and the accused person cannot be kept under trial indefinitely and that the accused has a right to speedy trial. The learned counsel placed reliance upon the judgment of this Court in [Abdul Rehman Antulay And Ors. vs. R.S. Nayak And Anr.](#), (1992) 1 SCC 225. In paras (63) and (64) of the said judgment it was held as under:-

“63. In [Machander v. State of Hyderabad](#) (1955) 2 SCR 524 this Court observed that while it is incumbent on the Court to see that no guilty persons escapes, it is still more its duty to see that justice is not delayed and accused persons are not indefinitely harassed. The scales, the Court observed, must be held even between the prosecution and the accused. In the facts of that case, the Court refused to order trial on account of the time already spent and other relevant circumstances of that case.

64. In [Veerabadran Chettiar v. Ramaswami Naicker](#) (1959) SCR 1211 this Court refused to send back proceedings on the ground that already a period of five years has elapsed and it would not be just and proper in the circumstances of the case to continue the proceedings after such a lapse of time. Similarly, in [Chajoo Ram v. Radhey Shyam](#) ((1971)



1 SCC 774 the Court refused to direct a re-trial after a period of 10 years having regard to the facts and circumstances of the case. In State of U.P. v. Kapil Deo Shukla ((1972) 3 SCC 504, though the Court found the acquittal of the accused unsustainable, it refused to order a remand or direct a trial after a lapse of 20 years”.

32. While we are of the view that the matter has to be remitted to the trial court for proceeding afresh from the stage of Section 313 Cr.P.C. questioning, we are not oblivious of the right of the accused to speedy trial and that the courts are to ensure speedy justice to the accused. While it is incumbent upon the Court to see that persons accused of crime must be given a fair trial and get speedy justice, in our view, every reasonable latitude must be given to those who are entrusted with administration of justice. In the facts and circumstances of each case, court should examine whether remand of the matter to the trial court would amount to indefinite harassment of the accused. When there is omission to put material evidence to the accused in the course of examination under Section 313 Cr.P.C., prosecution is not guilty of not adducing or suppressing such evidence; it is only the failure on the part of the learned trial court. The victim of the



offence or the accused should not suffer for laches or omission of the court. Criminal justice is not one- sided. It has many facets and we have to draw a balance between conflicting rights and duties.

33. Coming to the facts of this case, FSL Report (Ex-P12) was relied upon both by the trial court as well as by the High Court. The objection as to the defective 313 Cr.P.C. statement has not been raised in the trial court or in the High Court and the omission to put the question under Section 313 Cr.P.C., and prejudice caused to the accused is raised before this Court for the first time. It was brought to our notice that the appellant is in custody for about eight years. While the right of the accused to speedy trial is a valuable one, Court has to subserve the interest of justice keeping in view the right of the victim's family and the society at large.

34. In our view, accused is not entitled for acquittal on the ground of non-compliance of mandatory provisions of Section 313 Cr.P.C. We agree to some extent that the appellant is prejudiced on account of omission to put the question as to the opinion of Ballistic Expert (Ex- P12) which was relied upon by the trial court as well as by the High Court. Trial court should have been more careful in framing the



questions and in ensuring that all material evidence and incriminating circumstances were put to the accused. However, omission on the part of the Court to put questions under [Section 313](#) Cr.P.C. cannot enure to the benefit of the accused.”

29. Same view also been held in ***Jai Sao @ Ajay Sao vs. the State of Bihar reported in 2016(3) P.L.J.R. 441*** wherein it has been held:-

“13. In the case at hand, the incriminating circumstances, spoken to by each prosecution witness, on which the learned trial Court has relied upon, ought to have been put to the accused-appellant, when he was being examined under Section 313 (1) (b) of the Code of Criminal Procedure and the same having not been done, learned trial Court ought not to have based its findings on such incriminating pieces of evidence. In fact, it appears to us that the learned trial Court had not put to the accused-appellant, in the present case, even the sum-total of the prosecution's case, which, in our considered view, does not satisfy the requirements of law.

14. Situated thus, one has no option but to conclude that if the accused-appellant is not examined under Section 313(1)(b) of the Code of Criminal Procedure as warranted by law, it will deny to the



accused-appellant a valuable right vested in him by law to properly and effectively project his defence. At the same time, prosecution, to our mind, cannot be made to suffer solely for the lapse on the part of the learned trial Court in properly examining the accused-appellant under Section 313(1)(b) of the Code of Criminal Procedure. We are, therefore, clearly of the view, if we may reiterate, that this case needs to be remanded to the learned trial Court.”

30. Coming to the conduct of a Judge while presiding over a trial, it could be summarized as, being cautious, alert, sensitize and further, would always endeavour to dispense with fair justice.

31. In ***Pooja Pal v. Union of India and others reported in (2016) 3 SCC 135***, it has been held:-

“53. This Court in the above disquieting backdrop Zahira Habibulla (2004)4 SCC 158, did underline that discovery, vindication and establishment of truth were the avowed purposes underlying the existence of the courts of justice. Apart from indicating that the principles of a fair trial permeate the common law in both civil and criminal contexts, this Court underscored the necessity of a delicate judicial balancing of the competing interests in a criminal trial - the interests of the accused and the public and to a great extent that



too of the victim, at the same time not losing the sight of public interest involved in the prosecution of persons who commit offences.

54. It was propounded Zahira Habibulla (2004)4 SCC 158 that in a criminal case, the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community and are harmful to the society in general. That the concept of fair trial entails the triangulation of the interest of the accused, the victim, society and that the community acts through the state and the prosecuting agency was authoritatively stated. This Court observed that the interests of the society are not to be treated completely with disdain and as persona non grata. It was remarked as well that due administration of justice is always viewed as a continuous process, not confined to the determination of a particular case so much so that a court must cease to be a mute spectator and a mere recording machine but become a participant in the trial evincing intelligence and active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality



both to the parties and to the community.

55. In Zahira Habibulla (2004)4 SCC 158 While highlighting the courts' overriding duty to maintain public confidence in the administration of justice, it was enunciated as well, that they cannot turn a blind eye to vexatious and oppressive conduct, discernable in relation to the proceedings. That the principles of rule of law and due process are closely linked with human rights protection, guaranteeing a fair trial, primarily aimed at ascertaining the truth, was stated. It was held as well, that the society at large and the victims or their family members and relatives have an inbuilt right to be dealt fairly in a criminal trial and the denial thereof is as much injustice to the accused as to the victim and the society.

56. Dwelling upon the uncompromising significance and the worth of witnesses in the perspective of a fair trial, the following revealing comments of Bentham were extracted in paragraph 41:(Zahira Habibulla Case (2004)4 SCC 158 ,SCC pp.187-88)

“41. “Witnesses”, as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and



ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political count and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slot process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected



by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert the trial getting tainted and derailed and truth becoming a causality. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he has deposed.” (emphasis supplied)

57. It was underlined in *Zahira Habibulla Case* (2004)4 SCC 158 that if ultimately the truth is to be arrived at, the eyes and ears of justice have to be protected so that the interest of justice do not get incapacitated in the sense of making the proceedings before the courts, mere mock trials. While elucidating that a court ought to exercise its powers under [Section 311](#) of the Code and [Section 165](#) of the Evidence Act judicially and with circumspection, it was held that such invocation



*ought to be only to subserve the cause of justice and the public interest by eliciting evidence in aid of a just decision and to uphold the truth. It was proclaimed that though justice is depicted to be blindfolded, it is only a veil not to see who the party before it is, while pronouncing judgment on the cause brought before it by enforcing the law and administer justice and not to ignore or turn the attention away from the truth of the cause or the lis before it, in disregard of its duty to prevent miscarriage of justice. That any indifference, inaction or lethargy displayed in protecting the right of an ordinary citizen, more particularly when a grievance is expressed against the mighty administration, would erode the public faith in the judicial system was underlined. It was highlighted that the courts exist to do justice to the persons who are affected and therefore they cannot afford to get swayed by the abstract technicalities and close their eyes to the factors which need to be positively probed and noticed. The following statement in *Jennison vs. Baker*, (1972) 1 All ER 997 was recalled:*

“The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.”



58. It was declared in *Zahira Habibulla case* (2004)4 SCC 158 that the courts have to ensure that the accused persons are punished and that the might or the authority of the state is not used to shield themselves and their men and it should be ensured that they do not wield such powers, which under the Constitution has to be held only in trust for the public and society at large. That if any deficiency in investigation or prosecution is visible or can be perceived by lifting the veil covering such deficiency, the courts have to deal with the same with an iron hand appropriately within the framework of law was underlined.

59. Referring to its earlier decision in *Karnel Singh vs. State of M.P.* (1995) 5 SCC 518, it was reiterated that in a case of a defective investigation, the court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that truth is found by having recourse to *Section 311* of the Code or at a later stage also resorting to *Section 391* instead of throwing hands in the air in despair. It recalled as well its observations in *Ram Bihari Yadav v. State of Bihar & others*, (1998) 4 SCC 517 that the courts are installed for justice oriented mission and thus if a negligent investigation or omissions or lapses due



to perfunctory investigation are not effectively rectified, the faith and confidence of the people would be shaken in the law enforcing agency and also in the institution devised for administration of justice.

60. Though, as referred to hereinabove, trial was completed and the accused persons were acquitted, in the textual facts, this Court Zahira Habibulla case (2004)4 SCC 158 did direct retrial as prayed for, to avoid subversion of the justice delivery system and ordered the investigating agency or those supervising the investigation to act in terms of [Section 173\(8\)](#) of the Code as the circumstances would so warrant.

61. The observations and the propositions, though made in the backdrop of a request for retrial, those pertaining to the essentiality of a fair and complete investigation and trial as well as the solemn duty of the courts to ensure the discernment of truth to administer even handed justice as institutions of trust of public faith and confidence, are in our estimate, of universal application and binding effect, transcending the factual settings of a case. An adverse deduction vis-à-vis the quality of investigation and/a trial trivializing the cause of justice, is however the essential pre-requisite, for



such remedial intervention by way of further investigation, reinvestigation, additional evidence, retrial etc. to be made objectively but assuredly for the furtherance of the salutary objectives of the justice dispensing system as contemplated in law, it being of paramount pre-eminence.

62. This Court in Mohd. Hussain @ Julifkar Ali (2012)9 SCC 408 was also seized of a situation imploring for a retrial following the termination of the prosecution principally on account of delay, when juxtaposed to the demand for justice in cases involving grave crimes affecting the society at large. The offence involved was under [Sections 302/307/120B IPC](#) and [Sections 3 and 4](#) of the Explosive Substances Act, 1908 and had perpetrated an explosion in a passenger carrying bus. This Court amongst others recalled its observations in [Kartar Singh vs. State of Punjab](#) (1994) 3 SCC 569 that while dispensing justice, the courts should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear ones and above all the collective interest of the community and the safety of the nation, so that the public, may not lose faith in the system of judicial administration and indulge in private retribution. It however also took note of



its ruling in *State of M.P. vs. Bhooraji and others* (2001) 7 SCC 679 that a de novo trial should be the last resort and that too only when such a course becomes desperately indispensable and should be limited to the extreme exigency to avert a failure of justice. It noted with approval the observation in *P. Ramachandra Rao* (supra) that it is neither advisable nor feasible nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings and that the criminal courts are not obliged to terminate the trial or criminal proceedings merely on account of lapse of time. That such time limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings or to terminate the same and acquit or discharge the accused, was emphatically underlined. Reference too was made of the decision in *Zahira Habibulla H. Sheikh* ((2004)4 SCC 158).

32. In *Vinod Kumar v. State of Punjab* reported in (2015) 3 SCC 220, it has been held:-

“3. The narration of the sad chronology shocks the judicial conscience and gravitates the mind to pose a question, is it justified for any conscientious trial Judge to ignore the statutory command, not recognize "the felt necessities of time" and remain



impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracizing the concept that a civilized and orderly society thrives on rule of law which includes "fair trial" for the accused as well as the prosecution.?

33. In ***Rattiram and others v. State of Madhya Pradesh through Inspector of Police with Satyanarayan and others v. State of Madhya Pradesh through Incharge, Police Station Cantonment reported in (2012) 4 SCC 516***, it has been held:-

“39. The question posed by us fundamentally relates to the non-compliance of such interdict. The crux of the matter is whether it is such a substantial interdict which impinges upon the fate of the trial beyond any redemption or, for that matter it is such an omission or it is such an act that defeats the basic conception of fair trial. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism.

.....
.....



62. *We have referred to the aforesaid authorities to illumine and elucidate that the delay in conclusion of trial has a direct nexus with the collective cry of the society and the anguish and agony of an accused (quaere a victim). Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple pie order in carrying out the adjective law, would only be sound and fury signifying nothing.*

34. In ***J. Jayalalithaa and others v. State of Karnataka and others reported in (2014) 2 SCC 401***, it has been held:-

“29. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities and must be



conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution. “No trial can be allowed to prolong indefinitely due to the lethargy of the prosecuting agency or the State machinery and that is the raison d’etre in prescribing the time frame” for conclusion of the trial.

35. In *Bablu Kumar and others v. State of Bihar and another* reported in (2015) 8 SCC 787, it has been held:-

“22. Keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the Court, it can irrefragably be stated that the Court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court, to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of



which the trial becomes a farcical one. Law does not countenance a 'mock trial'. It is a serious concern of the society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The court is under the legal obligation to see that the witnesses who have been cited by the prosecution are produced by it or if summons are issued, they are actually served on the witnesses. If the court is of the opinion that the material witnesses have not been examined, it should not allow the prosecution to close the evidence. There can be no doubt that the prosecution may not examine all the material witnesses but that does not necessarily mean that the prosecution can choose not to examine any witness and convey to the court that it does not intend to cite the witnesses. The Public Prosecutor who conducts the trial, has a statutory duty to perform. He cannot afford to take things in a light manner. The Court also is not expected to accept the version of the prosecution as if it is sacred. It has to apply its mind on every occasion. Non-application of mind by the trial court has the potentiality to lead to the paralysis of the



conception of fair trial.”

36. After having holistic approach over the materials available on the record, it is evident that the learned lower Court was non-sensitized towards the legal proposition and on account thereof, the conduction of the trial is found suffering from grave legal defect causing miscarriage of justice and on account thereof, its ultimate result is fit to be set aside and is accordingly set aside. Appeal is allowed. Matter is remitted back to the learned lower Court to proceed afresh and conclude the trial in accordance with law within six months from the date of receipt of the L.C. Record in light of observation made hereinabove. Appellant is under custody, on account thereof, will remain till further order, if any, passed by the lower Court. It is made clear that no finding has been recorded on merit of the case.

37. Office is directed to transmit the L. C. Record to the learned lower Court at once.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	13.02.2017
Uploading Date	10.04.2017
Transmission Date	10.04.2017

