

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CONFIRMATION CASE NO.5 OF 2016

The State of Maharashtra ... Appellant

vs.

Atul Rama Lote ...Respondent

Mrs. Aruna Pai, Additional Public Prosecutor for the Appellant.
Dr.Yug Mohit Chaudhry for the Respondent/Accused.

**CORAM : B. P. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.
RESERVED : 25/03/2019
PRONOUNCED ON : 25/04/2019**

JUDGMENT: (Per B. P. Dharmadhikari, J.)

. The Court of District Judge-08 and Special Judge (POCSO), Thane in Special Case No.107/2014, vide judgment delivered on 28/9/2016 convicted accused under sections 363, 376 (2)(f), 302 and 201 of IPC and under section 3 (a) punishable under section 4 and 5 (i) and Section 5(m) punishable under section 6 of the POCSO Act i.e. Protection of Children from Sexual Offences Act, 2012 sentencing him to death for offence punishable under section 302 of IPC. He has been sentenced to suffer RI for life and fine of Rs.3,000/- Fine is to be withdrawn by the complainant. He has not been separately punished for offences punishable under sections 363 and 201 of IPC.

2. The case of prosecution is accused Atul was residing in vicinity of residence of deceased victim and her parents. Father of deceased was in business of preparing Bhujing (roasted chicken) on his handcart. Accused used to visit that handcart to eat Bhujing. Parents of deceased resided at Soyale Dayle chawl in Kudus Wada, while accused resided at Chinchghar pada. On 24/2/2014, as usual father of deceased was arranging his hand cart at 5.30 p.m. for doing business. At that time, accused came there. Accused inquired from said father viz., Siraj Ali Taj Ali Shah as to why bhujing was not prepared. Siraj Ali informed accused that he forgot to bring coal. Atul volunteered to fetch coal from house of Siraj Ali. Accordingly, after some time Atul brought the coal, gave it to Siraj Ali and left on bicycle. At about 8.30 p.m. when Siraj Ali went to his house, his wife Kamrunisa informed him that his daughter (victim) aged about 7 years was not traceable since 6.00 p.m. Siraj Ali started making inquiries, Imran, son of his neighbour, then aged about 6 years told him that accused Atul had come at 6.00 p.m. and victim left with him on his bicycle. Atul told her that he would purchase '*khau*' for her. Siraj Ali inquired with others and they informed him that '*Shendiwala*' Atul Lote took victim on his bicycle. He searched for his daughter but could not locate them. He therefore felt that Atul might have kidnapped his daughter with some

wrong intention for immoral purpose. He therefore lodged missing complaint Exhibit 15 on the basis of which FIR Exhibit 16 was registered.

3. On 25/2/2014 between 7.00 a.m. to 8.00 a.m. police called him to Poultry Farm House of Sanjay Bhoir at Chinchpada. The accused was present there and there showed dead body of victim which was behind said poultry farm. According to prosecution accused kidnapped minor victim, raped her and thereafter murdered her.

4. Police had registered offence under sections 363, 366(A), 376 and 302 of IPC and under sections 6 and 8 of POCSO Act on 25/2/2014. After completing investigation, chargesheet was filed and then in due course, under section 209 Cr.P.C. the matter was committed to Trial Court.

5. The then Presiding Officer of Trial Court framed charge (Exhibit 6) for offence punishable under sections 363, 366 (A), 376 and 302 of IPC and under section 6 and 8 of POCSO Act. The succeeding officer who delivered judgment altered the charges to section 363, 376(2)(f), 302 and 201 of IPC and section 3(a), 4, 5(i) and 5(m) and section 6 of the Protection of Children from Sexual Offences Act, 2012. Thereafter the impugned judgment came to be delivered.

6. We have heard learned Advocate Chaudhry for accused and Additional Public Prosecutor Mrs. Pai for the State. At the threshold learned Advocate Mrs.Pai requested for permitting the State Government to begin while learned advocate Chaudhry for accused submitted that he should be allowed to open. By a reasoned order on 18/3/2019 we have permitted learned Advocate Chaudhry to begin.

7. Learned Advocate Chaudhry has submitted that he would initially address the Court on apparent procedural errors in the trial which has resulted in serious prejudice to accused which has necessitated denovo trial. He submitted that thereafter he would address the Court on merits of material on record to show that charges are not established. After that he will like to address the Court on death punishment awarded for offence under section 302 in the present matter. Learned APP did not raise any serious objection to this course of action.

8. Accordingly, we have heard learned Advocate Chaudhry on the procedural lapses and on evidence/material on record and thereafter we have heard learned Additional Public Prosecutor on these aspects. During hearing, we found it proper not to hear parties on propriety of death punishment at that juncture.

9. Learned Advocate Chaudhry points out the impact of charge altered on 26/9/2016 i.e. just two days prior to delivering of judgment. He submitted that insofar as circumstances used against accused are (a) fact of victim being lastly seen with accused; (b) finding of his semen in vaginal swab, on frock of deceased and on his own underwear; (c) CDR of mobile of accused has also been relied upon to show that he was always near the spot where offence took place and (d) lastly, recovery of clothes of deceased and bicycle used by accused to carry victim under section 27 of the Evidence Act.

10. He states that evidence of all witnesses was recorded and thereafter statement of accused under section 313 was also recorded on 17/8/2016. Thereafter the Trial Court has altered charge on 26/9/2016 and judgment came to be delivered on 28/9/2016.

11. Entire trial was conducted when charge under section 366(A) was there and there was no charge under section 376 (2) (f) or section 3 (a) punishable under section 4 of The Protection of Children from Sexual Offences Act, 2012 or there was no charge for offences punishable under section 5(i) 5 (m). He has taken us through relevant provisions to urge that section 366(A) implies kidnapping for sexual exploitation by some third person and therefore section 376 of IPC in that event, was not meant to be

used against the appellant. Section 376 (2)(f) requires holding of position of trust or confidence and these facts are reproduced for the first time on 26/9/2016. Requirements of offence punishable under section 6 viz., section 5(i)(m) has also been added later on. Section 5(i) contemplates grievous hurt and therefore requirement of section 320 of IPC must be satisfied.

12. He further submits that charge under section 201 of IPC came to be added after all panch witnesses were examined and after examination of Investigating Officer. He therefore states that in this situation prejudice caused to accused is writ large and few answers given by him under section 313 of Cr.P.C. have been used in the changed situation, to his prejudice. He contends that accused was given Legal Aid by the State Government and three different lawyers appeared for him. None of the lawyers have shown professional expertise expected of defence lawyer and hence the District Government Pleader who conducted prosecution on behalf of State, got an undue and unfair advantage.

13. To bring home the lack of appropriate assistance to accused during trial he submits that on 1/8/2016 after recording of evidence of 11 witnesses, prosecution filed application under section 294 of IPC vide Exhibit 38 and the learned defence lawyer on 2/8/2016 admitted 11 out of

total 12 documents including the panchanama of test identification parade and also seizure of frock of deceased on which semen of appellant was allegedly found. He contends that the prosecutor was waiting for such an opportunity and encashed it by capitalizing on lack of adequate legal assistance to the appellant. He further submits that the learned counsel representing the accused did not follow a standard practice of putting admission remark on admitted documents also.

14. He reads out provision of section 216 and 217 of Cr.P.C. According to him after charge is altered, burden is on the Trial Court to find out whether very same trial can continue or then denovo trial is called for. Trial Court has not recorded any such finding in the present matter. He further submits that after charges were altered, the prosecution filed pursis declining to led further evidence. Immediately thereafter, learned advocate for accused filed similar pursis. He submits that these documents filed on record do not show compliance with the provisions of section 216 or 217 of Cr.P.C. In view of changed perspective and ingredients, the Trial Court ought to have appreciated inability of learned counsel for accused to defend him effectively and taken appropriate steps including assistance of some other able lawyer as amicus curiae. He submits that pursis filed on behalf of accused does not show that further cross examination of prosecution witnesses was also declined. Accused only declined to examine

any witness in his favour i.e. in defence and the court did not recall prosecution witnesses and did not give him chance to cross those witnesses.

15. In order to buttress his submission that accused did not receive effective legal assistance, he has also relied upon evidence of Dr. Pankaj Patil (PW-14) and his post mortem report to show that it cannot legally be used to come to the finding of culpable homicide amounting to murder. He has similarly invited our attention to other so called discrepancies or anomalies in evidence/material on record. However, we find it convenient to refer to it when we evaluate his arguments on merits to prove respective charges. He invited our attention to evidence of Doctor and post mortem report to urge that at the most injury No.6 and 7 in Column No.17 thereof could be seen as contributing to death. But these injuries are only skin deep and there is no damage to *hyoid* bone. Even muscles or skin layer covering trachea or *hyoid* bone are not found damaged. As such throttling cannot be the cause of death. He has addressed the Court elaborately in this respect.

16. He submits that till 26/9/2016 the charge under section 366(A) was against the appellant and though section 376 was mentioned, the indication was of commission of alleged rape by somebody else. The altered charge for the first time introduces section 376(2)(f) of IPC and

other provisions of POCSO Act. The prosecution did not lead any evidence and no further opportunity under section 313 of Cr.P.C. was given to the appellant. Additional material which becomes relevant after 26/9/2016, therefore has not been put to the appellant at all and hence cannot be used against him.

17. He further submits that even the material collected during investigation is not sufficient to connect the appellant with crime. According to him to find out whether it is the appellant who has committed rape, medical examination of appellant was conducted and no injury indicating any rape was found on his person.

18. Medical Officer had collected blood sample of appellant to conduct DNA test to find out whether said DNA can be discovered in swabs collected from the body and the fluid which had flowed out of body of deceased. He submits that surprisingly, according to prosecution, semen (DNA) is not seen in the liquid which oozed out but it was detected in swab collected from inside the vagina. According to him, this is next to impossible.

19. Learned advocate Chaudhry pointed out that police had highhandedly collected semen of accused. He wanted to address the Court

on constitutionality of its procedure to demonstrate that it violates Article 21 and 14 of Constitution of India.

20. He further states that police directed medical officer to collect necessary samples and forward it to Chemical Analyser. Though semen sample was not asked for, Investigating Officer collected it and forwarded it as per forwarding letter to Chemical Analyzer. He submits that in forwarding letter, language has been twisted while describing the semen sample sent for analysis. The office of Chemical Analyzer instead of mentioning bundles or articles received for examination, mentioned that two bundles were received by it. Our attention is invited to report of Chemical Analyzer to show that as per said report dated 9/7/2014 DNA analysis was conducted. The male haplotypes of semen was detected on frock of deceased and in vaginal swab which match with the male hyplotypes blood sample of appellant. Additionally the semen was also detected on half pant of accused. He pointed out that semen of appellant/accused mentioned in testtube was not at all touched by chemical analyzer. He submits that the forwarding letters received by office of Chemical Analyzer and other material demonstrates that police used semen forcibly extracted to add it on frock of deceased and under-pant of accused. He however adds that appellant accused being young man at that time, finding of drop of semen on his underwear by itself cannot be

seen as an incriminating circumstance.

21. He invites our attention to position on spot to show how leggings of deceased were lying away from body. He, by relying upon evidence of PW-10 Rizwan Investigating Officer PW-14, submits that finding of blood at the center portion of leggings as reported by Forensic Science Laboratory, reveals falsehood in the story of prosecution. If the central portion of leggings was soaked in blood, there would have been blood on clothes and person of accused also.

22. In this backdrop, learned advocate Chaudhry has submitted that last seen theory pressed into service by prosecution is unsustainable.

23. The chronology of events as per prosecution shows that the father of victim PW-1-Siraj Ali got knowledge that his daughter is missing at 8.30 p.m. He submits that if the fact that PW-6-Imran Kallu Khan and PW-13-Yakub Sah also told him that victim was with accused, PW-1-Siraj Ali should have made efforts to trace out accused or then sent somebody to his residence but that has not been done. Evidence of employer of accused is relied upon to show that the brother of employer found accused at his residence taking bath at 8.00 p.m. It is submitted that accused was not absconding and his behaviour was perfectly normal. He was arrested from

that residence in the mid night at about 00.30 hours. He submits that residence of accused was just 10 minutes away and neither PW-1-Siraj Ali nor PW-13-Yakub Sah or any other family members attempted to contact him at his residence. He therefore states that their story is unbelievable and unacceptable. FIR has been lodged after midnight on next day and thus, there is delay of more than 4 hours in the matter. If the girl was missing and PW-1-Siraj Ali suspected any foul play, he would have immediately gone to police station and given photograph and other details of his daughter. Statement of PW-1 in FIR Exhibit 15 that the daughter was abducted for immoral purpose is also relied upon.

24. The alleged disclosure of full name of accused by a boy aged about 6 years, certain improvements therein by using adjective as '*Shendiwala*' (person with tuft) are also urged to be by way of an afterthought. It is claimed that said child would not have given full name of accused

25. The entry in lockup register on record of trial Court Exhibit 60 collectively is also relied upon to show that at 1.30 a.m. the police had already mentioned offence under section 363, 366 (A) as also offence punishable under POCSO Act and recorded that accused was placed in lockup and he was also taken out of lockup within 10 minutes at 1.40 a.m. on 25/2/2014. The arrest panchanama Exhibit 43 is also relied upon to

show that it was prepared in police station between 1.00 a.m. to 1.30 a.m. and then offence under section 363 and 366(A) have been mentioned. According to him the prosecution claims that body of deceased was found in the morning of 25/2/2014. He submits that the statements of witnesses relied upon for the purpose of proving "last seen" are all recorded on next day and not immediately. He therefore submits that there is interpolation in the matter to suit the said purpose of police to implicate the accused in a false case. To bring home this point, our attention is drawn to FIR and its copy. He pointed out that in FIR in column No.15, the date of forwarding the same to the Court is recorded as 26/2/2014, but it is seen that it was received by that Court on 3/3/2014. The copy is also not prepared contemporaneously but has been prepared later on.

26. This shows tampering with FIR itself and no diary entry number has been mentioned in it. Paragraph No.125 at page No.118 of police manual is relied upon to submit that each page of FIR has got 4 copies and when (original) FIR is written, simultaneously 4 more copies are generated. He also states that police manual itself clarifies need of promptness in forwarding FIR to the Competent Court to avoid any undue allegations and to maintain transparency. This has been followed in breach in present matter.

27. In support of his argument learned counsel Shri Chaudhary has relied upon the deposition of PW-1-Siraj Ali, PW-6-Imran and PW-13-Yakub. He pointed out that PW-6-Imran and PW-13-Yakub were available to police in police station when FIR was lodged but their statements have been conveniently recorded at the end. He also submits that learned counsel provided by the State Government to accused could not effectively cross examine these witnesses. He also urged that these witnesses have been introduced later on only to fill in lacunae and to some how connect accused in the matter.

28. Test identification parade and evidence of panch witness Pankaj is also challenged on the ground that police recorded his first statement earlier and second statement has been recorded on a date after TIP. TIP was conducted on 30/4/2014 and his second statement has been recorded on 7/5/2014. No person with tuft (shendiwala) was placed as dummy and dummies were not of same physique. He also submits that the witness could not tell serial number at which accused was standing in TIP.

29. Our attention is invited to question No.19 put to accused under section 313 Cr.P.C. examination in attempt to demonstrate that instead of putting each incriminating fact separately, all facts have been put together thereby forcing a layman like accused to get confused.

30. He claims that when police visited house of accused allegedly in the night and arrested him there, they could have taken search of house or its vicinity. Had any incriminating material been there, police would have definitely found it. Police could have in that event earlier come across the body of deceased in night hours only. He submits that police has, under guise of discovery recorded statement under section 27 of the Evidence Act and then recorded that spot was shown by accused. He also submits that body was not concealed and has been recovered from open space and as such section 27 of the Evidence Act has no application. Claim made by PW-9 that he was called to police station on 25/5/2014 and fact that body at the spot was covered with leaves is read out to show that PW-1 and PW-2 do not support this. The panchanama at Exhibit 32 and 33 also does not show any such leaves used to conceal body. Spot panchanama and evidence of PW-8 photographer is relied upon for this purpose. Our attention is invited to evidence of PW-10 and panchanama of spot Exhibit 35. Learned counsel submits that when there was charge under section 366(A) why police did not investigate field owner Amrut Patil in whose field body was found

31. He submits that accused resides at Kudus and works at same place. CDR record showing his movements therefore do no create any doubt. Accused being at his residence cannot be seen as an incriminating

circumstance. He claims that police paid four visits to residence of accused and surroundings to unearth the evidence. According to him even bicycle and mobile are shown to be recovered under section 27. He claims that when entire story was known to the prosecution, police could have immediately while arresting accused proceeded to recover the same. He further points out that prosecution avoided to hold any TIP for PW-6 and PW-13.

32. To point out importance of proper procedure during TIP, he relies upon Division Bench Judgment reported in the case of ***Ganesh Bhagwati Pandian vs. State of Maharashtra***¹. He also points out that this document has been exhibited because of alleged admission by accused under section 294 Cr.P.C. that too after answer by PW-4 that dummies were dissimilar. He contends that trial Court therefore has not acted with due diligence and permitted the senior law officer like District Government Pleader and Public Prosecutor to take undue advantage. Judgment reported in the case of ***Ramcharan Bhudiram Gupta vs. State of Maharashtra***² is also pressed into service to point out impact of omission to mention similarity of dummies. Judgment in the case of ***Rajesh Govind Jagesha v. State of Maharashtra*** is also relied upon to show effect of delay in conducting TIP.

¹ 1985 Cri. L. J. 191

² 1995 Cri. L. J.4048

Judgment in the case of *Subash and Shiv Shankar vs. State of U.P.*³ is also relied upon to show the effect of delay in conducting TIP. Paragraph Nos.8 and 9 are also read out.

33. On not putting incriminating facts properly under section 313 Cr.P.C. our attention is invited to judgment in the case of *Tata Singh vs. The State*⁴ Judgment delivered at Nagpur in *Rajesh Bagde vs. The State of Maharashtra*⁵ is also relied upon.

34. Learned Advocate Chaudhry also draws support from the judgment in the case of *Virsa Singh vs. State of Punjab*⁶ and *Dayaram @ Jayaram Parshuram vs. State of Maharashtra*⁷. He further contends that in the present matter rape is not the cause of death and hence at the most accused could have been convicted under section 325 of IPC. He relies upon the judgment in the case of *State Govt. of NCT of Delhi vs. Sunil and another*⁸ for this purpose.

35. On delay in lodging of FIR, he cites *Mahadeo Kundalik Vaidya and Ors. vs. State of Maharashtra*⁹ and particularly paragraph 40 thereof to show how recovery from open space is inadmissible under section 27 of the

3 (1987) 3 Supreme Court Cases 331

4 A.I.R. (38) 1951 Supreme Court 441

5 Criminal Appeal No.581/2004

6 AIR 1958 S.C. 465

7 1996(2) Mh. L. J. 1056

8 (2001) 1 SC C 652

9 2001 Cri. L. J. 4306

Evidence Act. He relies upon *Omprakash Krishnya Nayar vs. State of Maharashtra*¹⁰ and *State of Himachal Pradesh vs. Jeet Singh*¹¹. Recovery from same spot or multiple visits to it are questioned by citing *Thimma vs. The State of Mysore*¹². He further submits that while recording evidence under section 27 exact words of accused must be reproduced. For that purpose he cites *State of Karnataka vs. David Razario and another*¹³. Deposition of pancha on memorandum and panchanama are read out to urge that entire exercise needs to be discarded.

36. To attack alteration of charge, he relies upon *Kantilal Chandulal Mehta vs. The State of Maharashtra and Another*¹⁴ and *Armogam Munnaswami Kounder vs. The State of Maharashtra*¹⁵

37. Learned APP Mrs.Pai submits that on 24/9/2014 accused aged about 26 years was alone as his wife and daughter had gone out for 8-10 days. She relies upon evidence of PW-3. For this purpose, she further submits that evidence of PW-4, PW-6 and PW-13 brings on record the fact that the deceased was last seen alive with accused only and it is admitted by accused also while answering question No.19 under section 313 of Cr.P.C. She further states that accused has tuft (shendi) and accordingly this fact

10 2000(1) Mh. L. J. 499

11 AIR 1999 Supreme Court 1293

12 AIR 1971 Supreme Court 1871

13 2002 Cri.L.J. 4127

14 1969 (3) Supreme Court Cases 166

15 Order dated 7/9/2006 in Criminal Appeal No.602 of 2000

and injury on his wrist finds mention in arrest panchanama at Exhibit 43. She further shows how accused has intelligently answered other questions without getting confused.

38. According to prosecution, complainant and accused are known to each other accused was last seen with deceased and he has not explained injury on his wrist, discovery under section 27 of dead body at his instance and of his own clothes and finding of semen on his underwear and deceased conclusively connect him with the crime. She had read out relevant evidence for this purpose.

39. She submits that when a minor girl went missing, parents obviously searched for her and when she could not be found police report was made. Time of 3-4 hours lapsed in the process cannot be seen as unreasonable and there was no delay in the process. She further claims that FIR is not supposed to be an encyclopedia and information given by PW-13 need not be disclosed therein. Since accused and victim was also known to everybody, details or photograph were not necessary. She pointed out that there was no delay in recording statement of PW-6-Imran who was then a child of 6 years and his statement has been recorded properly on next day. Similarly, even statement of PW-13 has been recorded at the earliest possible opportunity and there is no delay in the matter. She pointed out

that child has identified accused in the Court. She relied upon various recoveries under section 27 and Chemical Analyzers report. She argues that leggings might have been used to wipe out blood from deceased and finding of blood on middle portion of leggings cannot absolve accused. She submits that after police received FIR, promptly steps were taken and in 5-6 hours the mystery was resolved. Learned APP urges that material on record shows knowledge to accused about the spot where the body of deceased was laying and knowledge of other incriminating material which therefore connects him directly with the crime.

40. She relies upon evidence of Doctor (PW-14) to show nature of injuries on body of deceased and his opinion. She submits that serious injuries including forceful intercourse was noticed and Doctor has deposed that injuries were sufficient to cause death. She highlighted the fact that there was no cross examination of Doctor by accused.

41. She has relied upon judgments reported in the case of *State of Himachal Pradesh vs. Jeet Singh*¹⁶, , *State of Maharashtra vs. Bharat Fakira Dhiwar*¹⁷, *A.N. Venkatesh and another vs. State of Karnataka*¹⁸,. She also draws support from *Harivadan Babubhai Patel vs. State of*

¹⁶ (1999) 4 SCC 370

¹⁷ (2002) 1 SCC 622

¹⁸ 2005 Cri.L.J. 3732

*Gujarat*¹⁹, *Ronny @ Ronald James Alwaris and Ors. vs. State of Maharashtra*²⁰, and *Charandas Swami vs. State of Gujrat and Ors.*²¹, to explain how there is no delay in lodging of FIR or any error under section 313 examination or in matters of identification of accused in Court. She also states that there is no delay in sending FIR to Court. According to her accused has to show prejudice caused due to section 313 examination and he has failed to do so.

42. She has also relied upon *Yogesh Singh vs. Mahabeer Singh and Ors.*²² to show that there was no enmity between any witness and accused, and no prejudice has been shown by him. To explain importance of medical evidence also, she draws support from these judgments and also from judgment reported in the case of *Madan Gopal Kakkad vs. Naval Dubey and Another*²³.

43. While dealing with the procedural aspect of alteration in charge, she submits that initially charge was framed on 31/3/2015 and it was altered on 26/09/2016. She submits that in terms of section 216 Cr.P.C. the Court in its discretion proceeded further with the trial and gave parties

¹⁹ 2013 Cri.L.J. 3944

²⁰ (1998) 3 SCC 625

²¹(2017) 7 SCC 177

²² 2017 Cri. L. J. 291

²³ (1992) 3 SCC 204.

opportunity to lead evidence or to recall the witnesses. This offer and chance given in terms of section 216 of Cr.P.C. was not taken by accused and he filed “pursis” on 26/09/2016 only, refusing to give evidence. She draws support from the case in ***Sanichar Sahni vs. State of Bihar***²⁴.

44. She further submits that the accused never made any grievance before the trial Court about mode and manner of section 313 Cr.P.C. examination. His examination as per that section was over on 12/8/2016 and charge came to be altered on 17/9/2016. She points out the judgment of Hon'ble Apex Court in the case of ***S. Ganesan vs. Rama Raghuraman and Ors.***²⁵ and particularly paragraph 19 thereof.

45. Section 304 of Cr.P.C. is also shown to this Court with a submission that the accused got adequate legal assistance and did not move any application pointing out any deficiency. No such effort has been made even before this Court and for the first time now Advocate Chaudhry is making this grievance during final arguments.

46. In reply arguments, Advocate Chaudhry submits that the injury on wrist of accused was minor and not enough to hold him guilty either of

²⁴ AIR 2010 SC 3786

²⁵ 2011 Vol 2 SCC 83

rape or murder. He points out that no male DNA is found in the nail clippings of the deceased. Judgment reported in the case of *Shankarlal v. State of Maharashtra*²⁶ is pressed into service for this purpose. To explain the effect of delay in recording statement under section 161 of Cr.P.C., he relies upon judgment in the case of *Ganesh Bhavan Patel and another vs. State of Maharashtra*²⁷. He points out that here the accused had never absconded and was busy performing his usual daily chores.

47. To explain how test identification in court becomes important and reason behind it, he relies upon the judgment in the case of Ronny @ Ronald James Alwaris and Ors. Vs. State of Maharashtra²⁸. *Shivram Hiraji Taral vs. State of Maharashtra*²⁹ is relied upon to explain the difference in injury causing death and in injury sufficient to cause it. The judgment in Juwarsingh s/o. Bheraji & Ors. Vs. State of Madhya Pradesh³⁰ is relied upon to point out what absence of cross examination implies. The delay of FIR and its effect is re-asserted by pointing out the judgment in the case of *Ishwar Singh vs. State of U.P.*³¹.

48. He claims that even if answer to question 19 during section 313

²⁶ AIR 1981 SC 765

²⁷ AIR 1978 SC 135

²⁸ (1998) 3 Supreme Court Cases 625

²⁹ 2000(3) Mh.L.J. 315

³⁰ 1980 (Supp) Supreme Court Cases 417

³¹ AIR 1976 SC 2423

examination is seen is relevant, it is in the backdrop of charge as framed under section 366A of IPC and it cannot be used as implicating material for the purpose of altered charges. He again draws support from the judgment in *Kantilal Chandulal Mehta Vs. State of Maharashtra and anr.*³² to buttress his submissions. He adds that in the present facts, death by itself is not equivalent to rape or to murder. He further submits that section 216(3)(4), section 211 of Cr.P.C. need to be read together and applied together in the present facts. He has read out order sheets maintained by Sessions Court to show that on 30/08/2016 written notes of arguments were already filed. To explain the purpose of extending adequate and effective legal aid, he relies upon the judgment in the case of *Ranchod Mathur Wasawa vs. State of Gujrat*³³, *Surendra Koli vs. State of Uttar Pradesh and Ors.*³⁴, *Nagaraj vs. State*³⁵, *Baliram Madhukar Dalvi vs. State of Maharashtra*³⁶ and *Suk Das Vs. Union Territory of Arunachal Pradesh*³⁷. He further submits that the trial court ought to have realized the inappropriate legal assistance received by the accused and he cites the judgment in the case of *Pooja Pal Vs. Union of India and Ors.*³⁸ He strenuously argues for acquittal of accused and opposes the step of remand.

³² 1969(3) Supreme Court Cases 166

³³ (1974) 3 SCC 581

³⁴ (2014) 16 SCC 718

³⁵ (2015) 4 SCC 739

³⁶ 2008 All MR (Cri) 2042

³⁷ (1986) 2 Supreme Court Cases 401

³⁸ (2016) 3 Supreme Court Cases 135

49. At this stage of arguments, after the parties concluding their arguments attention of respective counsel was drawn to section 29 and 30 of the POSCO. They fairly admit that the said provisions do not find any consideration in the entire judgment by the trial court. Learned APP sought adjournment to further assist the court in this respect. Accordingly we adjourned the hearing to next day.

50. On the next day, learned APP relied upon the judgment reported in the case of *Anant Prakash Sinha vs. State of Haryana*³⁹ and *Mossa Abdul Rahiman and Anr. vs. State of Kerala*⁴⁰ to explain the scope of power under section 217 Cr.P.C..

51. Learned advocate Chaudhry submits that prejudice suffered by accused is writ large and this court may at the most order denovo trial after taking steps to see that lawyer of competence of District Government Pleader is provided to the accused by the State Government. He submits how in other judgments already cited by him, the court did not remand the matter for fresh consideration or for continuation of the trial, and acquitted the accused persons because of ordeal suffered by them. He

³⁹ 2016 Cri. L. J. 1836 (SC)

⁴⁰ 1982 Cri.LJ 1384

claims that here the accused was laid into the trap even during the trial and made to admit the documents which otherwise could not have been proved. The entire trial is affected because of addition of section 366A of IPC and its continuation will be erroneous. When the accused continues in jail for over 5 years and under the death threat since 3.5 years, according to him, for this misconduct of trial, the accused cannot be allowed to suffer.

52. Before proceeding further, we find it appropriate to consider the objection to alteration of charge and exercise of its power by the trial court in the matter under section 216 and 217 of Cr.P.C.

53. Charge at Exh. 6 framed on 31/3/2015 was under six heads, first head was of kidnapping the victim aged about 7 years under section 363 of IPC., while the second was under section 366A alleging that it was with intent that the said victim girl may be or knowing that it is likely that the said minor girl would be forced to illicit intercourse with accused. Third head was of committing rape by accused on the victim girl thereby committing offence punishable under section 376 of IPC. Fourth was under section 302 of IPC. Fifth was of penetrative sexual assault on the minor girl thereby committing offences under section 6 of Protection of

Children From Sexual Offences Act, 2012 (for short “POCSO”) and last was of committing sexual assault punishable under section 8 of the POCSO.

54. This charge was altered on 26/9/2016. The first head under section 363 was kept as it is. The second head of the charge was accused committed rape of minor victim and thereby committed offence punishable under section 376(2)(f) IPC. Third head was committing her murder and thereby offence under section 302 IPC. Fourth head was after committing the offence of rape and murder of minor victim, the accused caused certain evidence of the said offence to disappear i.e. hiding of body near the drainage and beneath leaves in the farm of one Amrut Patil, hiding Hercules cycle and cloths and also hiding mobile phone. These articles were used for commission of offence and hence constituted evidence and with intention to screen himself from legal punishment, articles/evidence was concealed thereby committing offence punishable under section 201 of IPC. Fifth head was of charge punishable under section 3(a) punishable under section 4 of the POCSO and the last head was of commission of offence under section 5(i) and 5(m) punishable under section 6 of the POCSO. This altered charge is at Exh. 75 of the records.

55. In the judgment in *R. Rachaiah Vs. Home Secretary, Bangalore*⁴¹, the accused charged for the offence under section 306 IPC i.e. abetting the suicide were convicted in respect of alternative charge under section 302 of IPC. Hon'ble Apex Court found that addition or substitution of charge under section 302 IPC was bound to prejudice the accused persons. In this respect the Hon'ble Apex Court has discussed legal provisions from paragraph 8 onwards in the report. Hon'ble Apex Court states that while permitting the court to alter or add to any charge, safeguards have been provided in the interest of accused person in sub section 3 and sub section 4 of section 216 of Cr.P.C. Section 216(3) of Cr.P.C. in no uncertain terms stipulates that if by such alteration or addition, any prejudice is being caused to accused, in his defence or to the prosecutor in the conduct of the case, the Court has to proceed with the trial as if altered or added charge is original charge. Hon'ble Apex Court explains that such altered/added charge is treated as charge made for the first time and the trial has to proceed from that stage. Section 216(4) of Cr.P.C. makes position further clear and the trial court in such a situation is empowered to either direct new trial or adjourn the trial for such period as may be necessary. New trial is insisted if the charge is altogether different and distinct. It is pointed out that though the charge may be of same species, the provision for adjourning the trial is made to give sufficient opportunity to the accused to

41 AIR 2016 SC 2447

prepare and defend himself. In the same process, section 217 lays down that whenever charge is altered or added, the Court after commencing of trial has to allow the prosecutor or accused to recall or re-summon or examine any witnesses who have already been examined with reference to such alteration or addition. The Court may also allow further witnesses if it is found necessary. In paragraph 11, Hon'ble Apex Court has applied this law to the facts before it and noted that adding section 302 IPC gave altogether a different complexion and dimension to the prosecution case. In paragraph 12 it found that such charge was bound to create prejudice to the appellants and to take care of that prejudice, it was incumbent upon the prosecution to recall witnesses, examine them in the context of charge under section 302 of IPC and then allow the accused persons to cross examine those witnesses, Apex Court noticed that after alteration of charge only one witness i.e. Deputy Superintendent of Police was examined on the same day and case was not even adjourned as mandatorily required under sub section (4) of section 216 of Cr.P.C. Hon'ble Apex Court in paragraph 13 has observed as under :

“In a case like this, with the framing of alternative charge on 30.09.2006, testimony of those witnesses recorded prior to that date could even be taken into consideration. It hardly needs to be demonstrated that the provisions of Sections 216 and 217 are mandatory in nature as they not only subserve the requirement of principles of natural justice but guarantee an important right which is given to the accused persons to defend themselves appropriately by giving them

full opportunity. Cross-examination of the witnesses, in the process, is an important facet of this right. Credibility of any witness can be established only after the said witness is put to cross-examination by the accused person.”

56. In the present matter, there never was a charge under section 201 of IPC. That charge was added for the first time on 26/09/2016 i.e. after recording of section 313 defence and the arguments were already over. Not only this, the charge under section 366-A was also dropped on that date. Technically Section 366-A envisages the forcing kidnapped victim to illicit intercourse by somebody else and not by the person who kidnaps her. However, in the present matter, charge under section 366-A framed vide Exh. 6 specifically mentioned the accused as person who subjected the victim to illicit intercourse. Not only this, for said act, there was separate charge under section 376 of IPC. But then in Exh. 75, charge under section 376 was further specified and put under section 376(2)(f) meaning thereby that the victim was subjected to the said offence by the person being relative, guardian or teacher or a person in a position of trust. Thus new ingredients came to be added to it. Not only this, but then certain offences under section POCSO were also added.

57. By sixth head in Exh. 75, offences punishable under section 6 of POCSO have been added. This changes the entire dimension and

perspective of the trial. Here it is important to note the contention of Advocate Chaudhry that the appellant did not receive the effective legal assistance though he is entitled to it and the State Government pushed him at more disadvantageous situation by giving him inexperienced law officers while it utilized services of the expert top lawyers. We may note that he has also attempted to urge that notice to admit documents under section 294 of Cr.P.C. was served after recording deposition of 11 prosecution witnesses and only to steel unfair march. We will consider the correctness or otherwise of this contention little latter. However, he has simultaneously urged that the answer given to certain questions under section 313 examination, particularly question 19, are in the face of the fact that charge under section 366-A was there and hence, prosecution was attempting to prove that the minor victim was kidnapped so as to enable some other person to have illicit intercourse with her. We have already noted supra the language of charge as framed vide Exh. 6 and explained to accused in this respect.

58. But then, we note that the provisions of section 29 and 30 of POCSO are not used by the trial court at all. Not only this, same were not pressed into service till conclusion of hearing, even before us. Section 29 is presumption as to certain offences. A person prosecuted having

committed offence under section 3, 5, 7 and 9 of POCSO is presumed to have committed the offence. Section mandates that the special court trying him “shall presume” accordingly unless contrary is proved. Thus burden is on the accused to prove to the contrary. There is thus reversal of burden and accused presumed to be guilty has to prove his innocence. Section 30 is on presumption of culpable mental state. When in prosecution for any offence under POCSO, culpable mental state of accused is relevant, special Court “shall presume” existence of such mental state and in defence the accused has to prove the facts which negative such mental state. Sub section 2 of section 30 stipulates that for the purpose of section 30, a fact is said to be proved only when the special court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

59. In the present matter, section 29 and 30 of POCSO were not relevant till 26/09/2016, and after alteration only, section 3 or section 5(i) and 5(m) are attracted. Thus this principal of “reverse burden” gets attracted only on 26/09/2016. The question of prejudice, if any suffered by the accused on account of this shift, therefore, is/was answerable in the backdrop of these legal provisions.

60. Hon'ble Apex Court in ***Pooja Pal vs. Union of India and Others***⁴² in paragraph Nos.54 and 55 highlighted the role of Court. It has relied upon its earlier judgment reported in ***Zahira Habibulla H. Sheikh vs. State of Gujrat***⁴³ and pointed out that due administration of justice is a continuous process and a Court must cease to be a mute spectator and a mere recording machine. It has to become a participant in the trial evincing intelligence and active interest and elicit all relevant material necessary for reaching the correct conclusion. The Court has overriding duty to maintain public confidence in the administration of justice and they cannot turn a blind eye to vexatious and oppressive conduct discernable in relation to the proceedings.

61. The observations of Hon'ble Apex Court in the case of ***Nagaraj vs. State***⁴⁴ in paragraph No.12 show that at least in the trial of capital offences, a duty is cast on the court to ensure that the accused has adequate legal assistance. In facts before it Hon'ble Apex Court has concluded that such legal assistance was lacking. In ***Surendra Koli vs. State of Uttar Pradesh and Ors.***⁴⁵ in paragraph No.11 the Hon'ble Apex Court holds that where legal assistance is sought, the matter should be entrusted to a counsel who has expertise in conducting sessions trial.

42(2016) 3 Supreme Court Cases 135

43 (2004) 4 SCC 158

44 (2015) 4 Supreme Court Cases 739

45 (2014) 16 Supreme Court Cases 718

62. The provisions of section 29 and 30 of POCSO have escaped the attention of the Trial Court. The present facts cannot countenance the submission of learned APP that trial Court has exercised discretion conferred upon it by section 216(3) Cr.P.C. and found that no prejudice is caused to accused. There is no such order of Trial Court and mere obtaining pursis from parties that they did not wish to adduce further evidence does not satisfy the requirements of section 216(3)(4) in the present matter. The discretion has to be exercised after considering the relevant provisions and its impact on facts. When relevant legal provisions are not looked into by advocates or by Court, there cannot be a well informed decision and just use of discretion. For same reasons, we also hold that opportunity to recall witnesses under section 217 of Cr.P.C. cannot be said to be satisfied as there has to be well informed decision whether to proceed with the trial immediately or to grant adjournment and then to proceed with it. The Court has to record a finding that the trial can be proceeded with immediately or new trial is not necessary. After such an application of mind it can proceed to next stage i.e. stage of recall of witness under section 217 of Cr.P.C.

63. As already noticed supra after written notes of arguments and two

days prior to delivery of judgment, charge has been altered and the norm of innocence of accused relevant till then was rendered irrelevant. Not only this, this change in basic rules has escaped attention of the parties. It may have definitely caused prejudice to the accused. It also causes prejudice to the victim because provisions of section 29 and 30 of POCSO enacted by parliament are overlooked and have not been implemented. Coupled with this, is the contention of appellant that notice to admit vital document was served at fag end and disadvantage of inadequate legal assistance received by him was taken. We are not inclined to record any finding in this respect. All these facts may be relevant when the trial Court proceeds further to find out need of continuing same trial or denovo trial in terms of sub-section 3/4 of section 216 of Cr.P.C.

64. Whether accused Atul Rama Lote had suffered any prejudice already during the trial before alteration of the charge itself or whether he is visited with any prejudice after alteration of the charge are the issues which in the present facts have bearing on the question of course to be adopted in the Sessions trial after altered charge at Ex.75. Law gives trial court a power and also discretion. The use of discretion necessitates consideration of all relevant factors having bearing on the law and procedure for which discretion is conferred. Here future course in sessions

trial depends upon question of prejudice and hence, facts at hand and law governing the same. When two important sections which become relevant for the first time on 26/09/2014 are lost sight of, it cannot be said that application of mind by the trial court or its consideration is legal and valid. Hence, even if it is to be presumed that the trial court took a conscious decision to proceed with the same trial, it cannot be said that such decision is an informed decision reached after due application of mind. Application of mind leading to it and consequential use of discretion therefor is unsustainable.

65. Taking overall view of the matter, we keep all the contentions in relation to prejudice open.

66. In the light of discussion supra, the judgment of conviction & therefore the death sentence imposed on accused can not be sustained. But then the accused also can not be set free at this stage. Facts at hand or even the charge initially framed, prima-facie, point out relevance of POSCO Act & recourse to its Sections 29 or S.30 may be inevitable. If the burden of proof is reversed by a LAW, the fact of additional advantage to the State can not be ruled out. Object behind this scheme in POSCO can not be allowed to be defeated by the appellate court. We can not also overlook the fact that deceased minor victim & her relatives who are aggrieved persons can not be extended a secondary treatment and the balance can

not tilt in favour of the accused. Dr. Yug Chaudhary has attempted to press into service few judgments to buttress his prayer for acquittal. We have carefully looked into the respective judgments & we find that S. 386 (b) Cr.P.C. empowers the appellate court to pass suitable orders. It can either acquit or discharge the accused or remand the matter for re-trial to the competent Court. These powers definitely show that the appellate Court while adopting a particular course of action, must assign the reasons therefor. "Discharge" or "acquittal" ordered by the appellate Court of a person pronounced guilty by the trial court can not be without the valid reasons. Similarly, if he is to be retried, the reasons must appear on record to support the re-trial. Neither trial court nor the appellate court can drop the prosecution because it is turning out to be a persecution. Every cognizable offence must be investigated into & then undergo the judicial scrutiny. The trial for such scrutiny must be conducted as per law. Power to drop or quash the criminal proceedings of present nature is not available to the trial court. The High Court, while hearing the appeal against conviction or then a confirmation case, may in a just case invoke its extra ordinary powers under S. 482 Cr.P.C. But then considering the facts at hand, We do not find this to be a case of undue harassment of accused. In any case, the interest of justice demands that the State must get due opportunity to establish as per law the guilt of person found to be an accused by it. For

wrong framing of charges or consequential procedural errors, the legitimate expectations of victim family or the spirit of POSCO can not be defeated. For dropping of action of such a nature, a fault in finding of guilt already reached by the trial court is necessary & we are not in position to do so. We have not even touched any finding on facts in the judgment of the trial court. On the contrary, we have found that a proper procedure after alteration of charges has not been followed, this error needs to be corrected & for that purpose, remand is the only solution. The decision whether to proceed further with same trial or to order de-novo trial are the issues which must be addressed to by the trial court only.

67. We, therefore, pass the following order----

- a) The judgment & order dated 28.09.2016 convicting accused is quashed & set aside;
- b) The Special Case no. 107 of 2014 is restored back to the file of District Judge-8 & Special Judge (POSCO), Thane for proceeding further from the stage of alteration of Charge vide Ex. 75;
- c) The accused shall continue as under trial prisoner, during the trial;
- d) R & P be sent back immediately;
- e) We direct the parties to appear before the Trial Court on

15.05.2019 for appropriate further steps;

f) Special Court shall however attempt to complete the trial at the earliest as per law;

g) Confirmation Case is disposed of.

(PRAKASH D. NAIK,J)

(B. P. DHARMADHIKARI,J)