

IN THE HIGH COURT OF JUDICATURE AT PATNA

DEATH REFERENCE No.4 of 2017

Arising Out of PS. Case No.-106 Year-2015 Thana- SABAUR District- Bhagalpur

=====

The State of Bihar

... .. Petitioner/s

Versus

Munna Pandey, Son of Late Bir Bahadur Pandey, R/o Village - Thatheri Tola,
Sabour, P.S. - Sabour, District - Bhagalpur.

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 358 of 2017

Arising Out of PS. Case No.-106 Year-2015 Thana- SABAUR District- Bhagalpur

=====

Munna Pandey, Son of Late Bir Bahadur Pandey, R/o Village - Thatheri Tola,
Sabour, P.S. - Sabour, District - Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

Appearance :

(In DEATH REFERENCE No. 4 of 2017)

For the State : Mr. Ajay Mishra, APP

For the Respondent/s : Mr. Ansul, Adv.

Mrs. Sagrika, Adv.

Mr. Aditya Pandey, Adv.

Ms. Harini Raghupathy, Adv.

Mr. Abhinav Ashok, Adv.

Ms. Priyanka Singh, Adv.

Mr. Uday Bhanu, Adv.



Ms. Zainab Khan, Adv.

(In CRIMINAL APPEAL (DB) No. 358 of 2017)

For the Appellant/s : Mr. Ansul, Adv.
Mrs. Sagrika, Adv.
Mr. Aditya Pandey, Adv.
Ms. Harini Raghupathy, Adv.
Mr. Abhinav Ashok, Adv.
Ms. Priyanka Singh, Adv.
Mr. Uday Bhanu, Adv.
Ms. Zainab Khan, Adv.
For the State : Mr. Ajay Mishra, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 11-10-2023

A ten year old girl was raped and murdered in the month of May, 2015. Two persons were charged for the offences under Section 302 and 376 of the Indian Penal Code (*in short the I.P.C.*) and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (*in the POCSO Act, 2012*), one being the appellant/Munna Pandey before this Court and the other, viz., Pritam Tiwary, who was declared a juvenile by the Juvenile Justice Board.



2. The Trial Court, after having examined six (6) witnesses on behalf of the prosecution, convicted the sole appellant under Sections 302 and 376 of the I.P.C. and Section 4 of the POCSO Act, 2012 *vide* judgment dated 02.02.2017 in Sessions Trial No. 581 of 2015, arising out of Sabour P.S. Case No. 106 of 2015 dated 01.06.2015, and by order dated 23.02.2017, the appellant was sentenced to death with a fine of Rs. 10,000/- for the offence under Section 302 of the I.P.C. and to undergo R.I. for ten years for the offence under Section 376 of the I.P.C. No sentence was awarded to him for the offence under Section 4 of the POCSO Act, 2012.

3. The appellant preferred an appeal before this Court *vide* Cr. Appeal (DB) No. 358 of 2017. Since the sentence of death was imposed on the appellant, the Trial Court transmitted the proceedings of the case to this Court under Section 366 of the Code of Criminal Procedure (in short the Cr.P.C.) for confirmation of the



sentence of death.

4. Both, the Death Reference No. 04 of 2017 and the Cr. Appeal (DB) No. 358 of 2017 were heard together by a Division Bench of this Court which *vide* its judgment dated 10.04.2018, affirmed the sentence of death and dismissed the appeal of the appellant.

5. The appellant, without losing heart, challenged the judgment of this Court before the Supreme Court in Cr. Appeal Nos. 1271-1272 of 2018, when a 3-Judges Bench of the Supreme Court set aside the judgment of the High Court and remanded the matter to the High Court, restoring before it the Reference as also the appeal for re-evaluation and re-appraisal of the facts and evidence which would be independent of the opinion of the Trial Court, particularly in view of the lapses on the part of the defence in not proving the major contradictions in the form of material omissions, surfacing from the oral evidence of the prosecution witnesses.



6. While remanding the matter to this Court, the Supreme Court noted the fact that the appellant had remained in jail for the last eight years and, therefore, there was some urgency for the High Court to decide the matter expeditiously.

7. The reasons for the Supreme Court to set aside the judgment of the High Court, affirming the conviction and death sentence of the appellant and dismissal of his appeal, would be discussed later.

8. We have heard Sri Ansul, the learned Advocate, who has appeared *pro bono* in this matter at the instance of an organization called Project-39A, run under the aegis of the National Law University, Delhi, which assists poor persons on death row in the entire length and breadth of the country.

9. The learned Advocate who had appeared for the appellant on the earlier occasion has no objection to the case being addressed by Sri Ansul, representing Project-39A.



10. It would be necessary to refer to the facts of the case first.

11. The mother of the victim (P.W. 2) lodged the *fardbeyan* at the house of one Nawal Kishore Ojha @ Fuchan Pandey (brother of the appellant) on 01.06.2015 at about 12:45 P.M., which was recorded by the SHO, Sabour Police Station (P.W. 5). She has alleged that she had gone to her late sister's house a couple of days prior to the occurrence. On 31.05.2015, *i.e.*, a day before the lodging of the *fardbeyan*, her elder daughter (P.W. 3) informed her on telephone at 12:00 P.M. that her younger daughter (deceased) was not to be found in the house. On hearing this, P.W. 2 immediately left for Sabour, her hometown. She was told by P.W. 3 that the victim had gone to the house of the appellant to watch television. When she did not come back home till about 11:00 A.M. in the day, P.W. 3 telephonically informed her. After coming to Sabour, she went to the house of the appellant in search of her



daughter, but the house was found to be locked. Thereafter, she made a search for her daughter but could get no clue about her. When the appellant was asked to open the lock of the house, he evaded and said that he did not have the keys. The informant (P.W. 2), thereafter, informed the brother of the appellant on telephone, who at the relevant time had gone to his in-law's house. The brother of the appellant came back on 01.06.2015 at about 12:00 P.M. in the day. When he opened the lock of his room, Pritam Tiwari, his brother-in-law, was found to be hiding there. The room was locked from outside. Later, when the lock of the room of the appellant was opened, the dead body of her daughter was found beneath the bed. This convinced her that the appellant and Pritam Tiwari had raped and killed her daughter by smothering her and had concealed the dead body inside the room of the appellant.

12. On the basis of the afore-noted *fardbeyan* of P.W. 2, a case *vide* Sabour P.S. Case No.



106 of 2015, dated 01.06.2015, was registered for investigation against the appellant and Pritam Tiwari under Section 376(D), 302 and 201/34 of the I.P.C. and Section 4 of the POCSO Act, 2012.

13. The police, after investigation, submitted charge-sheet against the appellant and Pritam Tiwari, whereafter cognizance was taken against the appellant and the case of Pritam Tiwari was referred to the Juvenile Justice Board.

14. The Trial Court, as noted above, examined six witnesses on behalf of the prosecution and finding the appellant guilty of the offences under Sections 376 and 302 of the I.P.C. and Section 4 of the POCSO Act, sentenced him to death.

15. The High Court while hearing the appeal, completely relied upon the deposition of P.Ws. 1, 2 and 3 to connect the circumstances leading to the guilt of the appellant.

16. Before the Trial Court, P.W. 2 made a



some what different statement than what she had alleged in the FIR. She iterated that her elder daughter (P.W. 3) had informed her on telephone on 31.05.2015 that the victim was not to be found in the house. She said that P.W. 3 had informed her that the victim was asked by the appellant to come to his house for watching television. When she had gone to the house of the appellant, she had found it locked. Along with her, P.Ws. 1 and 3 and one Khushboo Devi (her sister-in-law), who has not been examined at the Trial and the villagers also searched for the victim. On being called by the villagers, the appellant came and when the informant asked him about her daughter, he expressed complete ignorance. Expressing suspicion on the appellant, she (P.W. 2) asked him to open the door of his room, but he evaded on the ground that he did not have the keys. She then suggested the appellant to break the lock of the room. She also apprised the appellant that P.W. 3 had informed her that he was seen locking the door



sometimes in the day when P.W. 3 had gone to look for her sister. Pritam Tiwari also was not available in the house. This had made her doubt that the victim may have gone with Pritam. This process of search continued till about evening. She, thereafter, again went to the house of the appellant and she and others saw a dim light burning in the room, which had fallen in the share of Fuchan Pandey. Everybody suspected that some one was hiding inside that room. It was at that time that the local persons called Fuchan and asked him to come over. He promised to come on the next day, which promise he kept and arrived at his house at 10-11 A.M. on 01.06.2015. The appellant also was called to his house by the villagers. Fuchan was not readily agreeable to open the lock of the house. However, when the appellant was assaulted by the villagers, he gave the keys. With that key, the lock of the room of Fuchan Pandey was opened. That room was also found to be locked from inside as well. When the door was opened, Pritam Tiwary



was found, who tried to hide himself.

17. By this time, she has averred, the police had also arrived. Pritam was caught by the villagers. The locks were opened by the villagers where the dead body of the daughter of P.W. 2 was found. It appeared to all that the victim had been raped and strangled. In front of the police and the villagers, Pritam confessed that he along with the appellant had committed the crime. All the three persons, namely, the appellant, his brother/Fuchan and Pritam were assaulted by the villagers.

18. During cross-examination, she stated that as a neighbour, she and her family were on visiting terms with the appellant. She knew that the appellant and his brother stayed separately and in the ancestral house, one room fell in the share of the appellant, whereas the other came to the share of his brother/Fuchan Pandey. About 10 to 15 days prior to the occurrence, Fuchan Pandey had gone to his in-law's



house at Sabhapur.

19. She assessed the age of the appellant to be 50 to 55 years and of Pritam to be 19 to 20 years.

20. P.W. 2 denied the suggestion that it was Pritam Tiwari only who had raped and killed the deceased and that the appellant was falsely implicated in this case. When further questioned about the appellant, She told the Court that about five to six months ago, the appellant had taken a house on rent. In paragraph-25 of her cross-examination, she has denied that she had not stated in her *fardbeyan* that her daughter (P.W. 3) had seen the appellant locking the door of his house.

21. Similarly, P.W. 3, the elder sister of the victim, has also supported the prosecution version in as much as she stated before the Trial Court that she saw the appellant putting a lock on the door of his house at 11:00 A.M. The appellant had told her that the victim had gone back home after watching the TV. It was only then that she (P.W. 3) had informed her mother (P.W.



2), when her mother and her cousin/Babloo (P.W. 1) came to Sabour and went to the house of the appellant in search of the victim. When the appellant was asked to open the lock, he is said to have retaliated that if the lock is forcibly opened, he would file a case of *dacoity* against anyone responsible for it. The appellant, on not finding Pritam around, suggested that perhaps Pritam may have taken away the victim. Believing the appellant, P.W. 3 and others started looking for Pritam but to no avail.

22. Later in the evening, when she along with others had gone to the house of the appellant, a bulb was found burning inside the room of Fuchan Pandey, which raised suspicion in the minds of everybody that some one had been hiding inside the room. Fuchan was then informed, who came on the next day and the locks of the outer gate as also the respective rooms of the appellant and his brother were opened. Pritam Tiwari was found hiding in the room of Fuchan Pandey,



whereas the dead body was found in the room of the appellant.

23. Pritam Tiwari had confessed before her (P.W. 3) that he along with the appellant had raped and killed the deceased. She has further stated that Pritam was entrusted with the task of looking after the house of Fuchan. Both, the appellant and his brother had not given any cause to the family of P.W. 3 of any complaint.

24. In paragraph-17 of her cross-examination, she has stated that on 01.06.2015, Fuchan arrived before the appellant and inside the house, only Pritam was available. She has denied the suggestion that Pritam had any association with the victim as the victim was much younger to Pritam.

25. Similar statements have been made by Babloo (P.W. 1), who is the cousin of the deceased.

26. The dead body was sent for post-mortem examination on 01.06.2015.



27. Dr. Sandip Lal (P.W. 4), who conducted the post-mortem of the deceased, found the dead body to be decomposed. The face had turned blackish; nails were found to be cyanosed; both upper and lower lips were swollen; abrasions were present over the inner aspect of both upper and lower lips; lower lip was found lacerated at the margin; nose was found to be compressed; nasal bones were found to be dislocated; trachea was deeply congested. On the examination of the genitalia, P.W. 4 had found the hymen to be ruptured with presence of blood clots. The labia in the right side was found to be swollen and bruised. The vaginal swab was collected and sent to the Department of Pathology, Jawaharlal Medical College Hospital, Bhagalpur for the needful.

28. In the opinion of P.W. 4, injury No. 1 on the lips and nose were caused due to pressure applied by some soft and blunt object, which was opined to be dangerous and grievous in nature. Injury No. 2 on the



genitalia was also anti-mortem and caused by some blunt object. The cause of death was stated to be asphyxia and shock due to pressure exerted over the mouth and nose. The time fixed for death was 12 to 36 hours from the post-mortem examination.

29. The Investigator of this case (P.W. 5) had made a map of the P.O. She had arrested Pritam Tiwari and the appellant at the spot. Thereafter, she recorded the statement of P.Ws. 1, 2, 3 and 6. The clothes of the victim and of the appellant were seized and a seizure list was prepared in three copies (Exhibit- 6, 6/1 and 6/2).

30. P.W. 5 (I.O.) has stated before the Trial Court that when she reached the place of occurrence, approximately 150 persons had already congregated there. The lock of the house also had already been opened by the members of the public. However, she did not find any sign of violence on the door of the house of the appellant. Before her, neither the appellant nor



Pritam Tiwari had made any confession.

31. What is important to note is that in paragraph-8 of her deposition, she has stated very categorically that she had followed the instructions of the superior police officer and had not obtained the FSL report.

32. No further questions were asked from her with respect to her investigation of the crime.

33. One Vijay Prasad Sah, a neighbour, has been examined as P.W. 6 at the Trial, who had visited the P.O. on hearing the noise near the house of the appellant. Many people had assembled in front of the house of the appellant. He learnt there that the victim had gone missing and that later, her dead body was found beneath the bed, inside the room of the appellant. He also confirmed that Pritam is the brother-in-law of Fuchan, who had been residing in the house for about two to three months.

34. On perusal of the deposition of the



witnesses, the Supreme Court doubted whether such statements were made by the witnesses during the course of investigation. Both, P.Ws. 2 and 3 were questioned about their having made statement before the Investigator that they had not stated about the appellant putting the lock outside his house at 11:00 A.M. on 01.06.2015, which they had accepted. However, when no question was put to the Investigator (P.W. 5) regarding such statement having been made either by P.W. 2 or 3, the Supreme Court, in its endeavor to elicit the truth, looked at the police papers and found that the witnesses were not at all questioned with respect to their previous statements for the purposes of contradicting them. In fact, the Supreme Court found that none of the witnesses had stated about the appellant having put a lock on the door or the appellant having come to the house of the victim to call the deceased to watch television programme.

35. This allegation was directed against



Pritam Tiwari and not against the appellant.

36. It was at that point that the Supreme Court thought that the appellant has not been given a fair deal in the trial; perhaps for the inexperience of the lawyer conducting the case or the Trial Judge completely abdicating his functions, who merely behaved like an umpire, giving complete freedom to the parties to lead evidence the way they wanted.

37. A Trial Court always has to be on his guard and has to be in know of the facts of the case for him to either allow or disallow questions by parties to the witnesses. When there was no cross-examination of the witnesses, especially, with respect to facts which could have provided the fulcrum for any decision with respect to either murder, rape or any circumstance leading to the suspicion that the accused/appellant could have had his hand in it, the Trial Court was required to intervene which he did not.

38. In this context, the Supreme Court also



found that the High Court also while dealing with the Reference, did not exert itself and merely relied upon the opinion of the Trial Court, which, in turn, was based on the testimony of P.Ws. 1, 2 and 3 but without any careful analysis.

39. It would now be necessary for us to list the grounds on which the Supreme Court did not agree with the opinion of the High Court dismissing the appeal and confirming the death sentence.

40. The Supreme Court, on the basis of the evidence on record, found that even though the case was based on circumstantial evidence, the chain of circumstances were not complete, thereby excluding any hypothesis of the guilt or innocence of the appellant. Even though the appellant was taken to hospital for treatment as he had been assaulted by members of the public, no medical examination was done on him as is mandated under Section 53-A of the Cr.P.C. No samples were collected for the purpose of DNA examination,



which was necessary in this case of rape where the victim had died and the offence was sought to be established only by circumstantial evidence and all these lapses were fatal to the prosecution case.

41. It was also noticed by the Supreme Court that the prosecution had not placed on record the exculpatory evidence against the appellant. All that was brought on record was a letter by the Officer-in-Charge of the Sabour Police Station seeking permission to send the articles so seized for forensic examination. The Investigating Officer, following the instructions of the superior police officer, did not receive the FSL report. The vaginal swab of the deceased, which had been collected at the time of post-mortem and was sent by the Doctor (P.W. 4) to the pathology lab for examination, was also not obtained. In fact, the Supreme Court had found that the pathology report indicated that there was no spermatozoa in the vaginal swab.



42. It was very noticeable that P.Ws. 1, 2 and 3 had made different statements at the Trial than what they had made before the Investigator and that also, after three months of the other accused, namely, Pritam Tiwari having been declared a juvenile.

43. The Supreme Court found great force in the submission of the appellant that only when the prosecution realized that there was no use keeping the allegation focused on Pritam Tiwari, as he would in no case be punished for more than three years because of his juvenility, deliberately, the allegation of calling over the deceased to the house and locking the door of the house/room by the appellant, sometimes in the afternoon on 01.06.2015, was introduced at the Trial.

44. The Supreme Court noted that the Trial Court did not take into account certain other ancillary facts, which could not have been side-stepped in a serious case of this kind where a ten year old girl had been raped and killed.



45. Admittedly, the appellant did not have good relations with his brother and precisely for the lack of bonhomie between the two brothers, a two-roomed house was partitioned, one room going to each of the brothers. The appellant had also taken a house on rent. Apart from this, the Supreme Court found that there was consistent evidence of P.Ws. 1, 2 and 3 of the appellant being called by the villagers in the evening of 31.05.2015 and in the morning of 01.06.2015.

46. From these two facts, it could have been inferred that the appellant was not a regular resident of the house where the dead body was found concealed.

47. The Supreme Court, in order to clear its doubt, looked at the police papers and found the map in the police papers, which clearly revealed that there was no interconnection between the two rooms from inside and both the rooms had an exit on the *varanda*. The lock of the outer iron grill was broken by the villagers. The room in which Pritam Tiwari was found was locked from



inside as well and the door of the appellant was opened by the keys which were brought by Fuchan and not the appellant. Apart from this, the villagers who had assembled at the P.O. and had broken the lock of the main door as also of the rooms, have not been examined. The sister-in-law of the informant, viz., Khushboo who was present in the house on 31.05.2015 when the deceased had gone to the appellants's house, has also not been examined.

48. It, therefore, appeared to the Supreme Court that the investigation was only on the lines of confession of Pritam Tiwari.

49. The appellant was also not put to all the circumstances under Section 313 Cr.P.C. for him to effectively explain away the accusation levelled against him. The circumstances were: (a) P.W. 3 having seen the appellant locking the grill and door of his room; (b) the appellant giving false information to P.W. 3 that the victim had already left after watching the television; (c)



the appellant refusing to open the door as he did not have the keys; (d) the appellant giving the keys to the villagers after he was assaulted and (e) the so called extra judicial confession by Pritam Tiwari implicating the appellant.

50. Last but not the least, neither the Trial Court nor the High Court ever referred to the mitigating circumstances which would have inured in favour of the appellant before handing over the death sentence to the appellant. In fact, the High Court had not discussed any one of the mitigating factors that the appellant did not have any criminal antecedent and had displayed good behaviour in jail, which was certified by the Superintendent of the concerned jail.

51. The appellant has two minor children who have been ostracized from the village but despite that, their family has continued to keep its ties and connection with the society alive. The wife of the appellant has been elected as a councillor in the year 2010. The appellant



presently is more than 56 years of age. All these facts suggested a strong possibility of reformation of the appellant.

52. The primary reason for the matter to be remanded by the Supreme Court is the failure of the High Court in not dealing with the Reference made under Section 366 Cr.P.C. in a proper manner.

53. Whenever a Court of *Sessions* passes a sentence of death, the proceedings are to be compulsorily submitted to the High Court and the sentence of death is not to be executed unless it is confirmed by the High Court. Section 367 Cr.P.C. clothes the High Court with the power to direct further inquiry to be made or additional evidence to be taken, if while dealing with the Reference, the High Court is of the view that further inquiry ought to be made into or additional evidence taken upon any point bearing on the guilt or innocence of the convicted person. It must then make such inquiry or take such evidence itself or direct it



to be made or taken by the Court of *Sessions*. It is within the powers of the High Court to either confirm the sentence or annul the conviction and acquit the accused person.

54. This power has to be exercised diligently. There cannot be any question about the width of this power.

55. The entire case record was before the High Court as an appeal is a continuation of the Trial of the accused on the same set of evidence. Precisely for this reason, the High Courts have been given powers to take fresh evidence, if so desired. The High Court while dealing with the Reference has to satisfy itself as to whether a case beyond reasonable doubt has been made out against the accused persons for the infliction of the penalty of death. The proceedings before the High Court, in Reference, therefore, are in the nature of re-appraisal and re-assessment of the entire facts and law so that the High Court is satisfied on the materials about



the guilt or innocence of the accused persons.

56. This duty being cast upon the Court in dealing with Reference under Section 366 Cr.P.C., it would only be a travesty of justice if the High Court does not consider the proceedings in all its aspects and arrives to a conclusion on the materials, independently of the view expressed by the Sessions Judge. While doing so, the High Court would only be assisted by the opinion expressed by the learned Sessions Judge, but under the provisions of the law referred to above, it is for the High Court to come to an independent conclusion of its own.

*[Refer to **Jumman and Ors. Vs. State of Punjab (AIR 1957 SC 469)**; **Rama Shankar Singh @ Ram Shankar Roy and Ors. Vs. State of West Bengal (AIR 1962 SC 1239)** and **Bhupendra Singh Vs. State of Punjab (AIR 1968 SC 1438)**].*

57. The Trial Court had made no efforts to ensure that adequate questions were put to the witnesses to elicit the truth.

58. The High Court, in Appeal and in



Reference, fell in the same error.

59. When the attention of P.Ws. 2 and 3 were drawn to a particular aspect of the matter, namely, the appellant having called the deceased to his house and having been seen locking his door on the next day and which suggestion was denied; the same questions ought to have been put to the Investigator for proving the contradiction. The Trial Court should have woken up from the slumber. The Trial Court was definitely not awake.

60. The impact was an unfair Trial to the appellant.

61. In an adversarial system of Trial, the Presiding Officer of a Criminal Court is not to remain a mere spectator or a recording machine. He has to be an active participant in the Trial by evincing intelligence and active interest by putting questions to witnesses in order to ascertain the truth. After all, a good umpire also decides whether the parties are playing foul. Reticence



of a Judge may not always be a virtue to be extolled, more so, when under his nose, injustice occurs or there could be a possibility of Trial not being conducted in a fair manner.

62. The role of a Judge, especially in Criminal Courts, has been debated enough and many similes have been suggested. Is he to assume the role of a referee in a football match or of an umpire in a cricket match? Is he required to drop the mantle of a Judge and assume the robe of an Advocate? Can he put on his gloves and go against a witness whom he suspects to be making wrong statement?

63. All these doubts have now been cleared.

64. Robust judging is the response to the cry of justice. The time honoured presumption of innocence of persons accused of heinous offences cannot be relaxed, yet at the same time, the principle cannot be used as a "convenient shibboleth" to subvert the true course of justice.



65. A Judge in a Criminal Court, is not for nothing, provided with all the tools. It is but lamentable that those tools are not used.

66. In the preset case, those tools have not been used at all.

67. Out of the several powers available with the Trial Court, one is Section 165 of the Indian Evidence Act, 1872.

68. Section 165 of the Indian Evidence Act, 1872 is extracted hereinbelow for ready reference:-

"165. Judge's power to put questions or order production.—The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question: Provided that the Judgment must be based upon facts declared by this Act to be relevant, and duly proved: Provided also that this section shall not authorize any Judge to compel any witness to answer any



question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

69. The whole purpose of producing evidence in Court is: (a) to find out the truth of what actually occurred and (b) a Trial is not a game or contest to be won or lost by the number of witnesses called but they are to be assessed for their quality and credibility. And if the Trial Court sees it not happening, he must use his powers under Section 165 of the Indian Evidence Act, 1872.

70. The powers of Section 165, as can be noted, is very vast and unrestricted in putting any question he pleases, in any form, at any time, to any witness or to parties, about any fact, relevant or irrelevant, in order to discover the relevant facts. Even



if any question by the Court under Section 165 of the Indian Evidence Act, 1872 crosses in the realm of irrelevancy, it would not transgress beyond the contours of powers of the Court. No questions could be raised about the impact of the question put to a witness by the Court under Section 165 of the Indian Evidence Act, 1872. [Refer to ***State of Rajasthan Vs. Ani @ Hanif and Ors.; (1997) 6 SCC 162***].

71. In fact, in the present case, we have noticed that the cross-examination of P.W. 2 had to be postponed because she broke down a number of times while answering the questions. This should have prompted the Trial Court to have suavely put such questions to her which would have brought out the truth.

72. The offence which the Trial Court was trying, no doubt, diabolical. However, it would be equally distressing if an innocent person is convicted only because of the moral compass that a 10 year old girl has been raped and killed, showing utmost depravity



and suspicion against the appellant. Suspicion after all, as has rightly been explained by a jurist, is a sea without a shore and anybody who takes a voyage in that sea is rendered rudderless and without a compass.

73. This, perhaps, struck the Supreme Court and, therefore, the police papers were referred to.

74. A question now arises whether any adverse interference against prosecution can be drawn on the basis of the statement of the witnesses before the police during the course of investigation, as doing so would be to qualify such statements before the police to be put in the class of "evidence" as defined under Section 3 of the Indian Evidence Act, 1872.

75. This aspects has to be seen from a different angle altogether.

76. We have already noted that when there was no positive reaction of the Trial Court as also the High Court while dealing with the Reference even when a denial was obtained by the defense from P.Ws. 1 and



3 about a crucial fact which could have proved to be pivotal for deciding the innocence or guilt of the accused and when no such question was put to the Investigator for duly proving such contradiction, that the Supreme Court became doubtful whether the records have been perused by the Trial Court or even the High Court.

77. There is no difficulty in looking at the police papers in order to clear the doubts. The only difficulty is whether such statement could be used as an evidence for drawing any adverse inference against a witness or for contradicting them.

78. Even though the issue has been dealt with in a number of cases with the position of law having been explained without any doubt, we would refer to the provisions contained in Sections 161 and 162 of the Cr.P.C. alongside the provisions contained in Section 145 of the Indian Evidence Act, 1872.

79. Section 161 of the Cr.P.C. gives the power to a police officer making an investigation to



examine orally any person who is acquainted with the facts and circumstances of the case that is under investigation and such person is bound to answer truly all questions relating to such case put to him other than the questions, the answer to which would incriminate him. The answer so given by the person may be reduced into writing and could also be recorded by audio-video electronic means.

80. There are certain checks, especially with respect to the statement of a woman against whom the offences under Sections 354, 354-A to D, 376-A to E or Section 509 of the I.P.C. is alleged to have been committed, in which case, the statement shall be recorded only by a woman police officer or any other woman officer. How such statements recorded under Section 161 are to be used in a Trial, if at all it is used? There is a complete embargo of such statements before the police to be signed by the maker. It is for this reason that it has been ordained under Section 162



Cr.P.C. that no such statement made before the police during the course of investigation would be used for any other purpose except as provided in that section, at any enquiry or Trial. If a prosecution witness is called in a Trial, any part of his statement could be used by an accused for contradicting him, but it could be done only in the manner provided by Section 145 of the Indian Evidence Act, 1872. If any part of such statement is so used, the attention of the maker has to be drawn to that statement.

81. Section 145 of the Indian Evidence Act, 1872 reads as follows:-

"145. Cross-examination as to previous statements in writing.-A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

82. Thus, without such statement of the



witness being shown to him and the same having been proved, it cannot be used for contradicting him.

83. In the present case, the Supreme Court has looked into the police papers to find out the earlier version of the prosecution witnesses. This was only when the Supreme Court found that a fair Trial has not been handed over to the appellant because of inadequate cross-examination in view of specific statement made by the witnesses during investigation. For this reason, the case has been remanded for a re-appraisal.

84. Under such circumstances, can we *suo motu* look into such statements and use it against the witnesses for the purposes of contradicting them?

85. With the bar under Section 162 of the Cr.P.C. and the procedure prescribed under Section 145 of the Indian Evidence Act, 1872, it would be difficult to do so.

86. Even if the Trial Court would have put



questions to the witnesses with reference to their earlier statement before the police by employing the provisions contained in Section 165 of the Evidence Act, then also, compulsorily, the attention of the witnesses to such previous statements had to be drawn.

87. In ***Tara Singh, Vs. The State; 1951 SCC 903***, an issue was raised whether the evidence recorded by the Committal Magistrate under the 1898 Code could have been used by the Trial Court for drawing any adverse inference, solely on the basis of such recorded statement by the Committal Magistrate, where no opportunity was given to the accused to cross-examine the witnesses. Justice *Vivian Bose* authoring the judgment pointed out the difference of judicial opinion regarding the issue.

88. Section 288 of the 1898 Code provided that the evidence recorded by the Committing Magistrate in the presence of an accused could be treated as an evidence for all purposes, but subject to the provisions



of the Indian Evidence Act, 1872. There was one line of reasoning prevalent that time that Section 145 of the Indian Evidence Act, 1872 was not attracted because that section only related to previous statements and writing which are to be used for the purpose of contradiction alone. The other line of reasoning, which was approved by *Justice Bose*, was that there could not be any exception to any provision in the Evidence Act and the application of Section 145 of the Evidence Act, 1872, therefore, could not be excluded, even it be with respect to an evidence recorded by the Committal Magistrate under the Code. Thus, in that case, since reliance was placed on an evidence which did not pass the procedural test of Section 145 of the Indian Evidence Act, 1872, the same was not approved and a re-trial *de novo* was ordered.

89. In ***Raghunandan Vs. State of U.P.; (1974) 4 SCC 186***, the Supreme Court has referred to a judgment in ***Emperor Vs. Lal Miya; AIR 1943 Cal 521***



and has held that any statement of a witness recorded by the police during investigation cannot be used for any purpose other than one mentioned in Section 162 of the Cr.P.C.; but this prohibition applies only to the parties to the proceedings and does not operate against the powers of the Court, when it considers the testimony of a witness to be necessary. The Supreme Court went on to explain that the ban imposed by Section 162 Cr.P.C. against the use of statement of a witness recorded by the police during investigation, though may be sweeping and wide but at the same time, it would not curtail the powers of a Court under Section 165 of the Evidence Act, 1872 to put any question to a witness in order to discover or obtain proper proof of relevant facts. The first and second *proviso* to Section 165 of Evidence Act, 1872 make it very clear that it would not be tramelled by the ban of Section 162 of Cr.P.C. or else, it would have been stated so by the Legislature under Section 162 of the Cr.P.C. Section 162 of Cr.P.C was enacted



much after Section 165 of the Indian Evidence Act, 1872. But then also, unless the attention of the witness is not drawn to his/her earlier statement, the same cannot be used for any purpose. [Also refer to **Dandu Lakshmi Reddy Vs. State of A.P., (1999) 7 SCC 69.**]

90. In **V.K. Mishra Vs. State of Uttarakhand and Anr.; (2015) 9 SCC 588**, the Supreme Court has fully explained the interplay of Sections 161 and 162 of the Cr.P.C. and Section 145 of the Indian Evidence Act, 1872. The relevant paragraphs from the judgment are being quoted of for the sake of completeness:

15. *Section 161 CrPC titled "Examination of witnesses by police" provides for oral examination of a person by any investigating officer when such person is supposed to be acquainted with the facts and circumstances of the case. The purpose for and the manner in which the police statement recorded under Section 161 CrPC can be used at any trial are indicated in Section 162 CrPC. Section 162 CrPC reads as under:*

"162. Statements to police not to be signed: Use of statements in evidence.—(1) No statement made by any person to a police officer in the course of an



investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act.

Explanation.—An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any



omission amounts to a contradiction in the particular context shall be a question of fact."

16. *Section 162 CrPC bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police under Section 161(1) CrPC can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162(1) CrPC. The statements under Section 161 CrPC recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose: (i) of contradicting such witness by an accused under Section 145 of the Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and (iii) the re-examination of the witness if necessary.*

17. *The court cannot suo motu make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 CrPC "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. The statement before the investigating officer can be used for contradiction but only*



after strict compliance with Section 145 of the Evidence Act that is by drawing attention to the parts intended for contradiction.

18. Section 145 of the Evidence Act reads as under: (It has already been extracted before).

19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will



depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction."

(emphasis provided)

91. But then, what happens when such power has not been exercised by the Trial Court and even in Reference, the High Court has not used its power under Section 367 of the Cr.P.C.?

92. Can the previous statement of the witnesses be now looked into?

93. This, thus, has put us in a quandary.

94. Do we remand the case to the Trial Court for again examining the witnesses or would it be more appropriate, keeping in mind that a lot of time has elapsed, that we exercise the powers under Section 367 of the Cr.P.C. and ourselves take additional evidence



upon the issues bearing upon the guilt or innocence of the appellant?

95. The statement made by the witnesses before the Investigator has been extracted by the Supreme Court under its exceptional and wide reservoir of powers.

96. The witnesses would, either in the event of re-examination by the Trial Court, admit it or deny it. In case they admit, then they stand contradicted, which contradiction would be proved by putting the same question to the Investigator. In the event of their accepting to have made such statement, such contradiction would stand proved. In no case would any other situation arise even if the matter is remanded to the Trial Court.

97. Though in a different context, but which would be very apt to the fact situation of this case, it has been held by the Supreme Court in ***State of M.P. Vs. Bhooraji; (2001) 7 SCC 679*** that normally "a *de*



novo Trial” should be the last resort and that too only when such a recourse becomes so desperately indispensable that it would be necessary to order for it. It should be limited to the extreme exigency to avert a “failure of justice” which, otherwise, would not be achieved. “Any omission or illegality in the procedure which does not affect the core of the case may not be a ground for ordering a de novo Trial. In cases of de novo Trials, there is always a possibility of serious impact on the roster of the Trial Courts which are otherwise crammed with dockets and hardship of many persons who would have taken all the troubles at their disposal to reach out to the Court in the first instance and having deposed their version in that case. To them and the members of the public, the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. After all, law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation.”



98. This occurrence is of the year 2015. In case of remand, the mother and the sister of the victim would be required to be called to the witness stand again. They would suffer the same travails which they had earlier. The might be subjected to ridicule or perhaps ostracization. The sister of victim at that time was 16 years old. She may have been married with a family of her own. Such harrowing experience once again, in our estimation, would do more harm than gain.

99. In ***Rahul Vs. State of Delhi, Ministry of Home Affairs and Anr.; (2023) 1 SCC 83***, the Supreme Court, after having quoted the observations of *Chinnappa Reddy, J.* in ***Ram Chander Vs. State of Haryana; (1981) 3 SCC 191***, that for a criminal Court to be an effective instrument in dispensing justice, the presiding Judge must put questions to the witnesses in order to ascertain the truth, and then having found in the facts of the case that the material prosecution witnesses were not adequately examined and cross-



examined and the Trial Court behaved like a passive umpire, came to the conclusion that the appellant/accused was deprived of his right to have a fair trial, apart from the fact that truth also could not be elicited by the Trial Court, and thus acquitted the accused.

100. We also have noted that there are, even without looking into the earlier statements of the witnesses, several glaring lapses in the appreciation of already existing evidence. The prosecution witnesses, through their own deposition, have rendered themselves unworthy of complete reliance.

101. The FIR lodged by P.W. 2 misses out on the core issues on which suspicion could be and was raised by PW-2 against the appellant. The circumstances which have been woven up together by the Trial Court as also the High Court in the first instance, are that P.W. 3 had seen the appellant locking the grill and door of his room and that he had given a false information to P.W.



3 that the victim had already left the house of the appellant after watching the television. The other circumstances inching towards the guilt of the appellant were the cognate circumstances, namely, his refusal to open the door when he had the keys with him and his handing over the keys only when he was assaulted by the villagers. Even if these fact situations are accepted to be *ex facie* true, it would not form a chain, so complete, so as to exclude any other hypothesis but the guilt of the appellant.

102. The law pertaining to appreciation of circumstantial evidence was very succinctly explained by the Supreme Court in ***Hanumant Vs. State of M.P.; (1952) 2 SCC 71***, wherein it was held that in cases where the evidence would be of a circumstantial nature from which the conclusion of guilt is drawn, has to be fully established and all the facts so established ought to be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive



nature and tendency. They should be such as to exclude every hypothesis but the one proposed to be proved. Simultaneously, there must be a chain of evidence complete in itself, leaving no room for any reasonable doubt that the accused could be innocent also. Such proposition, by and large, had been followed rather consistently till date. [Also refer to ***Tufail Vs. State of U.P., (1969) 3 SCC 198; Ram Gopal Vs. State of Maharashtra, (1972) 4 SCC 625 and Sharad Birdhi Chand Sharda Vs. State of Maharashtra, (1984) 4 SCC 116.***]

103. A further elucidation was made by the Supreme Court in ***Shivaji Sahebrao Bobade and Anr. Vs. State of Maharashtra (1973) 2 SCC 793***, wherein the Supreme Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved”. [Also refer to ***Padala Veera Reddy Vs. State of A.P. (1989 Supp. 2 SCC 706); Gambhir Vs. State of Maharashtra (1982 2 SCC 351)*** and



***Navaneethakrishnan Vs. The State by Inspector of Police
(2018 16 SCC 161)].***

104. Keeping these principles in mind, if the evidence of P.Ws. 1, 2 and 3 and simultaneously of P.Ws. 5 and 6, the I.O. and an independent witness, are analyzed, it would become absolutely clear that the inconsistencies are apparent in their deposition. Missing out in the FIR on the very fact that the informant (P.W. 2) was informed by P.W. 3 that she had seen the appellant locking the door is, in fact, in the nature of contradiction which completely discredits P.W. 2 so far as the appellant is concerned.

105. The Trial Court did not appreciate the evidence available on record that the appellant and his brother were not on good terms. The brother of the appellant had entrusted the upkeep of the house to his brother-in-law, namely, Pritam Tiwari, who is a person of young age. Every time that P.W. 2 along with P.Ws. 1 and 3 and villagers came to the house of the appellant



to look for the victim, the appellant was not present there and, therefore, he had to be called by the villagers. The appellant never evaded but agreed to come to the house. It is not believable that when the relationship between him and his brother was so strained so as to partition a two-roomed house and where the appellant was not able to reside even after partition, that he would get in-cahoots with the brother-in-law of his brother for committing such an act. In fact, the converse proposition is more plausible that when Pritam was apprehended by the villagers in front of the police, who had hid himself inside the room allotted to the share of the brother of the appellant, he made a confession implicating the appellant as well. This confession of Pritam further reflects that it was maneuvered by the brother of the appellant or the police or the local persons who had assembled at the place of occurrence.

106. The conduct of Pritam also appears to be absolutely doubtful in hiding himself in the room



when the dead body also was kept in the same house. If the appellant chose to come out of the house, which was perhaps only for his safety, Pritam would not have stayed back, if Pritam and the appellant were acting in unison. Even otherwise, if the appellant had committed the act along with Pritam, he would have not advised Pritam to stay back in the house for him to be caught and buckle under the pressure of local persons and spill the beans.

107. The very fact that the appellant was not present in his house, whereas Pritam was present all through, even locking the room from inside when a lock had been put outside, justifies the inference that the appellant has wrongly been framed in this case.

108. Was the police toeing the line of the confession of co-accused?

109. It appears to be so.

110. The confession was not made before the Investigator. Only P.Ws. 1, 2 and 3 have talked



about Pritam having confessed before the members of the public, which fact has not been stated by the independent witness, namely, P.W. 6. The timing of the P.Ws. 1 to 3 to depose against the appellant, in particular, is eye-catching. It was only after Pritam was declared juvenile by the Juvenile Justice Board.

111. Was it then an attempt to anyhow salvage the case from being rejected that for the first time before the Trial Court, accusations against the appellant were made?

112. If at all P.W. 3 had seen the appellant locking the door on 01.06.2015 in the afternoon and heard him give false information to her that the deceased had already left for her home after watching the television show, she would have definitely shared this information with her mother (P.W. 2), who would have then stated it as a ground in the FIR for suspecting the complicity of the appellant.

113. True it is that the FIR is never



expected to be an encyclopedia of all information. It is not even a substantive piece of evidence and it only sets the criminal law in motion. It could be used for corroborating or contradicting the maker of it. However, an omission of this kind makes the testimony of P.W. 3 as also P.W. 2 highly suspect and capable of being doubted for its correctness.

114. Another question which haunts us is as to where had the rape and murder taken place. Did it happen in the room of the appellant or that the deceased who had come to watch the television installed in the room of the brother of the appellant, raped and murdered there and her dead body was dragged and kept in the room of the appellant?

115. Neither of it appears to be possible.

116. The house has only two rooms as can be derived from the deposition of the witnesses. One room each has fallen in the share of the appellant and his brother. There is no inter-connectivity between the



rooms from inside. However, there is a common *verandah*. The occurrence is said to have taken place some times after the deceased had left for the appellant's house on 31.05.2016 in the morning. Till about afternoon, when she had not returned to her home and when her sister (P.W. 3) had gone to look for her, there was no suspicion at all nor P.W. 3 could spot any incriminating mark or circumstance to doubt about the deceased having been harmed in any manner.

117. In all its probability, the deceased would have been murdered sometimes between 9:00 A.M. to 11:00 A.M. and then P.Ws. 1, 2 and 3 and the entire village had assembled at the house by evening. Till evening of 31st of May, 2015, there was no clue and the suspicion merely veered around Pritam Tiwari. Even the appellant is said to have suspected the hand of Pritam Tiwari and on his so stating it, P.W. 2 claims to have looked for Pritam Tiwari instead of her own daughter, thinking that Pritam might have abducted the



victim. If at all the appellant would have been in know of the fact that very shortly it would be known to the villagers and others that the dead body has been kept in his room, he would not have come back on the next day to face the ire of the public.

118. These sequence of events provide sufficient reason to doubt the correctness of the prosecution version.

119. The conduct of the appellant becomes very relevant in the ultimate analysis of the evidence on record. Such conduct may be taken into account under Section 11 of the Indian Evidence Act, 1872.

120. After having said all this, we are still groping as to how the dead body was found beneath a bed in the room allotted in the share of the appellant which was locked from outside. The I.O. has not stated anything about what else she saw in the room. The room, perhaps, was completely spartan with a bed and nothing more. There were no sign of blood or marks of



struggle either in the room in which Pritam Tiwari was hiding or in the room from where the dead body was recovered. There was no trail of blood or any incriminating mark.

121. What then must have happened?

122. An inference can be made that the entire suspicion is based only on the premise of the regular habit of the victim going to the house of the appellant where Pritam had been staying for last 2 - 3 months as in-charge of the house, for watching television shows and no more.

123. For the time being, we are not taking into account the statement made by the prosecution witnesses before the police for the reason of those witnesses not having been contradicted by drawing their attention to the earlier statements, for such statements to qualify as evidence. Thus, even if it is assumed that Pritam would have called the victim, the evidence on record is that children of the locality always visited the



house for witnessing television programme.

124. Was the deceased alone in the house with Pritam Tiwary or there were others also?

125. We have no clue again because of no investigation having been made by the I.O. in a proper manner or the witnesses not having been cross-examined adequately.

126. The deceased died primarily of suffocation/asphyxia caused by smothering. The nasal bone was found to have been damaged. The manner in which the murder had been committed reflects complete depravity. But who all did it?

127. The victim was only half dressed.

128. The I.O. has stated before the Trial Court that the undergarments of both the victim/deceased and the appellant were seized and sent for forensic examination. However, on record, there is only a letter by which permission has been sought from the Trial Court for sending the same to the forensic



laboratory. The report was neither procured by the I.O. nor the same was awaited or called for by the Trial Court.

129. What could be a more passive approach of both the Investigator and the Trial Court?

130. The forensic evidence in this regard, even without DNA profiling, would have otherwise been a clincher so far as the guilt of the appellant is concerned; but alas! no importance was given to it.

131. Was the prosecution fearful that the entire story would be busted if the report comes?

132. The pathological report was not brought on record even when P.W. 4/the Doctor has specifically stated that the same was collected during the course of postmortem examination and was sent to the pathological laboratory of the hospital. The Trial Court ought to have asked for that report and the prosecution should have brought it on record. For all we know, the report might have been damaging to the prosecution



case.

133. There is yet another aspect of the matter which renders the Trial of the appellant absolutely unfair.

134. The appellant after his arrest was sent to hospital for treatment of the wounds which he had suffered because of the assault by the villagers. That was the time when his examination under 53-A should have been made and necessary samples collected for DNA profiling.

135. Section 53-A has been inserted in the Cr.P.C. in the year 2006 requiring the examination of person accused of rape by medical practitioner. Whenever a person is arrested on such charge and there are reasonable grounds of believing that the examination of his person will afford evidence as to the commission of such offence, it would only be lawful for a registered medical practitioner employed in the hospital run by the government or by a local authority and in the absence of



such a practitioner within the radius of 16 kilometers from the place where the offence has been committed, by any other registered medical practitioner, acting at the request of a police officer of the rank of Sub Inspector and above, and for any person acting in good faith in his aid and under his direction is to examine such arrested person and to use such force as is reasonably necessary for such purpose.

136. While examining such arrested person, the Doctor is required to identify the marks of injury as also the description of materials taken from the person of the accused for DNA profiling and other materials which would help unravel the truth.

137. The report of the medical practitioner would precisely indicate the reasons for the conclusion arrived at by the medical practitioner. The report shall be forwarded to the I.O., who shall then forward it to the Magistrate for the needful.

138. This has not been done even when



there was no opposition to it by the appellant. It needs no repetition that when the offence charged is heinous and the evidence put forth is circumstantial in nature, the Courts are required to put the material evidence under scrutiny of a much higher standard.

139. The provisions contained in Section 53-A was incorporated in the Code as it had become necessary for the prosecution in cases of rape and murder of DNA test for facilitating the prosecution to prove its case against the accused.

140. Prior to its insertion in the Code also, DNA test and matching of semen was being resorted to but without the specific provision in place, non-observance of the same would not have otherwise led to an inference of weak prosecution. [Refer to **Chotkau Vs. State of Uttar Pradesh; (2023) 6 SCC 742.**]

141. Though in **Rajendra Prahladrao Wasnik Vs. State of Maharashtra; (2019) 12 SCC 460**, it was held that the compliance of Section 53-A is not



mandatory but non-compliance definitely weakens the prosecution case.

142. The chain of circumstances, therefore, could not be forged by the prosecution.

143. There could be a possibility of only Pritam Tiwari having committed the offence. There is also a possibility of other miscreants having entered the house when the victim/deceased was there. There is also a possibility that the appellant was never there at the place of occurrence and only in order to shift the gaze of the investigation from the brother of the appellant, Pritam Tiwari named him, who had strained relationship with his brother. This explains for the villagers to break open the lock and not open it even when keys were ultimately handed over by the appellant. Apart from this, the appellant had arrived at the place of occurrence after his brother. The brother of the appellant had opened the main iron door and had also opened the lock of his room.



144. Was it a ploy, namely, to put a lock outside the room of the brother of the appellant when Pritam was hiding inside in order to give it an adroit appearance of the house not being inhabited at the relevant time.

145. There could be myriad situations which could be inferred because of the faulty investigation and equally faulty method adopted by the Trial Court in not getting the toe-hold of the proceedings of the Court, thereby allowing the parties to have their field day without exercising any control over the Trial process.

146. The confusion got worst confounded when no circumstance which was relied upon by the Trial Court to convict and sentence the appellant, was put to him under Section 313 of the Cr.P.C. for him to effectively explain away the charge so levelled against him. Merely four questions were asked from the appellant which did not relate to any circumstance



inferring his guilt, but only broad facts that the appellant raped and killed the deceased and concealed the dead body. All the circumstances in between these penumbra of facts were never put to the appellant. That was, again, a stage where the Trial Court could have elicited some information which could have helped him come to the right conclusion.

147. For all these reasons, we find that the prosecution has not been able to prove the case beyond all reasonable doubts and, therefore, benefit of doubt has to be given to the appellant.

148. We, therefore, find ourselves completely unable to affirm the conviction and the sentence of death.

149. The Reference, thus, is rejected.

150. We have not discussed about the mitigating factors which were not taken into account by the Trial Court, for the reason that we have not found the accusation against the appellant to be beyond all



reasonable doubts in the first place. The question of sentencing comes only later.

151. For the same very reasons, we allow the appeal and set aside the judgment of conviction and order of sentence, referred to above, passed by the Trial Court.

152. The appellant/Munna Pandey is in jail for about eight (8) years by now. He is directed to be set at liberty forthwith unless his detention is required in any other case.

153. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

154. However, in view of the provisions contained under Section 357A of the Cr.P.C., the State Legal Services Authority shall provide compensation to the mother of the victim, if already not done, in accordance with law, without any unnecessary delay.

155. Before parting, we place on record the



valuable assistance rendered by Mr. Ansul and the learned Advocates representing Project-39A.

156. The records of these cases be returned to the Trial Court forthwith.

157. Interlocutory application/s, if any, in both the cases, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(Alok Kumar Pandey, J)

Praveen-II/-
Saurabh, Manoj,
Shahzad

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	16-10-2023
Transmission Date	16-10-2023

