HIGH COURT OF MADHYA PRADESH
BENCH GWALIOR

DIVISION BENCH

G.S. Ahluwalia and Rajeev Kumar Shrivastava J.J.

CRRFC No.9 of 2018

State of M.P. Vs. Nandu @ Nandkishore Gupta
&
Cr.A. No.6946 of 2018

Nandu @ Nandkishore Gupta Vs. State of M.P.

Shri Rajesh Shukla, Deputy Advocate General for State.
Shri D.R. Sharma, with Shri Padam Singh with Shri Vijay Dutt Sharma, Counsel for respondent/accused in CRRFC No.9 of 2018 and for appellant in Cr.A. No.6946 of 2018

Date of Hearing : 15-July-2021
Date of Judgment : 26-July-2021
Whether approved for reporting : Yes

Heard through Video Conferencing

JUDGMENT
26-July-2021

Per G.S. Ahluwalia J.

1. CRRFC No.9/2018 is a reference under Section 366 of Cr.P.C. for confirmation of death sentence awarded by 1st Additional Sessions Judge, Datia by judgment and sentence dated 13-8-2018 passed in Special Sessions Trial No.21/2018, whereas Cr.A. No.6946 of 2018 is a Criminal Appeal filed by the accused under Section 374 of Cr.P.C. against the same judgment and sentence.

2. By this common judgment, CRRFC No.9 of 2018 and Cr.A. No.6946 of 2018 shall be disposed of.

3. It is not out of place to mention here that co-accused Ranu @ Dilip Sahu was a juvenile and he was being tried as an adult in the Children's Court. Since, the trial of the co-accused Ranu @ Dilip Sahu was to commence, therefore at the request of the Children"s Court, the record of the Trial Court was sent back with a request to the Children's Court to expedite the matter and the hearing of this case was deferred so that it may not cause any prejudice to either of the respective parties. Thereafter on 18-3-2019, 17-6-2019 also, the hearing of this appeal was deferred in the light of pendency of trial against co-accused Ranu @ Dilip Sahu. On 18-3-2019, it was also observed, that if the Trial against the co-accused Ranu @ Dilip Sahu is completed, then the record of the Trial Court be requisitioned. Accordingly, the Record of the Trial Court was again sent back to this Court, however, the Trial against the co-accused Ranu @ Dilip Sahu was still pending. Therefore, by order dated 26-8-2019, the office was directed to return the original record to the Children's Court after retaining the Xerox copy of the same. Thereafter, the matter came up for hearing on 5-4-2021. It was found that a report has been received regarding the status of the trial pending against co-accused Ranu @ Dilip Sahu, according to which co-accused Ranu @ Dilip Sahu has absconded after breaking the Special Home Indore and therefore, the trial has come to a halt. Accordingly, it was observed that under these circumstances, there is no good reason to defer the hearing of the appeal. Accordingly, the hearing of the case started on 9-4-2021 but,

thereafter, due to summer vacations, the case could not be taken up. Thereafter, the Special Division Bench was reconstituted w.e.f. 12-7-2021 and accordingly, the hearing of the case was concluded on 15-7-2021.

4. The prosecution story in short is that on 2-3-2018 at about 20:50, the complainant Sanjeev Kumar Gupta, lodged a F.I.R. that he had gone to market. His wife and son Rishabh Gupta aged about 10 years, were in the house. At about 6 P.M., he came back from the market, then he was told by his wife, that at about 5 P.M., his son had gone out of the house for playing but now he is missing. Accordingly, the complainant and his wife verified from the neighbourers but could not get any information about whereabouts of their son. It was also alleged that it appears that some unidentified person has taken away his child. It was further alleged that at about 7:30 P.M., he has received a call from some unidentified person on his mobile no.9669842934 from mobile No.9513543492 and 14714332274, who informed that his son is with him. Accordingly, the F.I.R. in crime No.53 of 2018 was registered in Police Station Indergarh, Distt. Gwalior.

5. On 3-3-2018 at 8:10 A.M., Spot map was prepared. At 17:40, the CCTV footage of the camera installed in the shop of Dharmendra Prajapati was seen. In the said CCTV footage, the missing boy was seen going on a motorcycle along with the respondent/accused Nandkishore and co-accused Ranu @ Dilip Sahu. On 3-3-2018 itself

at 18:30, the CCTV footage of the cameras installed in the house of Pradeep Kumar were seen, in which the missing boy was seen on a motorcycle along with respondent/accused Nandkishore and co-accused Ranu @ Dilip Sahu. Thereafter, on 4-3-2018 at 7:40, the memorandum of co-accused Ranu @ Dilip Sahu was recorded. At 8:00, the memorandum of respondent/accused Nandkishore was recorded. At 8:20, the lock of the room of co-accused Ranu @ Dilip Sahu was broke open and a chappal of the missing boy and one torn bed-sheet were seized. Co-accused Ranu @ Dilip Sahu was arrested at 8:30 whereas the respondent/accused Nandkishore was arrested at 8:50. On the basis of confessional statements made by the co-accused Ranu @ Dilip Sahu as well as respondent/accused Nandkishore, the dead body of the boy, namely Rishabh Gupta was recovered from a Canal at 9:15. Identification panchnama of the dead body was prepared at 9:30. Dehati Nalishi was recorded at 9:45. Notice under Section 175 of Cr.P.C. was given to the witnesses at 10:00 and *Lash Panchnama* was prepared at 10:30. The dead body was found packed in gunny bags and accordingly vide seizure memo prepared at 11:00, two gunny bags, two pieces of bed-sheets which were used for tying the mouth of gunny bags, one bottle containing the water of canal, two pieces of bed-sheets which were used for tying the mouth of the dead body, as well as the rope which was used for tying the hands and legs of the deceased were seized.

6. The dead body of the deceased was sent for postmortem.

According to the postmortem report, the dead body was received by the autopsy surgeon at 9:00. Postmortem was conducted on 4-3-2018 and vide seizure memo prepared at 13:10, Viscera, heart, lungs, liver, spleen, Hyoid bone and tibia bone of the deceased, One slide of anal swab, cloths of the deceased and a bottle containing the liquid were seized. At 16:40, unnatural death under Section 174 of Cr.P.C. was registered and the dead body of the deceased was handed over to the witnesses on 4-3-2018 itself. On 5-3-2018 at 14:15, the cloths of the respondent/accused Nandkishore, his pubic hairs and specimen of seal of Distt. Hospital Datia were seized. The confessional statement of respondent/accused Nandkishore was recorded on 5-3-2018 at 16:40 and the confessional statement of co-accused Ranu @ Dilip Sahu was recorded at 16:55 on 5-3-2018. On 5-3-2018 itself at 18:00, the motorcycle of the co-accused Ranu @ Dilip Sahu was seized. The respondent/accused was got medically examined on 5-3-2018. Another confessional statement of co-accused Ranu @ Dilip Sahu was recorded on 7-3-2018 and the mobile number of the mobile, seized from the possession of co-accused Ranu @ Dilip was checked and it was found that the mobile number of the mobile of co-accused Ranu @ Dilip was 7389346752 and panchnama was prepared. On 7-3-2018, a mobile from Co-accused Ranu @ Dilip was seized. Call details of the mobile phones of the complainant and co-accused Ranu @ Dilip were obtained. Another confessional statement of respondent/accused Nandkishore was recorded on 8-3-2018 at 9:00

and a mobile was seized vide seizure memo dated 8-3-2018 prepared at 10:20. Semen slide of the respondent/accused Nandkishore was prepared on 8-3-2018. On 12-3-2018, the hard disk of the CCTV camera of Dharmendra Prajapati was seized at 17:00, whereas hard disk of CCTV camera of Pradeep Kumar was seized at 18:05. The relevant CCTV footage was got transferred in different pen drives which were seized vide seizure memo dated 13-3-2018 at 19:00. The hard disks were handed over in Supurdagi to Dharmendra Prajapati and Pradeep Kumar on 13-3-2018 at 20:00. The certificates under Section 65 B of Evidence were obtained. The mobile phone of the complainant and mark sheet of the deceased were seized on 23-8-2018 at 10:00. The call details and certificate under Section 65-B of Evidence Act for CDR were obtained. On 1-5-2018, the internal organs of the deceased Rishabh Gupta were sent to F.S.L., Gwalior. Similarly, water of canal, hyoid and tibia bone of the deceased were sent to Forensic Medico Legal Institution, Bhopal. Similarly, anal swab of the deceased, torn bed sheet recovered from the room of co-accused Ranu @Dilip Sahu, cloths of the deceased, blood sample of co-accused Ranu @ Dilip Sahu and respondent/accused were sent to F.S.L. Sagar for DNA fingerprinting. Similarly, two pieces of bed-sheets which were used for tying the mouth of the gunny bags, two pieces of bed-sheets which were used for tying the mouth of the deceased, rope which was used for tying the hands and legs of the deceased, underwear, pubic hairs and semen slide of the

respondent/accused, underwear, pubic hairs and semen slide of co-accused Ranu @ Dilip Sahu were sent to F.S.L. Sagar to verify the presence of human blood, human tissues, blood group and presence of human semen and sperms. A query was also made as to whether the pieces of bed-sheets are part of one bed-sheet or not? The police after completing the investigation filed charge sheet on 2-5-2018 against the respondent/accused Nandkishore for offence under Sections 363, 364-A, 377, 302, 201, 34 of I.P.C., under Section 5/6 of Protection of Children from Sexual Offences Act, 2012 (in short POCSO Act) and under Section 11/13 of M.P.D.V.P.K. Act.

7. Since, the co-accused Ranu @ Dilip was a juvenile, therefore, charge sheet against him was filed before the Juvenile Justice Board, Datia, and by order dated 29-6-2018, the Juvenile Justice Board, Datia, held that the co-accused Ranu @ Dilip Sahu be tried as an adult before the Children's Court, accordingly, the case was committed to Children's Court, Datia.

8. The Trial Court by order dated 16-5-2018 framed charges under Sections 364-A of I.P.C. read with Section 11/13 of M.P.D.V.P.K. Act, 377 of I.P.C., 302 of I.P.C. read with Section 11/13 of M.P.D.V.P.K. Act or in the alternative under Section 302/34 of I.P.C. read with Section 11/13 of M.P.D.V.P.K. Act, Section 201 of I.P.C. and under Section 5/6 of POCSO Act.

9. The respondent/accused Nandkishore abjured his guilt and pleaded not guilty.

10. The prosecution, in order to prove its case, examined Ramesh (P.W.1), Laxmi (P.W.2), Sanjeev Gupta (P.W.3), Rajendra Prasad Gupta (P.W.4), Bahadur Singh (P.W.5), Dharmendra Singh Prajapati (P.W.6), Vishal Sharma (P.W.7), Kamal Kishore (P.W.8), Dr. V.S. Khare (P.W.9), Pradeep Kumar Narvariya (P.W.10), Dr. Jai bharat (P.W.11), Ritesh Sharma (P.W.12), Jagdish Gupta (P.W.13), Brajraj Tomar (P.W. 14), Dr. S.S. Batham (P.W. 15), Dinesh Kumar (P.W.16), Rambihari Patsariya (P.W. 17), Sanjeev Gaur (P.W.18), Ajay Channa (P.W.19), and Y.S. Tomar (P.W.20).

11. The prosecution relied upon Panchnama of watching CCTV footage of shop of Dharmendra Prajapati, Ex. P.1, F.I.R., Ex. P.2, Crime Details Form, Ex. P.3, Panchnama of watching CCTV footage of house of Pradeep Kumar Narvariya, Ex. P.4, Marksheet of class 2 of deceased, Ex. P.5, Marksheet of class 3 of deceased, Ex. P.6, seizure memo of Mobile of complainant/father of deceased child, Ex. P.7, Forwarding form to DNA fingerprint Sagar of respondent/accused Nandkishore, Ex. P.8, Forwarding form to DNA fingerprint Sagar of co-accused Ranu Sahu @ Dilip, Ex. P.9, seizure memo of blood sample, Ex. P.10, Memorandum of respondent/accused Nandkishore, Ex. P.11, Memorandum of co-accused Ranu Sahu @ Dilip Sahu Ex. P.11A-C, Panchnama of breaking the lock of room of co-accused Ranu Sahu @ Dilip Sahu, Ex. P.12, seizure of chappal, bed-sheet from the room of co-accused Ranu Sahu @ Dilip Sahu Ex. P.13, Panchnama of recovery of dead

body from canal, Ex. P.14, Identification of dead body, Ex. P.15, Arrest memo of respondent/accused Nandkishore Ex. P.16, Arrest memo of co-accused Ranu Sahu @ Dilip Sahu, Ex. P.16A-C, Notice under Section 175 Cr.P.C., Ex. P.17, *Naksha Panchayatnama* Ex. P.18, Seizure of gunny bags, pieces of bed-sheet, rope etc. Ex. P.19, Acknowledgment of receipt of dead body, Ex. P.20, Seizure of Hard disk from Dharmendra Prajapati, Ex. P.21, Supurdagi of Hard disk to Dharmendra Prajapati Ex. P.22, Panchnama of watching mobile number Ex. P.23, Panchanama of watching mobile number of co-accused Ranu Sahu @ Dilip Sahu, Ex P.23A-C, Seizure memo of mobile of respondent/accused Nandkishore Ex. P.24, Seizure memo of mobile of co-accused Ranu Sahu @ Dilip Sahu, Ex. P.24A-C, Memorandum of respondent/accused Nandkishore Ex. P.25, Memorandum of respondent/accused Nandkishore Ex. P.26, Memorandum of co-accused Ranu Sahu @ Dilip Sahu, Ex. P.26A-C, Seizure of internal organs, tibia bone etc of the deceased Ex. P.27, Seizure memo of cloths and pubic hairs of respondent/accused Nandkishore Ex. P.28, Postmortem report Ex. P.29, Seizure of Hard disk from Pradeep Kumar Ex. P.30, Supurdagi of Hard disk to Pradeep Kumar Ex. P.31, Certificates under Section 65B of Evidence Act, Ex. P.32 and P.33, Seizure of Pen Drive in which footage of CCTV cameras installed in the shop and house of Dharmendra and Pradeep Kumar, Ex. P.34, Dehati Nalishi Ex. P.35, Registration of unnatural death Ex. P.36, M.L.C. of respondent/accused Nandkishore

Ex. P.37 and P.38, Certificate under Section 65B of Evidence Act, P.39, Call details of Mobile No. 9669842934 Ex. P.40, Call details of Mobile No. 7389346752 Ex. P.41, Details of registration of Mobile SIM No. 7389346751 Ex. P.42, Call details of Mobile No. 9522164922 Ex. P.43,, Details of registration of Mobile SIM No. 95222164922 Ex. P.44, Requisition for Post Mortem Ex. P.45, Memorandum of co-accused Ranu Sahu @ Dilip Sahu Ex. P.46C, Seizure of Motorcycle from co-accused Ranu Sahu @ Dilip Sahu Ex. P.47C, Requisition for obtaining call details of complainant and accused persons, Ex. P.48, Certificate under Section 65B of Evidence Act, Ex. P.49, Letter for enhancing offence under POCSO and MPDVPK Act, Ex. P.50, Draft for FSL Ex. P.51, FSL report Ex. P.52, Draft for examination of seized articles Ex. P.53, FSL report Ex. P.54, FSL report Ex. P.55, Draft for Forensic Medico Legal Institution Ex. P.56, Report of Forensic Medico Legal Institution Ex. P.57, Draft for FSL Sagar Ex. P. 58, Letters for transfer of data of Hard Disk to Pen Drive Ex. P.59 and P.60. DNA report Ex. C-1.

12. The appellant did not examine any witness in his defence.

13. The Trial Court by judgment dated 13-8-2018 convicted the respondent/accused for offence under Sections 364-A of IPC read with Section 11/13 of MPDVPK Act, Section 377 of IPC, Section 302 of IPC read with Section 11/13 of MPDVPK Act, under Section 201 of IPC, Section 5/6 of POCSO Act and awarded death sentence and fine of Rs. 25,000/- for offence under Section 364-A of IPC read

with Section 13 of MPDVPK Act, Rigorous Imprisonment of 10 years and fine of Rs. 10,000/- with default imprisonment for offence under Section 377 of I.P.C., death sentence and a fine of Rs. 25,000/- for offence under Section 302 of I.P.C. read with Section 13 of M.P.D.V.P.K Act, rigorous imprisonment of 7 years and a fine of Rs. 10,000 with default imprisonment for offence under Section 201 of I.P.C. and Life imprisonment and a fine of Rs. 25,000 with default imprisonment for offence under Section 5/6 of POCSO Act. All the sentences were directed to run concurrently.

14. Accordingly, this reference under Section 366 of Cr.P.C. has been received for confirmation of Death sentence, whereas Cr.A. No.6946/2018 has been filed by the appellant, thereby challenging his conviction and sentence passed by the Trial Court.

15. Challenging the conviction and sentence, it is submitted by the Counsels for the respondent/accused Nandkishore, that in the seizure memo of bed-sheet from the room of co-accused Ranu @ Dilip Sahu, Ex. P.13, there is no mention that the torn bed-sheet was having any stains. Further there is nothing on record that the pieces of bed-sheet which were used for tying the mouth of the deceased as well as the mouth of the gunny bags were that of the bed-sheet recovered from the room of co-accused Ranu @ Dilip Sahu. There is nothing in the DNA report to suggest that what was the source of DNA profile found on the bed-sheet and the cloths of the deceased. It is further submitted that it is clear from the memo of recovery of dead body

Ex.P.14, the dead body was recovered at 9:15 AM, and it is also clear from the memo of identification of dead body, Ex. P.15, that the dead body was got identified at 9:30 A.M., whereas the dead body of the deceased had already reached the hospital at 9 A.M. It is further submitted that according to the prosecution case itself, the CCTV footage of deceased going along with the respondent/accused Nandkishore and co-accused Ranu @ Dilip Sahu were transferred in Pen Drives, but it is not clear that whether the Hard disks seized from Dharmendra Prajapati and Pradeep Kumar were containing other data or not? It is further submitted that Hard disk in question were never produced before the Court. It is further submitted that it is clear from the CCTV footage, that the deceased was seen running behind the motorcycle of the respondent/accused and co-accused and he voluntarily sat on the motorcycle, therefore, it cannot be said that he was kidnapped. No independent witnesses were examined. There is no allegation of demand of Rs.1 lac in the FIR, therefore, the offence under Section 364-A of IPC was wrongly added. The voice sample of the respondent/accused was not taken. According to the FIR, the boy went missing at about 5 P.M., whereas in the CCTV footage, he was seen going on a motorcycle along with the respondent/accused and co-accused at 4:30 P.M. There is nothing on record that the seized articles were kept in a safe custody before the same were sent to FSL, Sagar, FSL, Gwalior and Forensic Medico Legal Institute, Bhopal.

16. By referring to the order-sheet dated 9-7-2018, it is submitted

that Dr. S.S. Batham (P.W. 15), Dr. Dinesh Kumar (P.W.16) and Rambihari Patsaria (P.W.17) were examined in absence of the respondent/accused.

17. Further by referring to the order-sheets of the Trial Court, it is submitted that on 2-5-2018, it was observed that cognizance is to be taken and the case was adjourned to 15-5-2018. As the respondent/accused was not produced, therefore, the case was adjourned to 16-5-2018. On 16-5-2018, charges were framed and the trial program was also filed and the case was fixed for 5-6-2018 for examination on witnesses. On 5-6-2018, Ramesh (P.W.1), Laxmi (P.W. 2) and Sanjeev Gupta (P.W.3) were examined. On 6-6-2018 Rajendra Prasad Gupta (P.W.4), Bahadur Singh (P.W.5), and Dharmendra Prajapati (P.W.6) were examined. Thereafter on 7-6-2018 Vishal Sharma (P.W.7), Kamal Kishore (P.W.8), Dr. V.S. Khare (P.W.9) and Pradeep Kumar Narvaria (P.W.10) were examined. Thereafter on 8-6-2018 Dr. Jaibharat (P.W.11) and Ritesh Sharma (P.W.12) were examined and the case was adjourned to 19-6-2018. On 19-6-2018 Jagdish Gupta (P.W. 13) was examined. On the same day, supplementary charge sheet was also filed and the copy of the same was supplied to the Counsel for the respondent/accused. On 20-6-2018 Brijraj Singh Tomar (P.W. 14) was examined and prosecution witness Ramniwas Gupta and Vaibhav Gupta were given up. Thereafter on 9-7-2018 Dr. S.S. Batham (P.W.15), Dr. Dinesh Kumar (P.W.16) and Rambihari Patsaria (P.W. 17) were examined and

prosecution witness Sanju Parihar was given up. On 10-7-2018 Sanjeev Gaud (P.W.18) and Ajay Channa (P.W.19) were examined and on 11-7-2018 Y.S. Tomar (P.W. 20) was partially examined and the case was fixed for 13-7-2018 for further examination-in-chief and cross examination. On 13-7-2018, Y.S. Tomar (P.W.20) was examined. The Prosecution closed its case and the case was fixed for 17-7-2018. On 17-7-2018, the prosecution filed an application under Section 311 of Cr.P.C. for recalling of Sanjeev Gupta, which was orally opposed by the Counsel for the respondent/accused, however, the application filed by prosecution under Section 311 of Cr.P.C. was allowed and he was recalled on 18-7-2018. On 18-7-2018, Sanjeev Gupta (P.W. 3) was further examined and cross examined and the case was fixed for 19-7-2018 for accused statement. On 19-7-2018, the accused statement could not be recorded due to disruption of electricity supply and the case was adjourned to 20-7-2018. On 20-7-2018, the case was adjourned on account of bereavement in the family of the Counsel of the respondent/accused and on 25-7-2018, the accused statement was recorded and the case was fixed for 2-8-2018 for defence evidence. On 2-8-2018 one more opportunity was granted to examine defence witness and the case was adjourned to 7-8-2018. On 7-8-2018, the respondent/accused expressed that he does not wish to examine any witness in his defence, but the Trial Court found that the DNA Test Report has not been received therefore, adjourned the case for 10-8-2018 for production of DNA report as

well as for final hearing. The DNA report was received on 10-8-2018 and without giving any opportunity to raise objection to the said DNA report, the Trial Court marked the same as Ex.C/1 in the light of the provisions of Section 293 of Cr.P.C. On the very same day, the respondent/accused was further examined under Section 313 of Cr.P.C. and fixed the case for final arguments on the very same day and the final arguments were also heard and the judgment was delivered on 13-8-2018. It is submitted that although in the order sheet dated 10-8-2018, it is mentioned that the respondent/accused had not raised any effective objection against the DNA report, but it is clear that the admissibility of the DNA report was objected by the respondent/accused, but the same was rejected without dealing with the objections. It is further submitted that since, the case was fixed for 10-8-2018 for receipt of DNA report, thus, it is clear that the prosecution case was not closed for all practical purposes, but still the Trial Court acted in a haste by marking the DNA report as Ex.C/1, and thereby further examining the respondent/accused under Section 313 of Cr.P.C. as well as hearing the matter finally on the same day. It is submitted that it appears that the Trial Court was under pressure of media trial.

18. *Per contra*, the Counsel for the State has supported the findings of conviction recorded by the Trial Court. It is submitted that it is true that on 7-8-2018, the case was adjourned to 10-8-2018 for production of DNA report as well as for final hearing. It is submitted

that the respondent/accused was already aware that the case was to be heard finally on 10-8-2018, therefore, it cannot be said that any prejudice was caused to the respondent/accused, or he was deprived of a reasonable opportunity because of the fact that the matter was heard finally by the Trial Court on 10-8-2018. It is further submitted that so far expedite recording of evidence of witnesses is concerned, it is a well established principle of law that expeditious disposal of trial is a fundamental right of an accused. The Trial Program is given in advance, so that the parties may know that which witness is likely to examined on which date. The respondent/accused never raised an objection that since, the witnesses are coming on their first date of appearance, therefore, he is not in a position to effectively cross examine them. Even the Trial Program was never objected by the respondent/accused.

19. Heard the learned Counsel for the parties.

20. Before considering the submissions made by the Counsel for the respondent/accused on the merits of the case, this Court would like to consider the submission that whether reasonable opportunity was given by the Trial Court to the respondent/accused or not? If not, then whether the entire trial would stand vitiated or what would be the effect of such non-affording of the opportunity.

21. The first contention in this regard is that 3 important witnesses, namely Dr. S.S. Batham (P.W.15), Dr. Dinesh Kumar (P.W.16) and Rambihari Patsaria (P.W.17) were examined on 9-7-2018, but on that

date, the respondent/accused was not produced from the jail.

22. Section 273 of Cr.P.C. reads as under :

> **273. Evidence to be taken in presence of accused**.— Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader:
> Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.
> Explanation.—In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

23. The relevant potion of Order sheet dated 9-7-2018 reads as under :

> **9.7.2018.** राज्य द्वारा श्री पुष्पेंद्र कुमार गर्ग डी पी ओ।
> अभियुक्त नन्द किशोर न्यायिक निरोध जेल दतिया से प्रस्तुत नही उसकी ओर से श्री संजोगानंद यादव अधिवक्ता उपस्थित ।
> अभियुक्त नंदकिशोर को आज न्यायिक निरोध जेल दतिया से प्रस्तुत नही किया गया है उसकी ओर से प्रस्तुत विद्वान अधिवक्ता द्वारा यह व्यक्त किया गया कि प्रकरण मे उन्हे अभियुक्त की पैरवी हेतु सशक्त किया गया है तथा वे प्रकरण मे अभियुक्त की ओर से उपस्थित हो रहे है। अतः अभियुक्त की अनुपस्थिति मे यदि कोई साक्षी उपस्थित होता है तो उन्हे अभियुक्त की अनुपस्थिति मे साक्ष्य कराये जाने मे कोई आपत्ति नही है।
> अभियोजन साक्षी डॉ. एस.एस. बाथम, डॉ. दिनेश कुमार तथा साक्षी रामबिहारी पटसारिया तथा साक्षी संजू परिहार उपस्थित।.....

24. As already pointed out, Prosecution witness Sanju Parihar was given up. However, Dr. S.S. Batham (P.W. 15), Dr. Dinesh Kumar (P.W.16) and Rambihari Patsaria (P.W.17) were examined in absence of the respondent/accused.

25. So far as Rambihari Patsaria (P.W. 17) is concerned, he has deposed regarding mobile number of co-accused Ranu @ Dilip Sahu. He has not deposed any thing against the respondent/accused. Therefore, this Court is of the considered opinion, that so far as Rambihari Patsaria (P.W. 17) is concerned, no prejudice has been caused to the respondent/accused.

26. However, so far as Dr. S.S. Batham (P.W. 15) and Dr. Dinesh Kumar (P.W. 16) are concerned, they have deposed against the respondent/accused. Dr. S.S. Batham (P.W. 15) had prepared the semen slide of the respondent/accused, whereas Dr. Dinesh Kumar (P.W. 16) had medically examined the respondent/accused and had also seized the underwear and pubic hairs of the respondent/accused. It is not out of place to mention here that underwear and public hairs of the respondent/accused were sent to F.S.L. Sagar by draft, Ex. P.53 with a request to the Director, F.S.L. Sagar to give his opinion, as to whether human blood, human tissues, blood group on article D,E,F and G and whether human semen and sperms were found on underwear (H), Pubic Hair (I),Semen Slide of respondent/accused (M) and other articles like J,K and L or not? As per F.S.L. report, Ex. P.54, human Semen and Sperms were found on underwear (H), Pubic Hair (I),Semen Slide of respondent/accused (M) apart from other articles.

27. The Trial Court in para 92 of its judgment has taken note of the evidence of Dr. S.S. Batham (P.W.15) and Dr. Dinesh Kumar

(P.W.16) as well as the fact that underwear, pubic hair and semen slide of the respondent/accused were seized.

28. The Supreme Court in the case of **Atma Ram & Others Vs. State of Rajasthan** reported in **(2019) 20 SCC 481** has held as under:

> **19.** The emphasis was laid by Dr Manish Singhvi, learned Senior Advocate for the State on the articles relied upon by him to submit that the theory of "harmless error" which has been recognised in criminal jurisprudence and that there must be a remedial approach. Again, we need not go into these broader concepts as the provisions of the Code, in our considered view, are clearly indicative and lay down with clarity as to which infringements per se, would result in vitiation of proceedings. Chapter XXXV of the Code deals with "Irregular Proceedings", and Section 461 stipulates certain infringements or irregularities which vitiate proceedings. Barring those stipulated in Section 461, the thrust of the Chapter is that any infringement or irregularity would not vitiate the proceedings unless, as a result of such infringement or irregularity, great prejudice had occasioned to the accused. Shri Hegde, learned Senior Advocate was quick to rely on the passages in *Jayendra Vishnu Thakur* to submit that the prejudice in such cases would be inherent or per se. Paras 57 and 58 of the said decision were as under: (SCC p. 129)
>
> "*57*. Mr Naphade would submit that the appellant did not suffer any prejudice. We do not agree. Infringement of such a valuable right itself causes prejudice. In *S.L. Kapoor* v. *Jagmohan* this Court clearly held: (SCC p. 395, para 24)
>
> '*24*. … In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced.'

58. In *A.R. Antulay* v. *R.S. Nayak* a seven-Judge Bench of this Court has also held that when an order has been passed in violation of a fundamental right or in breach of the principles of natural justice, the same would be a nullity. (See also *State of Haryana* v. *State of Punjab* and *Rajasthan SRTC* v. *Zakir Hussain*.)"

20. The aforementioned observations in *Jayendra Vishnu Thakur* must be read in the peculiar factual context of the matter. The accused Jayendra Vishnu Thakur was tried in respect of certain offences in a court in Delhi and at the same time he was also an accused in a trial under the provisions of the TADA Act in a court in Pune. The trial in the court in Pune proceeded on the basis that Jayendra Vishnu Thakur was an absconding accused. The evidence was thus led in the trial in Pune in his absence when he was not sent up for trial, at the end of which all the accused were acquitted. However, in an appeal arising therefrom, this Court convicted some of the accused for the offences with which they were tried. In the meantime, Jayendra Vishnu Thakur was convicted by the court in Delhi and was undergoing sentence imposed upon him. Later, he was produced before the court in Pune with a supplementary charge-sheet and charges were framed against him along with certain other accused. A request was made by the Public Prosecutor that the evidence of some of the witnesses, which was led in the earlier trial be read in evidence in the fresh trial against Jayendra Vishnu Thakur as those witnesses were either dead or not available to be examined. The request was allowed which order of the court in Pune was under challenge before this Court. It was found by this Court that the basic premise for application of Section 299 of the Code was completely absent. The accused had not absconded. He was very much in confinement and could have been produced in the earlier trial before the court in Pune. Since the requirements of Section 299 were not satisfied, the evidence led on the earlier occasion could not be taken as evidence in the subsequent proceedings. The witnesses were not alive and could not be re-examined in the fresh trial nor could there be cross-examination on behalf of the accused. If the evidence in the earlier trial was to be read in the subsequent trial, the accused would be denied the opportunity of cross-examination of the witnesses concerned. Thus, the prejudice was inherent. It is in this factual context that the observations of this

Court have to be considered. Same is not the situation in the present matter. It is not the direction of the High Court to read the entire evidence on the earlier occasion as evidence in the de novo trial. The direction is to re-examine those witnesses who were not examined in the presence of the appellants. The direction now ensures the presence of the appellants in the Court, so that they have every opportunity to watch the witnesses deposing in the trial and cross-examine the said witnesses. Since these basic requirements would be scrupulously observed and complied with, there is no prejudice at all.

21. The learned Amicus Curiae was right in relying upon the provisions of Chapter XXVIII (Sections 366 to 371 of the Code) and Chapter XXIX (Sections 372 to 394 of the Code). He was also right in saying that Chapter XXVIII was more relevant in the present matter and the judgment of the High Court was supported more strongly by the provisions of Chapter XXVIII. The provisions of Sections 366 to 368 and Sections 386 and 391 are quoted here for ready reference:

366. Sentence of death to be submitted by Court of Session for confirmation.—(1) When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.

(2) The Court passing the sentence shall commit the convicted person to jail custody under a warrant.

367. Power to direct further inquiry to be made or additional evidence to be taken.—(1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

(2) Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.

(3) When the inquiry or evidence (if any) is not made or taken by the High Court, the result of such inquiry or evidence shall be certified to such Court.

368. Power of High Court to confirm sentence or annual conviction.—In any case submitted under

Section 366, the High Court—

(*a*) may confirm the sentence, or pass any other sentence warranted by law, or

(*b*) may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or an amended charge, or

(*c*) may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

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386. Powers of the Appellate Court.—After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the appellate court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(*a*) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(*b*) in an appeal from a conviction—

(*i*) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial, or

(*ii*) alter the finding, maintaining the sentence, or

(*iii*) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(*c*) in an appeal for enhancement of sentence—

(*i*) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court competent to try the offence, or

(*ii*) alter the finding maintaining the sentence, or

(*iii*) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(*d*) in an appeal from any other order, alter or reverse such order;

(*e*) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the appellate court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the court passing the order or sentence under appeal.

***

391. Appellate Court may take further evidence or direct it to be taken.—(1) In dealing with any appeal under this Chapter, the appellate court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the appellate court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the appellate court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

22. According to Section 366 when a Court of Session passes a sentence of death, the proceedings must be 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 then proceeds to lay down the power of the High Court to direct further enquiry to be made or additional evidence to be taken. Section 368, thereafter, lays down the power of the High Court to confirm the sentence so imposed or annul the conviction. One of the powers which the High Court can exercise is one under Section 368(*c*) of the Code and that is to "acquit the accused person". Pertinently, the power to acquit the person can be exercised by the High Court even without there being any substantive appeal on the part of the accused challenging his conviction. To that extent, the proceedings under Chapter XXVIII which deal with "submission of death sentences for confirmation" is a proceeding in

continuation of the trial. These provisions thus entitle the High Court to direct further enquiry or to take additional evidence and the High Court may, in a given case, even acquit the accused person. The scope of the chapter is wider. Chapter XXIX of the Code deals with "Appeals". Section 391 also entitles the appellate court to take further evidence or direct such further evidence to be taken. Section 386 then enumerates powers of the appellate court which inter alia includes the power to "reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial". The powers of the appellate court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the Code. If the power can go to the extent of ordering a complete retrial, the exercise of power to a lesser extent, namely, ordering de novo examination of twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court. There is, thus, no infraction or jurisdictional error on the part of the High Court.

23. It is true that as consistently laid down by this Court, an order of retrial of a criminal case is not to be taken resort to easily and must be made in exceptional cases. For example, it was observed by this Court in *Ukha Kolhe* v. *State of Maharashtra*, as under: (AIR p. 1537, para 11)

"*11*. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of retrial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and

will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C.J., in *Ramanlal Rathi* v. *State*: (SCC OnLine Cal para 10)

'*10*. If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witnesses who should, have been heard. But, I have never known of a case where a retrial can be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case.' "

We must also consider the matter from the standpoint and perspective of the victims as suggested by the learned Amicus Curiae. Four persons of a family were done to death. It is certainly in the societal interest that the guilty must be punished and at the same time the procedural requirements which ensure fairness in trial must be adhered to. If there was an infraction, which otherwise does not vitiate the trial by itself, the attempt must be to remedy the situation to the extent possible, so that the interests of the accused as well as societal interest are adequately safeguarded. The very same witnesses were directed to be de novo examined which would ensure that the interest of the prosecution is subserved and at the same time the accused will have every right and opportunity to watch the witnesses deposing against them, watch their demeanour and instruct their counsel properly so that the said witnesses can be effectively cross-examined. In the process, the interest of the accused would also stand protected. On the other hand, if we were to accept the submission that the proceedings stood vitiated and, therefore, the High Court was powerless to order de novo examination of the witnesses concerned, it would result in great miscarriage of justice. The persons who are accused of committing four murders would not effectively be tried. The evidence against them would not be read for a technical infraction resulting in great miscarriage.

> Viewed thus, the order and directions passed by the High Court completely ensure that a fair procedure is adopted and the depositions of the witnesses, after due distillation from their cross-examination can be read in evidence.

29. It is submitted by the Counsel for the State that since, the presence of human semen and sperms on the underwear, pubic hair and semen slide of the respondent/accused was natural, therefore, even if the evidence of Dr. S.S. Batham (P.W. 15) and Dr. Dinesh Kumar (P.W. 16) is ignored, still then the guilt of the respondent/accused stands proved beyond reasonable doubt.

30. Considered the submissions made by the Counsel for the parties.

31. As already pointed out, the Trial Court has referred to the evidence of Dr. S.S. Batham (P.W. 15), Dr. Dinesh Kumar (P.W.16) and the seizure of underwear, pubic hairs and semen slide of the respondent/accused. Thus, the contention of the Counsel for the State that the evidence of these two witnesses may be ignored, cannot be accepted. As the respondent/accused has also been convicted for offence under Section 377 of I.P.C., therefore, this Court is of the considered opinion, that the evidence of Dr. S.S. Batham (P.W. 15) and Dr. Dinesh Kumar (P.W. 16) is of importance to prove the preparation of semen slide or seizure of underwear and pubic hairs of the respondent/accused.

32. It is next contended by the Counsel for the State that since, the Counsel of the respondent/accused himself had given his no

objection to the recording of evidence of these witnesses in absence of the respondent/accused, therefore, now the respondent/accused cannot make a complaint regarding violation of Section 273 of Cr.P.C.

33. Considered the submissions made by the Counsel for the State.

34. In the present case, the respondent/accused was in jail, therefore, the provisions of Section 317 of Cr.P.C. are not applicable. Only when an application is filed under Section 317 of Cr.P.C. and a statement is made by the accused, that his presence through his Counsel may be accepted and he does not have any objection regarding the question of identity or recording of evidence of the witness in his absence, then the effect of such declaration can be considered. Further, before considering the rigors of Section 317, the Trial Court has to record his reasons that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused is persistently disturbing the proceedings in Court.

35. However, in the present case, the respondent/accused was in jail and he was not produced by the prosecution. Therefore there was no question of disturbing the proceedings in the Court. Further, on all the occasions, the Counsel for the respondent/accused had cross examined the witnesses. Any Undertaking or No Objection given by the Counsel for the respondent/accused, cannot be said to be an Undertaking or No Objection on behalf of the respondent/accused

who was in jail and was not produced by the prosecution itself. The respondent/accused was not responsible for his absence, but it was the prosecution who had failed to keep the respondent/accused present in the Court. Therefore, the fault on the part of the prosecution to keep the accused present before the Court can not be taken to the disadvantage of the respondent/accused. Further, any Undertaking or No objection given by a Counsel without the instructions of the respondent/accused would not bind the accused.

36. Therefore, in the light of the judgment passed by the Supreme Court in the case of **Atmaram (Supra)**, the case is liable to be remanded back to the Trial Court, with a direction to record the evidence of Dr. S.S. Batham (P.W. 15) and Dr. Dinesh Kumar (P.W. 16) in the presence of the respondent/accused.

37. So far as the another contention of the Counsel for the respondent/accused, that witnesses were examined on the dates which were so fixed by the Trial Court, and the Trial Court has proceeded expeditiously, thereby jeopardizing the interest of the respondent/accused is concerned, the same cannot be accepted for the following reasons:

38. Sections 230 and 231 of Cr.P.C. read as under :

> **230. Date for prosecution evidence**.— If the accused refuses to plead, or does not plead, or claims to be tried or is not convicted under Section 229, the Judge shall fix a date for the examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing.

> **231. Evidence for prosecution**.— (1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.
> (2) The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.

39. Thus, it is clear that on the date so fixed, the Judge has to take all such evidence as may be produced in support of prosecution. If the witnesses are present, then the presiding judge cannot refuse to examine them except for the reasons mentioned in the order sheet. In the present case, no objection was ever raised by the Counsel for the respondent/accused, that witnesses are appearing on their first date of appearance, therefore, he is not in a position to cross examine them effectively. Even otherwise, it is not the case of the respondent/accused, that since, the witnesses were examined on each date so fixed by the Trial Court, therefore, any prejudice has been caused to the respondent/accused. No application for recall of any witness was filed by the respondent/accused on the ground that certain questions could not be put to them as the evidence is being recorded expeditiously. Further, expeditious trial is a fundamental right of an accused. If the Trial Court has proceeded expeditiously by examining the witnesses on the date so fixed, this Court is of the considered opinion, that no fault can be found on the part of the Trial Court by examining the witnesses on the date so fixed in the Trial.

40. The Supreme Court in the case of **Gouri Shankar Vs. State of Punjab** reported in **(2021) 3 SCC 380** has held as under :

> **9.** At the motion stage when the matter came up before this Court on 20-2-2020, the plea which was raised by the learned counsel for the appellant was that on the date of framing of charges i.e. 29-4-2013, the statement of material prosecution witnesses PW 1 and PW 2 was recorded without affording reasonable opportunity to the appellant-accused to cross-examine the prosecution witnesses as mandated under Section 230 of the Code of Criminal Procedure, 1973. After the notice was served, counter-affidavit has been filed by the respondent and the fact noticed by us in our order dated 20-2-2020 has been explained in Para 13 of the counter-affidavit that after framing of charges, the appellant pleaded guilty, however following the rule of prudence, the trial court decided to examine four witnesses before recording the conviction, and accordingly PW 1 and PW 2 were examined first and perusal of their statements i.e. Annexure P-2 and Annexure P-3 would show that the opportunity was granted to the appellant-accused to cross-examine the witnesses on 29-4-2013 and in fact cross-examination was done by the counsel for the appellant-accused. However, after cross-examination of these two witnesses, the appellant pleaded to claim trial on 14-5-2013 and thereafter the evidence of other prosecution witnesses was recorded. At no stage, the appellant moved any application for recalling the witnesses and to be more specific, of PW 1 and PW 2 and this issue has been raised for the first time before this Court.
>
> **10.** After taking note of the statement of fact which has been stated by the respondent in the counter-affidavit and Para 13 in particular, of which the reference has been made and with assistance of the learned counsel, we have gone through the material available on record and find no error in the finding of guilt being recorded by the trial court and confirmed by the High Court in the impugned judgment which calls for our interference.

Thus, the objection regarding expeditious trial is hereby rejected.

41. It is next contended by the Counsel for the respondent/accused that the prosecution closed its case on 13-7-2018 and on 17-7-2018,

an application filed by prosecution under Section 311 of Cr.P.C. was allowed and Sanjeev Gupta (P.W.3) was further examined on 18-7-2018, and the accused statements under Section 313 of Cr.P.C. were recorded on 25-7-2018 and the case was adjourned for examination of defence witness. The respondent/accused also expressed his unwillingness to examine any defence witness on 7-8-2018, but the Trial Court on its own found that the DNA report has not been produced, therefore, fixed the case for 10-8-2018 for filing of DNA report as well as for Final arguments. It is submitted that once, the prosecution case was not closed for all practical purposes, then the Trial Court should not have fixed the case for final arguments. Furthermore, on 10-8-2018, the DNA report was filed and after mentioning that no effective objection was raised by the respondent/accused, the DNA report was exhibited as Ex.C-1 in the light of the provisions of Section 293 of Cr.P.C. It is submitted that the Trial Court acted in a haste and on the very same day, further examination of accused under Section 313 of Cr.P.C. was done and fixed the case for final hearing on the same day and ultimately heard the matter finally. It is submitted that this undue haste shown by the Trial Court has seriously prejudiced the respondent/accused.

42. Considered the submissions.

43. Orders dated 7-8-2018 and 10-8-2018 read as under :

7.8..2018 राज्य द्वारा श्री पुष्पेंद्र कुमार गर्ग डी पी ओ।
अभियुक्त नन्द किशोर न्यायिक निरोध जेल दतिया से पेश उसकी ओर से श्री संजोगानंद यादव अधिवक्ता उपस्थित

प्रकरण मे डी एन ए प्रतिवेदन पेश नही। प्रकरण निराकरण की अवस्था पर है अतः पुलिस अधीक्षक दतिया को पत्र लेख किया जावे कि वे संबंधितों को आगामी दिनांक को प्रकरण मे डी एन ए प्रतिवेदन प्रस्तुत किये जाने हेतु उचित निर्देश प्रदान करे। बचाव पक्ष अधिवक्ता द्वारा बचाव साक्ष्य न देना व्यक्त किया।

प्रकरण डी एन ए की प्रस्तुति एवं अंतिम तर्क हेतु दिनांक 10.8.2018 को पेश हों।

10.8.2018. राज्य द्वारा श्री पुष्पेंद्र कुमार गर्ग डी पी ओ।

अभियुक्त नन्द किशोर न्यायिक निरोध जेल दतिया से पेश उसकी ओर से श्री संजोगानंद यादव अधिवक्ता उपस्थित

अभियोजन द्वारा एक ओवदन पत्र सहित राज्य न्यायालयिक विज्ञान प्रयोगशाला सागर का प्रतिवेदन प्रस्तुत किया गया, प्रतिलिपि प्रतिरक्षा पक्ष के विद्वान अभिभावक को प्रदान की गई प्रकट विलंब से प्राप्त होने के कारण को देखते हुए एवं प्रभावी आपत्ति भी न होने से आवेदन स्वीकार करते हुए उक्त राज्य न्यायालयिक विज्ञान प्रयोगशाला का प्रतिवेदन अभिलेख पर लिया जाता है और धारा 293 दंप्रसं के प्रावधान को दृष्टिगत रखते हुए उक्त प्रतिवेदन पर प्रदर्श सी–1 अंकित किया जाता है।

प्रकरण प्रदर्श सी–1 के प्रतिवेदन के संबंध मे दंप्रसं की धारा 313 प्रावधान के परिप्रेक्ष्य मे अभियुक्त के अतिरिक्त परीक्षण हेतु कुछ देर बाद प्रस्तुत हो

<u>पुनश्चः</u>

अभियुक्त का दंप्रसं की धारा 31 के प्रावधानांतर्गत अतिरिक्त अभियुक्त परीक्षण किया गया। प्रतिरक्षा पक्ष द्वारा प्रकरण मे कोई बचाव साक्ष्य न देना व्यक्त किया।

प्रकरण उभयपक्ष की सहमति से आज ही अंतिम तर्क हेतु नियत किया जाता है। प्रकरण अंतिम तर्क हेतु थोडी देर बाद पेश हो

<u>पुनश्चः</u>

पक्षकार पूर्ववत।

उभय पक्ष के अंतिम तर्क श्रवण किये गये। प्रकरण निर्णय हेतु नियत किया जाता है।

प्रकरण निर्णय हेतु दिनांक 13.8.2018 को पेश हो।

44. From the above mentioned order-sheets, it appears that the case for final arguments was fixed on the same day with the consent of the Counsel for the parties, but whether it can be said that any prejudice was caused to the respondent/accused or not?

45. It is submitted by the Counsel for the respondent/accused that in the seizure memo Ex. P. 13, it is not mentioned that whether any

stains of any kind were found on the bed sheet recovered from the room of the co-accused Ranu @ Dilip Sahu. It is further submitted that even in the DNA report, it is merely mentioned that DNA profile was found from the source from Cloths of the deceased and the bed sheet, but the nature of source is not mentioned whereas the Scientific Officer has mentioned that DNA profile of the respondent/accused was extracted from source "blood sample". It is submitted that when the Scientific Officer was mentioning about the "blood sample" as a source for extracting DNA profile of the respondent/accused, then the omission on his part to disclose the nature of source found on the cloths of the deceased and the bed sheet recovered from the room of the co-accused Ranu @ Dilip Sahu assumes importance. It is submitted that the respondent/accused by cross examining the Scientific Officer, could have pointed out that the DNA report is not worth reliance, however, the objection raised by the respondent/accused to the DNA report was rejected merely by mentioning that no effective objection was raised. It is further submitted that the DNA report has also been considered against the respondent/accused, therefore grave prejudice has been caused to him.

46. Further, it is submitted that under the facts and circumstances of the case, it is clear that the consent of the Counsel for the respondent/accused to argue the matter finally cannot be said to be voluntary.

47. Considered the submissions made by the Counsel for the parties.

48. Sections 232, 233 and 234 of Cr.P.C. read as under :

> **232. Acquittal**.— If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.
>
> **233. Entering upon defence**.— (1) Where the accused is not acquitted under Section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.
>
> (2) If the accused puts in any written statement, the Judge shall file it with the record.
>
> (3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.
>
> **234. Arguments**.— When the examination of the witnesses (if any) for the defence is complete, the prosecutor shall sum up his case and the accused or his pleader shall be entitled to reply:
>
> Provided that where any point of law is raised by the accused or his pleader, the prosecution may, with the permission of the Judge, make his submissions with regard to such point of law.

49. From the plain reading of Section 233 Cr.P.C., it is clear that if a judgment is not passed under Section 232 of Cr.P.C., then the accused shall be called upon to enter his defence and thereafter, final arguments shall be heard as per the provisions of Section 234 of Cr.P.C.

50. Since, the case was fixed for 10-8-2018 for production of DNA

report, thus, it is clear that on 10-8-2018, the case of the prosecution was implicitly reopened by the Trial Court by order dated 7-8-2018 by directing the prosecution to produce the DNA report. Therefore, by order dated 7-8-2018, the Trial Court should not have fixed the case for final arguments.

51. Further, the Trial Court by rejecting the objections of the respondent/accused as ***non-effective objections,*** has committed mistake. The Trial Court was expected to mention the objections raised by the respondent/accused to the DNA report and then should have dealt with the same by assigning reasons. This mistake of rejecting the objections as *non-effective objections* has opened a Pandora box as the respondent/accused may now raise even those objections which might not have been taken by him in the Trial Court. Be that as it may. Where the life and liberty of a person is involved, then the objections of the accused should be decided by assigning reasons and should not be decided by holding that they are *not effective*. Further the Trial Court is expected to at-least mention the nature of objections raised by the accused. Under these circumstances, we are of the considered opinion, that the rejection of the objection to the DNA report by terming as *non-effective objection* was not in accordance with law.

52. Further, the provision of Section 234 of Cr.P.C. which deals with Final arguments is not a mere formality. Although there is no bar that the final arguments cannot be heard expeditiously, but the facts

and circumstances of this Case indicates that the case of the prosecution was closed, further examination of accused under Section 313 of Cr.P.C. and the final arguments were heard on the very same day. By no stretch of imagination, it can be said that the respondent/accused did not suffer any prejudice.

53. No time was granted to the respondent/accused to prepare the final arguments at-least in the light of the DNA report, which was considered as an important piece of circumstance by the Trial Court against the respondent/accused.

54. It is a matter of common knowledge that the final arguments requires thorough preparation of case. The concept of final arguments is based on the principle of Natural Justice. The oral as well as documentary evidence is to be appreciated after hearing the arguments of both the parties. Every accused is entitled for an opportunity to effectively put forward his case by suggesting appreciation of oral and ocular evidence in a manner which may be favoring him and to present before the Judge that he should be acquitted. In short it can be said that final argument is **Final Sum up of the case**, by the Counsel. By making a specific provision under Section 234 of Cr.P.C., the legislature has attached great importance to “Final Arguments”. The Court must give patient hearing to both the parties, so that they can effectively present their case to show as to why they should win. The order sheet dated 10-8-2018 is in three parts :

(i) Application was filed for taking DNA report on record and the objection of the accused was rejected merely by holding that it was a *non-effective objection*. **T**he DNA report was exhibited as Ex. C-1 in the light of provisions of Section 293 of Cr.P.C.

(ii) The further statement of the accused under Section 313 of Cr.P.C. was recorded and he did not pray for time to lead evidence in defence.

(iii) The case was fixed for final arguments on the same day and later on, the final arguments were heard on the same day.

55. Reference under Section 366 of Cr.P.C. is a continuation of Trial. Therefore, it is obligatory on the High Court to ensure that the persons who are facing trial for murder are provided fair procedure and no prejudice should be caused to them due to procedural lapse.

56. As this Court has already come to a conclusion that the manner in which the proceedings were undertaken by the Trial Court on 10-8-2018 has certainly caused prejudice to the accused as the accused was deprived of his valuable right to oppose the DNA report as well as to effectively argue the matter finally as per the provision of Section 234 of Cr.P.C., therefore, the order-sheet dated 10-8-2018 passed by the Trial Court, so far as it relates to rejection of objection to DNA report as well as fixing the case for Final Arguments on the same day

and hearing the Final Arguments on the same day is held to be bad in law and cannot be given the stamp of approval. As a natural consequence, it is directed that the DNA report shall be exhibited afresh after deciding the objections or after examining the Scientific Officer.

57. Accordingly, the judgment of conviction and sentence dated 13-8-2018 passed by 1st A.S.J., Datia in Special Sessions Trial No.21/2018 is hereby **Set aside.**

58. The matter is remanded back to the Trial Court with a direction to record the evidence of Dr. S.S. Batham (P.W. 15) and Dr. Dinesh Kumar (P.W. 16) afresh in the presence of the respondent/accused. After recording the evidence of the above mentioned two witnesses, the Trial Court shall proceed further from the stage of filing of DNA report i.e., 10-8-2018. The respondent/accused **shall** be granted an opportunity to file written objection to the DNA report and the same shall be decided in accordance with law. If an application for cross-examination of Scientific Officer is filed, then the same shall be considered and decided in accordance with law. Thereafter, if any opportunity is sought by the accused to lead any evidence in his defence in the light of the DNA report, then the same shall be afforded to him in accordance with law. Only after following the provisions of Section 233 of Cr.P.C., the case shall be fixed for Final Arguments, thereby giving at-least one week time to prepare and argue the matter.

59. Since, the impugned judgment has been set aside and the matter is being remanded back for recording of evidence of Dr. S.S. Batham (P.W. 15) and Dr. Dinesh Kumar (P.W. 16) afresh in the presence of the respondent/accused and thereafter to proceed further from the stage of filing of objection to the DNA report, therefore, by way of abandon caution, it is observed that all the findings of conviction recorded by the Trial Court have also stood wiped out. The Trial Court is directed to decide the case without getting influenced or prejudiced by any of the findings given in the impugned judgment.

60. If the respondent/accused expresses his desire to engage a different Counsel of his own choice or prays for providing a Counsel from Legal Aid, then the said prayer shall be allowed. In case, if a Counsel from Legal Aid is provided, then the Trial Court shall ensure, that the Counsel so provided to the respondent/accused must have standing of at-least 15 years practice in the bar and must have thorough knowledge of Criminal Law.

61. The Trial Court is directed to complete the entire exercise within a period of 4 months from the date of receipt of copy of this judgment.

62. Since, the respondent/accused is in jail, therefore, a copy of this judgment be provided to the respondent/accused immediately free of cost.

63. CRRFC No.9 of 2018 and Cr.A. No.6946 of 2018 are **disposed**

of accordingly.

(G.S. Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge