HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

DIVISION BENCH

BEFORE: SHEEL NAGU

AND

RAJEEV KUMAR SHRIVASTAVA, JJ.

CRIMINAL REFERENCE CASE NO. 13/2019

The State of Madhya Pradesh

Versus

Ravi @ Toli Malviya

Shri Kuber Boddh, Deputy Advocate General for the State.
Shri Vijay Dutt Sharma, learned counsel for he respondent as amicus curiae.

CRIMINAL APPAL NO. 9132/2019

Ravi @ Toli Malviya

Versus

The State of Madhya Pradesh

Shri Padam Singh, leaned counsel for the appellant.
Shri Kuber Boddh, Deputy Advocate General for the State.

Whether approved for reporting : Yes/No

J U D G M E N T
(30.01.2020)

Per Rajeev Kumar Shrivastava,J.:

This judgment shall govern the disposal of Criminal Reference Case No. 13/2019 as well as Criminal Appeal No. 9132/2019 as both arise out of judgment dated 26/30.9.2019 passed by Second Additional Sessions Judge & Special Judge

(Protection of Children from Sexual Offences Act, 2012), Vidisha (MP) in Special Sessions Trial No. 300002/2016.

2. As per **Criminal Reference Case No. 13/2019**, Second Additional Sessions Judge & Special Judge (Protection of Children from Sexual Offences Act, 2012), Vidisha (MP) vide judgment dated 26/30.9.2019 in Special Sessions Trial No. 300002/2016, having found the accused guilty under Sections 363, 366-A, 364, 376(2)(i), 376(2)(j), 376(2)(k), 302 and 201 IPC, has inflicted penalty of death sentence and has submitted the matter for confirmation.

3. **Criminal Appeal No.9132/2019** has been filed by the accused from jail against the aforesaid judgment, whereby he has been convicted and sentenced as under :-

Sections	Act	Imprisonment	Fine	Imprisonment in lieu of fine
363	IPC	Seven years RI	1000/-	one month additional RI)
366-A	IPC	Ten years RI	2000/-	two months additional RI
364	IPC	Ten years RI	2000/-	two months additional RI
376(2)(i)	IPC	Life Imprisonment	4000/-	three months additional RI
376(2)(j)	IPC	Life Imprisonment	4000/-	three months additional RI
376(2)(k)	IPC	Life Imprisonment	4000/-	three months additional RI
302	IPC	Penalty of Death Sentence	-	-
201	IPC	Seven years RI	1000/-	one month additional RI

It was also directed in the judgment that all the punishments

of imprisonment shall run concurrently.

4. The short facts of the case are that on 24.10.2015 in between 2 pm to 7 pm the accused had kidnapped 7 years old prosecutrix from the temple situated outside platform No.6 from the custody of her lawful guardians, thereafter accused committed rape with the minor and killed her and knowingly disappeared the evidence of offence committed by him. According to the prosecution, on 25.10.2015 informant Rajkumar (PW-1) and Gajendra Sahu (PW-2) had seen deadbody in the well of Mallu Patel. They informed the Police Station Civil Line, Vidisha. ASI S.N.S. Solanki (PW-34) reached the spot and registered merg intimation (Ex.P/1). On the basis of merg intimation, Police Station Civil Line, Vidisha registered Merg Case No. 80/2015 (Ex.P/38). S.N.S. Solanki (PW-34) prepared the spot map (Ex.P/5). Thereafter, body of the deceased was taken out from the well and Safina Form (Ex.P/50) was issued. Thereafter post-mortem of the deadbody was conducted. The post-mortem report Ex.P/29 and Ex.P/51 reveals as under :-

> "A necked dead body female child lying in supine position on pm table. Rigor mortis present over lower limb. Mouth semi open, eye closed. Conjunctival congestion present and swelling present over face and eye. Cynosis present over the lip and tip of nose. Tongue between the teeth and impression of upper teeth on anterior aspect of tongue and red colour secretion over both nostril region. Ecchymosis present on vertebral aspect of tongue and hypostasis present over the back. Both wrists were open and mud present over the body, more on right hand and peeling of skin over thigh (inner and medial aspect of thigh) and following injuries were present over the body :
>
> (i) Contusion 4cm x 4cm over right

frontal region over headm ecchymosis present;

(ii) Contusion 4cm x 4cm over left just above eyebrow;

(iii) Contused abbrasion 3cm x 2cm over right side of neck below the angle of mandible;

(iv) Multiple abbrasions present ove anterior and superior aspect of wound No.(iii), size varies 1cm x ¼ cm and . 5cm x 1/4cm.

(v) Multiple abbrasions (four) 1 and 1/4cm over right TM Joint (in front of right ear) and .5cm x 1/4cm.

All injuries are anti-mortem in nature."

As per opinion of the doctor, cause of the death was cardiorespiratory arrest as a result of multiple causes like smothering, injury over the private part, vulva and rupture of vagina and uterus.

5. The investigating officer Sanjeev Kumar Chouksey (PW-31) investigated the matter, recorded the statements of the witnesses. After completion of necessary investigation, police filed the charge-sheet. The matter was committed for trial. The accused was charged for committing offence punishable under Sections 363, 366-A, 376, 302, 201 of IPC and Section 4 read with Section 3 of Protection of Children from Sexual Offences Act, 2012, and Sections 376 (2)(i)(j)(k) and 364 of IPC and Section 5( ) read with Section 6 of POCSO Act. The accused abjured his guilt. The matter was committed for trial. Prosecution examined 35 witnesses and exhibited 90 documents to bring home the charge. Whereas, the accused person while confronting the prosecution witnesses exhibited 5 documents.

6. The Trial Court vide impugned judgment found the accused

guilty of the offences as aforesaid and imposed the death penalty and has submitted the matter to the High Court under Section 366 Cr.P.C. for confirmation of death sentence. The accused has also preferred an appeal under Section 374 Cr.P.C.

7. This Court for proper assistance appointed Shri Vijay Dutt Sharma, Advocate as amicus curiae.

8. Learned amicus curiae submitted that on 13.3.2019 and 12.4.2019 when the accused was not produced from jail, remaining chief examination and cross-examination of PW-31 Sanjeev Kumar Chouksey was done in absence of the accused, therefore, the trial is vitiated which is de hors the mandatory provisions contained in Section 273 CrPC as the trial Court recorded prosecution evidence in absence of accused, As a result whereof, since the valuable right of the accused of having prosecution witnesses examined in his presence has been infringed, the entire proceedings got vitiated, and for that the judgment based on such proceedings is a nullity in the eyes of law, which deserves to be set aside, and the matter be relegated to the Trial Court for fresh trial. Reliance is placed on the decisions in **Atma Ram & Others vs. State of Rajasthan [2019 CrLR (SC) 633]** and **State of Madhya Pradesh vs. Budhram s/o Kunkuram Satnami [1996 CriLJ 46].**

9. Per Contra, learned State counsel submitted that the trial Court after appreciating and marshaling the evidence in proper perspective has rightly inflicted the death penalty and the appeal filed by the accused deserves to be dismissed.

10. Before entering into rival contentions, submissions which border around the provision contained under Section 273 Cr.P.C.

are taken up first. Section 273 Cr.P.C. runs 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:
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> 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.
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> Explanation.- In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code."

11. Section 205 of CrPC provides that Magistrate may dispense with personal attendance of accused, which runs as under:-

> "205. Magistrate may dispense with personal attendance of accused.-- (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.
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> (2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided."

12. However, in the present case the trial relates to sessions trial, hence the provision of Section 205 CrPC will not be attracted.

13. Section 317 of CrPC relevant in the case in hand reads as

under:-

> "317. Provision for inquiries and trial being held in the absence of accused in certain cases.-- (1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.
> (2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately."

14. If we analyze the provisions of Section 317 CrPC, then it is apparent that at any stage of an inquiry or trial, under this Code, if the Judge or Magistrate is satisfied, **for reasons to be recorded,** that the personal attendance of the accused before the Court is not necessary in the interests of justice, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused. Meaning thereby, this section provides special provision for recording of evidence in absence of accused if the accused is represented by his pleader, but the condition precedent is, the reason for doing so should be recorded by the Judge.

15. In **Budhram (supra),** the Division Bench relied on earlier decision in **Daryav Singh Vs. State of M.P**. **(Cr.A.345/88 decided on 05.05.1988)** wherein, taking note of the fact that on 12.12.1987 one prosecution witness was examined in absence of accused, the matter was remanded back to the Trial Court for redeciding the matter after recording the evidence of said witness in presence of the accused. In the aforesaid judgment, the Division Bench took note of the fact that *when the trial commenced the accused was not defended by a lawyer. Opportunity was afforded to him to engage a lawyer as he had made a request to the Court in that behalf. Ultimately he engaged a lawyer. During the course of the trial on a number of occasions the accused was not produced before the Court and the trial had to be adjourned. On 31-1-95 the story was repeated and the appellant/accused was not produced before the Court. On that date Bhogilal (P. W. 14), Urmilabai (P.W. 15), Kamlabai (P.W. 16), Kiranbai (P.W. 17) and Nandram (P.W. 18), Awadesh Kumar (P.W.19) and Investigating Officer C.P. Jhariya (P.W.20) were present. The learned counsel representing the accused informed the Court that he had no objection if the witnesses in attendance were examined and, accordingly, the learned Judge recorded the evidence of all these witnesses in absence of the accused. Ultimately, the matter ended in conviction based mainly on the testimony of P. W. 10 Kotwar Patel Das who testified to the extra-judicial confession made by the accused to him*. Being convinced that the provision of Section 273 Cr.P.C. was violated appellants' conviction and sentence of death was set aside and the case was remitted to the Trial Court for recording of evidence of (PW-14) to (PW-20) afresh in presence of

the appellant, who be given full opportunity to cross-examine them.

16. In **Atma Ram (supra)**, in respect of the offences punishable under Sections 302, 307, 452, 447, 323, 147, 148 and 149 IPC, the Trial Court without ensuring the presence of the accused proceeded to examine PW/3, PW/4, PW/12, PW/13, PW/14, PW/15, PW/17, PW/18, PW/20 and PW/23, respectively on 13.02.2015, 13.08.2015, 03.09.2015, 09.10.2015, 05.11.2015, 08.03.2016, 12.05.2016, 20.06.2016, 14.02.2017, 22.11.2016 and 14.02.2017 and after recording conviction proceeded to impose the sentence of death penalty. The High Court of Rajasthan in reference under Section 366 Cr.P.C. taking note of the fact that despite objection of the defence counsel (raised at initial stage) the Trial Court proceeded to record the evidence of 12 witnesses. While posing the issue as to whether the entire trial should be declared vitiated or that the matter be remanded to the Trial Court for recording the statements of these witnesses afresh by exercising powers under Section 391 Cr.P.C. or that the impugned judgment should be set aside and the *de novo* trial be directed by exercising power under Section 386(b) Cr.P.C., directed that to do complete justice to the accused as well as to the victims, directed:

> ".....It is hereby directed that Trial Court shall summon and record the statements of the witnesses PW-1 Chandu Ram, PW-2 Chandrakala, PW-3 Surendra Singh, PW-4 Dharam Pal, PW-12 Vikrant Sharma, PW-13 Prahlad, PW-14 Ram Kumar, PW-15 Sushila, PW-17 Dr. Arun Tungariya, PW-18 Ram Pratap, PW-20 Sahab Singh and PW-23 Ramesh Kumar afresh after securing presence of the accused in the Court. Upon

> remand, the Trial Court shall conduct the proceedings on a day to day basis and shall, after recording the statements of the witnesses afresh in the above terms, re-examine the accused under Section 313 Cr.P.C.; provide them a justifiable/proper opportunity of leading defence and decide the case afresh and as per law within four months from the date of receipt of copy of this judgment."

17. On its challenge before the Supreme Court, the order was upheld. Their Lordships were pleased to hold:

> "18. Section 273 opens with the expression "Except as otherwise expressly provided…" By its very nature, the exceptions to the application of Section 273 must be those which are expressly provided in the Code. Shri Hegde is right in his submission in that behalf. Sections 299 and 317 are such express exceptions provided in the Code. In the circumstances mentioned in said Sections 299 and 317, the contents of which need no further elaboration, the Courts would be justified in recording evidence in the absence of the accused. Under its latter part, Section 273 also provides for a situation in which evidence could be recorded in the absence of the accused, when it says "when his personal attendance is dispensed with, in the presence of his pleader". There was a debate during the course of hearing in the present matter whether such dispensation by the Court has to be express or could it be implied from the circumstances. We need not go into these questions as the record clearly indicates that an objection was raised by the Advocate appearing for the appellant's right at the initial stage that the evidence was being recorded without ensuring the presence of the appellants in Court. There was neither any

willingness on the part of the appellants nor any order or direction by the Trial Court that the evidence be recorded in the absence of the appellants. The matter, therefore, would not come within the scope of the latter part of Section 273 and it cannot be said that there was any dispensation as contemplated by the said Section. We will, therefore, proceed on the footing that there was no dispensation and yet the evidence was recorded without ensuring the presence of the accused. The High Court was, therefore, absolutely right in concluding that Section 273 stood violated in the present matter and that there was an infringement of the salutary principle under Section 273. The submissions advanced by Shri Sanjay Hegde, learned Senior Advocate, relying upon paragraphs in *Jayendra Vishnu Thakur Vs. State of Maharashtra and others,* (2009) 7 SCC 104 as quoted above, that the right of the accused to watch the prosecution witness is a valuable right, also need not detain us. We accept that such a right is a valuable one and there was an infringement in the present case. What is material to consider is the effect of such infringement? Would it vitiate the trial or such an infringement is a curable one?

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 recognized 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*. Paragraphs 57 and 58 of said decision were as under:-

> "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*, (1980) 4 SCC 379, this Court clearly held: (SCC p. 395, para 24)
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> > "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 will comes from a person who has denied justice that the person who has been denied justice is not prejudiced."
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> 58. In *A.R. Antulay vs. R.S. Nayak,* (1988) 2 SCC 602, 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 Vs. State of Punjab*, (2004) 12 SCC 673 and

Rajasthan SRTC Vs. Zakir Hussain, (2005) 7 SCC 447."

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 TADA Act [Terrorists and Anti Disruptive Activities (Prevention) Act, 1987] 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 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 [Paras 8 and 9 of *Jayendra Vishnu Thakur Vs. State of Maharashtra* (supra)]. 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 concerned witnesses. 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 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 the Chapter XXVIII was more relevant in the present matter and the judgment of the High Court was supported more strongly by 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 of a 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.

386. *Powers of the Appellate Court.* – After perusing such record and hearing the appellant or his Pleader, 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 is 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 Sessions 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 deals 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 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 re-trial, 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 *Pandit Ukha Kolhe Vs. State of Maharashtra*, as under:-

> "15. An order for retrial of a criminal case is made in exceptional cases, and not unless the Appellate Court is satisfied that the Court trying the proceeding had

> no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the Appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C.J., in *Ramanlal Rathi Vs. The State,* AIR (1951) Cal. 305.

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

evidence and did not know how to prove their case."

24. The order passed by the High Court in the present matter was not to enable the Prosecutor to rectify the defects or infirmities in the evidence or to enable him to lead evidence which he had not cared to lead on the earlier occasion. The evidence in the form of testimony of those twelve witnesses was led and those witnesses were cross-examined. There was no infirmity except the one that the evidence was not led in the presence of the appellants. The remedy proposed was only to rectify such infirmity, and not to enable the Prosecutor to rectify defects in the evidence.

25. We must also consider the matter from the stand point 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 sub-served and at the same time the accused will have every right and opportunity to watch the witnesses deposing against them, watch their demeanor and instruct their Counsel properly so that 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 concerned witnesses, 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.
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> 26. We, therefore, see no reason to interfere with the order passed and the directions issued by the High Court in the present matter. We affirm the view taken by the High Court and dismiss these appeals. The restraint which we had placed on the Trial Court not to pronounce the judgment hereby stands vacated. The Trial Court is now free to take the matter to its logical conclusion. Let a copy of this Order be immediately transmitted to the concerned Trial Court."

18. In the case at hand, it is borne out from the record that prosecution examined its witness Sanjeev Kumar Chouksey (PW-31) on 13.3.2019 and 12.4.2019 in absence of the accused and on these dates no specific reasoned order had been passed by the Trial Court under which the evidence of aforesaid witness could have been recorded. Apart from this, the pleader of the accused had not given any version or statement that he was authorised by the accused to cross-examine the said witness in absence of the accused.

19. In the light of the law laid down in the case of **Atma Ram & Ors. (supra)** wherein it has been held that Section 273 opens

with the expression "Except as otherwise expressly provided…" and the only exception is that if accused remained absent for the circumstances mentioned in Sections 299 and 317 of Cr.P.C., no examination and cross-examination of the witnesses could have been undertaken. Therefore, learned Trial Court erred in proceedings with the witness Sanjeev Kumar Chouksey (PW-31) overlooking the mandatory provision contained in Section 273 Cr.P.C.

20. For these reasons, matter is remanded to the Second Additional Sessions Judge & Special Judge (Protection of Children from Sexual Offences Act, 2012), Vidisha (MP) to cause examination, cross-examination and re-examination of prosecution witness, namely, Sanjeev Kumar Chouksey (PW-31) in presence of the accused and his pleader and then to record statement of accused under Section 313 Cr.P.C. and after completion of trial, the Trial Court shall pronounce the judgment afresh.

21. We hope and trust that the Trial Court shall complete the proceedings within a period of thirty days from the date of receipt of the judgment. Let a copy of judgment along with the record be transmitted forthwith to the Trial Court.

22. We record our gratitude for Shri V.D.Sharma for his able assistance as amicus curiae in this Court.

23. The reference and appeal are disposed of finally in above terms.

(Sheel Nagu) **(Rajeev Kumar Shrivastava)**
(yog) **Judge** **Judge**