HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

DIVISION BENCH

G.S. Ahluwalia
and
Rajeev Kumar Shrivastava JJ.

CRRFC No.3/2020

In Reference Vs. Ravi @ Toli

Cr.A. No.3007/2020

Ravi @ Toli Vs. State of M.P.

Shri Rajesh Shukla, Dy. A.G. With Shri Rajeev Upadhyaya, Counsel for the State.
Shri Padam Singh with Shri Udaiveer Singh and Shri V.D. Sharma, Counsel for Ravi @ Toli.

Date of Hearing	:	6/9/2021
Date of Judgment	:	9/9/2021
Approved for reporting	:	Yes

Judgment

09- September-2021

Per G. S. Ahluwalia J.

CRRFC No.3/2020 is a reference under Section 366 of Cr.P.C. for confirmation of death sentence, whereas Cr.A. No.3007/2020 has been filed by the accused/appellant against the judgment and sentence dated 7-3-2020 passed by 2nd Additional Sessions Judge/ Special Judge (POCSO ACT), Vidisha in S.T. No.300002/2016 by

which the appellant Ravi @ Toli has been convicted and sentenced as under :

Conviction under Section	Sentence	Fine
363 of I.P.C.	7 years R.I.	Rs. 1,000 in default 1 month R.I.
366A of I.P.C.	10 years R.I.	Rs. 2,000 in default 2 months R.I.
364 of I.P.C.	10 years R.I.	Rs. 2,000 in default 2 months R.I.
376(2)(i) of I.P.C.	Life Imprisonment till natural death	Rs. 4,000 in default 3 months R.I.
376(2)(j) of I.P.C.	Life Imprisonment till natural death	Rs. 4,000 in default 3 months R.I.
376(2)(k) of I.P.C.	Life Imprisonment till natural death	Rs. 4,000 in default 3 months R.I.
302 of I.P.C.	Death Sentence	
201 of I.P.C.	7 years	Rs. 1,000 in default 1 month R.I. All the sentences shall run concurrently.

2. It is not out of place to mention here that earlier the Trial Court by judgment and sentence dated 26-9-2019 had convicted the appellant for the above mentioned offences and had awarded death sentence. The appellant preferred Criminal Appeal No.9132 of 2019 whereas CRRFC No.13/2019 was registered for confirmation of death sentence.

3. As this Court found that Sanjeev Chouksey (P.W.31) was examined contrary to the provisions of Section 273 of Cr.P.C., therefore, by Judgment dated 30-1-2020, this Court set aside the

judgment and sentence passed by the Trial Court and remanded the matter back with a direction to the Trial Court to cause examination, cross-examination and re-examination of prosecution witness namely Sanjeev Kumar Chouksey (P.W.31) in the presence of the appellant and to record the statement of the accused under Section 313 of Cr.P.C. and to pronounce the judgment afresh.

4. Accordingly, the Trial Court after recording the evidence of Sanjeev Kumar Chouksey (P.W. 31), again convicted and sentenced the appellant by the impugned judgment.

5. The prosecution story in short is that on 24-10-2015 in between 2 P.M. to 7 P.M., the appellant/accused kidnapped a 7 years old prosecutrix from a temple situated outside the platform no.6, Railway Station Bhopal, from the custody of her lawful guardians. Thereafter, he took her to Vidisha and committed rape and killed her by smothering. The dead body of a minor girl was found in a well situated in the field of Mullu Patel in Vidisha. Accordingly, the Police Station Civil Lines, Vidisha was informed. Asstt. Sub-Inspector S.N.S. Solanki reached on the spot and registered *merg* intimation (Ex. P.1). The Police Station Civil Lines, registered *Merg* case No.80/2015. S.N.S. Solanki prepared a spot map. Thereafter, the dead body of the deceased was taken out from the well. One Blue Jeans was also found in the well and vide seizure memo Ex. P.4, water from the well and blue jeans were seized. The photography of the recovery

of dead body of the deceased from the well was done. The photographs were seized. Tibia bone for diatom test, sternum bone, 5 ml of blood of the deceased,viscera, uterus, heart, kidney, spleen and liver, whole stomach and its contents, a piece of small intestine, and salt solution were sealed and handed over to the police constable. Since, the dead body of the deceased had remained unidentified, therefore, it was buried. On 29-10-2015, one slacks of black colour, two coins of 1 Rupee, one steel ring, blood stained earth and plain earth were seized from a place at a distance of 100 ft.s from well from where the dead body of the deceased was recovered. Another spot map of the place from where slacks was recovered was prepared. The photographs of slacks, blood stains, coins and ring were taken. On the same day, one shawl was seized from Puja Kirar. On 31-10-2015, one mobile was seized from the possession of one Suresh @ Vishal. On 1-11-2015, F.I.R. was registered against the appellant Ravi @ Toli and on 6-11-2015, the appellant/accused was arrested. His confessional statement under Section 27 of Evidence Act was recorded. The medical examination of the appellant/accused was got done. Semen slide of the appellant/accused was prepared. At the instance of the appellant/accused, one T-shirt of the deceased was recovered from the same well. The said T-shirt was identified by the appellant/accused. Blood samples of the appellant/accused were taken. Since, the dead body of the deceased was already buried,

therefore, the mother of the deceased refused to dig out the dead body and identified the dead body from its photo. The photo of the dead body, slacks, T-Shirt and shawl were got identified from Kiran @ Bhoori @ Rihana (P.W.23), mother of the deceased. On the information given by the appellant/accused, one Kurta of gray colour, Jeans of black colour, and underwear of blue colour were seized from the house of the appellant/accused situated in Bhopal. The seized articles were sent for DNA test. The DNA test report was obtained. The CDR of mobile No. 9755673381 were obtained. The statements of the witnesses were recorded and the police after completing the investigation filed a charge sheet against the appellant/accused for offence under Sections 302, 376(2)(i),(j),(k),(l), 376 क and ग, 201, 363, 364, 75 of I.P.C. and under Section 5(m)/6 of Protection of Children from Sexual Offences Act, 2012 (In Short POCSO) was filed.

6. The Trial Court by order dated 15-2-2016 framed charges under Sections 363, 366-A, 376, 302, 201 of I.P.C. and under Section 3 and 4 of POCSO. Thereafter, by order dated 19-5-2017 charges were also framed for offence under Sections 376(2) (i),(j),(k), 364 of I.P.C. and under Section 5(m) read with Section 6 of POCSO and by order dated 16-9-2019 amended charges under Sections 363, 366A, 302, 201, 376(2)(i),(j),(k), 364 of I.P.C. and under Section 3 read with Section 4 read with Section 5(m) read with Section 6 of POCSO were framed.

7. The appellant/accused abjured his guilt and pleaded not guilty.

8. The prosecution in order to prove its case, examined Rajkumari Rajak (P.W.1), Kamlesh Adivasi (P.W.2), Balveer Yadav (P.W.3), Pooja Kirar (P.W.4), Bhooribai Ahirwar (P.W.5), Sanju Parihar (P.W.6), Prakash Ahirwar (P.W.7), Manoj Pachori (P.W.8), Moolchandra Rajak (P.W.9), Preetam Singh Rajak (P.W.10), Rakesh Vishwakarma (P.W.11), Dashrath Malviya (P.W.12), Kok Singh (P.W.13), Dhaniram Pal (P.W.14), Preetam Lodhi (P.W.15), Dheerendra Gupta (P.W. 16), Mohit Kashyap (P.W.17), Siddhi Kushwah (P.W.18), Dr. R.K. Sahu (P.W. 19), Gajendra (P.W. 20), Dr. P.C. Manjhi (P.W.21), Rukmani Bai (P.W.22), Kiran @ Bhoori @ Rihana (P.W.23), Dr. Pradeep Gupta (P.W. 24), Dr. C.H. Jain (P.W. 25), Ramswaroop Soni (P.W.26), Vijay Tripathi (P.W. 27), Tulsi Ram Suryavanshi (P.W. 28), Satish Pandey (P.W.29), Sumant Singh (P.W. 30), Sanjeev Chouksey (P.W.31), Dr. Pankaj Shrivastava (P.W.32), Sanjay @ Sanju Parihar (P.W. 33), S. N. Singh Solanki (P.W. 34), and Surendra Singh (P.W.35).

9. The appellant examined Bharat Singh (D.W.1) in his defence.

10. The Trial Court by impugned judgment and sentence, has convicted and sentenced the appellant/accused for the offences mentioned above.

11. Challenging the judgment and conviction recorded by the Trial Court, it is submitted by the Counsel for the appellant/ accused as

under :

(i) The prosecution has failed to prove the DNA, as well as Medical and Scientific evidence against the appellant/accused;

(ii) The circumstance of last seen together is not proved;

(iii) Chain of circumstances is not complete;

(iv) Faulty and illegal investigation has given a deep dent to the prosecution case;

(v) The prosecution has failed to prove the place of occurrence;

(vi) Presence of Deceased in Bhopal has not been proved beyond reasonable doubt;

(vii) Presence of accused at the alleged place of incidence i.e., place of kidnapping i.e., Bhopal and the well from where the dead body was recovered i.e., Vidisha has not been proved.

(viii) The arrest of the appellant/accused and seizure of articles is contrary to law;

(ix) FIR is ante dated and ante timed ;

(x) Erroneous and illegal findings recorded by the Trial Court ;

(xi) Non-compliance of Section 53-A of Cr.P.C. ;

(xii) Aggravating and Mitigating circumstances have not been taken into consideration ;

(xiii) In the alternative, the death sentence be commuted to Life Imprisonment.

12. *Per contra*, the Counsel for the State has supported the

prosecution story. It is submitted that the act of the appellant/accused is a gruesome act. A minor girl was kidnapped from Bhopal, and the appellant brought her to Vidisha, where after committing rape on her, She was killed by smothering and her dead body was thrown in the well. The presence of DNA profile of the appellant/accused on the slacks clearly establishes his involvement in the matter. The circumstance of Last Seen Together was duly proved. The appellant/accused had a criminal history, therefore, he has been rightly awarded death sentence. The prosecution has proved the following circumstances beyond reasonable doubt :

(i) The deceased went missing from Platform No.6, Bhopal on 24-10-2015;

(ii) On 24-10-2015, the deceased was seen alive for the last time in the company of the appellant/accused ;

(iii) On 24-10-2015, the appellant/accused took the deceased to the house of Puja Kirar at Vidisha ;

(iv) Pink coloured shawl of the deceased was seized on production of the same by Puja Kirar ;

(v) The said Shawl was duly identified by the mother of the deceased ;

(vi) On 25-10-2015, the dead body of the deceased was recovered from the well of Mullu Patel ;

(vii) Black coloured slacks, two coins of Rs.1/- denomination, one

steel ring and blood stained and plain earth were seized on 29-10-2015;

(viii) The T-shirt of the deceased was recovered from the well of Mullu Patel on the disclosure statement made by appellant/accused ;

(ix) Symptoms of murder and rape were found on the dead body of the deceased ;

(x) Black coloured Kurta, black Jeans and underwear of the appellant/accused were seized on the disclosure statement made by the appellant/accused ;

(xi) Slacks and T-shirt were identified by the mother ;

(xii) Slacks, Vaginal Slide, Kurta of the appellant/accused, Pant, and underwear of the appellant were sent for DNA Test ;

(xiii) As per DNA test report, DNA profile of the appellant/accused was found on the slacks of the deceased.

13. Heard the learned Counsel for the parties.

14. Before proceeding further, this Court would like to mention here that on 6-9-2021, the CD, Article 29 was taken out from the sealed envelop in the presence of all the Counsels for the parties and an attempt was made to run the CD. But the CD did not run. Therefore, the CD was cleaned with soap water so that in case if the CD is not running due to some foreign material on it, then it can be removed. Thereafter, the CD started running. Five Folders were visible marked as OO2, 1, 2, 3 and 4. The Folder No.002 was

containing the following caption :

अपराध क्रमांक 514–15 धारा 302,201,376(2)च, आई पी सी 3–4 पास्को एक्ट

Folder No. 1 contains the following caption and videography of recovery of dead body of deceased from the well.

धटनास्थल अहमदपुर रोड, विजयनगर 25.10.2015

Folder No.2 contains the following caption and videography of confessional statement of appellant/accused

6.011.2015

Folder No. 3 contains the following caption and videography of appellant/accused pointing the place where he had committed rape on the prosecutrix/deceased.

अरोपी रवि मालवीय द्वारा धटनास्थल बतया गया 7.11. 2015

Folder No.4 contains the following caption and videography of recovery of Pant, Shirt and underwear from the house of the appellant/accused at Bhopal.

आरोपी रवि मालवीय के भोपाल वाले धर मे जप्ती कार्यवाही की गई।

(Hindi version has been reproduced with same spelling mistakes)

The videography done on different dates, shall be considered at the relevant place. The CD was re-sealed by affixing transparent tape

on the envelop.

15. Before adverting to the merits of the case, this Court would like to consider as to whether the death of the deceased was homicidal or not?

16. Dr. R. K. Sahu (P.W. 19) has conducted the Post-mortem of the dead body of the deceased and found following injuries :

> "A naked dead body female child lying in supine position on PM Table. Rigormortis present over lower limb. Mouth semi open, eyes 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 head. Ecchymosis present;
>
> (ii) Contusion 4cm X 4cm over left just above eyebrow;
>
> (iii) Contused abrasion 3cm X 2cm over right side of neck

below the angle of mandible;

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

(v) Multiple abrasions (Four)1 and 1/4cm over right TM joint (In front of right ear) and 2 .5 cm x1/4cm.

17. On internal examination Local Ecchymosis was found. Full tear present upto anal region. 2 vaginal and 2 anal slides were prepared. Uterus was found ruptured and was preserved.

18. The Cause of death was smothering as well as injury present over the private part (Vulva and rupture of vagina and uterus).

19. Uterus, heart, kidney, spleen and liver were preserved. Similarly, whole stomach and its contents and a piece of small intestine were preserved. Vaginal and anal slides were prepared for comparison, Tibia bone of right side was preserved for diatom test, sternum bone was preserved for DNA Test and 5 ml of blood of the deceased was preserved and handed over to the police constable. The Post-mortem report is Ex. P.29.

20. Dr. C.H. Jain (P.W 25) had conducted diatom test. He has stated that by letter dated 3-11-2015, he had received one bottle containing the water of the well, uterus of an unknown girl, bone for diatom test. Required piece of bone for conducting diatom test was taken out and the remaining part of the bone was handed back to the

concerning police constable. On examination, he found that the length of the uterus was 5.5 cm and both ovaries were attached to it. There was a tear of 1 cm on the back side of the uterus and Ecchymosis was present around the tear. Various kinds of diatoms were found in the water of the well, whereas no diatom was found in the bone of the deceased. It was opined by the witness that abrasion found on the frontal region of the head was caused by some hard and blunt object. The injuries no.3 and 4 as reflected in the post-mortem report, Ex. P.29 were caused due to smothering, Similarly, four abrasions which were found near right ear were caused at the time of smothering. There was a tear in the back side of the uterus upto vagina and anal region, and since, no injury was found on or around the private part of the deceased, therefore, the internal injury must have been caused on account of rape. It was further stated that in case of excessive bleeding, the patient would go in shock, as a result, all the internal organs would become pale but since they were congested, therefore, it is clear that the deceased had already died before bleeding and the deceased did not die on account of injury on her private part. The cause of death of the deceased was smothering and all the injuries found on the body of the deceased were antemortem in nature. The reports given by this witness are Ex. P.36 and P.37. This witness was cross-examined in detail and in cross-examination, this witness specifically denied that any injury found on the body of the

deceased could have been caused by fall. This witness has specifically stated that the "dead body of the deceased" was thrown in the well. He further clarified that since, Ecchymosis was present over the uterus, therefore, he had opined that the injury to the uterus was antemortem in nature. He further denied that he had given his report on the basis of post-mortem report, Ex. P.29.

21. A diatom is a unicellular eukaryotic alga characterized by siliceous covering and symmetry. Diatoms are mostly aquatic, being found in fresh, blackish and saltwater. The comprise the taxonomic class Bacillariophyceae and may be solitary or in colonies. Thus, if an alive person fell down in a water body, then due to inhaling of water, diatoms present in the water also enters inside the body of the deceased, which indicates that at the time of drowning, the deceased was alive. However, when a dead body is thrown in a water body, then there is no inhaling of water, therefore, no diatom will be found in the bone/body of the deceased.

22. Thus, from the evidence of Dr. R.K. Sahu (P.W. 19) and Dr. C. H. Jain (P.W. 25), it is clear that the dead body of the deceased was thrown in the well specifically when no diatom was found in the bone of the deceased. Further looking to the internal injury sustained by the deceased, this Court is of the considered opinion, that the death of the deceased was homicidal in nature.

23. The next question for consideration is that whether the

appellant/accused is the author of murder of the deceased or not?

Whether the prosecution has established that the deceased was the daughter of Kiran @ Bhoori @ Rihana (P.W. 23) ?

Age of the deceased **:**

24. Dr. R.K. Sahu (P.W.19) has conducted Post-mortem of the dead body of the deceased. In his post-mortem report, Ex. P. 29, he has assessed the age of the deceased in between 8-9 years.

25. The S.H.O., Police Station Civil Lines, Vidisha had assessed the age of the girl as 7-8 years, therefore, in the pamphlet, Ex. P.2, which was got published by him, it is specifically mentioned that the dead body of a girl aged about 7-8 years has been recovered from a well in a naked condition.

26. Similarly, in Naksha Panchnama, Ex. P.6, the age of the girl was assessed by the witnesses between 6-7 years.

27. Whereas Kiran @ Bhoori @ Rihana (P.W. 23) in her examination in chief itself, has disclosed the date of birth of her daughter Khushboo as 27-3-2011. The incident took place on 24-10-2015. Thus, if the age of the daughter of Kiran @ Bhoori @ Rihana (P.W. 23) is calculated, then it is clear that the daughter of Kiran @ Bhoori @ Rihana was only 4 ½ years.

28. Further, when there was a discrepancy in the age of the girl of Kiran @ Bhoori @ Rihana (P.W.23) and the estimate age of the dead body recovered from the well, then the prosecution should have gone

for age determination and one of the best possible method was determination of age of the deceased from her teeth. In Modi's Medical Jurisprudence, it has been mentioned that the "estimation of age from the teeth by noting the number of teeth erupted, location and state of eruption and with X-ray examination with some amount of certainty, is possible upto 17 to 20 years of age. A careful detailed record of the teeth and the presence of any peculiarities, like decay, malposition, overlapping or rotation, broken teeth, fillings, gaps or dentures will often help in identification of the age of the individual." However, in spite of the fact that the dead body was found in an intact condition, but still the prosecution did not care to verify the age of the deceased. Even the ossification test could have also been conducted to consider the age of the deceased. But, all these aspects were deliberately omitted by the prosecution.

29. Thus, it is clear that the age of the daughter of Kiran @ Bhoori @ Rihana (P.W. 23) doesnot match with the age of the dead body recovered from the well.

Conduct of Kiran @ Bhoori @ Rihana Khan (P.W. 23) :

30. According to prosecution case, Kiran @ Bhoori @ Rihana Khan (P.W.23) is the mother of the dead body. It is also the case of the prosecution, that the deceased as well as Kiran @ Bhoori @ Rihana Khan (P.W. 23) are the residents of Bhopal, whereas the dead body of a minor girl was recovered from a well on 25-10-2015 in

Vidisha.

31. Kiran @ Bhoori @ Rihana Khan (P.W. 23) has stated that about 7-8 years back, She had married one Ramzan @ Ramzani and was blessed with a girl on 27-3-2011, namely Khushboo whose nickname was Kali. About 3-4 years back, she had obtained divorce from Ramzan and started living with Shakeel. This witness and Shakeel are vendors and sell fruits etc. in the running trains. While going in a train, they used to leave her daughter near a temple situated on Platform No.6 and some times, She used to leave her daughter with her father. The appellant/accused was also a vendor used to sell goods in the running trains. As the appellant/accused used to provide some articles to daughter of this witness, therefore, the appellant/ accused is known to her and was also known to her daughter. On 24-10-2015, after leaving her daughter in the temple at 2:00 P.M., She and Shakeel went to sell fruits in the running trains. Her daughter was sleeping on platform no.6 and therefore, She put a pink colour shawl on her. Her daughter was wearing slacks of black colour, T-shirt of blue colour with something written on it in white colour. When She came back at 7 P.M., She did not find her daughter. As the first husband of this witness, used to take her daughter with him, therefore, She thought that Ramzan might have taken her. However, She could not meet her daughter for 2-3 days. Thereafter, She came to Vidisha for selling her goods. She met with Rukmani (P.W.22) on platform no.2 of Vidisha

Railway Station, then She informed her that her daughter Kali is missing. Rukmani (P.W. 22) in her turn informed that the dead body of a girl has been recovered from a well and the police has published the pamphlets. When this witness requested Rukmani (P.W. 22) to show the pamphlet, then She was asked to come on the next day. However, She could not go to Vidisha on the next day, but thereafter, She and Shakeel came to Vidisha by Punjab Mail and met with Rukmani (P.W. 22). Rukmani (P.W. 22) showed a photograph of a dead girl and since her face was stained with blood, therefore, She could not identify her daughter as She was very frightened. Rukmani (P.W. 22) also showed her the photograph of the appellant/accused and She immediately identified him. Thereafter, She came back to Bhopal, and again saw the photograph of the dead body and then She realized that it was the photograph of her daughter Khushboo. On the next day, She went to Police Station where she identified the photographs of the cloths of the girl. She also identified the shawl. Thereafter, She was called for identifying the cloths and photograph of the deceased and She had rightly identified the same. The identification memo is Ex. P. 10. In cross-examination, this witness has admitted that She has 5 daughters and one son. She further admitted that she is also facing a criminal trial and was detained in the jail. She further claimed that the appellant/ accused is known to her from his childhood and at that time, She was not having any

child. She denied that the appellant/accused used to visit her house, but admitted that as appellant/accused was also a vendor, therefore, She was meeting him on daily basis. She further denied that the appellant/accused was residing with her. She further denied that She was having any intimate or illicit relationship with the appellant/accused. The identification parade was conducted in the office of S.D.M. and 4-5 slacks, 4-5 T-Shirts and 4-5 Shawls were kept there. She further claimed that at the time of identification, the photographs were not shown. When She came to Vidisha, She had requested Rukmani (P.W. 22) to show the photograph of the dead body and accordingly, Rukmani (P.W. 22) had called some police personnel who brought the pamphlet and after seeing the photograph, she went to police station. She further admitted that She could not identify the photo at the first instance, therefore, She went back to Bhopal along with the photograph which was identified by her mother and her family members. By that time, her condition had also improved and accordingly, She also identified the photograph. She further denied that She had not received any information of her daughter for 3 days but clarified that She had come to know about Kali on **26th**. She also admitted that She had also gone to the house of Ramzan. She further admitted that She had not lodged the missing person report, thereafter claimed that She had lodged the missing person report in Bhopal, but admitted that the said report is not on

record. She further admitted that She has cordial relations with Rukmani (P.W. 22).

32. If the evidence of Kiran @ Bhoori @ Rihana (P.W. 23) is considered, then it is clear that She is not a trustworthy witness.

33. As already pointed out, the age of the daughter of Kiran @ Bhoori @ Rihana (P.W. 23) was only 4 ½ years, whereas the age of the dead body of the girl was 8-9 years. According to this witness, her daughter went missing on 24-10-2015, and she lodged her missing person report in Bhopal but the said missing person report was not produced by the prosecution. Further, there is a material variance in the evidence of this witness and Rukmani (P.W.22).

34. This witness has stated that after 2-3 days, when She came to Vidisha for selling her goods, then She met with Rukmani (P.W. 22) on platform no.2 of Vidisha Railway Station, where she informed Rukmani (P.W. 22) that her daughter is missing. Rukmani (P.W. 22) in her turn informed that about 3-4 days back, the dead body of a girl has been recovered from a well and called this witness on the next day for seeing the pamphlet. However, this witness could not go to Vidisha on the next day and thereafter, She went along with Shakeel, where She was shown the photograph of a dead body but She could not identify the photograph. Whereas Rukmani (P.W. 22) has stated that during Moharram festival, she was sitting along with Kiran @ Bhoori @ Rihana (P.W. 23) on the Platform, where she was informed

by Kiran @ Bhoori @ Rihana (P.W. 23) that her daughter is missing and thereafter, Rukmani (P.W. 22) came back to Vidisha. Thus, it is clear that Rukmani (P.W. 22) has claimed that She had met with Kiran @ Bhoori @ Rihana (P.W. 23) in Bhopal, whereas Kiran @ Bhoori @ Rihana (P.W. 23) claims that She had met with Rukmani (P.W. 22) in Vidisha. It is further claimed by Rukmani (P.W. 22) that when She came back to Vidisha, then the police personnel had shown her pamphlet then She informed the police personnel that she knows the mother of the deceased who is residing in Bhopal. However, no statement of this witness was recorded under Section 161 of Cr.P.C. immediately thereafter, to show that this witness had identified the photo. Thus, it is clear that Rukmani (P.W. 22) had claimed that as soon as She was shown the pamphlet by the police, She identified the girl. However, Kiran @ Bhoori @ Rihana (P.W. 23) has not claimed that Rukmani (P.W. 22) had ever informed her that the dead body of her daughter has been recovered. Rukmani (P.W. 22) has further claimed that on the next day, She went to Bhopal, and informed Kiran @ Bhoori @ Rihana (P.W. 23) and then came back to Vidisha along with Kiran @ Bhoori @ Rihana (P.W. 23) and her mother and went to Police Station Dehat, where Kiran @ Bhoori @ Rihana (P.W. 23) could not identify the photograph of the dead body but identified the cloths of the girl. In cross-examination, this witness has claimed that she had not shown the pamphlet to Kiran @ Bhoori @ Rihana (P.W.

23) but Kiran @ Bhoori @ Rihana (P.W. 23) had seen the pamphlets which were affixed on various walls of Vidisha Railway Station. She further claimed that She had not given any pamphlet to Kiran @ Bhoori @ Rihana (P.W. 23) but could not clarify as to how it was mentioned in her police statement, Ex. D.2 that Kiran @ Bhoori @ Rihana (P.W. 23) took the pamphlet with her to Bhopal. She further admitted that Kiran @ Bhoori @ Rihana (P.W. 23) is known to her for the last more than 20 years. She further stated that as the girl used to accompany her mother Kiran @ Bhoori @ Rihana (P.W. 23) therefore, She had identified her photograph. She further admitted that She frequently visits the G.R.P. Police Station and Dehat Police Station and denied that She goes there for mopping and dusting purpose and stated that whenever any pickpocketer is arrested, then She is called by the police for searching purposes. Thus, it is clear that Rukmani (P.W. 22) has admitted that She is a pocket witness of the police.

35. Thus, it is clear that according to Rukmani (P.W.22) She had already identified the photograph of the dead body, but Kiran @ Bhoori @ Rihana (P.W. 23) does not say so. Kiran @ Bhoori @ Rihana (P.W. 23) has never claimed that She was ever informed by Rukmani (P.W. 22) that the dead body of her daughter has been recovered. Even Rukmani (P.W.22) doesnot claim that She had ever informed Kiran @ Bhoori @ Rihana (P.W. 23) that her daughter has

been killed.

36. Further, Rukmani (P.W.22) has claimed that She had never shown the pamphlet to Kiran @ Bhoori @ Rihana (P.W. 23), and Kiran @ Bhoori @ Rihana (P.W. 23) had seen the pamphlets which were affixed on the walls of Railway Station, whereas Kiran @ Bhoori @ Rihana (P.W. 23) has stated that Pamphlet was shown to her by Rukmani (P.W.22). Rukmani (P.W. 22) has stated that since, the dead body of the deceased was swollen, therefore, Kiran @ Bhoori @ Rihana (P.W. 23) could not identify her own daughter, whereas Sanjay @ Sanju Parihar (P.W.33) has specifically stated that it is incorrect to say that the dead body of the deceased was not in identifiable condition. Sanjay @ Sanju (P.W.33) was shown pamphlet, Ex. P.2 and after seeing that pamphlet, Sanjay @ Sanju (P.W. 33) specifically claimed that the dead body can be identified from the photograph. This Court has also seen the pamphlet, Ex. P.2 and the other photographs of the dead body of the girl which are marked as Article A1**,** A2 and the photograph of the girl is clearly identifiable.

37. Further, this Court has also seen the Videography of the recovery of the dead body from the well. Earlier, live streaming of the Court proceedings were going on and some part of the videography was witnessed by the Counsels, but realizing that the dead body of the deceased would disclose the identity of the

deceased, therefore, the live streaming of the proceedings was stopped in order to make the Court proceedings as Camera Proceedings and the video of Folder No.1 was shown to the Counsel for the parties in toto. It is true that the face of the dead body of the deceased was not visible, when the dead body was inside the well, but after the dead body was taken out from the well, there was no swelling on the dead body or face, and her face was clearly identifiable. Although there was some blood on nose and forehead, but the face was easily identifiable.

38. Thus, it is surprising, that Kiran @ Bhoori @ Rihana Khan (P.W. 23) who claims herself to be the mother of the dead body recovered from the well, was not in a position to identify the photograph of her own daughter? This conduct of Kiran @ Bhoori @ Rihana (P.W. 23) raises a suspicion that in fact the dead body recovered from the well in Vidisha was that of her daughter or not.

39. Rukmani (P.W. 22) has claimed that Kiran @ Bhoori @ Rihana (P.W. 23) is known to her. Rukmani (P.W. 22) has further claimed that She is the pocket witness of the police. Thus, it appears that at the instance of the Police of Police Station Civil Lines, Distt. Vidisha, Rukmani (P.W.22) must have persuaded Kiran @ Bhoori @ Rihana (P.W. 23) to develop the false story of her daughter.

40. There is another important aspect of the matter. It is clear from

order sheet dated 17-8-2017, it was informed to the Court that the prosecution witness Kiran @ Bhoori @ Rihana is lodged in Central Jail, Bhopal in connection with crime No. 222/2017 for offence under sections 327,324,506 of I.P.C., and accordingly, a prayer was made by the prosecution, that Kiran @ Bhoori @ Rihana may be summoned by production warrant, and accordingly, production warrant was issued. On 21-8-2017, Kiran @ Bhoori @ Rihana (P.W. 23) was produced from Jail and her examination-in-chief was recorded. It is further mentioned in order dated 21-8-2017, that Kiran @ Bhoori @ Rihana (P.W. 23) is pregnant. Be that whatever it may be.

Why Kiran @ Bhoori @ Rihana Khan (P.W. 23) did not show any interest in taking the dead body of her daughter?

41. In the present case, the identification of the dead body of the girl was tried to be established on the basis of identification by photograph.

42. The dead body of the deceased was buried on 26-10-2015, Ex. P.9. As already pointed out, Kiran @ Bhoori @ Rihana (P.W. 23) has claimed that She had come to know about the incident on 26th. When Kiran @ Bhoori @ Rihana (P.W. 23) had already come to know about the unfortunate incident with her girl, then why She did not claim the dead body of her daughter. Why the police did not try to get the dead body identified by taking out the same from burial?

43. Further the police has prepared a Panchnama, Ex. P. 27 to the

effect that since, 15 days have expired, therefore, She does not want to get the dead body of her daughter and she is satisfied with the photo identification. This Panchnama was prepared on 7-11-2015. In this panchnama, Ex. P. 27 itself, it is mentioned that Kiran @ Bhoori @ Rihana (P.W. 23) had identified the photograph of her daughter after 3-4 days from 24-10-2015. Thus, it is clear that when Kiran @ Bhoori @ Rihana (P.W. 23) had already identified the photograph on 27th or 28th of Oct. 2015 (whereas it is the case of prosecution that Kiran @ Bhoori @ Rihana (P.W. 23) had identified the articles on 7-11-2015 or 8-11-2015), then why the dead body was not immediately dug out for the purposes of identification? Thus,it is clear that Kiran @ Bhoori @ Rihana Khan (P.W. 23) was not interested in seeing the dead body and this attitude would be there, only when the dead body is not that of daughter of Kiran @ Bhoori @ Rihana Khan (P.W.23). It is submitted by the Counsel for the State that since, Kiran @ Bhoori @ Rihana Khan (P.W. 23) is Muslim by caste, and the dead bodies are buried as per Muslim customs and since, the dead body of the deceased was already buried, therefore, She might not be interested in taking out the dead body from burial.

44. This submission cannot be accepted. It is true that as per Muslim customs, dead bodies are buried, but they are buried after following some rituals. Be that as it may. Digging out the dead body of the deceased was not the only source for identification, but 5 ml

blood of the deceased was also preserved by Dr. R.K. Sahu (P.W. 19). Further, internal organs of the deceased were with the police, and therefore, the police could have got the DNA of the deceased matched with the DNA of Kiran @ Bhoori @ Rihana (P.W. 23). But even that was not done.

45. As per Post-mortem report, Ex. P.29, 5 ml of blood sample of the deceased was collected and was handed over to the police constable however, the same was not seized vide seizure memo Ex. P.90. When 5 Ml of blood was collected and handed over by Dr. R.K. Sahu (P.W. 19) to the police constable, then it is for the prosecution to explain as to why said 5 ml blood of the deceased was not seized and where it was kept, but the prosecution has failed to explain the same. Thus, it is clear that the police had other means to establish the identity of the dead body as daughter of Kiran @ Bhoori @ Rihana Khan (P.W.23) but that was not done. This non-action on the part of the police clearly indicates, that in fact the police was somehow trying to create false evidence and went to the extent of fabricating the same.

46. Further, Sanjeev Chouksey (P.W.31) has claimed that Kiran @ Bhoori @ Rihana (P.W. 23) had informed that since, her daughter was born on the Railway Station, therefore, She does not have any document of the hospital. The said explanation given by Sanjeev Chouksey (P.W. 31) cannot be accepted, for the reasons that even if

someone gives birth to a child even on the platform, then She would be shifted to the hospital by the railway authorities. Even otherwise, the Govt. of Union has made Aadhar Card mandatory for every citizen. In the present case, even the Aadhar Card of the deceased has not been seized and produced.

47. Further, in para 23 of the cross-examination of Sanjeev Chouksey (P.W. 31), the defence has challenged that Kiran @ Bhoori @ Rihana (P.W. 23) is not the mother of the deceased.

When did Kiran @ Bhoori @ Rihana (P.W.23) came to know about her girl ?

48. As per prosecution story, Kiran @ Bhoori @ Rihana (P.W. 23) identified the photograph and cloths of the dead body on 7-11-2015 whereas Kiran @ Bhoori @ Rihana (P.W. 23) has stated in para 9 of her cross-examination, that she had come to know about her daughter (deceased) on 26th (Must be October 2015). If She had already come to know about the fate of her daughter on 26th, then why She remained silent till 7-11-2015?

49. Thus, it is held that the prosecution has miserably failed in establishing that the dead body of a girl which was recovered from a well in Vidisha, was that of the daughter of Kiran @ Bhoori @ Rihana Khan (P.W. 23).

Last Seen Together

50. Another circumstance which was been relied upon by the

prosecution is that of Last Seen Together and has examined five witnesses in this regard i.e., Kamlesh Adivasi (P.W. 2), Balveer Yadav (P.W.3), Puja Kirar (P.W.4), Sanjay @ Sanju Parihar (P.W.6) and by mistake he was once again examined as P.W. 33 as well as Kok Singh (P.W. 13). All the five witnesses can be termed as Chance witnesses, as their presence or meeting with the appellant/accused is not under normal condition. It is true that the evidence of chance witness cannot be brushed aside provided his evidence is found to be trustworthy. However, the evidence of chance witness should be examined very carefully and cautiously. The Supreme Court in the case of **Baby Vs. Inpsector of Police,** reported in **(2016) 13 SCC 333** has held as under :

> **30.** This Court in *Jarnail Singh* v. *State of Punjab* has elaborately explained the reliability of a chance witness as under: (SCC p. 725, paras 21-22)
>
> "*21*. In *Sachchey Lal Tiwari* v. *State of U.P.* this Court while considering the evidentiary value of the chance witness in a case of murder which had taken place in a street and passer-by had deposed that he had witnessed the incident, observed as under: (SCC p. 414, para 7)
>
> *If the offence is committed in a street only a passer-by will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, there must be an explanation for his presence there*.
>
> The Court further explained that the expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country like India where people are less formal and more casual, at any rate in the matter of explaining their presence.
>
> 22. *The evidence of a chance witness requires a*

> *very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence* (Satbir *v.* Surat Singh, Harjinder Singh *v.* State of Punjab, Acharaparambath Pradeepan *v.* State of Kerala and Sarvesh Narain Shukla *v.* Daroga Singh). Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (vide Shankarlal *v.* State of Rajasthan)."

The Supreme Court in the case of **Harbeer Singh Vs. Sheeshpal** reported in **(2016) 16 SCC418** has held as under :

> **22.** The High Court has further noted that there were chance witnesses whose statements should not have been relied upon. The learned counsel for the respondents has specifically submitted that PW 5 and PW 6 are chance witnesses whose presence at the place of occurrence was not natural.
>
> **23.** The defining attributes of a "chance witness" were explained by Mahajan, J., in *Puran* v. *State of Punjab*. It was held that such witnesses have the habit of appearing suddenly on the scene when something is happening and then disappearing after noticing the occurrence about which they are called later on to give evidence.
>
> **24.** In *Mousam Singha Roy* v. *State of W.B.*, this Court discarded the evidence of chance witnesses while observing that certain glaring contradictions/omissions in the evidence of PW 2 and PW 3 and the absence of their names in the FIR has been very lightly discarded by the courts below. Similarly, *Shankarlal* v. *State of Rajasthan* and *Jarnail Singh* v. *State of Punjab* are authorities for the proposition that deposition of a chance witness, whose presence at the place of incident remains doubtful, ought to be discarded. Therefore, for the reasons recorded by the High Court we hold that PW 5 and PW 6 were chance witnesses and their statements have been rightly discarded.

The Supreme Court in the case of **Jarnail Singh v. State of Punjab,** reported in **(2009) 9 SCC 719** has held as under :

> **22.** The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must

> adequately explain his presence at the place of occurrence (*Satbir* v. *Surat Singh*, *Harjinder Singh* v. *State of Punjab*, *Acharaparambath Pradeepan* v. *State of Kerala* and *Sarvesh Narain Shukla* v. *Daroga Singh*). Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (vide *Shankarlal* v. *State of Rajasthan*).

51. Thus, if a chance witness, fails to explain his presence on the place of occurrence and deposes like a parrot, as well as he does not disclose the fact to anybody including the police, then he should be discarded.

52. Accordingly, the evidence of all the above mentioned five witnesses shall be considered by keeping the law laid down by the Supreme Court in mind.

Kamlesh Adivasi :

53. Kamlesh Adivasi (P.W. 2) has claimed that he is an Auto Rickshaw driver. He was waiting for passengers outside platform no.2 of Vidisha Railway Station. At that time, the appellant/accused came there along with 6-7 years old girl and asked for lift. When he demanded Rs.50 for dropping him in Puranpura, then he informed that he does not have money and accordingly, this witness refused to take him to Puranpura. This witness claims that he had seen the face of the girl and he can identify her. The photograph of the girl was shown to this witness in the Court, who identified. He further claimed that the name of the appellant/accused is Ravi Toli. In cross-examination, this witness expressed his ignorance about the duration

of Moharram festival. He also admitted that he does not remember the date, month and year of the incident. He further admitted that the police had read out the statements to him. He also could not disclose that how many passengers had hired his auto. He also stated that he cannot name any of them. He further claimed that one Sunil from Dehat Police Station had enquired from him. He further claimed that somebody who had seen that appellant/accused talking to this witness had informed the police. He further admitted that the pamphlets were affixed on the walls of the Railway Station. He further claimed that after 10-12 days of the incident, he had come to know about the incident, but could not name the persons, who had given information to him.

54. From the evidence of this witness, it is clear that he is a tutored, unreliable and untrustworthy witness. He claims himself to be an Auto Rickshaw driver. He fairly conceded that he cannot say the date, month and year of the incident. He was also not in a position to point out that how many passengers were taken by him to their destinations. He was also not in a position to name any of the passenger. This witness does not claim any friendship with the appellant/accused, then how he can say that the name of the appellant/accused is Ravi Toli? Thus, it is clear that this witness is a tutored, untrustworthy and unreliable witness. Further, the dead body of the deceased was recovered on 25-10-2015, whereas this witness

was examined on 10-3-2016 i.e., after 5 months of the incident. When this witness was not in a position to name any of the passenger, then how he could remember the identity and name of the appellant/ accused with so much of certainty? It is not the case of the witness, that he voluntarily informed the police that the appellant/accused was seen by him in the company of the deceased. Accordingly, it is held that Kamlesh Advisai (P.W.2) is a tutored witness and is untrustworthy and unreliable witness. Further, this witness has not stated that appellant/accused was also accompanied by one more boy.

55. Furthermore, the police had not got the appellant/accused identified from this witness, and this witness has identified the appellant/accused in the dock. It is true that even if, the dock identification is not preceded by TIP by police, then also it is admissible as it is substantive evidence and can be relied upon, but such dock identification should be appreciated meticulously and only if the witness is found reliable, then the dock identification can be relied upon.

56. The Supreme Court in the case of **Prakash Vs. State of Karnataka** reported in **(2014) 12 SCC 133** has held as under :

> **13.2.** Secondly, why is it that no test identification parade was held to determine whether Prakash was actually the person who was seen by PW 6 Gangamma and by Ammajamma?
>
> **14.** Two types of pre-trial identification evidence are possible and they have been succinctly expressed in *Marcoulx* v. *R.* by the Supreme Court of Canada in the following words:

> "An important pre-trial step in many criminal prosecutions is the identification of the accused by the alleged victim. Apart from identification with the aid of a photograph or photographs, the identification procedure adopted by the police officers will normally be one of two types: (*i*) the show up—of a single suspect; (*ii*) the line-up presentation of the suspect as part of a group."

14.1. With reference to the first type of identification evidence, the Court quotes Prof. Glanville Williams from an eminently readable and instructive article in which he says:

> "… if the suspect objects [to an identification parade] the police will merely have him "identified" by showing him to the witness and asking the witness whether he is the man. Since this is obviously far more dangerous to the accused than taking part in a parade, the choice of a parade is almost always accepted."

14.2. With reference to the second type of identification evidence, Prof. Glanville Williams says:

> "Since identification in the dock is patently unsatisfactory, the police have developed the practice of holding identification parades before the trial as a means of fortifying a positive identification…. The main purpose of such a parade from the point of view of the police is to provide them with fairly strong evidence of identity on which to proceed with their investigations and to base an eventual prosecution. The advantage of identification parades from the point of view of the trial is that, by giving the witness a number of persons from amongst whom to choose, the prosecution seems to dispose once and for all the question whether the defendant in the dock is in fact the man seen and referred to by the witness."

14.3. A similar view was expressed by the Canadian Supreme Court in *Mezzo* v. *R.*

15. An identification parade is not mandatory nor can it be claimed by the suspect as a matter of right. The purpose of pre-trial identification evidence is to assure the investigating agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim later in court at the trial. If the suspect is a complete stranger to the witness or victim, then an identification parade is desirable unless the suspect has been seen by the witness or victim for some length of

time.10 In *Malkhansingh* v. *State of M.P.* it was held: (SCC pp. 751-52, para 7)

> "*7*. … The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact."

16. However, if the suspect is known to the witness or victim or they have been shown a photograph of the suspect or the suspect has been exposed to the public by the media no identification evidence is necessary. Even so, the failure of a victim or a witness to identify a suspect is not always fatal to the case of the prosecution. In *Visveswaran* v. *State* it was held: (SCC p. 78, para 11)

> "*11*. … The identification of the accused either in a test identification parade or in court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence."

The Supreme Court in the case of **Malkhan Singh Vs. State of M.P.** reported in **(2003) 5 SCC 746** has held as under ;

14. In *Ramanbhai Naranbhai* v. *State of Gujarat* after considering the earlier decisions this Court observed: (SCC p. 369, para 20)

> "*20*. It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and circumstances wherein the police is said to have given the names of the accused to the witnesses. Under these circumstances, identification of such a named accused only in the Court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in turn, relied upon an

> earlier decision of this Court in the case of *State (Delhi Admn.)* v. *V.C. Shukla* wherein also Fazal Ali, J., speaking for a three-Judge Bench made similar observations in this regard. In that case the evidence of the witness in the Court and his identifying the accused only in the Court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eyewitnesses. It, therefore, cannot be held, as tried to be submitted by learned counsel for the appellants, that in the absence of a test identification parade, the evidence of an eyewitness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case. It is, of course, true as submitted by learned counsel for the appellants that the later decisions of this Court in the case of *Rajesh Govind Jagesha* v. *State of Maharashtra* and *State of H.P.* v. *Lekh Raj* had not considered the aforesaid three-Judge Bench decisions of this Court. However, in our view, the ratio of the aforesaid later decisions of this Court cannot be said to be running counter to what is decided by the earlier three-Judge Bench judgments on the facts and circumstances examined by the Court while rendering these decisions. But even assuming as submitted by learned counsel for the appellants that the evidence of these two injured witnesses i.e. Bhogilal Ranchhodbhai and Karsanbhai Vallabhbhai identifying the accused in the Court may be treated to be of no assistance to the prosecution, the fact remains that these eyewitnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad daylight. They could not be said to be interested in roping in innocent persons by shielding the real accused who had assaulted them."

57. Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion, that Kamlesh Adivasi is

not a trustworthy witness and hence, he is disbelieved.

Balvir Yadav (P.W.3)

58. Balvir Yadav (P.W.3) also claims that he is an Auto Rickshaw Driver. His evidence is also to the effect that the appellant/accused had requested him to drop him in Puranpura, but since, this witness was having other passengers, therefore, did not drop him. In cross-examination, this witness admitted that he has not brought the Registration Book, Driving License. He further admitted that he has not brought his auto. He also could not point the date and month on which he had met with the appellant/accused. He also could not point out that how many passengers were dropped by him to their destinations. He also admitted that neither he is remembering their names and faces. Thus, it is clear that there is a doubt as to whether this witness is an Auto Rickshaw Driver or not? He was not having any driving license, R.C. Book and even on the date of his evidence, he did not come to Court on his own Auto. Further, he was not in a position to point out the names of the passengers as well as their descriptions. Further, he did not inform anybody that he had seen the appellant/accused in the company of the deceased. On the contrary, this witness has admitted that the police had approached him. This witness has not stated anything as to whether the appellant/accused was accompanied by one more boy or not? Thus, it is held that Balvir Yadav (P.W.3) is not a trustworthy witness and hence, he is

disbelieved.

Puja Kirar (P.W.4)

59. The third witness of last seen together is Puja Kirar (P.W.4). This witness has stated that in the month of Oct. 2015, the appellant had come to her house along with one girl. The appellant demanded a glass of water and expressed his apologies for not attending the last rites of mother of this witness. This witness enquired about the girl, then the appellant told that She is his daughter. This witness asked that since, the appellant/accused is an unmarried person, then how he can have a child, then he informed that he is in relationship with a lady and the girl has born out of said relationship. One more boy was accompanying the appellant/accused and the appellant by giving a currency note of Rs.10, asked the said boy to bring some thing for the girl. In reply, the said boy said that he is providing from the morning but still the appellant/accused said that he should bring something for her. Thereafter, they (all the three) went away. She could not identify the boy who was accompanying the appellant/ accused. She also identified that the photograph of the girl, Article 1 as that of the same girl who was with the appellant/accused. The girl was having an untidy pink coloured shawl with mud on it and was left by her on her cycle. On the next date She came to know that the dead body of a girl was recovered from the well. Later on, She came to know that she was the same girl, who had come with the appellant. She also handed

over the shawl to the police, which was left by the girl on her cycle. In cross-examination, She admitted that She had never visited the house of the appellant/accused. ***She further admitted, that when She reached the Court premises, then She had heard Archana Madam talking to somebody on phone that "both the girls have come and therefore, they should be immediately sent inside (On 11-3-2016 only two witnesses i.e., Puja Kirar (P.W.4) and Bhuri Bai Ahirwar (P.W.5) were examined, therefore, Archana Madam, after noticing Puja Kirar (P.W.4) and Bhuribai Ahirwar (P.W.5) must have stated that both the girls have arrived and therefore, they should be sent inside [must be Court room])". She further admitted that Archana Mandam is posted as Town Inspector in Police Station Dehat and police had read out the statement to her.*** She further admitted that the appellant/accused had never come to her house on earlier occasion.

60. From the plain reading of the evidence of this witness, it is clear that She was tutored by the police and prior to recording of her evidence, her statement was read over to her by Police. Further, when this witness had never gone to the house of the appellant/accused and the appellant/accused had never come to the house of this witness on any earlier occasion, then why the appellant/accused would go to the house of this witness along with the girl? Further, this witness has also not clarified that how the appellant/accused was known to this witness? Further, this witness has stated that when the

appellant/accused asked the another boy to bring something for the girl, then he replied that he is already providing to the girl since morning.

61. If the evidence of Puja Kirar (P.W. 4) is read along with Kamlesh Adivasi (P.W.2) and Balveer (P.W.3) then it is clear that both the Auto Rickshaw Drivers did not notice another boy with the appellant/accused, whereas according to Puja Kirar (P.W. 4), the another boy had said that the appellant/accused is already providing (must be eatables) to the girl from the morning. Thus, it appears that the prosecution story was that the said boy was also accompanying the appellant/accused since morning, but the police did not try to find out the whereabouts of the said boy, but the evidence of Puja Kirar (P.W. 4) runs contrary to the evidence of Kamlesh Adivasi (P.W.2) and Balveer (P.W.3) who did not notice any boy with the appellant/accused.

62. Thus, it is clear that Puja Kirar (P.W. 4) is a tutored and unreliable, untrustworthy witness. Accordingly, her evidence is rejected.

63. Manoj Pachouri (P.W. 8) has stated in his examination-in-chief, that he was told by Puja Kirar (P.W.4) that the appellant/accused had come to her colony and one girl was with him. Since, this Court has already disbelieved Puja Kirar (P.W.4) therefore, the evidence of this witness loses its effect, but even then in cross-examination, this

witness has admitted that he was not told by Puja Kirar (P.W.4) but was told by her father Kok Singh. Thus, the evidence of this witness has no value.

Sanjay @ Sanju Parihar (P.W.6 & 33)

64. This witness was examined twice i.e., on 20-4-2016 as P.W. 6 and 18-7-2018 as P.W. 33. The Trial Court by order dated 6-5-2019 observed that since, the evidence of Sanjay @ Sanju Parihar has been recorded twice, and therefore, the evidence recorded on 18-7-2018 shall not be read.

65. In the considered opinion of this Court, the above mentioned observations made by the Trial Court are not correct. It is true, that the evidence of Sanjay @ Sanju Parihar were recorded twice, but the defence Counsel can always take advantage of the facts which have come on record in the cross-examination done on 18-7-2018. Therefore, the order dated 6-5-2019 passed by the Trial Court is hereby **Set aside** and it is held that the evidence of Sanjay @ Sanju Parihar recorded on 18-7-2018 shall also be read.

66. This witness has stated that he was going to the house of his friend Sonu Panda. He was introduced by Sonu Panda with the appellant/accused. On the next day of Dussehra festival (Whereas all other witnesses are saying Moharram Festival), he met with appellant/accused. He was with one girl aged about 7 years, who was wearing black coloured slacks and T-shirt. He enquired from the

appellant/accused about his whereabouts. He also enquired from the girl about her identity then She said that the appellant/accused is her father. On the next day a pamphlet of a girl was shown by one Abhishek Sahu and he immediately identified that she was the same girl who was with the appellant/accused. In cross-examination, he denied the suggestion that on earlier occasion, his father had deposed against the appellant/accused.

67. This witness was once against examined as P.W. 33. His second evidence was recorded after 2 years of recording of his first evidence, but surprisingly, he has once again given the minutest and parrot like details of the incident.

68. This witness has stated that he had seen the girl in the company of the appellant/accused on 24-10-2015 and on the next date he had seen the pamphlet of the girl. However, according to Sanjeev Chouksey (P.W. 31), the investigating officer, he had sent a letter, Ex. P.40 to the Commissioner, Public Relation Secretariat for publication of the photograph of the girl in all the newspapers. However, he tried to clarify that he had already got the pamphlet, Ex. P.2 published prior to that.

69. This explanation given by Sanjeev Chouksey (P.W.31) is false *perse.*

70. It is clear from Letter dated 28-1-2015 (Ex. P.40), no pamphlet or draft was sent by this witness to the Commissioner, Public Relation

Secretariat. Further Sanjeev Chouksey (P.W. 31) has specifically stated that he had sent the letter, Ex. P.40 along with the photograph (Not pamphlet) of the deceased but if the contents of the pamphlet, Ex. P.2 and the newspaper report, Ex. P.41 are compared, then both are verbatim same. The contents of pamphlet, Ex. P.2 and the contents of the newspaper, Ex. P.42 are reproduced as under :

Photo

> उपरोक्त अज्ञात बलिका जिसकी उम्र करीबन 7–8 वर्ष के बीच है, चेहरा सांवबल, रंग सांवला, बाल काले बोय कट छोटे, उंचाई करीबन 3 फिट है। मृत एवं नग्न अवस्था में कुंआ मे दिनांक 25/10/2015 को मिली है। जिस पर थाना सिविल लाईन विदिशा में मर्ग कं 80/15 धारा 174 CRPC को पंजीबद्व कर जांच मे लिया गया है। अतः उक्त अज्ञात बलिका के संबंध मे जानकारी मिलने पर थाना सिविल लाईन विदिशा के फोन नं 07592–232826 एवं थाना प्रभारी के मो. 9755564645, 704913706 पर तत्काल सूचित करने की कृपा करें।

71. The news in the newspaper was published on 1-11-2015. As already pointed out, on comparison, both the items i.e., pamphlet, Ex. P.2 and Newspaper Ex. P.41 are verbatim same. Since, the Commissioner, Public Relation Secretariat had received the letter, Ex. P.40 on 29-10-2015, and the news in newspaper was published on 1-11-2015, therefore, it is clear that even the pamphlet was published/printed subsequent to 29-10-2015. If Sanjeev Chouksey (P.W. 31) had got the pamphlet printed on his own, then he should have disclosed the name of printer, but that was not done. Thus, it is clear that the pamphlet was printed subsequent to 29-10-2015, whereas Sanjay @ Sanju Parihar (P.W. 6), (P.W.33) has stated that on

the next day i.e., 25-11-2015, he had seen the pamphlet whereas the pamphlet was not in existence on 25-11-2015. Furthermore, Sanjay @ Sanju Parihar did not disclose to the police that he had seen the girl with the appellant/accused on 24-11-2015. Further the parrot like evidence of Sanjay @ Sanju Parihar (P.W.6), (P.W. 33) clearly shows that he was tutored otherwise, when his evidence for second time was recorded after 2 years of first evidence, then he could not have stated in a stereotyped manner. Further, the admission of Puja Kirar (P.W.4) that the police had read over the statement to her, clearly shows that the witnesses were being tutored by the police.

Kok Singh (P.W. 13)

72. This witness has stated that after coming back from his job, he was having bath. When he came out, he saw that the appellant/accused was talking to his daughter Puja (P.W. 4) and one small girl was with the appellant/accused and he had identified the girl from pamphlet Ex. P.2

73. This witness has not stated that one more boy was also with the appellant/accused and the minor girl. Secondly, Puja Kirar (P.W. 4) has not stated that during her conversation with appellant/accused, her father had also come out of the house. On the contrary, her evidence is that when She was talking to the appellant/accused, her father was having bath. Since, Puja Kirar (P.W. 4) is a tutored witness and has been disbelieved by the Court, then in view of

material variance in the evidence of Puja Kirar (P.W.4) and Kok Singh (P.W. 13), it is held that Kok Singh (P.W. 13) is not a reliable witness. Hence, his testimony is hereby rejected.

74. Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion that Kamlesh Adivasi (P.W. 2), Balveer Yadav (P.W.3), Puja Kirar (P.W.4), Sanjay @ Sanju Parihar (P.W.6), (P.W.33) are untrustworthy witnesses and cannot be relied upon. In order to shift the burden to the accused to prove his innocence or to explain as to when he parted with the deceased, the prosecution must prove the circumstance of Last Seen Together beyond reasonable doubt.

75. The Supreme Court in the case of **Ashok Vs. State of Maharashtra** reported in **(2015) 4 SCC 393** has held as under :

> **8.** The "last seen together" theory has been elucidated by this Court in *Trimukh Maroti Kirkan* v. *State of Maharashtra*, in the following words: (SCC p. 694, para 22)
>
> "*22*. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof onto the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.*–*"

9. In *Ram Gulam Chaudhary* v. *State of Bihar*, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor was his body found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy.

10. In *Nika Ram* v. *State of H.P.*, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

11. The latest judgment on the point is *Kanhaiya Lal* v. *State of Rajasthan*. In this case this Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.

12. From the study of abovestated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, etc. non-explanation of death of the deceased, may lead to a presumption of guilt.

The Supreme Court in the case of **Digamber Vaishnav Vs. State of Chhatisgarh** reported in **(2019) 4 SCC 522** has held as under :

40.....However, if the last seen evidence does not inspire

> the confidence or is not trustworthy, there can be no conviction. To constitute the last seen together factor as an incriminating circumstance, there must be close proximity between the time of seeing and recovery of dead body.
>
> **41.** In *Arjun Marik* v. *State of Bihar*, it has been held as under: (SCC p. 385, para 31)
>
> "*31*. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded."
>
> **42.** In *Kanhaiya Lal* v. *State of Rajasthan*, the Court has reiterated that the last seen together does not by itself lead to the inference that it was the accused who committed the crime. It is held thus: (SCC p. 719, para 12)
>
> "*12*. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant."

76. Since, the prosecution has failed to discharge its burden to prove the circumstance of last seen together, therefore, the burden does not shift to the appellant/accused to explain the circumstance.

Whether Slacks on which the DNA of the appellant/accused was found, was really recovered on 29-11-2015 and was kept in a secured and sealed manner or not?

77. The Dead body of the girl was recovered on 25-10-2015, whereas it is the prosecution case, that one black coloured slacks, 2 coins of Rupees One, one steel ring, blood stained earth and plain

earth were seized vide seizure memo Ex. P. 11 on 29-10-2015 in an open condition from a distance of about 100 meters from the well.

78. When the dead body of a minor girl was already recovered from the well on 25-10-2015, then why the Investigating Officer, did not search for evidence in the surrounding area? It is submitted by Shri Rajesh Shukla that it appears that the investigating officer, tried to collect evidence only after the post-mortem report was received from which it became clear that the death was homicidal. However, Shri Shukla could not point out the date on which the post-mortem report was received by the concerning police station. However, in F.I.R., Ex.P. 43, which was registered on 1-11-2015, it is mentioned that today i.e., 1-11-2015, the post-mortem report was received. Further, Sanjeev Chouksey (P.W. 31) has stated in his evidence that he had received the post-mortem report on 1-11-2015. Thus, the submission made by Shri Rajesh Shukla that the investigating officer, must have searched the nearby areas on 29-10-2015 after receiving the post-mortem report is false and baseless. The prosecution is completely silent on the issue as to what prompted the investigating officer to search out the surrounding areas of the well on 29-10-2015. Further, when a question was asked to Shri Rajesh Shukla, Dy. Advocate General, as to why the investigating officer, did not look for incriminating articles in the surrounding areas, then it was submitted by Shri Shukla that since, lot of persons had gathered

there, therefore, the investigating officer could not search for the evidence in the surrounding areas of the well. The answer given by Shri Shukla is contrary to record. In crime detail form, Ex. P.5, Spot map prepared on 25-10-2015 is also annexed and in the said spot map, it is mentioned that on the eastern side of the well, a warehouse is situated at a distance of 500 meters. In the spot map, some more buildings have been shown. Thus, it is clear that the investigating officer had searched the area upto 500 meters, whereas the slacks is alleged to have been recovered on 29-10-2015 from a distance of 100 meters away from the well. When the investigating officer had already searched the surrounding area on 25-10-2015 upto the distance of 500 meters, then how he could not notice the slacks, specially when it was lying in an open condition in an open field which was easily detectable from naked eye. Further, a temple is also situated near the well, therefore, the worshipers must be visiting the temple every day. Thus, it is clear that the spot from which the slacks was allegedly seized on 29-10-2015 was in a close vicinity of the temple and there is no evidence on record to show that the owner of the field, i.e., Renu Maheshwari had never gone to her fields. Further, a T-Shirt of the deceased was also allegedly shown to have been recovered on 7-11-2015 from the same well at the instance of the appellant/accused. When the dead body of the deceased was recovered, there was water in the well which is not only specifically

mentioned in Naksha Panchama, Ex. P.6, but is also clear from photograph Article A1, in which a dead boy of a girl is seen floating in the well. But when T-shirt of the deceased was allegedly recovered on 7-11-2015, the well was completely dry, which is evident from recovery memo Ex. P.26. When Shri Rajesh Shukla, Dy. Advocate General was asked to clarify that when the well was having water on 25-10-2015, then how it became dry on 7-11-2015, then it was submitted by Shri Shukla that generally in rural area, the owner of the well drain out the entire water from the well if any dead body is found. Therefore, it is possible that the owner of the well may have drained out the water from the well. Although there is no such explanation available on record, and the owner of the well was not examined by the prosecution to prove the above mentioned explanation, but even for the sake of arguments, if the contention of the Counsel for the State is accepted, then it is clear that the State is also admitting that after the recovery of dead body of the deceased on 25-10-2015, there was movement in the area as the owner of the well must have drain out the water from the well. Thus, it is clear that when there is a temple at a nearby place from well and the investigating officer had already searched the surrounding area upto 500 meters, then it is not possible that the investigating officer could have missed the slacks on 25-10-2015.

79. Further, it is clear from photographs Article 16- Article 19, a

temple is situated near the well and the slacks was recovered from an open field behind the temple. The field belongs to one Malkhan as per Spot Panchnama Ex. P.59 but he has not been examined by the prosecution. Even Renu Maheshwari and Malkhan were not cited as witnesses.

80. Further, from another spot map prepared on 29-10-2015, Ex. P.56, it is clear that the warehouse is situated on the eastern side of the well whereas the slacks was seized from an area which is on Northern-Eastern side of the well. However, from the *Nazri Naksha*, Ex. P.59 prepared by Tahsildar, it is clear that the slacks was seized from field which is on eastern side of the well. Therefore, by no stretch of imagination, it can be said that the investigating officer, could have missed the slacks on 25-10-2015. Further, the slacks was found from a place which is at a close vicinity of the temple. Therefore, the seizure of slacks on 29-10-2015 appears to be an ante-dated and ante-timed document, forged with an intention to create false evidence.

81. Further, this Court has seen the videography done on 7-11-2015 and is part of Folder No. 3. From the Video, it is clear that the appellant/accused with Sanjeev Chouksey (P.W. 31) along with 3-5 persons were standing in the mid of the road, and thereafter, somebody gives instruction by saying “Ready”. Thereafter, the appellant/accused pointed out towards a Country Made Liquor Shop

which is situated on the just opposite side of the road where the appellant/accused and Sanjeev Chouksey (P.W.31) and other persons were standing. Thereafter, the appellant/accused was directed to take to the place where he committed offence. Thereafter, all of the them start walking and after covering a distance of approx. 40-50 meters, they take a *Kachha Road.* This *Kaccha Road* is motorable and fresh tyre marks of a four wheeler are clearly visible. Then again the appellant/accused walked for another 50-70 meters and took a slight turn towards a trail (पगडंडी) and stops at one place on the trail itself and points out the place where the offence was allegedly committed and slacks was left. As already pointed out, slacks was shown to be recovered on 29-10-2015 from an open place. The place pointed out by the appellant/accused is not only an open place, but in fact it is a trail (पगडंडी). The fresh tyre marks on the *Kachha Road* of a four wheeler clearly indicates, that one four wheeler had already gone to the place of so called incident. However, it is not known that whether those tyre marks were that of police vehicle or not? However, as the police was trying to create evidence, therefore, the possibility of tyre marks of police vehicle cannot be ruled out. Furthermore, while walking Sanjeev Chouksey (P.W. 31) had also instructed someone to move away as if Sanjeev Chouksey (P.W. 31) was aware of the fact that the appellant/accused would go in the said direction. Be that as it may.

82. In the videography, the appellant/accused disclosed to the police party, that some bleeding had taken place from the private part and from nose of the deceased. Her stool had also come out. Thereafter, he lifted the dead body of the deceased on his shoulder and his shirt got some stains also. Then the appellant/accused threw the dead body in the well along with T-Shirt. It is not out of place to mention here that no stains whatsoever, were found on the shirt and no DNA was extracted. Thus, the whole story was nothing but a concocted story created with a solitary intention to create evidence.

83. However, the effect of this aspect would be considered after considering the other aspects of the matter.

84. According to the prosecution case, the appellant/accused was arrested on 06-11-2015 at 22:45.

85. Kiran @ Bhoori @ Rihana (P.W. 23) had identified Slacks, T-Shirt, Shawl and two photographs of the deceased on 8-11-2015, vide identification memo Ex. P.10. In the seizure memo, Ex. P.11, it is mentioned that slacks, two coins of Rs. One, One Steel ring were sealed on the spot, but in the Identification Memo, Ex. P.10, it is nowhere mentioned by Naib-Tahsildar, that the slacks, T-shirt, Shawl were received in sealed condition. Dhirendra Gupta (P.W.16) had conducted the Identification of the cloths of the deceased. In his examination-in-chief, this witness has claimed that the cloths were received in sealed condition, however, in para 8 of his cross-

examination, this witness has categorically admitted that the envelops were already in open condition. Thus, it is clear that the cloths were sent to the Naib-Tahsildar in an open condition, therefore, he has not mentioned in the identification memo that the articles were received in sealed condition.

86. Another aspect of the matter is that although in the identification memo, Ex. P.10, it is mentioned by Dhirendra Singh, Naib-Tahsildar that the articles were returned back in a sealed condition, but the specimen of seal is not affixed on the identification memo. Further, Dhirendra Singh (P.W. 16) has not stated in his evidence, that he had returned the cloths in a sealed condition.

87. Another important aspect of the matter is that by memo dated 23-11-2015, Ex. P.45, the Superintendent of Police, Sagar had sent articles to F.S.L., Sagar for conducting D.N.A. Test. In this memo itself, the details of the articles and the details of the seal affixed on them is also mentioned. At serial no.1, 2 and 3, i.e.,, the anal slide, vaginal slide and uterus of the deceased were sent with the seal of Hospital. Similarly, at serial no. 10 and 11, the semen slide and blood sample of the appellant/accused were sent with the seal of hospital. But the black slacks, Blood stained earth, T-shirt of the deceased, black kurta, blank pant and underwear of the appellant/accused were sent with the seal of Superintendent of Police, Vidisha. If Naib-Tahsildar, after conducting Identification memo, had sealed the

articles, then the articles should have contained the seal of the office of Naib-Tahsildar and not of the office of Superintendent of Police, Vidisha. Thus, it is clear that Slacks was neither sent in a sealed condition to the Naib-Tahsildar nor it was sealed by the Naib-Tahsildar after conducting the Identification and it is clear that the cloths were sealed for the first time on 23-11-2015, when they were sent to F.S.L.,Sagar.

88. Further, the prosecution has not produced any record of the police station to prove that these articles were kept in a proper and safe manner. The prosecution is completely silent regarding the storage of the slacks. The prosecution has not produced the register of Malkhana of the concerning Police Station to show that on what date, the Slacks was received in Malkhana for the first time and on what date, it was taken out from Malkhana for sending the same to the office of Naib-Tahsildar and on what date, the slacks was received back from the office of Naib-Tahsildar and again on what date, they were sent to F.S.L. Sagar.

89. Further, Sanjeev Chouksey (P.W. 31) has stated in para 24 of his cross-examination, that he had shown the photographs of the cloths of the deceased to Kiran @ Bhoori @ Rihana (P.W. 23) prior to holding of Test Identification Parade. Kiran @ Bhoori @ Rihana (P.W. 23) has also stated that She had seen the photographs of the cloths of the deceased in the police station, but Rukmani (P.W. 22) in

her examination-in-chief itself, has stated that when She, Kiran @ Bhoori @ Rihana (P.W. 23) and her mother went to Police Station then the cloths of the deceased were shown to Kiran @ Bhoori @ Rihana (P.W. 23). She further clarified that after seeing the cloths, Kiran @ Bhoori @ Rihana (P.W. 23) had identified the dead body. She further clarified on her own, that the cloths of the deceased were Black Slacks, One Kurti and Shawl. This witness has not stated that the photograph of Black Slacks was shown to Kiran @ Bhoori @ Rihana (P.W. 23). As admitted by Sanjeev Chouksey (P.W. 31) that the photograph of the cloths of the deceased were already shown to Kiran @ Bhoori @ Rihana (P.W. 23) prior to holding of Identification, thus, it is clear that the black slacks was shown to Kiran @ Bhoori @ Rihana (P.W. 23) either on 7-11-2015 or in the morning of 8-11-2015. When Kiran @ Bhoori @ Rihana (P.W. 23) was shown slacks in the police station, then it is clear that even on 7-11-2015 or 8-11-2015, the black slacks was in an open condition. Thus, it is clear that black slacks came into picture on 7-11-2015 or 8-11-2015.

90. Another important aspect of the matter is that on 7-11-2015, the appellant/accused was taken by the police to the spot, and a Panchnama, Ex. P.21 was prepared mentioning that the appellant/accused had pointed out the place where he had committed rape on the deceased as well as the place where he had removed the

slacks of the deceased and two coins of Rs.1/- and steel ring were left. Mohit Kashyap (P.W. 17) is one of the witness of this Panchnama. In para 21, this witness has stated that appellant/accused had taken to a place where coins and steel ring were lying and the appellant/accused picked them up and handed over to the police. Thereafter, on his own, this witness further stated that black slacks was also lying there and the appellant/accused had picked it up. Thus, it is clear from the evidence of this witness that on 7-11-2015, black slacks was lying on the spot which was picked up by the appellant/accused and was handed over to the police.

91. It is submitted by Shri Rajesh Shukla, that since, Mohit Kashyap (P.W. 17) is not a witness of seizure of slacks on 29-10-2015, therefore, his above mentioned statement in his cross-examination, is liable to be discarded.

92. The contention of the Counsel for the State cannot be accepted. Cross-examination is the only and important tool in the hands of the accused to dislodge the prosecution case, and much importance is to be given to cross-examination. Mohit Kashyap (P.W. 17) is a witness of Panchanama, Ex. P.21 prepared on 7-11-2015 by which the appellant/accused was asked to point out the place where he had committed the offence. Thus, it is clear that on 7-11-2015, Mohit Kashyap (P.W. 17) had gone to the spot along with the police and appellant/accused. Once, he on his own has claimed that slacks was

given by the appellant/accused himself on 7-11-2015 to the police and this witness was not declared hostile by the Public Prosecutor on this aspect, then it is binding on the prosecution. Section 154 of Evidence Act does not limit the application of the said provision, only to the stage of Examination-in-chief and it applies to all the three stages i.e., Examination-in-chief, Cross-examination and Re-Examination. The Supreme Court in the case of **Dahyabhai Chhaganbhai Thakkar v. State of Gujarat,** reported in **(1964) 7 SCR 361 : AIR 1954 SC 1563** has held as under:

> **8.** Now we come to the merits of the case. Ordinarily this Court in exercise of its jurisdiction under Article 136 of the Constitution accepts the findings of fact arrived at by the High Court. But, after having gone through the judgments of the learned Additional Sessions Judge and the High Court, we are satisfied that this is an exceptional case to depart from the said practice. The learned Additional Sessions Judge rejected the evidence of the prosecution witnesses on the ground that their version was a subsequent development designed to help the accused. The learned Judges of the High Court accepted their evidence for two different reasons. Raju, J., held that a court can permit a party calling a witness to put questions under Section 154 of the Evidence Act only in the examination in chief of the witness; for this conclusion, he has given the following two reasons: (*1*) the wording of Sections 137 and 154 of the Evidence Act indicates it, and (*2*) if he is permitted to put questions in the nature of cross-examination at the stage of reexamination by the adverse party, the adverse party will have no chance of cross-examining the witness with reference to the answers given to the said questions. Neither of the two reasons, in our view, is tenable. Section 137 of the Evidence Act gives only the three stages in the examination of a witness, namely, examination-in-chief, cross-examination and re-examination. This is a routine sequence in the examination of a witness. This has no relevance to the question when a party calling a witness can

be permitted to put to him questions under Section 154 of the Evidence Act: that is governed by the provisions of Section 154 of the said Act, which confers a discretionary power on the court to permit a person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Section 154 does not in terms, or by necessary implication confine the exercise of the power by the court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief is to make it ineffective in practice. A clever witness in his examination in-chief faithfully conforms to what he stated earlier to the police or in the committing court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, we do not see why the court cannot, during the course of his cross-examination, permit the person calling him as a witness to put questions to him which might be put in cross-examination by the adverse party. To confine the operation of Section 154 of the Evidence Act to a particular stage in the examination of a witness is to read words in the section which are not there. We cannot also agree with the High Court that if a party calling a witness is permitted to put such questions to the witness after he has been cross-examined by the adverse party, the adverse party will not have any opportunity to further cross-examine the witness on the answers elicited by putting such questions. In such an event the court certainly, in exercise of its discretion, will permit the adverse party to cross-examine the witness on the answers elicited by such questions. The court, therefore, can permit a person, who calls a witness, to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it takes care to give an opportunity to the accused to cross-examine him on the answers elicited which do not find place in the examination-in-chief.

The Supreme Court in the case of **R.K. Dey Vs. State of Orissa** reported in **AIR 1977 SC 170** has held as under :

10. Before proceeding further we might like to state the law on the subject at this stage. Section 154 of the Evidence Act

is the only provision under which a party calling its own witnesses may claim permission of the Court to cross-examine them. The section runs thus :

"The Court may, in its discretion permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party."

The section confers a judicial discretion on the Court to permit cross-examination and does not contain any conditions or principles which may govern the exercise of such discretion. It is, however well settled that the discretion must be judiciously and properly exercised in the interests of justice. The law on the subject is well settled that a party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the Court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement which he made before an earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. One of the glaring instances in which this Court substained the order of the Court in allowing cross-examination was where the witness resiles from a very material statement regarding the manner in which the accused committed the offence. In Dahyabhai v. State of Gujarat, (1964) 7 SCR 361 at pp. 368, 369, 370 = (AIR 1964 SC 1563 at p. 1569) this Court made the following observations :

"Section 154 does not in terms, or by necessary implication confine the exercise of the power by the Court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the Court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief is to make it ineffective in practice. A clever witness in his examination-in-chief faithfully conforms to what he stated earlier to the police or in the committing court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, we do not see why the Court cannot, during the course of his cross-examination, permit the person calling him as a witness to put questions to him which might be put in cross-examination by the adverse party."

"Broadly stated, the position in the present case is that the witnesses in their statements before the police attributed a

> clear intention to the accused to commit murder but before the Court they stated that the accused was insane and, therefore, he committed the murder."
> A perusal of the above observations will clearly indicate that the permission to cross-examine was upheld by this Court because the witnesses had categorically stated before the police that the accused had committed the murder but resiled from that statement and made out a new case in evidence before the Court that the accused was insane. Thus it is clear that before a witness can be declared hostile and the party examining the witness is allowed to cross-examine him, there must be some material to show that the witness is not speaking the truth or has exhibited an element of hostility to the party for whom he is deposing. Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross-examine its own witnesses cannot be allowed. In other words a witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the Court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth. In order to ascertain the intention of the witness or his conduct, the Judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which he gave before the previous authorities. The Court must, however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention.

93. Thus, the Court can grant permission to declare a witness hostile, if it comes to a conclusion that either the witness is not speaking the truth or has exhibited hostility to the party who has called him. The basic concept of cross-examination is to elicit truth from the mouth of the witness and that is why, under Section 154 of Evidence Act, the Court has a discretion to declare any witness as

hostile when it comes to a conclusion that the witness is not telling the truth. In the present case, the prosecution itself did not make a prayer for declaring Mohit Kashyap (P.W. 17) hostile on the ground that he is not speaking the truth, but not having done so, the prosecution cannot say, that the evidence of Mohit Kashyap (P.W. 17) that black slacks was handed over by the appellant/accused on 7-11-2015, by picking up from the spot should be ignored. On the contrary, the said voluntary disclosure of fact by Mohit Kashyap (P.W. 17) in his cross examination, is nothing short of truth and that is why, black slacks did not come into picture prior to 7-11-2015 or 8-11-2015. Further, if the videography done by the police on 7-11-2015 is seen, then it is clear that the appellant/accused is not seen picking up and handing over the slacks, 2 coins of 1 Rupee and Steel Ring, but if the videography is seen in the light of the evidence of Mohit Kashyap (P.W. 17) as well as the fresh tyre marks of four wheeler on *Kachha Road,* then it is clear that the videography which is contained in Folder 3 is nothing but a film whose story was already written and was filmed under the direction of Sanjeev Chouksey (P.W. 31) and not on the disclosure by the appellant/accused.

94. Shubh Narayan Singh Solanki (P.W. 34) has also not stated as to what prompted him to search for the evidence in the surrounding areas of the well. He has not explained that when the dead body was recovered on 25-10-2015, then why he did not search for the

evidence. Further, slacks has been seized from an open space. It is not the case of the prosecution that the slacks was kept in a hidden condition and was not visible or accessible to general public including the owner of the field. As per Spot Panchnama, Ex. P.58, the slacks was seized from the field of one Renu Maheshwari, but She has not been examined by the prosecution. The Supreme Court in the case of **Anter Singh v. State of Rajasthan,** reported in **(2004) 10 SCC 657,** has held as under :

> 10..... Though recovery from an open space may not always render it vulnerable, it would depend upon the factual situation in a given case and the truthfulness or otherwise of such claim. In the case at hand the recovery was made from an open space visible from the place where the dead body was lying and at a close proximity. It is not clear from the evidence that it was hidden in such a way so as making it difficult to be noticed. The evidence tendered is totally silent as to in whose custody were the bullets, empty cartridges and the pistol.

95. As already pointed out that according to the prosecution itself, the slacks, 2 coins of Rs.1/-, one steel ring were seized on 29-10-2015. However, from the videography, it is clear that they were shown to have been recovered from an open place which is a Trail, having easy access to general public and since it is a Trail, then it cannot be said that it could not have been noticed by any of the bypasser. Further, in the videography contained in folder “3”, it is visible that when the police party was going to the spot with the appellant/accused, then one person had crossed them. Thus, it is

clear that the trail was being used by local residents. The dead body was recovered on 25-10-2015, whereas the slacks was shown to have been recovered on 29-10-2015 i.e., after 4 days, therefore, this Court is of the considered opinion, that in fact the recovery of slacks on 29-10-2015 was nothing but a story developed by the police. Further, when the police was getting every proceeding videographed, then why the recovery of slacks on 29-10-2015 was not videographed by the police ?

96. There is another aspect of the matter. Why the appellant/accused would leave slacks on the spot and would throw the T-Shirt of the deceased in the well. If he really wanted to get rid of cloths of the deceased, then he would have thrown the slacks also.

97. From the appreciation of the above mentioned aspects of the matter, it is clear that on 7-11-2015, the black slacks was shown to Kiran @ Bhoori @ Rihana (P.W. 23) in the police station (Kiran @ Bhoori @ Rihana (P.W. 23) in her police statement recorded on 7-11-2015, Ex.D.3 has stated that she has identified the cloths in the police station). Thus, it is clear that on 7-11-2015, the black slacks was in open condition. Thereafter, it was sent to the office of Naib-Tahsildar, but there is no mention in the Identification Memo Ex. P.10 that cloths were received in sealed condition and in view of specific admission by Dhirendra Gupta (P.W. 16) that the envelops were open, it is clear that the cloths including slacks were sent to the

office of Naib-Tahsildar in an open condition. Further, the Naib-Tahsildar in Identification Memo Ex. P.10 has mentioned that the cloths were sealed after identification, but did not affix the specimen of seal and further, Dhirendra Gupta (P.W. 16) has not stated in his evidence that cloths were sealed by him after the identification. Further, it is clear from Memo dated 23-11-2015, Ex. P.21, that the slacks was sent to F.S.L., Sagar with the seal of Superintendent of Police, Vidisha, whereas if the slacks was sealed by the Naib-Tahsildar after conducting Identification, then the cloths /slacks should be containing the seal of office of Naib-Tahsiddar and not that of Superintendent of Police, Vidisha. Thus, it is clear that the slacks remained in open condition till 23-11-2015. further, the prosecution has not filed any document to show as to whether the slacks was kept in safe custody and has also not filed the Malkhana Register to prove the safe custody of the slacks. Further, Mohit Kashyap (P.W. 17) has claimed that slacks was handed over by the appellant/accused on 7-11-2015. Further, Dhaniram Pal (P.W. 14) has stated that he is working on the post of Peon, in the Tahsil Office. Kiran @ Bhoori @ Rihana (P.W.23) had identified one Jeans Pant, Slacks, T-Shrit, Shawl and two photographs of the deceased. He has not stated that those articles were in a sealed condition. Further, he has also introduced one Jeans Pant in Identification Proceedings which is not the case of the prosecution. Thus, it is clear that although the

prosecution has come up with a case that slacks was already recovered on 29-10-2015, but in fact, it appears that the said stand of the prosecution is false and in fact the story of seizure of slacks on 29-10-2015 was concocted and in fact the evidence was created by the police after taking the appellant/accused into custody.

98. Further, Bhuribai Ahirwar (P.W.5) has identified the Slacks, Article A2 as blue jeans pant which was recovered from the well along with the dead body. Thus, it is clear that Bhuribai Ahirwar (P.W. 5) is not a reliable and trustworthy witness.

99. Accordingly, it is held that Black slacks was not recovered on 29-10-2015, but in fact the seizure of the same is an ante-dated and ante-timed act of the investigating officer and, hence, the circumstance of recovery of slacks on 29-10-2015 is hereby rejected.

Whether the Identification of Slacks by Kiran @ Bhoori @ Rihana (P.W. 23) is reliable?

100. Although this Court has already held that Black Slacks was not seized on 29-10-2015, but it is an ante-dated and ante-timed act of the investigating officer, but still this Court thinks it appropriate to consider the circumstance of identification of slacks by Kiran @ Bhoori @ Rihana (P.W.23).

101. Kiran @ Bhoori @ Rihana (P.W. 23) has stated that She had already seen and identified the cloths of the deceased in the police station and thereafter, she had identified the same in the

Identification conducted by the S.D.M. (In fact it was conducted by Naib-Tahsildar). Sanjeev Chousksey (P.W. 31) has also admitted that he had shown the cloths of the deceased to Kiran @ Bhoori @ Rihana (P.W. 23) prior to holding of Test Identification by the Executive Officer. Thus, it is clear that slacks was already shown to Kiran @ Bhoori @ Rihana (P.W. 23) prior to holding of Test Identification on 8-11-2015. Under these circumstances, this Court is of the considered opinion, that the identification of the Slacks by Kiran @ Bhoori @ Rihana (P.W. 23) loses its effect. To ensure that identification of slacks is an incriminating circumstance against the accused, the prosecution must adduce evidence to prove that either the accused or the article was never shown to the witness after his arrest or seizure. Once, it is established that the article was already shown to the witness prior to holding of Test Identification Parade, then it is alone sufficient to discard the identification of slacks by Kiran @ Bhoori @ Rihana (P.W. 23) in Court. The Supreme Court in the case of **N.J. Suraj v. State** reported in **(2004) 11 SCC 346** has held as under :

> 3.....The appellant was put to the test identification parade where these witnesses are said to have identified the appellant, but in their evidence they admitted that the photograph of the accused was shown to them before holding the test identification parade. In view of the fact that the photograph of the accused was shown to the witnesses, their identification in the test identification parade becomes meaningless and no reliance could be placed thereon.....

The Supreme Court in the case of **Kirshan Kumar Malik Vs. State of Haryana** reported in **(2011) 7 SCC 130** has held as under :

> 26....Admittedly, she was already shown the appellant and the other accused at the police station, after they were arrested. Thus, her dock identification in the court had become meaningless.....

102. Accordingly, the identification of cloths by Kiran @ Bhoori @ Rihana (P.W. 23) is meaningless and cannot be considered for any purpose. Therefore, the identification of Slacks by Kiran @ Bhoori @ Rihana (P.W. 23) in the Court is hereby discarded and no reliance can be placed on such identification.

Presence of DNA profile of the appellant/accused on slacks

103. It is the case of the prosecution that as per D.N.A. Test Report, Ex. P.49, the D.N.A. Profile of the appellant/accused was not found on Anal Slide, Vaginal Slide, Blood stained earth, T-shirt and Kurta of appellant/accused, but DNA profile of the appellant/accused was found on slacks and the pant of the appellant/accused. According to the prosecution story, the slacks was of the deceased. In the seizure memo, Ex. P.11, there is no mention that any blood stains or semen stains were found on the slacks. According to the prosecution, blood stained earth was also seized from the place, from where the slacks was also seized. According to the prosecution, the slacks was of the deceased, therefore, the same should also contain the blood of the deceased, if any. However, in the D.N.A. Test Report, Ex. P.49, only

the DNA profile of the appellant/accused was found whereas Multiple DNA profiles should have been found, i.e., of the deceased and the appellant/accused. Further, neither in the DNA test report, Ex. P.49 nor Dr. Pankaj Shrivastava P.W.32 has clarified the source from which the DNA profile of the appellant/accused was obtained from the slacks. As already pointed out, in Seizure Memo Ex. P.11, no blood stains or semen stains on slacks were mentioned.

104. It is submitted by Shri Rajesh Shukla, that since, the appellant/accused must have come in contact with slacks of the deceased, therefore, due to rubbing of skin of the appellant/accused with the slacks, there is a possibility that the DNA of the appellant/accused must have come on the slacks.

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

106. If the DNA of the appellant/accused can transmit to slacks on account of rubbing of his skin, then the DNA of the deceased should also have been found on the slacks, as She was wearing the slacks and there was more rubbing of skin of the deceased with her slacks. As already pointed out, only the DNA of the appellant/accused has been found on the slacks and the DNA of the deceased was not found, or multiple DNA Profiles were not found on the slacks. Therefore, the contention of the Counsel for the State that the DNA of the appellant/accused could have been transmitted to the slacks of the deceased on account of rubbing of his skin is far fetched

argument and cannot be accepted.

107. On the contrary, this Court has already come to a conclusion that the seizure of slacks on 29-10-2015 is untrustworthy. The appellant was arrested on 6-11-2015 and the slacks came into picture thereafter, when it was shown to Kiran @ Bhoori @ Rihana (P.W. 23), therefore, it is possible that in order to create a false evidence, the blood or the semen of the appellant/accused may have been put on the slacks, so that the DNA of the appellant can be extracted. It is really surprising, that the DNA of the appellant/accused was not found in the vaginal slide as well as anal slide of the deceased. Further Dr. Pankaj Shrivastava (P.W.32) has stated that he had not conducted DNA test of uterus which was received subsequently, because it was a case of murder, therefore there was no need or importance of conducting DNA test of Uterus. It is really shocking that on one hand Dr. Pankaj Shrivastava (P.W. 32) was searching for presence of DNA of the accused on vaginal slide of the deceased and on the other hand he did not conduct DNA test of Uterus specifically when there was a big tear in the uterus. If the deceased was raped which had resulted in rupture or tear in uterus, then it is clear that foreign body i.e., penis must have touched or rubbed with the uterus and the semen must have reached upto uterus, then it cannot be said that there was no need to conduct DNA test of the uterus. Thus, it is clear that the investigating officer, namely Sanjeev Chouksey (P.W.

31) and Dr. Pankaj Shrivastava (P.W. 32) were aware of the fact that the source of DNA is present in the slacks only and not on any other internal part of the body of the deceased.

108. At this stage, by referring to identification form, Ex. P.33, it is submitted by the Counsel for the appellant/accused, that 6 ml of blood of the appellant/accused was taken by the Doctor for the purposes of DNA Test. By referring to Modi's Jurisprudence, it is submitted that for conducting DNA test, only 2 ml blood sample is sufficient. Under heading **COLLECTION AND PRESERVATION OF BIOLOGICAL MATERIAL FOR LABORATORY EXAMINATION,** it is mentioned as under :

> Blood should be collected by Medical Officer and the following are the guidelines for collection and preservation :
>
> (a) Ante-mortem Collection :
>
> > 1) About 2 ml of blood taken in a sterile 5 ml injection vial (properly sealed and labelled) containing about 2 ml of 5% queous solution of sodium citrate containing 0.2% w/v of formaldehyde (or o.5% w/v of formalin solution).

109. It is submitted that since, 6 ml of blood of the appellant/accused was taken in two different vials containing 3 ml each, and there is nothing on record to show that what happened to another vial containing 3 ml of blood of the appellant/accused, then it is possible, that the investigating officer, must have sprinkled the

blood of the appellant/accused on the black Slacks and the pant of the appellant/accused, so that DNA profile of the appellant/accused can be extracted.

110. Considered the defence taken by the Counsel for the appellant/accused.

111. The deceased was subjected to rape, therefore, her slacks should have been stained with the blood of the deceased also. Multiple DNA profiles have not been detected on Black Slacks. Only the DNA profile of the appellant/accused has been detected on Black Slacks. If the contention of the Counsel for the State that the DNA of the appellant/accused could have transmitted on Black Slacks on account of rubbing of skin of the appellant/accused, even then the DNA of the deceased should have been found on account of rubbing of her skin. In the considered opinion of this Court, the presence of DNA profile of the appellant/accused alone on the Black Slacks supports the apprehension expressed by the Counsel for the appellant/accused, that since, the Black Slacks was in fact brought into picture by the prosecution on 7-11-2015 and thereafter, the Black Slacks remained in unsealed/open condition till 23-11-2015, therefore, the investigating officer had every opportunity to manipulate the evidence.

112. Thus, it is held that the circumstance of presence of DNA of the appellant/accused on Black Slacks, cannot be said to be

trustworthy and hence, it is rejected.

Whether any blood stains on the pant of the appellant/accused were there at the time of its seizure?

113. In the seizure memo, Ex. P16, by which pant of the accused, Article 24 was seized, it is not mentioned that any blood stains were there. A specific question was put to Sanjeev Chouksey (P.W. 31) in this regard and in para 40 of his cross-examination, he has specifically admitted that in the seizure memo Ex. P.16, it is not mentioned that any blood stains were seen on the pant. He further admitted that had there been any blood stains on the pant, then he would have certainly mentioned the same in the seizure memo. However, he tried to explain that since, the blood stains were not visible, therefore, the pant was sent for examination. However, no request was ever made by the prosecution to the F.S.L. Sagar to find out as to whether any blood stains were found on the pant of the accused, Article 24 or not? Further, Dr. Pankaj Shrivastava (P.W. 32) has not disclosed the source from which the DNA of the appellant/ accused was extracted. Thus, the contention of the Counsel for the appellant/accused that it appears that the additional blood of the accused which was taken by the prosecution, must have been utilized for sprinkling the same on the slacks and pant, Article 24, appears to be convincing.

114. There is one more interesting aspect of the matter. The Folder

No.4 of CD Article 29 is the videography of seizure of cloths of the appellant/accused. This videography starts with Sanjeev Chouksey (P.W. 31) and other persons sitting in a moving jeep along with the appellant/accused. Sanjeev Chouksey (P.W.31) is asking the appellant/accused about the location of his house and accordingly, the appellant/accused guided the police party towards his house. Thus, every attempt was made to show that in fact the police was not aware of the house of the appellant/accused and in fact, it is the appellant/accused, who took the police party to his house. But here, the investigating officer, Sanjeev Chouksey (P.W. 31) committed a serious mistake. As soon as the jeep reached in front of the house/small room of the appellant/accused, one person in black T-shirt with two white horizontal strips is waiting for the jeep. As soon as the jeep stops there, he immediately moves towards the back side of the jeep. A person with red coloured shirt who was sitting along with the appellant/accused on the back seat of the jeep says, "सुनील पकडो" and accordingly, the person who was in black T-Shirt and was waiting for the jeep, catch hold the handcuffs of the appellant/accused and goes inside the house of the appellant/accused, from where the appellant/accused picks up the cloths which were kept on the floor. Further, it is clear from the videography, that the house of the appellant/accused was nothing but a small room with kitchen in the same small house. It is clear from the Videography,

that when the appellant/accused was taken to the said room, then the door of the room was already open. Thus, it is clear that the so-called seizure of Shirt, Pant and Underwear of the appellant/accused was nothing but a farce and was the outcome of a well scripted film, but as Sanjeev Chouksey (P.W. 31) is not a good Director, therefore, he committed material mistakes while getting the proceedings videographed. All the three cloths, i.e., Jeans, Shirt and underwear were kept together on the floor. Thus, it is clear that the cloths were not kept by him in hidden condition. Further, after committing murder of the deceased at Vidisha, why the appellant/accused would bring his cloths to Bhopal? Be that as it may. One thing is important, that according to the prosecution, the colour of the shirt of the appellant was black and similarly, the colour of his pant was black. Surprisingly, the colour of slacks of the deceased was also black. If the entire method of investigation is seen, then it is clear that black colour was not co-incidence, but they were deliberately planted as stains would have been clearly visible on light coloured cloths. Thus, the manner in which one person in civil uniform was waiting for the jeep to arrive and thereafter, he immediately takes charge of the appellant/accused by holding his handcuffs, it is clear that the whole videography done by Sanjeev Chouksey (P.W. 31) was pre-planned and well scripted and but poorly directed film, and committed material mistake, which exposed everything.

Recovery of T-Shirt from the well

115. It is the case of the prosecution that on the disclosure of the appellant/accused, a T-Shirt which is alleged to be of the deceased was recovered from the same well from where the dead body of the deceased was recovered.

116. On 25-10-2015, when the dead body of the deceased was recovered, there was water in the well and the dead body was found floating in the water, which is evident from photograph, Article A/1. Further, it is also mentioned in the *Lash Panchnama* Ex. P6 that the total depth of the well is 38 ft. and the water level was 3 ft from bottom. Whereas in Search Panchnama, Ex. P.23, it is mentioned that the well is dry. An attempt was made by Shri Rajesh Shukla, Dy. Advocate General by submitting that generally when any dead body is found in a well, then the owner of the well drains out the water from the well. However, the prosecution has not examined the owner of the well to substantiate the explanation given by Shri Rajesh Shukla, Dy. Advocate General. Further, in Search Panchnama, Ex. P.23, it is mentioned that the water of the well has dried down and it has not been mentioned that the water of the well has been drain out. According to search Panchnama, Ex. P.23, the T-shirt was taken out from a dry well. It is not out of place to mention here that on 25-10-2015, when the dead body of the deceased was taken out from the well, then a blue coloured jeans was also recovered. However, the

prosecution is completely silent about the said blue coloured jeans. After the seizure, blue coloured jeans has not seen the light of the day. Further, it is a matter of common knowledge, that the cloths being lighter in weight would float on the water. When a blue coloured jeans can float in the well, then why the T-Shirt also did not float in the well and why it was not recovered on 25-10-2015 itself. Further, when the appellant/accused left the slacks of the deceased on the spot, then there was no need for him to throw the T-shirt in the well. Further, it is clear from the Video which is contained in Folder 1 of the CD Article 29, lot of articles like one plastic bag containing cloths, waste material were floating along with the dead body. Thus it is clear that the police was trying to create evidence instead of collecting evidence. Thus, the recovery of T-Shirt of the girl from the well at the instance of the appellant/accused is doubtful and hence it is disbelieved.

Whether any blood was found in the blood stained earth seized on 29-10-2015 ?

117. According to seizure memo Ex. P.11, blood stained earth was also seized along with black slacks. The prosecution has not filed the F.S.L. report to prove that any blood stains were found in the so-called blood stained earth? It is submitted by Shri Rajesh Shukla that in fact the blood stained earth was sent for DNA test and not to verify as to whether any blood stains were there in the blood stained earth

seized on 29-102-2015 or not? However, could not explain that if there were any blood stains in the earth, then why no DNA was found in the so called blood stained earth? As some bleeding is alleged to have taken place at the time of commission of offence, therefore, the blood stained earth should have contained DNA of the deceased but that was not found. Thus, it is clear that the seizure of slacks, blood stained earth was nothing but a farce with solitary intention to create false evidence.

Whether any blood stains were found on the Shawl?

118. An old pink coloured dirty shawl was handed over by Puja Kirar (P.W. 4) alleging that the appellant/accused had come along with a girl and that girl had left her shawl on the cycle. The shawl was seized vide seizure memo Ex. P.3. In seizure memo Ex. P.3, it is mentioned that apart from dust/mud, blood like stains were also there on the shawl. However, said Shawl was not sent to F.S.L., Sagar for DNA test or to find out as to whether the Shawl was having any blood stains or not? According to Puja Kirar (P.W. 4), the shawl was left by the girl herself, then there was no question of any blood stain on the same. It appears that while sprinkling blood of the appellant/ accused on different articles, blood of the appellant/accused was also sprinkled on the Shawl, and thereafter, when the investigating officer, Sanjeev Chouksey (P.W. 31) realized that presence of blood on Shawl would bring the prosecution story under doubt, then it was not sent to

any laboratory.

Whether CCTV footage of Railway Station Bhopal were checked?

119. According to prosecution story, the deceased was left by Kiran @ Bhoori @ Rihana (P.W. 23) on platform no.6 and the appellant/accused took the girl from platform no.6 and came to Platform No. 2 and boarded Rajdhani Express along with the girl and came to Vidisha at 7:30 P.M.. Bhopal is the Capital of the State of Madhya Pradesh and its Platforms have CCTV Surveillance System. For coming from platform no.6 to platform no.2, the appellant/accused was required to cross those places which were under CCTV Surveillance. Therefore, CCTV footage of Bhopal Railway Station was one of the important piece of evidence. However, Sanjeev Chouksey (P.W. 31) has admitted in para 30 of his cross-examination, that he had not checked the CCTV footage of Bhopal Railway Station. Although he tried to give an explanation that since much time had already passed, therefore, he did not check but later in para 31 of his cross-examination, he admitted that CCTV footage remains saved for a period of six months. He was given a suggestion that in fact he had seen the CCTV footage of Bhopal Railway Station, but since, the appellant/accused was not seen, therefore, he did not include the same in the case diary, however, the said suggestion was denied. However, one thing is clear, the

investigating officer was not collecting any evidence which was material and easily available but he was all the time, trying to create evidence. If the investigating officer had seized the CCTV footage of Bhopal Railway Station, then it could have been verified as to whether the appellant/accused had kidnapped the girl from platform no.6 and brought her to platform no. 2 and boarded Rajdhani Express or not? Thus, this lapse in the prosecution case, gives a very deep dent to the prosecution case.

How Rukmani (P.W.22) came in possession of photograph of appellant/accused?

120. Kiran @ Bhoori @ Rihana (P.W.23) has stated in para 2 of her examination-in-chief, that when She came to Vidisha, then the photograph of the dead body of a girl was shown to her by Rukmani (P.W.22) but as She was frightened, therefore, could not identify her. At that time, Rukmani (P.W. 22) had also shown the photo of the appellant/accused and She had identified him. However, Rukmani (P.W.22) has denied that She had shown the photograph of appellant/ accused to Kiran @ Bhoori @ Rihana (P.W. 23).

121. Rukmani (P.W. 22) does not claim that the appellant/accused was known to her. When Kiran @ Bhoori @ Rihana (P.W. 23) had seen the photograph of the dead body for the first time, by that time, the police had no clue about the assailant. Then how Rukmani (P.W. 22) came in possession of the photograph of appellant/accused?

Thus, it is clear that the investigating officer, Sanjeev Chouksey (P.W. 31) was out and out to create false evidence so that he can face the public agitation by claiming that he has solved a brutal blind murder case, without wasting any time.

Whether Kiran @ Bhoori @ Rihana (P.W.23) had illicit relationship with the appellant/accused.

122. Kiran @ Bhoori @ Rihana (P.W. 23) had stated in her statement recorded under Section 161 of Cr.P.C, Ex. D3, that the appellant Ravi Toli is known to her and on some occasions, they had physical relations also. However, in her Court evidence, She denies her relationship with the appellant/accused, whereas Sanjeev Chouksey (P.W. 31) has admitted in para 26 of his cross-examination, that Kiran @ Bhoori @ Rihana (P.W. 23) had disclosed her relationship with the appellant. Thus, it is clear that Kiran @ Bhoori @ Rihana (P.W. 23) is changing her version from time to time.

Why Sanjeev Chouksey (P.W. 31) did not take the investigation in his hands from the very inception?

123. In the videography which is part of Folder 1 of CD Article 29, Sanjeev Chouksey (P.W. 31) is present at the time of taking out the body of the deceased from the well and is monitoring the proceedings by giving instructions. He remained on the spot for the whole time, but in spite of that he allowed S.N.S. Solanki (P.W. 34), ASI to investigate the matter and to seize the slacks on 29-10-2015.

Thus, this conduct of Sanjeev Chouksey (P.W. 31) also creates doubt in the matter.

Why 5 ml of blood handed over by Dr. R.K. Sahu (P.W. 19) was not seized.

124. It is clear from the post-mortem report, Ex. P.29 as well as from the evidence of Dr. R.K. Sahu (P.W.19), 5 ml of blood of the deceased was also collected and was handed over to the police constable. The articles were seized vide seizure memo Ex. P.90 which was prepared by Tulsiram. However, the prosecution has not examined Tulsiram and Sanjeev Chouksey (P.W. 31) has proved the document by identifying the handwriting of Tulsiram.

125. It is not the case of the prosecution that Tulsiram is either dead or is untraceable. Section 69 of Evidence Act provides mode of proving a document in absence of attesting witness. The Supreme Court in the case of **Babu Singh Vs. Ram Sahai** reported in **(2008) 14 SCC 754** has held as under :

> **17.** It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search.....

126. Non-Examination of Tulsiram has given a deep dent to the prosecution, because the whereabouts of 5 ml of blood of the deceased could have been explained by Tulsiram only.

Whether the Videography of proceedings done by the police which are contained in CD Article 29 is the videography of the

proceedings or it is an already written script by the investigating officer.

127. This Court has already pointed out the mistakes in all the videographed proceedings except the proceeding dated 25-10-2015, when the dead body of the deceased was recovered. The videography of a proceeding is desirable to ensure the correctness of the investigation done by the police. It is always expected that the police would videograph the actual proceedings and should not get it filmed after re-creating the same. Recreation of the proceedings at a later stage so that it can be videographed would come in the category of creating false evidence. Section 161 of Cr.P.C. reads as under :

> **161. Examination of witnesses by police**.— (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.
> (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.
> (3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records:
> Provided that statement made under this sub-section may also be recorded by audio-video electronic means.
> Provided further that the statement of a woman against whom an offence under Section 354, Section 354-A, Section 354-B, Section 354-C, Section 354-D, Section 376, Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB], Section 376-E or Section 509 of the Indian Penal Code (45

> of 1860) is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.

128. Further, Police Headquarter, State of Madhya Pradesh has issued circular No. File No.1-01/Pu.Mu./Ati.M.N./Ni.S/Parpatra/ 45/2019/ dated 7-3-2019 which deals with guidelines for investigation in the matters of rape. Clause (5) of above mentioned circular reads as under :

> (5) पीडिता एवं गवाहो के कथन उसके समक्ष ही उससे पूछकर लिखे जाये और ऐसे कथन सी.सी.टी.व्ही./ वीडियो कैमरे के सामने इस प्रकार लिखे जावे कि कैमरा फ्रेम मे विवेचक, गवाह एवं दस्तावेज जिसे लिखा जा रहा है स्पष्ट दिखाई दें। यही प्रक्रिया जप्ती, गिरफ्तारी पत्रक एवं अन्य सभी दस्तावेजों के विषय मे अपनाई जावे जिसमे पीडिता या किसी भी साक्षी के हस्ताक्षर लिखे जाने हो।

129. Although the above mentioned circular is in relation to rape cases, but the same guidelines can be applied to other cases also.

Extra Judicial Confession to Preetam Singh Rajak (P.W.10)

130. The prosecution has also relied upon a circumstance, that when Preetam Singh Rajak (P.W. 10) was directed to call the appellant/accused with speaker phone in ON condition, then it was heard by Ramswaroop Soni (P.W.26) and Vijay Tripathi (P.W. 27) that the appellant/accused told Preetam Singh Rajak (P.W. 10) that Preetam (P.W.10) is with police and appellant/accused after committing bad work with a girl, has thrown her dead body in a well, therefore, he would not surrender and at present he is consuming liquor and if anybody has dare to arrest him, then he can do so.

131. It is not out of place to mention here that Preetam Singh Rajak (P.W. 10) has not supported the prosecution case, and has turned hostile. Ramswaroop Soni (P.W. 26) and Vijay Tripathi (P.W. 27) do not say that they were well acquainted with the voice of the appellant/accused. Further, the prosecution has failed to prove that the phone call was made on the mobile number of the appellant/accused. Sanjeev Chouksey (P.W. 31) in para 39 of his cross-examination has admitted that the SIM was not in the name of the appellant/accused. Further, most of the mobile phones have the software of recording the conversation. When the police was deliberately making a call to the appellant/accused through Preetam Singh Rajak (P.W. 10) then it could have ensured that the phone call is recorded, but no attempt was made. Even otherwise when the speaker phone was ON and every body standing there were in a position to hear the conversation, then the police should have recorded the conversation of Preetam Singh Rajak (P.W. 10) and the appellant/accused. Therefore, it is held that the prosecution has failed to prove the circumstance of Extra-Judicial Confession by the appellant/accused to Preetam Singh Rajak (P.W. 10) on mobile phone.

Whether Collection of Blood sample of the appellant/accused was improper.

132. By referring to the evidence of Dr. Pradeep Gupta, (P.W. 24) it

is submitted by Shri Padam Singh, Counsel for the appellant/accused that this witness has admitted that the blood of the appellant/accused was collected inside the jail in the presence of Kiran @ Bhoori @ Rihana (P.W. 23) and Sanjeev Chouksey (P.W. 31). He has also admitted that he did not take any permission from the jail authorities to take the outsiders inside the jail for the purposes of collection of blood sample. Kiran @ Bhoori @ Rihana (P.W. 23) has not stated in her evidence that the blood of the appellant/accused was collected in her presence.

133. It is really surprising that on one hand Kiran @ Bhoori @ Rihana (P.W. 23) was not interested in looking at the dead body of the deceased after digging out from burial, but at the same time, She was accompanying the investigation officer during the investigation.

134. In absence of any permission from the jail authorities, it is held that it is incorrect to say that the blood sample of the appellant/accused was collected in the presence of the witnesses.

135. By referring to Identification Form, Ex. P.33, it is submitted by Shri Padam Singh, Counsel for the appellant/accused, that since, the blood sample was taken by Pratap Jadhav and not by Dr. Pradeep Gupta, therefore, the collection of blood sample of the appellant/ accused was not in accordance with the guidelines given in the Modi's Jurisprudence.

136. Considered the submissions made by the Counsel for the

appellant/accused.

137. It is not out of place to mention here that attention of Dr. Pradeep Gupta was not drawn towards the guidelines mentioned in Modi's jurisprudence. Further, this witness has stated that the blood sample was taken in his presence and he had sealed both the vials. Therefore, this Court is of the considered opinion, that since, the blood sample of the appellant/accused was collected in the presence of Dr. Pradeep Gupta, and he himself had sealed the vials, therefore, his evidence with regard to the procedure adopted for actual collection of blood sample of the appellant/accused cannot be said to be unacceptable. But in view of the fact that there is nothing on record to show that the witnesses had also gone inside the jail and further Kiran @ Bhoori @ Rihana (P.W. 23) has not stated in her evidence that blood sample was collected in jail, therefore, this Court is of the considered opinion, that the circumstance of collection of blood sample of the appellant/accused has not been proved beyond reasonable doubt.

Absence of blood of the deceased on the cloths of the appellant/accused

138. According to the prosecution story, the offence of rape and murder was committed at one place, and thereafter, the accused threw the dead body in a well which was situated at a different place. While throwing the dead body, the accused must have brought the

dead body by lifting the same. However, no blood of the deceased was found on the cloths of the appellant/accused. Thus, this circumstance also makes the prosecution story unreliable.

Whether the dead body was found in the well of Mullu Patel

139. At the initial stage, it was the case of the prosecution, that the well belongs to one Mullu Patel, whereas Tahsildar in his report Ex. P. 58, has disclosed that Kh.No.400/1/1 i.e., where well is situated belongs to Malkhan and Kh. No. 400/1/2, i.e., where the girl was allegedly raped and killed belongs to one Renu Maheshwari. Whereas in the videography of proceedings dated 25-10-2015, it appears that one Parvat Singh is claiming that the well and the land belongs to him. Thus, it is clear that the prosecution has also failed to prove the ownership of well and land.

140. Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion, that the prosecution has miserably failed in establishing the guilt of the appellant/accused. On the contrary, it is clear that the prosecution has falsely created the evidence, instead of collecting the evidence. Accordingly, the appellant is acquitted of all the charges for which he was tried.

141. Before parting with this judgment, this Court would like to refer to the sentence of Life Sentence for remainder of life by the Trial Court.

142. The Supreme Court in the case of **Union of India Vs.**

Sriharan reported in **(2016) 7 SCC 1** has held as under ;

> **105.** We, therefore, reiterate that the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior court.

143. Thus, it is clear that only the Supreme Court and the High Court can award Life Sentence for remainder of life and the Trial Court cannot award such sentence.

Section 376(3) of IPC provides that that the rigorous imprisonment for a term shall not be less then twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

This provision was inserted by Act 22 of 2018 whereas the offence in question was committed on 24-10-2015 or 25-10-2015 i.e., prior to the above mentioned provision. It is well established principle of law that Penal Statute has to be given strict interpretation, and has no retrospective operation unless and until specifically made. As there is nothing on record to suggest that Section 376(3) of IPC was made applicable with retrospective operation, therefore, Section 376(3) of IPC would not apply to the

facts of the case.

The Trial Court has not only ignored vital discrepancies in the ocular and documentary evidence, but also ignored the law of the land while awarding life sentence for remainder of life for offence under Sections 376(2)(i)(j)(k) of I.P.C.

144. **Accordingly, the Registrar General of this Court is directed to circulate the copy of this judgment to all the Sessions as well as Additional Sessions Judges, to apprise them that the Trial Court cannot award Life Imprisonment for remainder of life of the accused.**

145. Now the next question for consideration is that whether honourable acquittal of the appellant/accused is sufficient, or further action be taken against the investigating officer Sanjeev Chouksey (P.W. 31), S.N.S. Solanki (P.W. 34), and witnesses Kamlesh Adivasi (P.W. 2), Balveer Singh (P.W. 3), Puja Kirar (P.W. 4), Sanjay @ Sanju Parihar (P.W. 6 and 33), Kok Singh (P.W. 13), Rukmani (P. W.22) and Kiran @ Bhoori @ Rihana (P.W. 23) for giving false evidence.

146. The appellant/accused was arrested on 6-11-2015 and for the last near about 6 years he is in jail. Initially he was awarded death sentence by judgment and sentence dated 26-9-2019 and thereafter, same sentence by impugned judgment and sentence. This Court can presume the mental condition of the appellant/accused after he was awarded death sentence. Further, by creating false evidence, these

witnesses have compelled the appellant/accused to remain in jail for a period of near about 6 years for the offence which has not been committed by him.

147. The Supreme Court in the case of **Dayal Singh and others Vs.State** reported in **AIR 2012 SC 3046** has held as under :

> 16. The Investigating Officer, as well as the doctor who are dealing with the investigation of a criminal case, are obliged to act in accordance with the police manual and the known canons of medical practice, respectively. They are both obliged to be diligent, truthful and fair in their approach and investigation. A default or breach of duty, intentionally or otherwise, can sometimes prove fatal to the case of the prosecution. An Investigating Officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. Where the default and omission is so flagrant that it speaks volumes of a deliberate act or such irresponsible attitude of investigation, no court can afford to overlook it, whether it did or did not cause prejudice to the case of the prosecution.....
>
> * * *
>
> **28**. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. For truly attaining this object of a 'fair trial', the Court should leave no stone unturned to do justice and protect the interest of the society as well.

148. Now the only question for determination is that under the facts

and circumstances of the case, whether it is feasible to direct for prosecution of above mentioned witnesses or not?

149. Section 340 of Cr.P.C. reads as under :

> **340. Procedure in cases mentioned in Section 195**.—(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (*b*) of sub-section (1) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,—
>
> (*a*) record a finding to that effect;
>
> (*b*) make a complaint thereof in writing;
>
> (*c*) send it to a Magistrate of the first class having jurisdiction;
>
> (*d*) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and
>
> (*e*) bind over any person to appear and give evidence before such Magistrate.
>
> (2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of Section 195.
>
> (3) A complaint made under this section shall be signed,—
>
> (*a*) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;
>
> (*b*) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorise in writing in this behalf.
>
> (4) In this section, "Court" has the same meaning as in Section 195.

150. The Supreme Court in the case of **K.T.M.S. Mohd. v. Union**

of India, reported in **(1992) 3 SCC 178** has held as under :

> **35.** In this context, reference may be made to Section 340 of the Code of Criminal Procedure under Chapter XXVI under the heading "Provisions as to Offences Affecting the Administration of Justice". This section confers an inherent power on a court to make a complaint in respect of an offence committed in or in relation to a proceeding *in that court*, or as the case may be, in respect of a document produced or given in evidence in a proceeding *in that court*, if *that court* is of opinion that it is expedient in the interest of justice that an enquiry should be made into an offence referred to in clause (*b*) of sub-section (1) of Section 195 and authorises *such court* to hold preliminary enquiry as it thinks necessary and then make a complaint thereof in writing after recording a finding to that effect as contemplated under sub-section (1) of Section 340. The words "in or in relation to a proceeding *in that court*" show that the court which can take action under this section is only the court operating within the definition of Section 195(3) before which or in relation to whose proceeding the offence has been committed. There is a word of caution inbuilt in that provision itself that the action to be taken should be expedient in the interest of justice. Therefore, it is incumbent that the power given by Section 340 of the Code should be used with utmost care and after due consideration. The scope of Section 340(1) which corresponds to Section 476(1) of the old Code was examined by this Court in *K. Karunakaran* v. *T.V. Eachara Warrier* and in that decision, it has observed: (SCC pp. 25 and 26, paras 21 and 26)
>
> > "At an enquiry held by the Court under Section 340(1), CrPC, irrespective of the result of the main case, the only question is whether a prima facie case is made out which, if unrebutted, may have a reasonable likelihood to establish the specified offence and whether it is also expedient in the interest of justice to take such action.
> >
> > … The two per-conditions are that the materials produced before the High Court make out a prima facie case for a complaint and secondly that it is expedient in the interest of justice to permit the prosecution under Section 193 IPC."
>
> **36.** The above provisions of Section 340 of the Code of Criminal Procedure are alluded only for the purpose of showing that necessary care and caution are to be taken before initiating a criminal proceeding for perjury against

the deponent of contradictory statements in a judicial proceeding.

The Supreme Court in the case of **State (NCT of Delhi) v. Pankaj Chaudhary,** reported in**(2019) 11 SCC 575** has held as under :

> **49.** There are two preconditions for initiating proceedings under Section 340 CrPC:
>
> (*i*) materials produced before the court must make out a prima facie case for a complaint for the purpose of inquiry into an offence referred to in clause (*b*)(*i*) of sub-section (1) of Section 195 CrPC, and
>
> (*ii*) it is expedient in the interests of justice that an inquiry should be made into the alleged offence.
>
> **50.** Observing that the court has to be satisfied as to the prima facie case for a complaint for the purpose of inquiry into an offence under Section 195(1)(*b*) CrPC, this Court in *Amarsang Nathaji* v. *Hardik Harshadbhai Patel* held as under: (SCC pp. 117-18, paras 6-8)
>
> "*6*. The mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify a prosecution under Sections 199 and 200 of the Penal Code, 1860 (45 of 1860) (hereinafter referred to as "IPC"); but it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings. Even after the above position has emerged also, still the court has to form an opinion that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred to in Section 340(1) CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution. (See *K.T.M.S. Mohd.* v. *Union of India*.) The court must be satisfied that such an inquiry is required in the interests of justice and appropriate in the facts of the case.
>
> *7*. In the process of formation of opinion by the court that it is expedient in the interests of justice that an inquiry should be made into, the requirement should

only be to have a prima facie satisfaction of the offence which appears to have been committed. It is open to the court to hold a preliminary inquiry though it is not mandatory. In case, the court is otherwise in a position to form such an opinion, that it appears to the court that an offence as referred to under Section 340 CrPC has been committed, the court may dispense with the preliminary inquiry. Even after forming an opinion as to the offence which appears to have been committed also, it is not mandatory that a complaint should be filed as a matter of course. (See *Pritish* v. *State of Maharashtra*.)

8. In *Iqbal Singh Marwah* v. *Meenakshi Marwah*, a Constitution Bench of this Court has gone into the scope of Section 340 CrPC. Para 23 deals with the relevant consideration: (SCC pp. 386-87)

'*23*. In view of the language used in Section 340 CrPC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(*b*), as the section is conditioned by the words "court is of opinion that it is expedient in the interests of justice". This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(1)(*b*). This expediency will normally be judged by the court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the court may not consider it expedient in the interest of justice to make a complaint.' "

The same principle was reiterated in *Chintamani Malviya* v. *High Court of M.P.*

151. If the facts of this case are considered in the light of law laid down by the Supreme Court with regard to prosecution of witnesses for giving false evidence, then it is clear that the entire case is based on created and concocted evidence. The police has not collected the evidence but has created false evidence. Therefore, this Court is of the considered opinion, that it is a fit case for directing prosecution of Sanjeev Chouksey (P.W. 31), S.N.S. Solanki (P.W. 34), and witnesses Kamlesh Adivasi (P.W. 2), Balveer Singh (P.W. 3), Puja Kirar (P.W. 4), Sanjay @ Sanju Parihar (P.W. 6 and 33), Kok Singh (P.W. 13), Rukmani (P. W.22) and Kiran @ Bhoori @ Rihana (P.W. 23) for giving false evidence.

152. The next question for consideration is that whether a preliminary enquiry is required or the direction can be issued on the basis of prima facie opinion formed by this Court by meticulous appreciation of evidence.

153. The Supreme Court in the case of **Pritish v. State of Maharashtra,** reported in **(2002) 1 SCC 253 has held as under :**

> **9.** Reading of the sub-section makes it clear that the hub of this provision is formation of an opinion by the court (before which proceedings were to be held) that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed. In order to form such opinion the court is empowered to hold a preliminary inquiry. It is not peremptory that such preliminary inquiry should be held. Even without such preliminary inquiry the court can form such an opinion when it appears to the court that an offence has been committed in relation to a proceeding in that court.

> It is important to notice that even when the court forms such an opinion it is not mandatory that the court should make a complaint. This sub-section has conferred a power on the court to do so. It does not mean that the court should, as a matter of course, make a complaint. But once the court decides to do so, then the court should make a finding to the effect that on the fact situation it is expedient in the interest of justice that the offence should further be probed into. If the court finds it necessary to conduct a preliminary inquiry to reach such a finding it is always open to the court to do so, though absence of any such preliminary inquiry would not vitiate a finding reached by the court regarding its opinion. It should again be remembered that the preliminary inquiry contemplated in the sub-section is not for finding whether any particular person is guilty or not. Far from that, the purpose of preliminary inquiry, even if the court opts to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed.

The Supreme Court in the case of **Amarsang Nathaji v. Hardik Harshadbhai Patel,** reported in **(2017) 1 SCC 11** has held as under :

> **7.** In the process of formation of opinion by the court that it is expedient in the interests of justice that an inquiry should be made into, the requirement should only be to have a prima facie satisfaction of the offence which appears to have been committed. It is open to the court to hold a preliminary inquiry though it is not mandatory. In case, the court is otherwise in a position to form such an opinion, that it appears to the court that an offence as referred to under Section 340 CrPC has been committed, the court may dispense with the preliminary inquiry. Even after forming an opinion as to the offence which appears to have been committed also, it is not mandatory that a complaint should be filed as a matter of course. (See *Pritish* v. *State of Maharashtra*.)

154. Since, the only purpose of enquiry is to find out as to whether prima facie offence has been made out or not, therefore, after forming

such a prima facie opinion, it is not necessary to conduct any further preliminary enquiry into the issue. Therefore, conducting an enquiry for directing prosecution of witnesses for giving false evidence is not necessary.

154. Another question for consideration is that whether a direction for prosecution of witnesses for giving false evidence can be given without affording an opportunity of hearing to them or not?

156. The question is no more *res integra.*

157. The Supreme Court in the case of **Pritish (Supra)** has held as under :

> **12.** Thus, the person against whom the complaint is made has a legal right to be heard whether he should be tried for the offence or not, but such a legal right is envisaged only when the Magistrate calls the accused to appear before him. The person concerned has then the right to participate in the pre-trial inquiry envisaged in Section 239 of the Code. It is open to him to satisfy the Magistrate that the allegations against him are groundless and that he is entitled to be discharged.
>
> **13.** The scheme delineated above would clearly show that there is no statutory requirement to afford an opportunity of hearing to the persons against whom that court might file a complaint before the Magistrate for initiating prosecution proceedings. Learned counsel for the appellant contended that even if there is no specific statutory provision for affording such an opportunity during the preliminary inquiry stage, the fact that an [illegible]260appeal is provided in Section 341 of the Code, to any person aggrieved by the order, is indicative of his right to participate in such preliminary inquiry.
>
> **14.** Section 341 of the Code confers a power on the party on whose application the court has decided or not decided to make a complaint, as well as the party against whom it is decided to make such complaint, to file an appeal to the court to which the former court is subordinate. But the mere fact that such an appeal is provided, it is not a premise for

concluding that the court is under a legal obligation to afford an opportunity (to the persons against whom the complaint would be made) to be heard prior to making the complaint. There are other provisions in the Code for reaching conclusions whether a person should be arrayed as accused in criminal proceedings or not, but in most of those proceedings there is no legal obligation cast on the court or the authorities concerned, to afford an opportunity of hearing to the would-be accused. In any event the appellant has already availed of the opportunity of the provisions of Section 341 of the Code by filing the appeal before the High Court as stated earlier.

15. Once the prosecution proceedings commence the person against whom the accusation is made has a legal right to be heard. Such a legal protection is incorporated in the scheme of the Code. Principles of natural justice would not be hampered by not hearing the person concerned at the stage of deciding whether such person should be proceeded against or not.

16. Be it noted that the court at the stage envisaged in Section 340 of the Code is not deciding the guilt or innocence of the party against whom proceedings are to be taken before the Magistrate. At that stage the court only considers whether it is expedient in the interest of justice that an inquiry should be made into any offence affecting administration of justice. In *M.S. Sheriff* v. *State of Madras* a Constitution Bench of this Court cautioned that no expression on the guilt or innocence of the persons should be made by the court while passing an order under Section 340 of the Code. An exercise of the court at that stage is not for finding whether any offence was committed or who committed the same. The scope is confined to see whether the court could then decide on the materials available that the matter requires inquiry by a criminal court and that it is expedient in the interest of justice to have it inquired into.

17. Learned Senior Counsel cited the decision of a Single Judge of the High Court of Andhra Pradesh in *Nimmakayala Audi Narrayanamma* v. *State of A.P.* in which the learned Judge observed that it is just and proper that the court issues a show-cause notice to the would-be accused as to why they should not be prosecuted. This was said while interpreting the scope of Section 476 of the old Code of Criminal Procedure (which corresponds with Section 340 of the present Code). The following is the main reasoning of the learned Single Judge: (AIR p. 121)

"The proceedings under Section 476 Criminal

> Procedure Code being judicial and criminal in nature, the interpretation that should be placed in construing the section should be just, fair, proper and equitable and must be in accordance with the principles of natural justice. By adopting such interpretation and procedure, the aggrieved party would be afforded with an adequate opportunity to show and satisfy the court that it was not in the interests of justice, to launch the prosecution and thereby avoid further proceeding. That apart, the appellate court also would be in a position to appreciate the reasons assigned in each case and would have the advantage of coming to its own conclusion without any difficulty about the justification or otherwise of launching the prosecution in a particular case. When once the prosecution had been launched, the accused will not be having an opportunity thereafter to raise the question of expediency in the interests of justice to launch the very prosecution itself. The case thereafter will have to be gone into on the merits."
>
> **18.** We are unable to agree with the said view of the learned Single Judge as the same was taken under the impression that a decision to order inquiry into the offence itself would prima facie amount to holding him, if not guilty, very near to a finding of his guilt. We have pointed out earlier that the purpose of conducting preliminary inquiry is not for that purpose at all. The would-be accused is not necessary for the court to decide the question of expediency in the interest of justice that an inquiry should be held. We have come across decisions of some other High Courts which held the view that the persons against whom proceedings were instituted have no such right to participate in the preliminary inquiry (vide *M. Muthuswamy* v. *Special Police Establishment*).

158. Thus, it is held that direction for prosecution of Sanjeev Chouksey (P.W. 31), S.N.S. Solanki (P.W. 34), and witnesses Kamlesh Adivasi (P.W. 2), Balveer Singh (P.W. 3), Puja Kirar (P.W. 4), Sanjay @ Sanju Parihar (P.W. 6 and 33), Kok Singh (P.W. 13), Rukmani (P. W.22) and Kiran @ Bhoori @ Rihana (P.W. 23) for giving false evidence can be given, even without giving them an

opportunity of hearing.

159. Further, this Court in the case of **Kallu Vs. State of M.P.,** by judgment dated 25-9-2017 passed in Cr.A. No.840/2004 had directed for prosecution of witnesses for giving false evidence. The S.L.P. (Cri) No.9715 of 2017 was dismissed by Supreme Court by order dated 26/7/2019.

160. Accordingly, it is directed that Sanjeev Chouksey (P.W. 31), S.N.S. Solanki (P.W. 34), and witnesses Kamlesh Adivasi (P.W. 2), Balveer Singh (P.W. 3), Puja Kirar (P.W. 4), Sanjay @ Sanju Parihar (P.W. 6 and 33), Kok Singh (P.W. 13), Rukmani (P. W.22) and Kiran @ Bhoori @ Rihana (P.W. 23) be prosecuted for giving false evidence before the Court.

161. **The Principal Registrar of this Court is directed to immediately take necessary steps in this regard.**

162. *Ex consequenti*, the judgment and sentence dated 7-3-2020 passed by 2nd Additional Sessions Judge/Special Judge (POCSO), Vidisha in Special Sessions Trial No.300002/2016 is hereby **set aside**.

163. The appellant is acquitted of all the charges leveled against him.

164. He is in jail. He be released immediately, if not required in any other case.

165. The office is directed to return the record of the Trial Court,

along with a copy of this judgment for necessary action and compliance.

166. Before parting away with the judgment, this Court would like to appreciate the efforts put by Shri Padam Singh and Shri V.D. Sharma, Advocates, who have represented the case appellant/accused very effectively and did not leave any stone unturned.

167. Accordingly, the appeal succeeds and is hereby **Allowed** and **Reference is answered in NEGATIVE.**

(G.S. Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge