**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 27th OF OCTOBER, 2022

CONC No. 415 OF 2022

Between:-

SUO MOTO IN THE MATTER OF THE STATE OF M.P.

…....APPELLANT

(BY SHRI A.K. NIRANKARI - GOVT. ADVOCATE)

AND

1. FATHER OF PROSECUTRIX "A", SON OF GARIBDAS, RESIDENT OF VILLAGE BIDNIYA, P.S. CIVIL LINES, DATIA.
2. PROSECUTRIX "X", D/O "A", RESIDENT OF VILLAGE BIDNIYA, P.S. CIVIL LINES, DATIA.
3. AJMER YADAV SON OF DWARIKA PRASAD YADV, RESIDENT OF VILLAAGE BIDANIYA, P.S. CIVIL LINES, DISTT. DATIA.
4. SANTOSH PARIHAR, SON OF RAGUNATH, RESIDENT OF VILLAGE REDA, P.S. DEHAT, TAHSIL AND DISTT. DATIA.
5. SONU PARIHAR @ NATHU PARIHAR, SON OF MAHENDRA SINGH PARIHAR, RESIDENT OF

VILLAGE BICHHONDANA, TEHSIL BHANDER, P.S. CIVIL LINES, DATIA.
6. AJAY KANT SHRIVASTAVA, SON OF LATE N.R. SHRIVASTAVA, RESIDENT OF TIGALIA DAROGA WALI GALI, DISTT. DATIA
7. P.K. GARG, D.P.O., AT PRESENT D.P.O., S.P.E. LOKAYUKT, BHOPAL.
8. DEVENDRA SHRIVASTAVA, SON OF LAXMINARAYAN SHRIVASTAVA, RESIDENT OF MUDIAN KA KUA, WARD NO. 28, DATIA.
9. ADITYA KHARE, SON OF R.S. KHARE, RESIDENT OF THANDI SADAK, DATIA.
10. ANIL AWASTHY, SON OF R.B. AWASTHI, R/O BADE BAZAR, DATIA.
11. MEHMOOD KHAN, SON OF LATE SHRI MUNABBAR KHAN, RESIDENT OF GHOSIPURA, GWALIOR.

.....RESPONDENTS

(SMT. KALPANA PARMAR, ADVOCATE FOR RESPONDENTS NO. 1 AND 2)
(NONE FOR RESPONDENT NO.3)
(SHRI SUNIL DUBEY, ADVOCATE FOR RESPONDENT NO.4)
(NONE FOR RESPONDENT NO. 5)
(SHRI RAJIV SHARMA, ADVOCATE FOR RESPONDENT NO. 6 AND 11)
(SHRI RAJIV BUDHOLIYA, ADVOCATE FOR RESPONDENT NO. 7)
(NONE FOR RESPONDENT NO.8)

(SHRI JITENDRA SHARMA, ADVOCATE FOR RESPONDENT NO. 9)
(SHRI SAURABH BHELSELWALE, ADVOCATE, FOR RESPONDENT NO. 10).

Heard on : 17th-October-2022
Delivered on :

This Contempt Petition coming on for hearing this day, ***Hon'ble Shri Justice G.S. Ahluwalia,*** *passed the following:*

JUDGEMENT

1. This Contempt Petition has been registered on suo moto exercise of power by this Court by order dated 10-2-2022 passed in M.Cr.C. No. 7380 of 2022 (Sonu Parihar @ Nathu Vs. State of M.P.).

2. This case shows a very sorry state of affairs, where some people in order to get rid of unwarranted pregnancy due to voluntary relationship with a close relative, have misused the lawful authority of this Court, by adopting a very innovative method. It is a very high time to put a check on this type of tendency, because the purpose of Medical termination of Pregnancy Act, 1971 is to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. Only specific pregnancies are to be permitted to be ended by licensed medical professionals. The primary objectives of the Act are also to reduce the death rate of women from unsafe and illegal abortions and to optimize the maternal health of Indian women. Only after this legislation, women are entitled to have safe abortions, but only under specific circumstances. However, the lawful authority of High Court cannot be permitted to be misused to terminate

the unwarranted pregnancy by hiding the identity of the biological father of the child. Section 3 of Medical Termination of Pregnancy Act, 1971 deals with a situation under which the pregnancy can be terminated by a Medical Practitioner, which reads as under :

> **3. When pregnancies may be terminated by registered medical practitioners**.—(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.
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> (2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,—
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> (*a*) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or
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> (*b*) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are,
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> of the opinion, formed in good faith, that—
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> (*i*) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
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> (*ii*) there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality.
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> *Explanation 1*.—For the purposes of clause (*a*), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.
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> *Explanation 2*.—For the purposes of clauses (*a*) and (*b*), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

(2-A) The norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by rules made under this Act.

(2-B) The provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

(2-C) Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board for the purposes of this Act to exercise such powers and functions as may be prescribed by rules made under this Act.

(2-D) The Medical Board shall consist of the following, namely—

(*a*) a Gynaecologist;

(*b*) a Paediatrician;

(*c*) a Radiologist or Sonologist; and

(*d*) such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be.]

(3) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(4) (*a*) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a [1][mentally ill person], shall be terminated except with the consent in writing of her guardian.

(*b*) Save as otherwise provided in clause (*a*), no pregnancy shall be terminated except with the consent of the pregnant woman.

3. Thus, the purpose of this Act is to save the life of a pregnant woman or of grave injury to her physical or mental health, or where there is substantial risk that if the child were born, it would suffer from any serious physical or mental abnormality. However, the provisions of this

Act cannot be used for killing an unborn baby in order to hide the identity of the biological father of the child or to by-pass any notice issued by the investigating officer.

4. The disturbing facts of the present case are that one Writ Petition No. 5723 of 2021 was filed by father 'A' of the prosecutrix 'X', for medical termination of her pregnancy, as not only She was minor but She was subjected to rape and FIR No. 25/2021 was also registered in Police Station Civil Lines, Distt. Datia for offence under Sections 363,343,376,376(2)(n), 120-B, 376(d), 109,366 of IPC and 5L/6,5/17 of POCSO Act.

5. The report of the Medical Board was called and the case diary of crime No. 25/2021 was also called. On 19-3-2021, the State Counsel made the following submissions :

> Accordingly, Shri Deepak Khot, has produced the Case Diary as well as the report of Medical Board in a sealed cover. According to the Case Diary, the date of birth of the prosecutrix as per her School Record, is 02/04/2004. Thus, it is clear that the prosecutrix is still minor. According to the prosecution case, the prosecutrix was raped by accused Sonu Parihar as a result of which, she has become pregnant.

6. After considering the fact that the prosecutrix is minor as well as the report of the Medical Board, Medical Termination of Pregnancy was permitted by order dated 19-3-2021 and the petition was allowed.

7. Thereafter, the accused Sonu Parihar @ Nathu, filed M.Cr.C. No. 7380 of 2022 for grant of bail on the ground that the prosecutrix, her father and brother have been examined and they have turned hostile and they have claimed that the Prosecutrix was major and nothing had happened to her and no petition for medical termination of pregnancy

was ever filed and the prosecutrix never went for abortion.

8. After considering the facts and circumstances of the case, the bail application filed by Sonu Parihar @ Nathu was rejected by order dated 10-2-2022 passed in M.Cr.C. No. 7380 of 2022 and following order was passed in exercise of suo moto power under Article 215 of Constitution of India :

> Gwalior, Dated: 10.02.2022
> Shri Prakhar Dhengula, Counsel for the applicant.
> Shri Lokendra Shrivastava, Counsel for the State.
> Case diary is available.
> This second application under Section 439 of Cr.P.C. has been filed for grant of bail. Previous application was dismissed by order dated 21.09.2021 passed in M.Cr.C. No.38174/2021.
> The applicant has been arrested on 08.02.2021 in connection with Crime No.25/2021 registered at Police Station Civil Line Distt. Datia for offence under Sections 363, 343, 376, 376 (2) (n), 120-B, 376 (d), 109, 366 of IPC and 5L/6, 5/17 of POCSO Act.
> It is submitted by the Counsel for the applicant that although this Court in first bail application which was decided on 21.09.2021 passed in M.Cr.C. No.38174/2021 has taken note of the DNA test report but the prosecutrix has infact turned hostile. She has claimed that she was major and nothing was done and no offence was committed with her. It is further submitted that even the father of the prosecutrix has specifically claimed that the date of birth was not disclosed by him at the time of the admission of prosecutrix in school. Therefore, it is clear that the prosecution has failed to prove that the prosecutrix was minor on the date of incident and as the prosecutrix in school has turned hostile, at present there is no substantive evidence against the applicant.
> Heard the learned Counsel for the applicant.
> The case in hand depicts very shocking state of affairs. The father of the prosecutrix had filed W.P. No.5723/2021 for medical termination of pregnancy of respondent no. 2 on the allegations that she is minor aged about 16 years and she was

subjected to rape and, as a result, she became pregnant and the pregnancy of the prosecutrix will not be in the interest of her justice. This Court while deciding W.P. No.5723/2021 had requisitioned the case diary and statement was made by Shri Deepak Khot, Counsel for the State that the date of birth of prosecutrix as per school record is 02.04.2004, therefore, she is minor and as she was raped by the applicant, therefore, she has become pregnant.

Considering the minority, allegation as well as report submitted by the Medical Board which was constituted in compliance of order dated 10.03.2021 passed in W.P. No. 5723/2021, this Court permitted the medical termination of pregnancy. Now the prosecutrix has claimed that she is major and no offence was committed by the applicant. Thus, it is clear that either the prosecutrix has not narrated the truth before the Trial Court or the prosecutrix and her father has filed a writ petition on false averment that the prosecutrix was minor and she got pregnant from the applicant.

So far as the prosecution of prosecutrix and her father for giving false evidence before the Trial Court is concerned, it is yet to be decided by the Trial Court. Therefore, it is left to the discretion of the Trial Court. However in view of the evidence given by the prosecutrix and her father, it is clear that they had filed W.P. No.5723/2021 on incorrect averments, as a result, one unborn baby was killed. This conduct of the prosecutrix and her father cannot be tolerated.

Accordingly, issue show cause notice to the prosecutrix and her father [name of father of prosecutrix is masked] to show cause as to why they should not be punished for having committed contempt of Court by filing W.P. No. 5723/2021 on false averments. Office is directed to register a separate case for Contempt of Court. The notice be served through Superintendent of Police, Datia.

List this Contempt Case on 21st of February, 2022.

So far as the merits of the case is concerned, Counsel for the applicant seeks permission of this Court to withdraw this application.

It is accordingly dismissed as withdrawn.

The Office is directed to immediately send a copy of this order

> to Principal District and Sessions Judge, Datia for communicating the same to the Trial Court for necessary information.
> Let a copy of this order be given to the State Counsel for communicating the same to Superintendent of Police, Datia for necessary information and compliance.
>
> (Underline Supplied)

9. The prosecutrix and her father did not appear inspite of service of notice, accordingly by order dated 21-2-2022, bailable warrants of arrest were issued.

10. On 7-3-2022 also, the prosecutrix and her father did not appear inspite of service of bailable warrant of arrest and accordingly, warrants of arrest were issued against them.

11. On 21-3-2022, the prosecutrix "X" and her father "A" were produced before the Court in execution of warrants of arrest and it was submitted by the prosecutrix and her father, that after the receipt of notice and bailable warrants issued by this Court, they had contacted the local Counsel who instructed them not to appear before this Court. However, the name of local Counsel was not disclosed by the father of the prosecutrix. On 21-3-2022, the prosecutrix "X" stuck to her evidence which She had given before the Court, that nothing had happened to her and She was major, however, the father stated that he had given false evidence before the Trial Court, and in fact, her daughter was raped and She was minor and he had filed the petition for medical termination of pregnancy. Since, the prosecutrix and her father were not in a position to engage any lawyer, therefore, Smt. Kalpana Parmar, Advocate was appointed as their Counsel and time was granted to file reply and the case was fixed for 28-3-2022.

12. Thereafter, the prosecutrix and her father filed the return which reads as under :

> "2. That, initially petitioner/contemnor no.1 [Name of father masked] filed a W.P.NO.5723/2021 for termination of pregnancy of prosecutrix in crime no.25/2021 of police station Civil Line Datia (contemnor no.2).
> 3. That, at the time of filing of Writ Petition, daughter of petitioner was minor and she was subjected to sexual offence and because of which she was pregnant and therefore she was may having pregnancy of 14 weeks and two days as per the report dated 15.03.2021.
> 4. That, by the order of Hon'ble Court pregnancy of prosecutrix (Contemnor No.2) was terminated by the Hospital.
> 5. That, after the pregnancy marriage of the contemnor no.2 was fixed and in the meanwhile, summon from the trial court was received for the evidence.
> 6. That, thereafter, contemnor's no.1 daughter got engaged as the contemnor belong to rustic villagers society and among the society of contemnor, early marriage are performed as per the rituals and because of the sexual offence against her, contemnor no.1 to avoid the social stigma, her engagement was fixed.
> 7. That, when the contemnor no.1 and 2 went to the trial court for there evidence, then some counsel/advocate met them and on the discussion regarding the evidence, it was advised that if, contemnor told before the court regarding the pregnancy of the contemnor no.2, then the engagement must be broken.
> 8. That, thereafter contemnor 1 and 2 in the garb of fear of cancellation of marriage, deposed before the trial court that no incident has happened with the prosecutrix/contemnor no.2.
> 9. That, the statement made by the contemnor no.1 and 2 before the trial court was the outcome of fear of society as well as the fear of broken of relationship (Engagement) and fear of non marriage of contemnor no.2 after disclosure regarding the pregnancy.
> 10. That, contemnors are not literate enough and having no knowledge of law and therefore, on the basis of advice and fear

of society, statement before the trial court has been made by the contemnors.

11. That, the contemnors are apologized before this Hon'ble Court and tendering there unconditional apology.

12. That, in the interest of justice, humble contemnors may kindly be condone and the prayer of the contemnors are bonafidely just and proper."

13. In view of the reply submitted by the Prosecutrix and her father, this Court decided to exercise its power under Section 482 of Cr.P.C., and issued notices to the accused persons to show cause as to why a direction for re-examination of prosecutrix and her father may not be given. Further, the Superintendent of Police, Datia was directed to conduct an enquiry to find out the names of Advocates who had given ill advise not to depose correct facts before the Trial Court.

14. On 7-4-2022, the Superintendent of Police, Datia filed his report. The father of the prosecutrix "A" in his statement before S.P., Datia alleged against the Public Prosecutor, three Counsels of different accused persons and one Anil Awasthy. Copies of Vakalatnamas filed by the Counsels for the accused persons were also sent along with report, and accordingly, S.P. Datia was directed to clarify the names of the Lawyers, who were representing the accused persons. On 19-4-2022, on the basis of the report of S.P., Datia, notices were issued to Shri P.K. Garg D.P.O., Shri Aditya Khare, Shri Devendra Shrivastava, Shri Ajay Kant Shrivastava and Shri Anil Awasthy and the record of the Trial Court was also summoned.

15. On 4-5-2022, the Counsel for the respondents were directed to argue on the question as to whether direction for re-examination of the witnesses can be given or not?

16. On 5-5-2022, the Counsel for the respondents were heard on the question of re-examination of the Prosecutrix, her father and her brother. All most all the lawyers submitted that under the given facts and circumstances of the case, the witnesses should be directed to be re-examined so that the truth may come forward and accordingly, the following order was passed on 5-5-2022 :

> Yesterday, this Court had requested Shri J.P.Mishra, Shri Jitendra Sharma, Shri Rajiv Sharma, Shri Rajiv Budholiya, Shri Yash Sharma and Shri Gaurav Mishra to assist the Court on the question as to whether the lawful authority of High Court can be permitted to be misused for getting rid of a child by seeking permission for medical termination of pregnancy, which otherwise would have been an offence or not, as well as whether re-examination of witnesses can be directed or not?
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> 2. In the present case, the father of the prosecutrix had filed a writ petition claiming that prosecutrix is minor and she was subjected to rape and after hearing the father of the prosecutrix as well as the State Counsel and after obtaining the medical opinion of the Medical Board, this Court had directed for medical termination of pregnancy. Whereas in her Court evidence in the trial, the prosecutrix has taken U turn and claimed that she is major and nothing had happened with her.
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> 3. Today, it is submitted by Shri J.P. Mishra, Shri Jitendra Sharma, Shri Rajiv Sharma, Shri Rajiv Budholiya, Shri Yash Sharma & Shri Gaurav Mishra that since they are also appearing for the Advocates, therefore, they be released from their task of assisting the Court as the interest of their clients may be conflicting. It is further submitted that in case if an order for re-examination of prosecutrix is passed, then this Court will have to give a finding that the evidence given by prosecutrix was not voluntary and since the prosecutrix has alleged against the Advocates in an enquiry conducted by the Superintendent of Police, Datia, therefore, directly or indirectly there may be some findings with regard to involvements of the Advocates and as the case of the Advocates is yet to be heard, therefore, this question may be deferred.

4. Shri Anil Mishra and Shri D.R. Sharma Advocates submitted that in the present case the question is as to whether the re-examination of prosecutrix can be directed in the light of her writ petition for medical termination of pregnancy which was filed on the averments that she is not only minor but is victim of rape. So far as the allegations made by the prosecutrix and her father in the enquiry conducted by Superintendent of Police, Datia is concerned, that may not be foundation for directing re-examination because there is ample material on record to show that a writ petition was filed claiming that the prosecutrix was minor and pregnant & was subjected to rape and even as per medical report, she was found to be pregnant carrying the pregnancy of three months.

5. Heard the learned counsel for the parties on the question of deferment.

6. Whether the prosecutrix has voluntarily resiled from her statement or she has resiled at the instance of third person is yet to be decided and for deciding the question of re-examination of prosecutrix, no finding will be required in this regard.

7. So far as the apprehension expressed by Counsel for Advocates is concerned, this Court is of the considered opinion that it appears to be misconceived. This Court has issued contempt notice to the prosecutrix and her father for making a false statement in Writ Petition No.5723/2021. The question of re-examination of the prosecutrix and her father and brother has arisen only in the light of the subsequent stand taken by them. But one thing is clear that in the writ petition the father of the prosecutrix had claimed her to be minor which was accepted by the State Counsel on the basis of the school record and she was pregnant as per the report of medical Board and her pregnancy was terminated in compliance of order passed by this Court in W.P. No.5723/2021. Whereas in the Court evidence she has taken a U turn. Further from the record of the Trial Court, it is clear that the order of termination of pregnancy passed by this Court is available, but she has denied termination of her pregnancy also. However as per DNA report, the prosecutrix is the biological mother of fetus. Although DNA profile of Sonu has been found in vaginal slide, vaginal swab, pubic hairs of the prosecutrix, but it has also been found

that none of the accused are biological father of fetus.

8. Therefore, it is made clear that the question as to whether the prosecutrix, her father and brother should be re-examined or not, shall be decided purely on the basis of averments made in W.P. No.5723/2021, the DNA test report as well as the evidence given by them before the Trial Court. This Court will not touch the question as to whether the statement made by the prosecutrix and her father before the Superintendent of Police, Datia by making allegations against the Advocates is correct or not**.** The question whether the prosecutrix and her father as well as brother had turned hostile on their own or under the pressure of any other person shall be considered and decided separately after considering their replies.

9. Heard on the question of re-examination of witnesses.

10. It is submitted by Shri Anil Mishra and Shri D.R. Sharma, Amicus, that Section 311 of Cr.P.C. gives power to **any Court** to summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined, if it is found to be essential to the just decision of the case. Thus, it is submitted that the second part of Section 311 of Cr.P.C. imposes an obligation on the Court to summon and examine or recall and re-examine any such person, if his evidence appears to be essential to the just decision of the case. To buttress his contentions, Shri Anil Mishra relied upon the judgment passed by the Supreme Court in the case of **Jamatraj Kewalji Govani vs. The State of Maharashtra** reported in **AIR 1968 SC 178.** He has also relied upon the judgment passed by the Andhra Pradesh High Court in the case of **Palacharla Rama Rao Vs. State of A.P.** reported in **2002 Cri.L.J. 4189** and the order passed by the coordinate Bench of this Court in the case of **Pahalwan Singh Vs. State of M.P. and another dated 14/3/2022 passed in M.Cr.C. No.19849/2021 (Jabalpur).**

11. It is further submitted that on perusal of the evidence of a witness, where the Court is satisfied that recall or re-examination is essential for just decision of the case, then the witness should be recalled. It is further submitted that the object of Section 311 of Cr.P.C. is to avoid failure of justice on account of any mistake on the part of the parties in bringing

the valuable evidence on record. Whether new evidence is necessary or not, would depend upon the facts of the case. Principle of fair trial informs and energizes many areas of law. The majesty of law can be upheld by due administration of justice. Fair trial involves human rights and fairness to all and denial of fair trial results in injustice to the accused as to the victim as well as to the society. It is submitted that in the present case, the father of the prosecutrix had filed Writ Petition No.5723/2021 seeking permission for medical termination of pregnancy of the prosecutrix on the ground that not only she is minor, but she is subjected to rape. After considering the submissions made by the counsel for the petitioner as well as the reply submitted by the counsel for the State with regard to the minority of the prosecutrix as well as after considering the medical report given by the Medical Board, this Court had directed for medical termination of pregnancy of the prosecutrix. Now the prosecutrix has taken a u-turn and it is clear from her evidence that she has claimed that she had never conceived and she never underwent abortion. Even the father of the prosecutrix has taken a u-turn in the Court and has claimed that he has never filed any writ petition before this Court for medical termination of pregnancy and the minor prosecutrix was never aborted. However, it is clear from the DNA test report that the prosecutrix is the biological mother of the fetus, which was taken out after her abortion. It is further submitted that while filing writ petition, the father of the prosecutrix had claimed that she has conceived on account of rape committed by the accused Sonu Parihar, whereas as per the DNA test report, although the DNA profile of Sonu Parihar was found in the vaginal slide, vaginal swab, pubic hairs and penty of the prosecutrix, but at the same time it has been opined that the accused Sonu Parihar is not the biological father of the fetus, whereas it has been specifically pointed out that the prosecutrix is the biological mother of the fetus. Thus, it appears that the prosecutrix must have conceived from some other person and in order to obtain the order of medical termination of pregnancy, she made a false allegation before this Court that she had conceived on account of rape committed by Sonu Parihar. It is submitted that no one

should be allowed to speak false before the Court, specifically when they have obtained an order of medical termination of pregnancy from the High Court.

12. The counsel for Ajmer submitted that the Supreme Court in the case of **Rajaram Prasad Yadav Vs. State of Bihar and another** reported in **(2013) 14 SCC 461** has laid down certain parameters for exercising power under Section 311 of Cr.P.C. and the facts and circumstances of this case are duly covered by those parameters.

13. It is submitted by Shri Prakhar Dhengula, counsel for Sonu Parihar that since the prosecutrix as well as her father have specifically denied regarding filing of the writ petition as well as undergoing the medical termination of pregnancy, therefore, no useful purpose would be served by directing for re-examination of the witnesses. It is further submitted that the power under Section 311 of Cr.P.C. can be exercised in a proceeding arising out of the Code. Since the present proceedings have been initiated for contempt of Court, therefore, this Court should not exercise *suo moto* powers under Section 482 of Cr.P.C.

14. Heard learned counsel for the parties.

15. This Court by order dated 28/3/2022, after considering the return filed by the prosecutrix and her father in which they had claimed that they have wrongly deposed before the Trial Court, observed as under:-

> "Accordingly, this Court is of the considered opinion that it is a fit case where this Court can exercise its power under Section 482 of CrPC also in order to do complete justice."

15.1 Notice was issued to the accused to show-cause as to why this Court should not direct the Trial Court to re-examine the prosecutrix and witnesses, as they have specifically taken a stand before this Court that the evidence given by them before the Trial Court is not the correct one.

16. Furthermore, this Court in order to do complete justice, can also exercise its *suo moto* powers under Section 482 of Cr.P.C. The evidence which was given by the prosecutrix as well as her father and her brother before the Trial Court has a direct nexus with the present contempt proceedings. In the

contempt proceedings, when the prosecutrix and her father had taken a specific stand that they have not deposed correctly before the Trial Court, then this Court would be failing in its duty in case if it does not *suo moto* exercises its powers under Section 482 of Cr.P.C. for re-examination of the prosecutrix, her father and her brother. The *suo moto* exercise of powers under the facts and circumstances of the case is closely interconnected with the subject matter of the contempt proceedings.

17. At this stage, it is submitted by the counsel for the accused that although this Court has a jurisdiction to *suo moto* exercise its powers under Section 482 of Cr.P.C., but instead of exercising the said power in the present case, this Court should direct for separate registration of an application under Section 482 of Cr.P.C.

18. However, the counsel for the accused Sonu Parihar was unable to point out any difference in forum. The power under Section 482 of Cr.P.C. is available with the High Court only, therefore, if a separate petition under Section 482 of Cr.P.C. is directed to be registered, still then the power would stand vested in this Court only and the forum would not change. Therefore, the objection taken by the counsel for the accused Sonu Parihar is not only misconceived, but it is purely technical in nature and the technicality of law should not be given precedence over justice, specifically when no prejudice will be caused to any of the parties.

19. So far as the question of power under Section 311 of Cr.P.C. is concerned, the Supreme Court in the case of **Rajaram Prasad Yadav (supra)** has held as under:-

> 14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the

various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a

just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not

brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

19.1 The Supreme Court in the case of **Zahira Habibullah Sheikh (5) and another Vs. State of Gujarat and others** reported in **(2006) 3 SCC 374** has held as under:-

34. As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the law of evidence. There is, however, an overriding and, perhaps, unifying principle. As Deane, J. put it:

"It is desirable that the requirement of fairness be separately identified since it transcends the context of more particularised legal rules and principles and

provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law."

35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. The principles of rule of law and due process are closely linked with human rights protection. Such rights

can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation

of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

38. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an over hasty stage-managed, tailored and partisan trial.

39. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

40. "Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle the truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if

allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. Doubts are raised about the roles of investigating agencies. Consequences of defective investigation have been elaborated in *Dhanaj Singh* v. *State of Punjab* [(2004) 3 SCC 654 : 2004 SCC (Cri) 851 : JT (2004) 3 SC 380] . It was observed as follows: (SCC p. 657, paras 5-7)

"*5*. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See *Karnel Singh* v. *State of M.P.* [(1995) 5 SCC 518 : 1995 SCC (Cri) 977])

6. In *Paras Yadav* v. *State of Bihar* [(1999) 2 SCC 126 : 1999 SCC (Cri) 104] it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not, the contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

7. As was observed in *Ram Bihari Yadav* v. *State of Bihar* [(1998) 4 SCC 517 : 1998 SCC (Cri) 1085] if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of

the people would be shaken not only in the law-enforcing agency but also in the administration of justice. The view was again reiterated in *Amar Singh* v. *Balwinder Singh* [(2003) 2 SCC 518 : 2003 SCC (Cri) 641] ."

41. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in the court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation (*sic* repetition). We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately the truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before the courts mere mock trials as are usually seen in movies.

19.2 The Supreme Court in the case of **Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others** reported in **(2004) 4 SCC 158** has held as under:-

42. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in

proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interests of the individual accused. In this courts have a vital role to play.

43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (*i*) giving a discretion to the court to examine the witness at any stage, and (*ii*) the mandatory portion which compels the court to examine a witness if

his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal* v. *Union of India* [1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595] this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, "any court", "at any stage", or "any enquiry or trial or other proceedings", "any person" and "any such person" clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, "essential" to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

45. It is not that in every case where the witness who had given evidence before court wants to change his mind and is prepared to speak differently, that the court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate court with a prayer that he is prepared to give evidence which is

materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case, accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

46. Ultimately, as noted above, ad nauseam the duty of the court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer on any party any right to examine, cross-examine and re-examine any witness. This is a power given to the court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.

55. The courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be

played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself.

19.3 The Supreme Court in the case of **V.N. Patil Vs. K. Niranjan Kumar and others** reported in **(2021) 3 SCC 661** has held as under:-

13. The scope of Section 311 CrPC which is relevant for the present purpose is reproduced hereunder:

"**311.** ***Power to summon material witness, or examine person present***.—Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

14. The object underlying Section 311 CrPC is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion".

15. The principles related to the exercise of the power under Section 311 CrPC have been well settled by this Court in *Vijay Kumar* v. *State of U.P.* [*Vijay Kumar* v. *State of U.P.*, (2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240] : (SCC p. 141, para

17)

"*17*. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

16. This principle has been further reiterated in *Mannan Shaikh* v. *State of W.B.* [*Mannan Shaikh* v. *State of W.B.*, (2014) 13 SCC 59 : (2014) 5 SCC (Cri) 547] and thereafter in *Ratanlal* v. *Prahlad Jat* [*Ratanlal* v. *Prahlad Jat*, (2017) 9 SCC 340 : (2017) 3 SCC (Cri) 729] and *Swapan Kumar Chatterjee* v. *CBI* [*Swapan Kumar Chatterjee* v. *CBI*, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839] . The relevant paragraphs of *Swapan Kumar Chatterjee* [*Swapan Kumar Chatterjee* v. *CBI*, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839] are as under: (*Swapan Kumar Chatterjee case* [*Swapan Kumar Chatterjee* v. *CBI*, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839] , SCC p. 331, paras 10-11)

"*10*. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (*i*) to summon any person as a witness; or (*ii*) to examine any person in attendance, though not summoned as a witness; or (*iii*) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (*i*) to

summon and examine, or (*ii*) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

17. The aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

20. On one hand the prosecutrix has used the lawful authority of this Court to get rid of an unwanted child by alleging that she is minor and she was subjected to rape by the accused Sonu Parihar, At the time of hearing of Writ Petition No.5723/2021 filed by her father, the case diary was also called and the State counsel after verifying from the case diary, had also stated that the prosecutrix is minor. After obtaining the medical opinion from the Medical Board, this Court had granted permission for medical termination of pregnancy. From the DNA test report, it is clear that the prosecutrix is the biological mother of the fetus.

21. Under these circumstances, this Court is of the considered opinion that the denial of prosecutrix and her father with regard to filing of writ petition for medical termination of pregnancy as well as abortion done in compliance of the order passed by this Court in Writ Petition No.5723/2021 coupled

with the DNA test report of the fetus, according to which, the prosecutrix is the biological mother as well as the DNA test report that the DNA profile of the accused Sonu Parihar was found in the vaginal slide, vaginal swab, pubic hairs as well as penty of the prosecutrix coupled with the fact that the stand taken by prosecutrix and her father before the SP, Datia in an enquiry conducted by the said authority in compliance of orders passed by this Court, this Court is of the considered opinion that it is a fit case where re-examination of the prosecutrix, her father and her brother must be directed to do the complete justice.

22. Accordingly, in *suo moto* exercise of powers under Section 482 of Cr.P.C, the Trial Court is directed to re-examine the prosecutrix (PW-1), her father (PW-2) and her brother (PW-3). The Trial Court is directed to return the record of the case immediately after re-examining the aforesaid three witnesses. The prosecutrix (PW-1), her father (PW-2) and her brother (PW-3) are directed to appear before the Trial Court on **2nd June, 2022** for their re-examination. It is made clear that if the prosecutrix (PW-1), her father (PW-2) and her brother (PW-3) fail to appear before the Trial Court on **2nd June, 2022**, even then the Trial Court shall immediately send back the record of the case after recording the order-sheet on the said date.

23. It is made clear that the order for re-examination has been issued purely on the basis of averments made in Writ Petition No.5723/2021 as well as the evidence given by the prosecutrix (PW-1), her father (PW-2) and her brother (PW-3) and the DNA test report only. The statement made by the prosecutrix and her father before the SP, Datia is taken into consideration only to the extent that these witnesses have not deposed correctly before the Trial Court.

24. Whether these witnesses resiled from their statements voluntarily or at the behest of some third person, shall be considered independently after replies are filed.

25. **List this case on 20/06/2022** for consideration of the contempt notice issued to the prosecutrix, her father as well as Advocates.

26. Office is directed to immediately return the record of the Trial Court alongwith copy of this order.

17. Accordingly, the prosecutrix "X", her father "A" and her brother "B" were directed to appear before the Trial Court on 2-6-2022, for their re-examination.

18. On 20-6-2022, the record of the Trial Court was received back and it was found that the prosecutrix "X" and her brother "B" did not appear before the Trial Court for their re-examination and the father of the prosecutrix "A" appeared at 4:10 P.M. only and once again turned hostile and stuck to his previous evidence which was given by him before the Trial Court. Accordingly, in the light of Judgment passed by the Supreme Court in the case of **Zahira Habibullah Sheikh (5) and another Vs. State of Gujarat and others** reported in **(2006) 3 SCC 374**, this Court by order dated 20-6-2022 issued another notice for Contempt of Court against the Prosecutrix "X" her brother "B" and her father "A". Similarly, notice was issued to Shri Mehmood Khan, Advocate, who had filed W.P. No. 5723/2021.

19. On 27-6-2022, as none appeared for the prosecutrix "X" and her father "A", therefore, warrant of arrest was issued against them. Since, the father of the prosecutrix had once again claimed before the Trial Court, that he had not filed the W.P. No. 5723/20221, therefore the Superintendent of Police, Datia was directed to obtain specimen signatures of father of Prosecutrix as well as signatures found on the affidavit and Vakalatnama filed along with W.P. No. 5723/20221 as well as the signatures made in the register of Oath Commissioner for comparison by the Handwriting expert, and the case was fixed for 15-7-2022 for filing of report of handwriting expert.

20. On 18-7-2022, the Counsel for the respondents sought time to

argue. By that time, the report of handwriting expert was not received, therefore, by order dated 18-7-2022, the Superintendent of Police, Datia was directed to send the signatures of the father of the prosecutrix on the FIR also for its comparison with the signatures of the father of the prosecutrix.

21. On 30-8-2022, the report of handwriting expert dated 15-8-2022, was opened in the open Court and according to the report of handwriting expert, the author of specimen signatures had not signed the questioned documents.

22. Further as per the DNA test report, the accused Sonu Parihar was not the biological father of the fetus, whereas the prosecutrix was found to be the biological mother of the fetus, therefore, this Court by order dated 30-8-2022, directed the Superintendent of Police, Datia to further investigate in Crime No. 25/2021 and following order was passed :

> In compliance of order dated 27.6.2022, the report of handwriting expert has been produced in a sealed cover. From the report of handwriting expert, the person who is the author of specimen signatures had not signed the questioned documents i.e. FIR and affidavit/Vakalatnama filed in support of the petition. From
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> From the DNA test report, it is clear that although the prosecutrix is the biological mother of the fetus but none of the accused is biological father of the fetus. Therefore, it appears that there is a third person who is behind the curtains and is the biological father of the fetus. The fact that the FIR does not contain the signatures of the father of the prosecutrix indicates the presence of third person at the time of lodging of FIR as well as it appears that third person had projected himself to be the father of the prosecutrix.
>
> Shri Mehmood Khan who had filed W.P. No.5723/2021 has filed his reply 1 and submitted that it is really unfortunate that the father of the prosecutrix has denied the filing of the

petition whereas on 8.3.2021 the complainant (father of the prosecutrix) had contacted the counsel namely Shri Mehmood Khan and had instructed him to file a writ petition for termination of pregnancy of his daughter and only on the instructions of the father of the prosecutrix as well as on the basis of Aadhar Card given by him, the petition was filed. In the affidavit filed along with W.P. No.5723/2021, Shri Mehmood Khan has duly identified the father of the prosecutrix as the petitioner.

In view of the report of handwriting expert it is necessary to find out that who is third person who had given affidavit/Vakalatnama in support of W.P. No.5723/2021 and had projected himself to be the father of the prosecutrix because the DNA test report indicates that none of the accused is the biological father of the fetus.

In view of the report of handwriting expert, according to which the FIR as well as the affidavit/Vakalatnama which were filed in support of W.P. No.5723/2021 does not contain the signatures of father of the prosecutrix as well as in view of DNA test report, according to which none of accused was found to be the biological father of the prosecutrix, the next question of consideration is as to whether this Court while exercising powers under Article 215 of the Constitution of India can direct for further investigation or not.

This contempt proceeding has arisen on account of a contrary stand taken by the prosecutrix as well as her father before the Trial Court by projecting that not only the prosecutrix was major but she never got pregnant as well as no writ petition was ever filed and no termination of pregnancy had taken place. This evidence given before Trial Court is found to be contrary to the record and during the course of arguments, a new fact has figured that even 2 the FIR does not contain the signature of the father of the prosecutrix. Whether the father of the prosecutrix had himself filed a writ petition or not is not very material because after obtaining an order, may be at the instance of third person, he permitted his daughter to undergo the termination of pregnancy and ultimately her pregnancy was terminated, therefore, it is clear that the prosecutrix and her father were a part of conspiracy in filing

W.P. No.5723/2021.

Since the subsequent development is closely knitted with the facts of the contempt proceedings wherein the prosecutrix and her father had leveled allegations against certain Advocates practicing in Datia by alleging that they had forced them to turn hostile before the Trial Court therefore, it is necessary to find out the correct facts and to unearth the truth.

Under these circumstances, this Court being a Constitutional Court also has a jurisdiction to pass necessary orders under Articles 226 and 227 of the Constitution of India as well as under Section 482 of Cr.P.C. It would be a too technical approach to register a separate proceedings for issuing a direction for further investigation. The accused who are facing trial are also party to these proceedings and are being represented before this court, therefore when all the parties are being represented and they are being heard at every stage, this Court is of the considered opinion that in the present proceedings this Court can also direct for a further investigation in exercise of powers under Articles 226 and 227 of the Constitution of India or under Section 482 of Cr.P.C.

Accordingly, the Superintendent of Police, Datia is directed to conduct a further investigation in Crime No.25/2021 registered in Police Station Civil Lines, Datia to find out as to who was the person who had appeared in the 3 police station at the time of lodging of the FIR and projected himself to be the father of the prosecutrix as well as who is biological father of the fetus. Further, the Superintendent of Police, Datia shall also investigate as to who filed the Writ Petition No.5723/2021 and whether the affidavit/Vakalatnama filed along with W.P. No.5723/2021 contains the signature of even third person or not?

Till then the further proceedings before the Trial Court in S.T. No.16/2021 SC shall remain stayed.

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

At this stage, it is submitted by the counsel for the State that the report of handwriting expert which has been submitted in a sealed envelop may be returned back, so that the same can

be taken into consideration during further investigation.

The submission made by the counsel for the State appears to be bonafide.

Accordingly, it is directed that if the Superintendent of Police, Datia submits a self-attested copy of the report of handwriting expert, then the Principal Registrar of this Court shall return the sealed envelop containing a register and the report of handwriting expert.

Looking to the controversy involved in the present case, it is directed that the further investigation shall not be conducted by any officer below the rank of Superintendent of Police.

However, Superintendent of Police is permitted to take assistance of his subordinate police officers.

List this case on 17.10.2022.

The Superintendent of Police, Datia is directed to submit his status report latest by 14.10.2022.

23. Accordingly, on 14-10-2022, the Superintendent of Police, Datia filed his status report with the following observations :

24. That, in overall investigation the Superintendent of Police Datia, District Datia reached the conclusion in following manner:

I. In respect of Biological father of fetus of prosecutrix, it is found that accused Bhagwat Yadav who is cousin brother of Prosecutrix is the biological father of the said fetus and accordingly,the separate FIR has been registered against him therein investigation is going on.

II. In respect of registration of FIR, I fact that the said FIR has been got registered by said [Name of father of prosecutrix which is masked].

III. In respect of signature of [Name of father of prosecutrix which is masked] on the affidavit and power filed with W.P. No. 5723/2021, I find that the signatures of [Name of father of prosecutrix which is masked] on the affidavit and Vakalatnama filed with said W.P. No. 5723/2021 was matched with the signature Shri Mehmood Khan.

25. It is also stated in the status report, that the brother of the

prosecutrix “B” disclosed that the prosecutrix is friend of Savita Yadav. Accordingly, Savita Yadav was interrogated who also stated that She had seen the prosecutrix and Bhagwat Yadav in objectionable condition, therefore, the blood samples of Bhagwat Yadav and Raja Yadav were collected and **it has been found that Bhagwat Yadav who is the Cousin brother of the prosecutrix, is the biological father of the fetus and accordingly, crime No. 373/2022 at police station Civil Lines Datia has been registered under Section 376(2)(F) of IPC and under Section 5/6 of POCSO Act and Bhagwat Yadav has been arrested.**

26. Accordingly, the Counsel for Mehmood Khan and Counsel for Prosecutrix, her brother and her father as well as Counsel for other respondents are also heard finally.

Role of Shri Mehmood Khan, Advocate

27. Shri Mehmood Khan, Advocate has filed his written reply to the show cause notice, thereby claiming that in fact the father of the prosecutrix had approached him and on his instructions, the petition was prepared and filed and the father of the prosecutrix had collected the certified copy of the order and expressed his anguish as to why the father of the prosecutrix is denying the filing of writ petition. But, in his police statement, Shri Mehmood Khan, Advocate took a different stand and stated that in fact Shri Vikrant Sharma, Advocate had instructed him to file the writ petition and he had received the pre-signed papers and under bonafide belief, he had identified the father of the prosecutrix in good faith and the certified copy of the order was obtained by Shri Vishal Sharma, Advocate, who is working as associate Counsel of Shri Vikrant Sharma. Thus, in his police statement, Shri Mehmood Khan, Advocate

disowned his earlier stand which was taken by him before this Court in his written reply. However, in the light of the report of handwriting expert, the Counsel for Mehmood Khan, Advocate, fairly conceded the mistake on the part of Shri Mehmood Khan and tendered an unconditional apology for the mistake committed by him. It is once submitted that in fact, the case was forwarded to him by Shri Vikrant Sharma, Advocate and under bonafide belief, he has committed the mistake of signing the documents by forging the signatures of the father of the prosecutrix. It is submitted that in fact Shri Mehmood Khan, Advocate should not have done so, but he did not realize the gravity of his conduct. Shri Mehmood Khan, Advocate, was also present in the Court, and he too submitted that he has committed a glaring mistake without realizing the gravity of the same and he blindly relied upon the instructions of his fellow advocate. Accordingly, he pleaded for mercy and tendered his unconditional apology.

28. Considered the submissions made by Shri Mehmood Khan, Advocate and Shri Rajiv Sharma, Counsel for Mehmood Khan.

29. It is true that the written reply filed by Shri Mehmood Khan, Advocate is contrary to the report of hand writing expert as well as the verbal stand taken by Shri Mehmood Khan, Advocate and his Counsel during the course of arguments, as well as the Police Statement of Shri Mehmood Khan, Advocate recorded by Superintendent of Police, Datia.

30. The statement of the father of the prosecutrix was recorded by the Superintendent of Police on 5-9-2022 and in that statement, the father of the prosecutrix has also stated that he wanted to file a writ petition for medical termination of pregnancy of his daughter and accordingly,

Bhagwan @ Pappu Yadav suggested that they would talk to Mullu Yadav, who knows some of the Lawyers practicing in High Court. Accordingly, Mullu gave them the phone number of Shri Vikrant Sharma, Advocate and accordingly, he and Pappu Yadav came to High Court and met with Shri Vikrant Sharma. Shri Vikrant Sharma, Advocate in his turn, introduced them to another Counsel who disclosed his name as Mehmood Khan and they were told by Shri Vikrant Sharma, that Mehmood Khan would contest their case. Thereafter, he handed over the papers to Shri Mehmood Khan, Advocate, but he did not obtain his signatures on any paper. 10-15 days thereafter, he received a mobile call from Shri Mehmood Khan that order has been passed and accordingly, he came to Gwalior and collected the order and got his daughter aborted in District Hospital Datia.

31. Thus, it is clear from the statement of father of the prosecutrix, that Shri Mehmood Khan was merely engaged by Shri Vikrant Sharma for filing writ petition, and neither Shri Vikrant Sharma, Advocate, nor Shri Mehmood Khan, Advocate had any role to play in lodging of FIR or turning of witnesses hostile before the Trial Court.

32. It is not out of place to mention that Shri Vikrant Sharma, Advocate is no more.

33. Thus, it is clear that Shri Mehmood Khan, Advocate has come in the entire picture as a Counsel for the father of the prosecutrix, only for the purposes of filing of writ petition.

34. But why Shri Mehmood Khan did not obtain the signatures of the father of the prosecutrix on the affidavit/Vakalatnama?

35. It is submitted by Shri Mehmood Khan, Advocate, that in the wake

of Covid 19 Pandemic, he did not obtain the signatures of the father of the prosecutrix “A” and he himself forged the signatures of the father of the prosecutrix “A”and thus he submitted that it was the biggest mistake which he has committed and therefore, pleaded for mercy and apology.

36. Filing of documents/petition with forged signatures of Petitioner will certainly amount to Contempt of Court.

37. Therefore, Shri Mehmood Khan, Advocate is held guilty of committing Contempt of Court.

38. However, Shri Mehmood Khan, Advocate has not only accepted his mistake but has tendered his unconditional apology.

39. The next question for consideration is that whether the unconditional apology tendered by Shri Mehmood Khan, Advocate is liable to be accepted or not?

40. Section 12 of Contempt of Courts Act read as under :

> **12. Punishment for contempt of court**.—(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both :
>
> Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.
>
> *Explanation*.—An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.
>
> (2) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect of itself or of a court subordinate to it.
>
> (3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a

sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit.

(4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced with the leave of the court, by the detention in civil prison of each such person :

Provided that nothing contained in this sub-section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission.

(5) Notwithstanding anything contained in sub-section (4), where the contempt of court referred to therein has been committed by a company and it is proved that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of such director, manager, secretary or other officer.

Explanation.—For the purpose of sub-sections (4) and (5),—

(*a*) "company" means any body corporate and includes a firm or other association of individuals; and

(*b*) "director", in relation to a firm, means a partner in the firm.

41. The Supreme Court in the case of **Kalyaneshwari v. Union of India,** reported in **(2012) 12 SCC 599** has held as under :

5. "Contempt" is disorderly conduct of a contemnor causing serious damage to the institution of justice administration. Such conduct, with reference to its adverse effects and consequences, can be discernibly classified into two categories: one which has a transient effect on the system and/or the person concerned

and is likely to wither away by the passage of time while the other causes permanent damage to the institution and administration of justice. The latter conduct would normally be unforgivable.

6. Institutional tolerance which the judiciary possesses, keeping in mind the larger interest of the public and administration of justice, should not be misunderstood as weakness of the system. Maintaining the magnanimity of law is the linchpin to the wheels of justice. Therefore, in certain cases, it would be inevitable for the court to take recourse to rigours of the statute.

7. It is the seriousness of the irresponsible acts of the contemnors and the degree of harm caused to the institution and administration of justice which would decisively determine the course which the court should adopt i.e. either drop the contempt proceedings or continue proceedings against the contemnor in accordance with law.

8. The apology tendered even at the outset of proceedings has to be bona fide, should demonstrate repentance and sincere regret on the part of the contemnor lest the administration of justice is permitted to be crudely hampered with immunity by the persons involved in the process of litigation or otherwise. An apology which lacks bonafides and is intended to truncate the process of law with the ulterior motive of escaping the likely consequences of such flagrant violation of the orders of the court and disrespect to the administration of justice cannot be accepted.

* * * *

23. It is a settled principle of law that contempt is a matter primarily between the court and the contemnor. The court has to take into consideration the behaviour of the contemnor, the attendant circumstances and their impact upon the justice delivery system. If the conduct of the contemnor is such that it hampers the justice delivery system as well as lowers the dignity of the courts, then the courts are expected to take somewhat stringent view to prevent further institutional damage and to protect the faith of the public in the justice delivery system.

42. Filing of writ petition by forging the signatures of the Petitioner

would certainly hamper the justice delivery system, but at the same time, the behavior of the contemnor can also be taken into consideration.

43. This Court has already come to a conclusion that Shri Mehmood Khan, Advocate has no role to play in lodging of FIR or turning of witnesses hostile before the Trial Court. Furthermore, Shri Mehmood Khan, Advocate has accepted his guilt and his behavior in the Court during the hearing, also reflected that he is feeling sorry from the bottom of his heart.

44. As already pointed out, the Superintendent of Police, Datia after conducting further investigation has come to a conclusion that in fact the prosecutrix was seen in objectionable condition with her cousin brother Bhagwat Yadav, therefore, his blood samples were collected and the DNA of Bhagawt Yadav has matched and accordingly it has been found that Bhagwat Yadav is the biological father of the fetus and separate crime No. 373/2022 has been registered in Civil Lines, Datia and Bhagwat Yadav has been arrested. Thus, it is clear that the entire intention of the prosecutrix and her father was to hide the identity of Bhagwat Yadav. Without adverting to the correctness of the FIR lodged by the prosecutrix and her father in crime no. 25/2021 in Police Station Civil Lines, Datia, it is clear that ill-designs of the prosecutrix and her father started immediately after the prosecutrix got pregnant from Bhagwat Yadav. Further, there is nothing on record to show that Shri Mehmood Khan, Advocate was aware of the ill-designs of the Prosecutrix “X” and her father “A”. As already held that Shri Mehmood Khan, Advocate had no role to play except to file writ petition on behalf of father of prosecutrix, therefore, the unconditional apology tendered by Shri Mehmood Khan,

Advocate can be considered, although he has committed an unpardonable mistake.

45. Accordingly, the unconditional apology tendered by Shri Mehmood Khan, Advocate is hereby accepted with a warning that he should not repeat the same in future and if he is found indulged in such type of practice in future also, then no apologizes would be accepted. Apart from that, it is also expected from Shri Mehmood Khan, Advocate, that he would make an attempt to bring awareness amongst the lawyers, that they should not indulge in any kind of unpardonable tactics.

Role of Shri P.K. Garg D.P.O., Shri Aditya Khare, Shri Devendra Shrivastava, Shri Ajay Kant Shrivastava and Shri Anil Awasthy, Advocates

46. So far as the notices issued to Shri P.K. Garg D.P.O., Shri Aditya Khare, Shri Devendra Shrivastava, Shri Ajay Kant Shrivastava and Shri Anil Awasthy, Advocates are concerned, they are hereby **withdrawn.** However, liberty is granted to them that if they so desire, then they may take legal action under Civil as well as Criminal law against the prosecutrix and her father for making false allegations against them, thereby defaming them.

Role of Shri Drigvijay Singh Bhadoria, Oath Commissioner before whom the alleged affidavit of father of prosecutrix was sworn

47. The next question is with regard to role played by Oath Commissioner Shri Drigvijay Singh Bhadoria, before whom the affidavit was sworn. The Superintendent of Police, Datia has also recorded the statements of Shri D.V.S. Bhadoria, Oath Commissioner. He in his statement has stated that since the affidavit was sworn in the year 2021,

therefore, he donot recollect as to whether father of the prosecutrix had signed the affidavit in his presence or not? Similarly he expressed that he cannot say as to whether the father of the prosecutrix had signed his register or not? But there is material variance in the statement of Shri Mehmood Khan and Shri D.V. Singh Bhadoria. Shri Mehmood Khan, has not stated that he went to the table of Shri D.V.S. Bhadoria with the father of the prosecutrix but claimed that he had received a pre signed affidavit and Vakalatnama from the office of Shri Vikrant Sharma, whereas Shri D.V.S. Bhadoria, Oath Commissioner, had stated that Shri Mehmood Khan, Advocate had come with one person. When Shri D.V.S. Bhadoria, Oath Commissioner, was unable to recollect as to whether the petitioner had signed the affidavit and his register or not, then how he could say with certainty that Shri Mehmood Khan, Advocate had come with a person? Further more, it is clear from the report of the handwriting expert, that the affidavit and Vakalatnama filed in W.P. No. 5723 of 2021 doesnot bear the signatures of the father of the prosecutrix but the signatures of father of the prosecutrix are in the handwriting of Shri Mehmood Khan. Thus, it is clear that the father of the prosecutrix never appeared before Shri D.V.S. Bhadoria, Oath Commissioner, inspite of that, the affidavit was executed by Shri D.V.S. Bhadoria, Oath Commissioner.

48. However, in the present case, no notice was ever issued to Shri D.V.S. Bhadoria, Oath Commissioner, by this Court. Thus, it would not be proper to comment on the role played by Shri D.V.S. Bhadoria, Oath Commissioner. Therefore, the Principal Secretary, Law and Legislative Department, Madhya Pradesh or any other Competent Authority is

directed to conduct an inquiry into the conduct of Shri D.V.S. Bhadoria, Oath Commissioner and to take a final decision as to whether he has misconducted himself or not and to take a final decision accordingly. Needless to mention, that before finally deciding the matter, full opportunity of hearing shall be given to Shri D.V.S. Bhadoria, Oath Commissioner. Let the enquiry be completed within a period of one month from today and compliance report be filed before Principal Registrar of this Court latest by 5th of January 2023.

Role of Prosecutrix and her father

First Contempt : Filing of W.P. No. 5723/2021 on false averments

49. Now the next question for consideration is that by obtaining an order of Medical Termination of Pregnancy on the basis of false averments, whether the prosecutrix "X" and her father "A" have committed Contempt of Court or not?

50. It has come on record that the prosecutrix "X" and her father "A" tried their level best to hide the relationship of the prosecutrix "X" with her Cousin brother Bhagwat Yadav and accordingly, from the very beginning no allegation was made by them against Bhagwat Yadav, however, the DNA test report exposed every thing.

51. It is true that the prosecutrix "X" did not file any writ petition before this Court, but undisputedly, the prosecutrix took advantage of the order of Medical Termination of Pregnancy and got herself aborted. If the petition was filed without her consent, then She should not have undergone the termination of her pregnancy. In compliance of order dated 10-3-2021 passed in W.P. No. 5723 of 2021, She appeared before the Medical Board for her examination in order to find out as to whether

termination of her pregnancy is safe or not? Thereafter, She went for her abortion in the light of order dated 19-3-2021 passed in W.P. No. 5723 of 2021. Furthermore, the prosecutrix had also signed the FIR in crime No. 25/2021 which was lodged in Police Station Civil Lines, Datia. In her cross-examination in the Trial, She denied in para 8 that She was aborted and fetus of 3 months was seized, but She admitted that Identification form, Ex. P.9 bears her signatures. She further admitted that on 23-3-2021, her blood sample was taken in Govt. Hospital, Datia. She further admitted that recovery panchnama, Ex. P.7 bears her signatures. She further admitted that Ex. P.4 and P.5 bears her photographs. Since, the prosecutrix was minor, therefore, petition was filed by her father. Looking to the fact that the prosecutrix voluntarily went for abortion, it is clear that the writ petition was filed with the consent of the prosecutrix. Therefore, She cannot run away from her liability, merely by saying that She did not file W.P. No. 5723 of 2021.

52. The father of the prosecutrix in his Court evidence recorded on 29-7-2021 admitted that he had lodged gum insaan report, Ex. P.9 which bears his signatures. He further admitted that the prosecutrix had come back after 1-1 ½ months thereafter. He also admitted his signatures on his statement recorded under Section 164 of Cr.P.C., Ex. P.12. He admitted that after the prosecutrix went missing, he had searched her in the house of his relatives. He admitted his signatures on Notice, Ex. P.21, by which he was informed by the police that his daughter has been found pregnant, and therefore, he should not give any medicine for termination of her pregnancy. Another notice, Ex. P.22 which is similar in nature also bears his signatures. He denied that he had filed writ

petition for termination of her pregnancy. He denied that in compliance of order passed by High Court, the pregnancy of his daughter was terminated. He admitted his signatures on the seizure memo, Ex. P.23 by which the fetus was seized.

53. The facts of the case have already been mentioned in the previous paragraphs of the order. Sessions Trial No. 16/2021 is pending against Sonu Parihar, Santosh and Ajmer Yadav. Similarly, FIR No. 373 of 2022 has been registered against Bhagwat Yadav in Police Station Civil Lines, Datia. Therefore, any comment with regard to the facts of the said case, will certainly have some effect on the outcome of the said trial and thus, detailed discussion on the merits of the case is being deliberately avoided.

54. Therefore, without commenting on the correctness of the allegations made in FIR No. 25/2021 and 373/2022 registered at Police Station Civil Lines, Datia, it is held that it is clear from the DNA test report, that Sonu Parihar was not the biological father of the fetus, whereas prosecutrix is the biological mother of the fetus. Further the police had issued notices, Ex. P.21 and P.22 (as is evident from the evidence of father of the prosecutrix recorded on 29-7-2021), thereby cautioning the father of the prosecutrix, not to give any pills for abortion, otherwise, he would be prosecuted for offence under Section 201 of IPC. Similarly, as per DNA test report, Bhagwat Yadav is the biological father of the fetus. Thus, it is clear that the prosecutrix and Bhagwat Yadav had physical relations with each other. Since, the prosecutrix was minor, therefore, termination of her pregnancy was not possible without obtaining an order from the High Court and if the prosecutrix, her father

and others had gone for termination of her pregnancy in an illegal manner, then the prosecutrix, her father and others would have been liable for committing offence under Sections 201, 315, 316 of IPC etc. Therefore, in order get over such hurdle, the prosecutrix, her father and others decided to misuse the lawful authority of this Court, for obtaining an order of Medical Termination of Pregnancy or in the other word, the prosecutrix, her father and others decided to kill the unborn baby by misusing the authority of this Court, which otherwise would have been an offence and contrary to the notice, Ex. P.21 and P.22 issued by the Police.

55. The father of the prosecutrix has tried to take a defence that in order to protect the married life of the prosecutrix, he had turned hostile before the Trial Court.

56. Considered the said defence taken by the father of the prosecutrix before the police in further investigation.

57. The prosecutrix and her father had lodged FIR in crime no. 25/2021 at Police Station, Civil Lines, Datia. Thereafter, they filed writ petition No. 5723 of 2021 for Medical Termination of Pregnancy. Further, it is clear from the police statement of father of the prosecutrix which was recorded by Superintendent of Police, Datia, that the fact that the prosecutrix had become pregnant was shared by her father with others. Even, it is clear from the statements of Bhagwan @ Pappu Yadav, Vijay Singh @ Mullu Yadav, Savita Yadav, the fact that the prosecutrix had eloped with some one and She has become pregnant was already known to the members of the Society. Thus, it is impossible for the prosecutrix and her father to keep her in-laws in dark about her past

incidents. Further, the father of the prosecutrix has claimed that She has married the prosecutrix but neither the name of her husband has been disclosed nor the address of her matrimonial home has been disclosed. Even the prosecutrix in her police statement, has not disclosed the name of her husband and has not claimed that She has got married. In the police statement, recorded by Superintendent of Police, Datia, the prosecutrix has been shown to be the resident of village Bidnia, Distt. Datia and her father's name has been mentioned. Furthermore, when an arrest warrant was issued by this Court by order dated 7-3-2022, the prosecutrix "X" was arrested by police on 20-3-2022 and an arrest warrant was prepared, which has been placed on record by the police. In the arrest memo, the prosecutrix has been shown to be a spinster as her name has been mentioned as Ku. "X" and She was arrested from the house of her father "A". Thus, whether the prosecutrix has got married or not is also in doubt. No other witness has stated about the marriage of the prosecutrix. Further, the father of the prosecutrix in his police statement recorded on 5-9-2022 has claimed that he has performed the marriage of his daughter about 1 year back, whereas the prosecutrix and her father had made a statement before this Court on earlier occasions and never disclosed that the prosecutrix has got married. Even if the prosecutrix has got married, the fact that She was subjected to rape and She had got pregnant cannot be suppressed from her in-laws in the light of the FIR and the writ petition No. 5723/2021 and the medical record of the prosecutrix.

58. Thus, the emotional card played by the father of the prosecutrix is nothing but an after thought with a solitary intention to paint himself as a

helpless father.

59. Further, the prosecutrix deliberately suppressed her physical relationship with Bhagwat Yadav, who is her cousin brother. As per DNA test report, Bhagwat Yadav is the biological father of the fetus. Thus, the prosecutrix and her father were suppressing entire facts right from the very beginning. Thus, this Court is of the considered opinion, that W.P. No. 5723/2021 was filed by suppressing correct facts with a solitary intention to avoid criminal liability of killing an unborn baby. Therefore, the prosecutrix, her father and others are liable for committing offence under Section 201,315,316 of IPC also. Therefore, the Superintendent of Police, Datia is directed to investigate crime no. 373/2022 registered at Police Station Civil Lines, Datia from that angle also.

60. The Supreme Court in the case of **Kalyaneshwari (Supra)** has already held that the court has to take into consideration the behavior of the contemnor, the attendant circumstances and their impact upon the justice delivery system. If the conduct of the contemnor is such that it hampers the justice delivery system as well as lowers the dignity of the courts, then the courts are expected to take somewhat stringent view to prevent further institutional damage and to protect the faith of the public in the justice delivery system.

61. While issuing show cause notice dated 10-2-2022, the Prosecutrix “X” and her father “A” were specifically informed about the grounds on which the Contempt Notice was issued. The Contemnors did not seek any opportunity either to lead any evidence or to cross-examine any witness/co-noticee.

62. Thus, the conduct of the contemnors namely the prosecutrix and her father has shaken the very purpose of Medical Termination of Pregnancy Act, 1971 and this has great impact on the justice delivery system and has also lowered down the dignity of the Court. If the prosecutrix and her father are allowed to go scotfree, then it would encourage others also to indulge in such type of activities. Therefore, the prosecutrix "X" and her father "A" are held guilty of committing Contempt of Court.

Second Contempt

Whether the prosecutrix "X", her father "A", her brother "B" have committed another contempt by flouting order dated 5-5-2022 and by making a false statement before this Court?

63. The prosecutrix and her father had made a statement before this Court on 21-3-2022, that only under the pressure of the local counsels, they had turned hostile before the Trial Court. Thereafter, this Court by order dated 5-5-2022 directed for re-examination of the prosecutrix"X", her father "A" and her brother "B" in the Trial. Thereafter, the father of the prosecutrix "A" again resiled from his statement and turned hostile and also claimed that he had never filed W.P. No. 5723/2021 and nothing had happened to her daughter and her pregnancy was not terminated. Further more, inspite of the clear direction by this Court, the prosecutrix "X" and her brother "B" did not appear before the Trial Court for their re-examination. Therefore, another notice was issued by order dated 20-6-2022 to show cause as to why the prosecutrix "X", her father "A" and her brother "B" be not punished for Contempt of Court and following order was passed :

The record of the Court below has been received.

In compliance of order dated 5/5/2022, the prosecutrix as well as her brother did not appear before the Trial Court although her father appeared before the Trial Court. The order sheet dated 2/6/2022 indicates that father of the prosecutrix had appeared at 4:10 PM and his evidence could not be concluded. Further, the father of the prosecutrix had told the Trial Court that since the prosecutrix and her brother had gone to Bhopal to attend the marriage and accordingly, the case was fixed for 3/6/2022. On 3/6/2022 the evidence of the father of the prosecutrix was recorded, however, the prosecutrix and her brother did not appear and thereafter, as directed, the record of the Trial Court has been sent to this Court.

This Court has gone through the evidence of the father of the prosecutrix. In cross-examination, he has once again turned hostile and has stated that he had not filed any writ petition seeking termination of medical pregnancy of the prosecutrix.

The father of the prosecutrix as well as the prosecutrix and her brother are directed to appear before this Court on the next date of hearing to show-cause as to why they are not punished for contempt of Court by changing their stand at different stages, as held by the Supreme Court in the case of **Zahira Habibullah Sheikh (5) and another vs. State of Gujarat and others** reported in **(2006) 3 SCC 374.**

Since Writ Petition No.5723/2021 was filed and argued

by Shri Mahmood Khan, Advocate and it is being pleaded by the father of the prosecutrix that the said writ petition was not filed by him, accordingly, issue notice to Shri Mahmood Khan, Advocate to file his reply in this regard.

64. Accordingly, the prosecutrix"X", her father "A" and her brother "B" filed their reply to show cause notice, and leveled serious allegations against the Trial Court itself. From the order-sheet of the Trial Court, it was clear that the father of the prosecutrix appeared before the Trial Court at 4:10 P.M., but in reply to the show cause, it was agitated that the father of the prosecutrix was sitting outside the Court room on 2-6-2022 from 11 A.M., but the Court Reader informed that the case is not fixed for recording of his evidence, but he continued to sit outside the Court room. Even the Court did not call him for recording of his evidence, but also claimed that his Counsel also did not make prayer before the Trial Court for recording of his evidence. At 4:10 P.M., his Counsel Shri Anil Awasthy came and informed the Court about the proceedings regarding recording of the statement of the father of the prosecutrix and only thereafter, the Trial Court started recording the evidence of father of the prosecutrix. [Although the father of the prosecutrix has claimed that Shri Anil Awasthy, Advocate was his Counsel, but Shri Anil Awasthy, Advocate was appearing as a Counsel of accused Santosh Parihar]. So far as denying the factum of filing of writ petition and getting his daughter aborted is concerned, he once again tried to justify that he did so on the advise of the lawyers so that the engagement of his daughter is not broken. Thus, it has been claimed that the prosecutrix "X', her father "A" and her brother "B" cannot be held liable for the ill-advice given by

the local Counsels. It was further pleaded that the father of the prosecutrix did not engage Shri Mehmood Khan, Advocate. However, the reply is completely silent as to why the prosecutrix "X", and her brother "B" did not appear before the Trial Court on 2-6-2022 and the reply is also silent that how the father of the prosecutrix came in possession of certified copy of the order passed in W.P. No. 5723 of 2021 and why he produced his daughter before Medical Board and thereafter for abortion.

65. This mis-adventourous act of the prosecutrix "X" and her brother "B" in violating/flouting the order dated 5-5-2022 in the given facts and circumstances of the case, is clear example of gross contempt of Court. The Supreme Court in the case of **Zahira Habibullah Sheikh (5) v. State of Gujarat,** reported in **(2006) 3 SCC 374** has held as under :

> **1**. The case at hand immediately brings into mind two stanzas (14 and 18) of the eighth chapter of *Manu Samhita* dealing with role of witnesses. They read as follows:
>
> *Stanza 14*
>
> यत्र धर्मो ह्यधर्मेण सत्यं यत्रानृतेन च ।
> हन्यते प्रेक्षमाणानां हतास्तत्र सभासदः ।।
>
> "*Jatro dharmo hyadharmena*
> *Satyam jatranrutenacha*
> *Hanyate prekshyamananam*
> *Hatastrata sabhasadah*"
>
> [Where in the presence of judges "dharma" is overcome by "adharma" and "truth" by "unfounded falsehood", at that place they (the judges) are destroyed by sin.]
>
> *Stanza 18*
>
> पादोऽधर्मस्य कर्तारं पादः साक्षिणमृच्छति ।
> पादः सभासदः सर्वान् पादो राजानमृच्छति ।।
>
> "*Padodharmasya kartaram*
> *Padah sakshinomruchhati*

Padah sabhasadah sarban
Pado rajanmruchhati"

[In the adharma flowing from wrong decision in a court of law, one-fourth each is attributed to the person committing the adharma, witness, the judges and the ruler.]

* * * *

35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts

of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

38. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which

the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an over hasty stage-managed, tailored and partisan trial.

39. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

40. "Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle the truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. Doubts are raised about the roles of

investigating agencies. Consequences of defective investigation have been elaborated in *Dhanaj Singh* v. *State of Punjab*. It was observed as follows: (SCC p. 657, paras 5-7)

> "*5*. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See *Karnel Singh* v. *State of M.P.*)
>
> *6*. In *Paras Yadav* v. *State of Bihar* it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not, the contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.
>
> *7*. As was observed in *Ram Bihari Yadav* v. *State of Bihar* if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice. The view was again reiterated in *Amar Singh* v. *Balwinder Singh*."

41. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in the court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like

caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation (*sic* repetition). We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately the truth is to be arrived at, the eyes and ears of justice have [398]to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before the courts mere mock trials as are usually seen in movies.

42. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of society. On the contrary, efforts should be to ensure a fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interest of the individual accused. In this courts have a vital role to play.

43. In the aforesaid background, we direct as follows:

(*1*) Zahira is sentenced to undergo simple imprisonment for one year and to pay costs of Rs 50,000 and in case of default of payment within two months, she shall suffer further imprisonment of one year.

(*2*) Her assets including bank deposits shall remain attached for a period of three months. The Income Tax Authorities are directed to initiate proceedings requiring her to explain the sources of acquisition of various assets and the expenses met by her during the period from 1-1-2002 till today. It is made clear that any observation made about her having not satisfactorily explained the

> aforesaid aspects would not be treated as conclusive. The proceedings shall be conducted in accordance with law. The Chief Commissioner, Vadodara is directed to take immediate steps for initiation of appropriate proceedings. It shall be open to the Income Tax Authorities to direct continuance of the attachment in accordance with law. If so advised, the Income Tax Authorities shall also require Madhu Srivastava and Bhattoo Srivastava to explain as to why the claim as made in the VCD of paying money shall not be further enquired into and if any tangible material comes to surface, appropriate action under the income tax law shall be taken notwithstanding the findings recorded by the inquiry officer that there is no acceptable material to show that they had paid money, as claimed, to Zahira. We make it clear that we are not directing initiation of proceedings as such, but leaving the matter to the Income Tax Authorities to take a decision. The trial court shall decide the matter before it without being influenced by any finding/observation made by the inquiry officer or by the fact that we have accepted the report and directed consequential action.

66. In the present case, the prosecutrix “X”, her father “A” and her brother “B” have changed their version from time to time with an oblique motive. Further, they did not hesitate in alleging against the Trial Court as well as the Local Counsels.

67. By order dated 20-6-2022, they were clearly specifically informed the charge on which they were required to show cause. Further, their reply is completely silent as to why the prosecutrix “X” and her brother “B” did not appear before the Trial Court on 2-6-2022. Further, they never prayed for examination of any witness nor cross-examination of any co-noticee including Shri Anil Awasthy, Advocate, against whom the Prosecutrix “X”, her father “A” and her brother “B” have leveled allegations.

68. Accordingly, the father of the prosecutrix "A" is held guilty of committing second Contempt of this Court, for regularly changing his version and the prosecutrix "X" and her brother "B" are held guilty of committing of second Contempt of Court by not appearing before the Trial Court inspite of clear direction by order dated 5-5-2022. Accordingly, they are held guilty of committing Contempt of Court by flouting order dated 5-5-2022 and by changing their version with an oblique motive.

69. The prosecutrix "X", her father "A" and her brother "B" are not present today. Looking to their previous conduct of not responding to the notice and bailable warrant which were issued against them at the very first instance, therefore, issue warrant of arrest against them for their appearance before this Court on 07th of November 2022 for hearing on the question of sentence.

70. List on **07th of November 2022.**

(G.S. AHLUWALIA)
JUDGE