IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 10th OF JANUARY, 2024

CRIMINAL APPEAL No. 7257 of 2019

BETWEEN:-

SANTOSH @ TANA S/O RAJARAM KHASELE, AGED ABOUT 30 YEARS, OCCUPATION: LABOUR, CASTE CHHIPA R/O INFRONT OF SUPER F QUARTER NO.1471 SARNI P.S. SARNI, DISTRICT BETUL (MADHYA PRADESH)

.....APPELLANT

(NONE)

AND

1. **THE STATE OF MADHYA PRADESH THROUGH POLICE STATION SARNI DISTRICT BETUL (MADHYA PRADESH)**

2. **"A" VICTIM, URMILA W/O SHRI SUKARLAL R/O GRAM MANKA DANA, POLICE STATION CHOPNA, DISTRICT BETUL (MADHYA PRADESH)**

.....RESPONDENTS

(SHRI SOURABH SHUKLA – PANEL LAWYER FOR RESPONDENT NO.1/STATE)

"Reserved on : 15.12.2023"

"Pronounced on : 10.01.2024".

This appeal having been heard and reserved for judgements, coming on for pronouncement this day, the court passed the following:

JUDGMENT

This Criminal Appeal under Section 374(2) of Cr.P.C. has been filed against judgment and sentence dated 20.08.2019 passed by Additional Sessions Judge/Special Judge (Scheduled Castes and Scheduled Tribes, (Prevention of Atrocities) Act), Betul in Special Case No.20014/2014 by which appellant has been convicted for the following offences:

Conviction	Sentence		
	Imprisonment	Fine	Imprisonment in lieu
U/s 323 of IPC (2counts)	R.I. for 3 months to each	Rs.500/- to each	R.I. for 1 month to each
U/s 354 IPC	R.I. for 1 year	Rs.500/-	R.I. for 1 month

2. It is not out of place to mention here that co-accused Sunil@Lefty and Sandeep are still absconding.

3. According to the prosecution case, prosecutrix (P.W.-2) lodged an FIR in Police Station Sarni on the allegations that on 04.12.2013 at about 2 p.m. she and Sukarlal had gone for walk on a hill behind Rakhad Mohalla, Sarni. At that time, appellant came there and had scuffle with her. He started abusing her filthily and also assaulted her by *lathi* and belt. When Sukarlal tried to intervene in the matter, he too was assaulted by him, as a result, he sustained injuries on his legs and back. Accordingly, Crime No.575/13 was registered against the appellant and absconding accused persons for offence under Sections 354, 294, 323,

506, 34 of IPC and Section 3(1)(11) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The injured persons were got medically examined. A *Lathi* was seized from the possession of appellant. The police after completing the investigation filed the charge sheet against the appellant and co-accused persons for offence under Sections 354A, 294, 323, 324, 506, 34 of IPC and under Section 3(1)(11) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

4. The Trial Court by order dated 27.07.2017 framed the charges under Sections 294, 323 of IPC or in alternative under Sections 323/34, 354, 506 (Part-II) of IPC and under Sections 3(1)(10) and 3(1)(11) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act against appellant and co-accused Sunil@Lefty and under Sections 294, 323 or in alternative 323/34, 354, 506 of IPC against co-accused Sandeep.

5. The accused persons abjured their guilt and pleaded not guilty.

6. The prosecution in order to prove its case examined Phoolwati (P.W.-1), prosecutrix (P.W.-2), Sukarlal (P.W.-3), Dr. V.N. Jharwade (P.W.-4), Achhelal Dhurve (P.W.-5), L.N. Yadav (P.W.-6), Shri Sundarlal (P.W.-7) and P.S. Mandloi (P.W.-8).

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

8. Trial Court by impugned judgment dated 20.08.2019 convicted the appellant for offence under Sections 323 of IPC (two counts) and under Section 354 of IPC and awarded jail sentence as already mentioned above.

9. It is not out of place to mention here that after the evidence of prosecution witnesses was recorded, co-accused Sunil@Lefty and Sandeep were declared absconding.

10. Heard learned counsel for State and perused the record.

11. Phoolwati (P.W.-1) is a hearsay witness who is sister of Sukarlal. She had stated that in the year 2013 Sukarlal and prosecutrix came to her house and thereafter, they went for a walk towards Rakhaddam. After coming back they informed that Lefty, Sandeep and Santosh (appellant) had teased the prosecutrix. This witness was also stated that she had seen the injuries sustained by prosecutrix and Sukarlal.

12. Prosecutrix (P.W.-2) had stated that incident took place on 04.12.2013. She had gone for walk with Sukarlal on a hill situated towards the side of Rakhadmohalla. All the three accused persons came there and started teasing her. When she raised an alarm, then they started abusing her. When Sukarlal came to save her, he too was assaulted, as a result, this witness sustained injuries on her knees and thighs. It was further alleged that accused persons while fleeing away had also extended a threat that in case if report is lodged, then they would be killed. Thereafter, she and Sukarlal came back to the house of Sundarlal and informed the incident to Sundarlal and Phoolwati. FIR was lodged. Her requisition for MLC is Ex.P/2 and police had prepared the spot map, Ex.P/3. She stated that she belongs to Scheduled Tribe. However, she was not aware of the caste of co-accused Sunil and Santosh (appellant). In cross-examination she stated that she is the resident of Kudikheda and she was not married on the date of incident. However, her contention is that she had gone to the house of her *bhabhi* alongwith her fiance Sukarlal. Accused persons were not known to

prosecutrix prior to the date of incident. She further stated that she narrated the bodily appearance of accused persons and accordingly her *bhabhi* disclosed their names. It was further stated that even her *bhabhi* had seen them. She denied that accused persons were going on a motorcycle and because of minor accident she had sustained injuries as a result some hot talks took place between them and accused persons.

13. Sukarlal (P.W.3) has also stated that he had gone towards the hill alongwith his fiancee where three persons came there and they started teasing her fiancee and were abusing filthily. They started assaulting his fiancee and when he tried to intervene in the matter, he too was assaulted. As a result, he sustained injuries on his right hand and both legs whereas his fiance had sustained injuries on her both knees and thighs. Thereafter, they came back to the house of his sister and narrated the incident. Accordingly, FIR was lodged. He was got medically examined This witness was cross-examined and he denied that while they were going towards the hill, there was a minor accident, as a result, there were some hot talks between the appellant and injured persons.

14. Dr. V.N. Jharwade (P.W.-4) had medically examined the prosecutrix (P.W.-2) and found following injuries on her body:

(i) Superficial Abrasion 1/2 x 1/2 c.m. on right shoulder.

(ii) Incised wound 1 c.m. x 1/2 x 1/2 c.m. above right eye.

(iii) Pain and swelling on both knees joint.

MLC is Ex.P/2-'A'.

According to this witness, he had medically examined Sukarlal, who had complained pain and swelling on both shoulders, knees joint, pain and swelling on both interior aspect of thigh and he had also complaint of back ache. His MLC is Ex.P/4.

This witness was cross-examined and he admitted that in case if a person falls on thorns, then injuries as sustained by prosecutrix could have been caused and the injuries which were sustained by Sukarlal (P.W.-3) could have been sustained by fall on account of disbalance.

15. Achchelal Dhurve (P.W.-5) had issued the caste certificate.

16. L.N. Yadav (P.W.-6) is the scribe of the report.

17. Sundarlal (P.W.-7) is a hearsay witness, who had stated that Sukarlal (P.W.-3) and prosecutrix (P.W.-2) informed him about the incident.

18. P.S. Mandloi (P.W.-8) had conducted the investigation and had prepared the spot map Ex.P/3 and had arrested the appellant as well as co-accused Sunil on 05.12.2013 by Arrest Memo Ex.P/8 and Ex.P/9. Co-accused Sandeep was arrested on 16.12.2013 by Arrest Memo Ex.P/10. Memorandum of Sunil was recorded and one *lathi* was seized from his possession by Seizure Memo Ex.P/12 and memorandum is Ex.P/11. The memorandum of appellant Santosh was recorded which is Ex.P/13 and a *lathi* was seized by Ex.P/14. The memorandum of co-accused Sandeep was recorded which is Ex.P/15 and belt was seized which is Ex.P/16. The statements of witnesses were recorded. In cross-examination, he had admitted that spot map is not in his handwriting. However, it was prepared by his Reader and he had signed the same.

19. A defence was taken by accused/appellant to the effect that appellant and co-accused persons were going on a motorcycle and on account of a minor accident, some hot talk took place between the parties, as a result, a false report has been lodged. Spot map is Ex.P/3 and in the spot map no road has been shown. Therefore, the defence taken by appellant that appellant and co-accused persons were going on

a motorcycle and because of minor accident the false report has been lodged is *per se* false.

20. However, the question for consideration is as to whether it was the appellant, who had committed the offence or not?

21. The FIR was lodged by prosecutrix (P.W.-2) and in the FIR she had specifically named the accused persons including the appellant whereas in her cross-examination she had specifically stated that appellants were not known to her prior to the incident and in fact when she gave the physical description of the assailants to Phoolwati (P.W.-1), then the names of assailants were disclosed by Phootwati. It was further claimed that Phoolwati (P.W.-1) had also seen the assailants. She further admitted that when the police had come to inquire about the incident, he did not narrate the names of co-accused to the police.

22. Phoolwati (P.W.-1) has not narrated that the bodily description of accused persons was told to her by the prosecutrix (P.W.-2) or Phoolwati (P.W.-1) had ever seen the accused assailants. Sukarlal (P.W.-3) has also not named the assailants and he had merely stated that incident was committed by three persons and he can identify them if they come in front of him.

23. Prosecutrix (P.W.-2) and Sukarlal (P.W.-3) were examined in absence of appellant. Order sheet dated 03.10.2017 reads as under:

> "राज्य द्वारा श्री नितिन मिश्रा लोक अभि. उप।
>
> आरोपी संतोष सह श्री पूरन राठौर अधिवक्ता उपस्थित।
>
> शेष आरोपीगण अनुपस्थित, श्री नरेन्द्र सोनी अधिवक्ता द्वारा अनुपस्थित आरोपीगण का गैर हाजिरी माफी आवेदन पेश, बाद विचार के स्वीकार।
>
> अभियोजन साक्षी फुलवती अ.सा.–1, उर्मिला अ.सा.–2, सुकरलाल अ.सा.–3 उपस्थित, जिन्हें परीक्षण प्रतिपरीक्षण पश्चात् उन्मुक्त किया गया।

अभियोजन सक्षी सुंदरलाल उपस्थित, जिसे अभियोजन की ओर से उपस्थित लोक अभियोजक द्वारा बिना परीक्षण कराये उन्मुक्त किया।

प्रकरण अभियोजन साक्ष्य हेतु पूर्ववत दि. 4.10.17 को पेश हो।"

24. There is nothing in the order sheet to indicate that any responsibility was taken by counsel for cross-examination of witnesses in absence of accused or any undertaking was given by accused that witnesses can be examined in his absence. Therefore, it is clear that Phootwati (P.W.-1), prosecturix (P.W.-2) and Sukarlal (P.W.-3) were examined in absence of appellant.

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

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

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

> **19.** The emphasis was laid by Dr Manish Singhvi, learned Senior Advocate for the State on the articles relied upon by him to submit that the theory of "harmless error" which has been recognised in criminal

jurisprudence and that there must be a remedial approach. Again, we need not go into these broader concepts as the provisions of the Code, in our considered view, are clearly indicative and lay down with clarity as to which infringements per se, would result in vitiation of proceedings. Chapter XXXV of the Code deals with "Irregular Proceedings", and Section 461 stipulates certain infringements or irregularities which vitiate proceedings. Barring those stipulated in Section 461, the thrust of the Chapter is that any infringement or irregularity would not vitiate the proceedings unless, as a result of such infringement or irregularity, great prejudice had occasioned to the accused. Shri Hegde, learned Senior Advocate was quick to rely on the passages in *Jayendra Vishnu Thakur* to submit that the prejudice in such cases would

be inherent or per se. Paras 57 and 58 of the said decision were as under: (SCC p. 129)

"*57*. Mr Naphade would submit that the appellant did not suffer any prejudice. We do not agree. Infringement of such a valuable right itself causes prejudice. In *S.L. Kapoor* v. *Jagmohan* this Court clearly held: (SCC p. 395, para 24)

'*24*. … In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced.'

58. In *A.R. Antulay* v. *R.S. Nayak* a seven-Judge Bench of this Court has also held that when an order has been passed in violation of a fundamental right or in breach of the principles of natural justice, the same would be a

nullity. (See also *State of Haryana* v. *State of Punjab* and *Rajasthan SRTC* v. *Zakir Hussain*.)"

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

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

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

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

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

367. Power to direct further inquiry to be made or additional evidence to be taken.—(1) If, when such proceedings are submitted, the High Court thinks that a

further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

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

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

368. Power of High Court to confirm sentence or annual conviction.—In any case submitted under Section 366, the High Court—

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

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

(*c*) may acquit the accused person:

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

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386. Powers of the Appellate Court.—After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the appellate court may, if it

considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

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

(*b*) in an appeal from a conviction—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22. According to Section 366 when a Court of Session passes a sentence of death, the proceedings must be submitted to the High Court and the sentence of death is not to be executed unless it is confirmed by the High Court. Section 367 then proceeds to lay down the power of the High Court to direct further enquiry to be made or additional evidence to be taken. Section 368, thereafter, lays down the power of the High Court to confirm the sentence so imposed or annul the conviction. One of the powers which the High Court can exercise is one under Section 368(*c*) of the Code and that is to "acquit the accused person". Pertinently, the power to acquit the person can be exercised by the

High Court even without there being any substantive appeal on the part of the accused challenging his conviction. To that extent, the proceedings under Chapter XXVIII which deal with "submission of death sentences for confirmation" is a proceeding in continuation of the trial. These provisions thus entitle the High Court to direct further enquiry or to take additional evidence and the High Court may, in a given case, even acquit the accused person. The scope of the chapter is wider. Chapter XXIX of the Code deals with "Appeals". Section 391 also entitles the appellate court to take further evidence or direct such further evidence to be taken. Section 386 then enumerates powers of the appellate court which inter alia includes the power to "reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial". The powers of the appellate court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the Code. If the power can go to the extent of ordering a complete retrial, the exercise of power to a lesser extent, namely, ordering de novo examination of twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court. There is, thus, no infraction or jurisdictional error on the part of the High Court.

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

"*11*. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of

misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of retrial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C.J., in *Ramanlal Rathi* v. *State*: (SCC OnLine Cal para 10)

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

We must also consider the matter from the standpoint and perspective of the victims as suggested by the learned Amicus Curiae. Four persons of a family were done to death. It is certainly in the societal interest that the guilty must be punished and at the same time the procedural requirements which ensure fairness in trial must be adhered to. If there was an infraction, which otherwise does not vitiate the trial by itself, the attempt

> must be to remedy the situation to the extent possible, so that the interests of the accused as well as societal interest are adequately safeguarded. The very same witnesses were directed to be de novo examined which would ensure that the interest of the prosecution is subserved and at the same time the accused will have every right and opportunity to watch the witnesses deposing against them, watch their demeanour and instruct their counsel properly so that the said witnesses can be effectively cross-examined. In the process, the interest of the accused would also stand protected. On the other hand, if we were to accept the submission that the proceedings stood vitiated and, therefore, the High Court was powerless to order de novo examination of the witnesses concerned, it would result in great miscarriage of justice. The persons who are accused of committing four murders would not effectively be tried. The evidence against them would not be read for a technical infraction resulting in great miscarriage. Viewed thus, the order and directions passed by the High Court completely ensure that a fair procedure is adopted and the depositions of the witnesses, after due distillation from their cross-examination can be read in evidence.

27. Accordingly, in the light of provisions of section 273 of Cr.P.C., this Court is of the considered opinion that examination of the witnesses in absence of appellant was not proper.

28. Under these circumstances, this Court is of considered opinion that since the valuable right of accused for cross-examination of the witnesses in his presence was violated, therefore, judgment and conviction recorded by Trial Court cannot be affirmed.

29. However, the only question for consideration is as to whether this Court should remand the matter back to the Trial Court or not?

30. The incident had taken place on 04.12.2013 i.e. 10 years back. Since the accused persons were not present, therefore, they could not be identified by witnesses in the dock and in the light of evidence of prosecutrix (P.W.-2) and Sukarlal (P.W.-3), their identification in the dock was necessary.

31. However, considering the nature of injuries sustained by prosecutrix (P.W.-2) and Sukarlal (P.W.-3) and coupled with the fact that incident took place about 10 years back, this Court does not found it to be a fit case for remand.

32. Accordingly, conviction of appellant recorded by the Trial Court for offence under Sections 323 (on 2 counts) and 354 of IPC is hereby **set aside**.

33. *Ex-consequenti*, the judgment and sentence dated 20.08.2019 passed by Additional Sessions Judge/Special Judge (Scheduled Castes and Scheduled Tribes, (Prevention of Atrocities) Act), Betul in Special Case No.200014/14 is hereby **set aside**.

34. The appellant is acquitted of all the charges levelled against him.

35. The bail bond and surety bond of appellant are hereby cancelled. The appellant is no more required in the present case.

36. Let a copy of this judgment alongwith record of Trial Court be sent back for necessary information and compliance.

37. The appeal succeeds and is hereby **allowed**.

(G.S. AHLUWALIA)
JUDGE

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