MUNNA KUMAR UPADHYAYA @ MUNNA UPADHYAYA
v.
THE STATE OF ANDHRA PRADESH THROUGH PUBLIC PROSECUTOR, HYDERABAD, ANDHRA PRADESH
(Criminal Appeal No. 1316 of 2008)

MAY 8, 2012

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Penal Code, 1860 - ss.302 r/w 34, 201, 411 and 435 - Murder - Of Railway Official and three members of his family (wife, son and daughter) inside their residence (bungalow) - Almirah in deceased's bedroom broken open and cash and jewellery taken away - Dead bodies transported out in a car which was later on doused with petrol and set on fire - Five accused - A-1 was domestic servant of the Railway Official - A-2 is nephew of A-1 - Trial court convicted all the accused - High Court acquitted A-3 and A-4 but sustained the conviction of A-1, A-2 and A-5 - Only A-2 pursued further appeal before Supreme Court - Held: To the entire occurrence, there was no eye-witness but the attendant circumstances were fully established by the prosecution - The forensic expert as well as the neighbours and the Investigating Officers had seen the blood stained walls, the floor, having been washed with phenyl and acid, which was sticky and various incriminating items seized in presence of the witnesses after confessions of the accused - There was no occasion for so many witnesses to falsely depose against the accused - Statement of these witnesses seen in conjunction with the circumstance that on the incident date, the accused had given different and conflicting versions to different persons (servants and neighbours) at different times, either for not permitting their entry into the house, or claiming that the family had gone out, fully support the case of the prosecution - Presence of finger prints of A-2 in the house and particularly on the almirah in

the bedroom of the deceased, remained unexplained - Also, PW-12 (the sole surviving daughter of the Railway Official) identified gold ornaments recovered from possession of accused persons as belonging to her deceased mother - With the help of the prosecution witnesses, the presence of the accused in the bungalow, their intention of committing such heinous crime, the manner in which the accused persons had destroyed the evidence, i.e., the car, dead bodies and blood stained cloths of the deceased and the accused themselves, from where and how they had procured the incriminating articles which they used in the crime, like knife, petrol etc. and finally the conduct of the accused prior to and after commission of the crime were established by the prosecution - Recovery of incriminating articles, cash and jewellery belonging to the deceased, the finger prints of the accused and the false stories given by the accused to different persons who came to the bungalow of the deceased on the incident date, to ensure that none of them enter the house of the deceased was unequivocally established - Conduct of A-2 also tilts the case in favour of the prosecution - In response to a question relating to the injuries that he had suffered, A-2 opted to make a denial - He not only failed to explain his conduct, in the manner in which every person of normal prudence would be expected to explain but even gave incorrect and false answers - Conviction of A-2 (appellant) accordingly confirmed u/ss.302 r/w 34, 201, 411 and 435 as the chain of circumstances undoubtedly point towards his guilt.

Code of Criminal Procedure, 1973 - s.313 - Statement under - Purpose of - Held: Is to serve a dual purpose, firstly, to afford to the accused an opportunity to explain his conduct and secondly to use denials of established facts as incriminating evidence against him - If an accused gives incorrect or false answers during the course of his statement u/s.313 CrPC, the Court can draw an adverse inference against him.

Evidence - Information given by injured accused to doctor in regard to circumstances leading to his injuries - Admissibility of - Held: History given to doctor by injured accused at the time of treatment would not be strictly an extra judicial confession, but would be a relevant piece of evidence.

Evidence - Test identification parade - Delay in holding identification parade - Effect - Plea of accused that the test identification parade was held after considerable unexplained delay, that too, when the photographs of the accused had been published in the newspapers and thus, the courts could not have relied upon such identification parade in returning a finding of guilt against the accused - Held: Delay per se cannot be fatal to the validity of holding an identification parade, in all cases, without exception - In the instant case, nothing on record to say that the photographs of the accused were actually printed in the newspaper - Even if that be so, they were printed months prior to the identification parade and would have lost their effect on the minds of the witnesses who were called upon to identify an accused - It cannot be said that merely because of delay, the Court should have rejected the entire evidence of identification of the accused.

Evidence - Circumstantial evidence - Appreciation of - Held: A case of circumstantial evidence is primarily dependent upon the prosecution story being established by cogent, reliable and admissible evidence - Each circumstance must be proved like any other fact which will, upon their composite reading, completely demonstrate how and by whom the offence had been committed.

Evidence - Confession - Extra-judicial confession - Admissibility and evidentiary value of - Held: Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind - The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime - The

extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility - Extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it.

'B', a Railway official, was living in a bungalow - the official residence allotted to him, along with his family members. A-1 was a domestic servant of 'B' and living in the servant quarters. He allegedly had a serious grudge against the wife of 'B' and therefore hatched a plan with his nephew, A2, and two others A-3 and A-4 to kill the entire family of 'B'.

The case of the prosecution was that on the incident date, after 'B' had left for his office in the morning, A-1 allowed the entry of A-2, A-3 and A-4 into the bungalow, and thereafter the four accused, armed with knives and a pistol, killed B's son, wife ['P'], and daughter, one by one and thereafter also broke open the almirah in the bedroom and took out cash and jewellery; that in the process of killing 'P', A-3 himself got injured whereafter A-1, A-2 and A-4 got him admitted to a hospital and returned to the bungalow and later in the evening they killed 'B' when he came back from office and that subsequently, on instructions of A-1, his sister A-5 cleaned the bungalow floor with phenyl and acid. It was alleged that thereafter the accused persons dumped the dead bodies along with blood stained clothes into a car which was transported out of the premises by A-1 and A-2 and parked near the railway track whereupon A-2 purchased petrol from petrol pump and then he and A-1 set the car along with the dead bodies on fire.

The trial Court convicted all the five accused- A-1 u/s 302, 201, 435 and 411 IPC and Section 25(1)(a) and 27(1) of the Arms Act; A-2 u/s. 302 r/w s.34, 201, 435 and 411

IPC; A-3 u/s. 302 r/w s.34 and 411 IPC and Section 25(1)(a) and 27 of the Arms Act; A-4 u/s.302 r/w s.34 and 201 and 411 IPC and A-5 u/s.201 and 411 IPC. While A-1 was sentenced to death, A-2 to A-4 were sentenced to life imprisonment and A-5 was sentenced to 3 years R.I. The High Court acquitted A-3 and A-4 but sustained the conviction of A-1, A-2 and A-5. The death sentence awarded to A-1 was however committed to life imprisonment by the High Court. A-5 did not prefer any appeal before this Court. The State also did not prefer any appeal before this Court against the acquittal of A-3 and A-4. A-1 had filed an appeal challenging the judgment of the High Court, but the same was dismissed at the SLP stage itself, as being withdrawn.

Only A-2 (appellant) pursued further appeal before this Court. He challenged his conviction on various grounds, viz.: a) that the case being one of circumstantial evidence, the entire evidence was of very weak nature and the prosecution had not been able to establish the chain of circumstances undoubtedly pointing only towards his guilt; b) that the High Court had entirely based its order of conviction on the finger prints found at the place of occurrence but there was no evidence as to how the finger prints of the accused persons were collected by the Police and how they were dispatched to the forensic laboratory for purposes of comparison; the vital link in the evidence relating to finger prints was missing and as such, the judgment of the High Court was liable to be set aside; c) that the test identification parade, firstly, was not held in accordance with law and secondly, it was held after considerable unexplained delay, that too, when the photographs of the accused had been published in the newspapers and thus, the courts could not have relied upon the identification parade in returning a finding of guilt against the accused and d) lastly, that

the acquittal of A-3 and A-4 by the High Court on merits was clear indication that the prosecution had failed to prove its case beyond reasonable doubt and thus, the High Court ought to have acquitted the appellant as well.

Dismissing the appeal, the Court

HELD: 1. The present case is one of circumstantial evidence and there is no witness to the commission of crime. Thus, there is a definite requirement of law that a heavy onus upon the prosecution be discharged to prove the complete chain of events and circumstances which will establish the offence and would undoubtedly only point towards the guilt of the accused. To prove this chain of events, prosecution had examined as many as 49 witnesses. This included the persons who were working at the bungalow, neighbours, the worker at the petrol pump from which Accused no.2 purchased petrol, the doctors, forensic experts, fingerprint expert and the only surviving member of the family i.e., the other daughter of 'B', PW12. This ocular evidence is in addition to the documentary and expert evidence brought by the prosecution on record. A case of circumstantial evidence is primarily dependent upon the prosecution story being established by cogent, reliable and admissible evidence. Each circumstance must be proved like any other fact which will, upon their composite reading, completely demonstrate how and by whom the offence had been committed. [Para 10] [635-A]

Sanatan Naskar and Anr. v. State of West Bengal **(2010) 8 SCC 249 - referred to.**

2.1. The identity of all the deceased and the fact that they were residents of the bungalow in question, that accused Nos. 1 and 5 were living in the premises and that accused No. 2 was nephew of accused No. 1 have been fully established on record by the statements of PW-3 to

PW-8 and PW-12, the daughter of 'B'. In fact, there can be no doubt as to the fact that the accused No. 1 was working as domestic servant of 'B' and living in the servant quarters. The reason for commission of crime, as per the case of the prosecution, was the persistent grudge of accused No. 1 towards 'P'. All the accused planned and then killed all the four members of the family, one by one. They committed the crime in a most brutal manner by cutting the throat of each one of the deceased. Of course, in the process, when accused No. 3 wanted to shoot 'P' in the scuffle, he suffered the gun injury and later they killed 'P' by causing a knife injury at her throat. [Paras 11, 13 and 14] [638-C-D, H; 639-A-C]

2.2. To the entire occurrence, there is no eye-witness but the attendant circumstances have fully been established by the prosecution. The forensic expert as well as the neighbours and the Investigating Officers had seen the blood stained walls, the floor, having been washed with phenyl and acid, which was sticky and various incriminating items seized in the presence of the witnesses after confessions of the accused. [Para 15] [639-C-D]

2.3. Furthermore, PW-8, the watchman, clearly stated that when he had come to the bungalow, it was accused No. 1 who did not permit him to go inside the house and asked him to wait outside at the main gate and then, had even sent him to get the sweets from the market, which he brought and gave to accused No.5. Similarly the carpenter, PW-23, who had come to repair the wooden bedsteads was again not allowed admission into the house and was sent away to work outside, on the pretext that 'P' was not feeling well and did not want to be disturbed. PW-3, a neighbour, identified accused No.1, accused No.2 and accused No.5 as he had seen them in the bungalow on various occasions. PW-4 also stated that she was working as a maid servant for sweeping and

mopping the floor of the bungalow and on the fateful day, was not permitted by accused No.1 to do her routine job. She found that the rear door from where she used to enter the house normally had been closed from inside and after she called for the accused, he asked her to go away because 'P' was not feeling well. On similar lines were the statements of PW5 and PW6. The statement of PW-6, in fact, completely brings out the involvement of accused No. 1 in the commission of the crime. [Para 16] [639-E-H; 640-A-B]

2.4. Besides all this is the statement of PW-12, the sole surviving member of the victim family, which has fully corroborated the statement of all these witnesses, as well as that of neighbour PW3. She was travelling from Delhi to Secunderabad by train. A number of times, she claims to have called up the numbers of her father and other family members, but none responded. Upon this, she had rang up PW-3 to find out what had happened. It was only on her arrival at Secunderabad that she came to know about the unfortunate event where her entire family had been murdered by the accused. Accused had disappeared from the premises in question. Prior thereto, he had even told the neighbour, who made enquiry in furtherance to the phone calls by PW-12,that 'B' and the family had gone out in the car on the evening of 17th March, 2003, but had never returned back. There is no occasion for so many witnesses to depose falsely implicating the accused in the commission of crime. The statement of these witnesses seen in conjunction with the circumstance that the accused had given different and conflicting versions to different persons (servants and neighbours) at different times, either for not permitting their entry into the house, or claiming that the family had gone out on 17th March, 2003, fully support the case of the prosecution. [Para 17] [640-F-H; 641-A-C]

2.5. PW 25 is again a very material witness, who has

proved the involvement of accused No. 2 in the commission of the crime. According to this witness, he was working as a helper in the University Filling Station petrol pump. He knew only accused No.2. On the evening of 17/18th March, 2003, at about 12.30 - 1.00 a.m. accused No. 2 had come to the petrol pump and asked for 10 litres of petrol. Accused No. 2 was carrying a plastic container for that purpose. Upon enquiry from this witness, he told this witness that he needed the petrol because his family was travelling in a car and the petrol in the car had finished and on this pretext, he purchased 10 litres of petrol. This witness duly identified MO 74, the plastic cane in which he had given petrol to the accused. This petrol, according to the prosecution, had been used in burning the car as well as the dead bodies of the deceased persons. PW36, the forensic expert collected various items from the scene of the car. From the burnt clothes, he reported that they bore traces of flammable material. Smell of petrol was also present at the scene and this fact stood confirmed by the statement of PW48, the Investigating Officer. Thus, it is clear that accused No. 2 had taken the petrol from the petrol pump and used it, along with other accused, for the purpose of putting the car and the dead bodies of the deceased persons on fire. [Para 18] [641-D-H; 642-A-B]

2.6. PW45, another forensic expert, had found human blood in the rooms where the crime was committed and also on the items which were sent to him for his opinion. The presence of human blood on these items, including the clothes which were sent for serological examination, clearly indicates that in that house, murder of some human beings had been committed. Identities of those human beings stands completely established not only by expert evidence but by the evidence of the neighbours also. [Para 19] [642-B-D]

2.7. The ballistics expert PW-37 expressed his opinion that the cartridges recovered had been fired from the recovered pistol. The cartridges were recovered from the bungalow while the pistol and live cartridge was recovered in furtherance to the confessional statements made by accused Nos.2 and 3. [Para 20] [642-D-E]

2.8. PW-38, the finger print expert had visited the site and lifted some chance finger prints on the steel almirahs from near the inner lock door and another set of finger prints from the rear side of the bathroom. He clearly stated that the chance finger prints matched with the finger prints of accused Nos.1 and 2. The attempt on behalf of the accused to object to the evidence of the finger prints on the ground that the investigating officer has not told in his examination-in-chief that he had taken the finger prints of the accused and sent them to the expert does not carry much weight in view of the documentary, ocular and expert evidence. It was expected of the Investigating Officer to make a statement in that behalf, but absence of such statement would not weigh so much against the prosecution that the court should be persuaded to reject the evidence of PW38 along with the clinching evidence of Ext. P-52, P-72 and P-73 respectively. Equally without merit is the submission on behalf of the appellant that the finger print could be there upon the almirah in the normal course of business, as accused No. 1 was the domestic servant working in the bungalow. What is important is that the presence of finger prints of accused No. 2 found in the house and particularly on the almirah in the bedroom of the deceased, remain unexplained and secondly, no attempt was made by any of the accused persons to take a stand to explain their conduct. Further, lifting of chance finger prints and on comparison being found to be matching with the sample finger prints of the accused, taken by the Police, is not the only piece of evidence. There is corroborating evidence of the

prosecution witnesses on the one hand, and on the other, evidence of PW-12, who identified the gold ornaments, which were stolen by the accused from the almirah, as belonging to her deceased mother ('P') and which were recovered from the possession of accused persons. The prosecution has by other evidence, clearly been able to establish the physical contact between the accused and the articles within the almirah, and therefore, the almirah door also. [Paras 22, 23, 24, 26, 28] [642-H; 643-A-D, G-H; 644-A-C, F-H; 645-F-G]

Chandran @ Surendran and Anr. v. State of Kerala **1991 Supp. (1) SCC 39 - distinguished.**

B.A. Umesh v. Registrar General, High Court of Karnataka **(2011) 3 SCC 85: 2011 (2) SCR 367 - relied on.**

3. As far as the deceased persons are concerned, because of the burnt condition of bodies, there could be no other evidence of cause of death except identification of the deceased persons which has already been established by the prosecution. The accused persons, particularly, accused Nos. 1, 2 and 3 suffered physical injury. Accused No.3 even suffered bullet injury which has been proved on record by the statement of PW-46, as also PW-33 and PW-43, all doctors. PW-18, who was running a clinic stated that he knew the accused and on 17th March, 2003, the accused persons had come to his residence and informed him that accused No.3 had suffered injury on account of a fall due to drunken state. After examining accused No.3, he found two bullet gun shots on the left leg of accused No.3, who was also in intoxicated condition. They were sent to hospital for treatment and they paid money for treatment. Thereafter, leaving Accused No. 3 in the hospital, the rest of the accused went missing. These are the circumstances which connect the accused persons with the crime. [Para 29] [645-G-H; 646-A-D]

4.1. The High Court declined to rely upon any of the extra judicial confessions made by the accused persons to various other persons.The High Court was right in not relying upon such confessions, but it ought to have rejected only the part inadmissible in accordance with the provisions of Section 27 of the Indian Evidence Act, 1872. The statements in so far as they concern, the use of various articles in commission of crime and recovery of such articles and stolen items, would form a valid and admissible piece of evidence for the consideration of the court. The history given to the doctor at the time of treatment would not be strictly an extra judicial confession, but would be a relevant piece of evidence, as these documents had been prepared by PW33 (the doctor who had treated the accused for their injuries) in the normal course of her business. Even the accused do not dispute that they were given treatment by the doctor in relation to these injuries. Thus, it was for the accused to explain this aspect. [Paras 30, 33, 34] [646-D; 647-A-D]

4.2. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. [Para 42] [650-B-C]

Balwinder Singh v. State of Punjab **1995 Supp. (4) SCC 259: 1995 (5) Suppl. SCR 10;** *Pakkirisamy v. State of T.N.* **(1997) 8 SCC 158;** *Kavita v. State of T.N.* **(1998) 6 SCC 108: 1998 (3) SCR 902;** *State of Rajasthan v. Raja Ram* **(2003) 8 SCC 180: 2003 (2) Suppl. SCR 445;** *Aloke Nath Dutta v. State of W.B.* **(2007) 12 SCC 230: 2006 (10) Suppl. SCR**

662; *Sansar Chand v. State of Rajasthan* **(2010) 10 SCC 604: 2010 (12) SCR 583;** *Rameshbhai Chandubhai Rathod v. State of Gujarat* **(2009) 5 SCC 740;** *Sk. Yusuf v. State of W.B.* **(2011) 11 SCC 754: 2011 (8) SCR 83 and** *Pancho v. State of Haryana* **(2011) 10 SCC 165: 2011 (12) SCR 1173 - referred to.**

5. In the instant case, there was some delay in holding the identification parade. But the delay per se cannot be fatal to the validity of holding an identification parade, in all cases, without exception. The purpose of the identification parade is to provide corroborative evidence and is more confirmatory in its nature. No other infirmity has been pointed out by the appellant, in the holding of the identification parade. The identification parade was held in accordance with law and the witnesses had identified the accused from amongst a number of persons who had joined the identification parade. There is nothing on record to say that the photographs of the accused were actually printed in the newspaper. Even if that be so, they were printed months prior to the identification parade and would have lost their effect on the minds of the witnesses who were called upon to identify an accused. However, it is always appropriate for the investigating agency to hold identification parade at the earliest, in accordance with law, so that the accused does not face prejudice on that count. In the facts and circumstances of the present case, it cannot be said that merely because of delay, the Court should reject the entire evidence of identification of the accused. More so, the accused persons were duly identified by these very witnesses in the open court, while they were deposing. [Paras 45, 46 and 47] [651-A-E; 656-D]

Rajesh Govind Jagesha v. State of Maharashtra **(1999) 8 SCC 428: 1999 (4) Suppl. SCR 277 - distinguished.**

Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi) **(2010) 6 SCC 1: 2010 (4) SCR 103 - referred to.**

6. It is clear that the prosecution had been able to comprehensively and reliably establish the chain of circumstances. The evidence produced on record does not leave any major loopholes in the case of the prosecution. With the help of the prosecution witnesses, the presence of the accused in the bungalow, their intention of committing such heinous crime, the manner in which the accused persons had destroyed the evidence, i.e., the car, dead bodies and blood stained cloths of the deceased and the accused themselves, from where and how they had procured the incriminating articles which they used in the crime, like knife, petrol etc. and finally the conduct of the accused prior to and after commission of the crime have been established by the prosecution. Most importantly, the recovery of incriminating articles, cash and jewellery belonging to the deceased, the finger prints of the accused and the false stories given by the accused to different persons who came to the bungalow of the deceased during 17th/18th March, 2003, to ensure that none of them enter the house of the deceased stand unequivocally established. [Paras 48, 49] [656-E-H; 657-A]

7. Besides all this circumstantial evidence, another very significant aspect of the case is that none of the accused, particularly accused No.2, offered any explanation during the recording of their statements under Section 313 CrPC. It is not even disputed that the material incriminating evidence was put to accused No.2 while his statement under Section 313 CrPC was recorded. Except for a vague denial, he stated nothing more. In fact, even in response to a question relating to the injuries that he had suffered, he opted to make a denial, which fact had duly been established by the

statements of the investigating officers, doctors and even the witnesses who had seen him immediately after the crime. It is a settled law that the statement under Section 313 CrPC is to serve a dual purpose, firstly, to afford to the accused an opportunity to explain his conduct and secondly to use denials of established facts as incriminating evidence against him. It was expected of the accused to render proper explanation for his injuries and his conduct. However, he opted to deny the same and in fact even gave false replies to the questions posed to him. If the accused gave incorrect or false answers during the course of his statement under Section 313 CrPC, the Court can draw an adverse inference against him. In the instant case, the accused-appellant (A-2) has not only failed to explain his conduct, in the manner in which every person of normal prudence would be expected to explain but had even given incorrect and false answers. The Court not only draws an adverse inference, but such conduct of the accused would also tilt the case in favour of the prosecution. [Paras 49, 50, 51, 52] [657-A-D; 660-A-D]

Asraf Ali v. State of Assam **(2008) 16 SCC 328: 2008 (10) SCR 1115 and** *Manu Sao v. State of Bihar* **(2010) 12 SCC 310: 2010 (8) SCR 811 - relied on.**

Case Law Reference:

(2010) 8 SCC 249	**referred to**	**Para 10**
1991 Supp. (1) SCC 39	**distinguished**	**Para 25**
2011 (2) SCR 367	**relied on**	**Para 27**
1995 (5) Suppl. SCR 10	**referred to**	**Para 35**
(1997) 8 SCC 158	**referred to**	**Para 36**
1998 (3) SCR 902	**referred to**	**Para 37**

2003 (2) Suppl. SCR 445	**referred to**	**Para 38**
2006 (10) Suppl. SCR 662	**referred to**	**Para 39**
2010 (12) SCR 583	**referred to**	**Para 40**
(2009) 5 SCC 740	**referred to**	**Para 41**
2011 (8) SCR 83	**referred to**	**Para 42**
2011 (12) SCR 1173	**referred to**	**Para 42**
1999 (4) Suppl. SCR 277	**distinguished**	**Para 44**
2010 (4) SCR 103	**referred to**	**Para 46**
2008 (10) SCR 1115	**relied on**	**Para 49**
2010 (8) SCR 811	**relied on**	**Para 49**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1316 of 2008.

From the Judgment & Order dated 28.03.2007 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 212 of 2007.

A.T.M. Ranga Ramanujam, Gouri Karuna Das Mohanti, Deepak Agnihotri, Prakhar Sharma, Anu Gupta for the Appellant.

D. Mahesh Babu, Mayur R. Shah, Shishir Pinaki for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of the High Court of Judicature, Andhra Pradesh at Hyderabad dated 28th March, 2007, confirming the judgment of conviction and order of sentence passed by the learned Third Additional Sessions Judge, Ranga Reddy District at L.B. Nagar on 22nd January, 2007.

Facts in Brief

2. One Shri Baldevraj Seth was working as Chief Track Engineer, South Central Railway. He was living in Bungalow No.100, Railways Officer's Colony, South Lalaguda of Secunderabad, the official residence allotted to him along with his family members, i.e., his wife, Prabha Seth, son, Master Rishab Seth and daughter Kanika Seth. Accused Chandra Bhushan Upadhyay (Accused No.1) was working as office peon in South Central Railways, Secunderabad and was attached to the bungalow of Shri Baldevraj Seth for the last 7 years. Accused No.1 was married in the year 1997 and was residing in the servant quarters of the said bungalow. In fact, he had been given two servant quarters. Accused No.1 was arrogant, evasive and in the habit of revolting against Smt. Prabha Seth who was a strict person and demanded better performance of duties by accused No.1. The wife of accused No.1, on the occasion of dussehra festival, went to her native place in Bihar, to which all the accused belong. After her departure, accused No.1 became more arrogant. Nearly a week before the occurrence, Smt. Prabha Seth had scolded accused No.1 for his shabby looks and had asked him to have a haircut. This aggravated the grudge of accused No.1 towards her. On the very next day, accused No.1 met his elder brother's son, Munna Kumar Upadhyay (Accused No.2), his brother-in-law, Maheshwar Upadhyay (Accused No.4) and their friend, Monu Singh (Accused No.3). As already noticed, all of them belong to the same village in the State of Bihar. Accused No.3 was working in Bharat Steels. Because of the serious grudge of accused No.1 towards Smt. Prabha Seth, they all planned to kill the entire family of Shri Baldevraj Seth and to decamp with the gold ornaments, etc.

3. In furtherance to their plan, accused No.1 is stated to have purchased two knives from a road side hawker in the market. He also told Accused Nos.2 to 4 to come to the bungalow in the morning of the next Monday to execute their

plan. On 17th March, 2003, at about 9.30 a.m., Baldevraj Seth left for his office. At about 10 a.m., accused No.2 to 4 came to the entrance of the bungalow, not permitting their entry from the main gate, accused No.1 took them to the bathroom in the back varandah and closed the door. Accused No.1 closed all the doors from inside. He did not permit the washerwoman to come inside the house and gave her clothes from outside. When the maid servants who used to come to the house everyday to clean the house, came at their respective times, they were sent back by accused No.1 on the pretext that Smt. Prabha Seth wanted the house to be cleaned with acid and phenyl and therefore, they should come on another day. A carpenter, Janagama Maheshwar, PW23 had also come to the premises for fixing some poster beds. However, accused No.1 did not permit him to come into the house and when the carpenter insisted on completing the work, accused No.1 told him that Smt. Prabha Seth was not well and does not want to be disturbed. At about 10.30 a.m., Smt. Prabha Seth went into the bathroom. ACCUSED NO.1 went to the room of Master Rishab, who was watching the television, and on the pretext of showing him something, called him to another bathroom. When Rishab reached the bathroom, accused Nos.2 to 4 held the boy while accused No.1 cut his throat, as a result of which he died instantaneously. His body was kept in the bathroom itself. Thereafter when Smt. Prabha Seth came out of the bathroom, accused No.1 immediately attacked her and accused No.3, Monu Singh, opened fire on her with a countrymade pistol. When she was trying to get free from the grip of accused No.1, there was a scuffle and because of the resultant misfire, accused No.3 himself received injury on his leg. Then, accused No.1, with the knife, succeeded in cutting the throat of Smt. Prabha Seth. Thereafter, the accused shifted her body also to the bathroom. Accused No.1 cleaned the blood stains from the room and watched for Kanika Seth, daughter of Baldevraj Seth, to arrive. She arrived at 11.45 a.m. from the school. When she pressed the call button, accused No.1 directed her to enter from the back door. The moment she stepped in, accused Nos.2 and

4 held her and accused No.1 cut her throat with a knife, as a result of which she collapsed. Her body was then shifted to the bathroom. After killing these three members of the family, they ran towards the bedroom, opened the almirah, took gold ornaments like necklace, chains, rings, wrist watch and net cash of Rs.44,560/-, which they distributed among themselves.

4. Accused No.3, Monu Singh was bleeding as a result of the bullet injury that he suffered. The other accused took him to the premises of Bharat Steel, where he was working as a security guard. There, one Shashidhar Pandey advised them to take accused No.3 to a doctor. The doctor, after observing the injury of accused No.3, asked them to shift the patient to Gandhi Hospital, Secunderabad. In fact, the doctor helped them to get admitted and receive the treatment. accused No.1 gave Rs.2,000/- to the said doctor for medical expenses and after giving that money, accused Nos.1, 2 and 4 left the place. Accuse No.1 sent away Pandu, the watchman, who had come to the residence of Baldevraj Seth, on the pretext of securing sweets. At about 6.50 p.m., Baldevraj Seth, returned from his office to his bungalow. He noticed that the lights of the bungalow were off. As a routine, the driver used to bring the briefcase of Baldevraj Seth inside the bungalow, but on that day, he was prevented from doing so by Accused No.1, who brought the briefcase inside himself. Baldevraj Seth, entered the house and immediately thereafter, accused fired at him and killed him. After killing him, he shifted his body also into the bathroom and cleaned the floor of the hall with phenyl and acid. He called Smt. Anju, accused No.5, who is his sister and was residing with him, to clean the floor, whereafter accused No.1 went away to Mahindra Hills to meet his brother in law. Thereafter, accused Nos.1, 2 and 4 returned to the bungalow and found that Pandu, the watchman was sleeping in the guardroom at the main gate. The accused waited there and at about 11 p.m. and then they took the car from the garage, shifted the dead bodies to the car putting the body of Baldevraj Seth in the dickey of the car. Accuse Nos.1 and 2 took the car near the railway garage. They

also dumped their blood stained clothes, as well as those of the deceased, in the car. After taking the car near the railway tracks at SP Nagar, Malkajgiri, and parking there, accused Nos.1 and 2 came back to Tarnaka to buy petrol. Accused No.2 purchased ten litres of petrol at Osmania University filling station, Tarnaka. They brought the petrol to the place where the accused had parked the car, put the petrol on the car and burnt the dead bodies with the car.

5. Thereafter, accused No.1 returned to the bungalow. Upon returning, in the next morning at 6 a.m., the accused informed the neighbour, one Sanjay Kumar Mishra (PW3) and others that Baldevraj Seth had gone with his family for dinner outside, on 17th March, 2003 at about 7.30 p.m. and did not return again. On 18th March, 2003 at about 6.45 a.m., Municipal Counsellor, PW-1 made a report in Malkajgiri Police Station stating that he had come to know that a car was in flames at SP Nagar Road, Malkajgiri, near Railway water tank. The Maruti car was completely burnt and some dead bodies were found in the car, so PW-1 requested the police to take necessary action. Upon this, Sub-Inspector of Police, Malkajgiri, PW-47 registered a case under Sections 302, 201 IPC noted the engine No. and chassis No. of the vehicle and thereby traced the owner. The dog squad was also put into service. In the meanwhile, the Chief Engineer along with other senior officers visited the spot and informed the police that one Meenal Seth, PW-12, the other daughter of Baldevraj Seth, was on the way from Delhi to Hyderabad in Rajdhani Express and had telephoned them stating that she was calling the phone numbers of the family members, but no one was responding. Thus, he had sent his peon to the house of Baldevraj Seth. However, accused No.1 had given him the same excuse that he had given to the neighbours that the family had gone out. In the morning, he had been told that the family had not returned. The dead bodies, on the basis of the articles recovered from the car itself, were identified. After establishing the identity of the

deceased, the investigating officer prepared the inquest report and started the investigation.

6. During the course of investigation, the investigating officer recorded the statements of different witnesses. From the very initial stages, accused No.1 appears to have been the prime suspect. It was for this reason that Pandu, PW8 had informed the investigating officer that he was not permitted to enter the bungalow and the accused had insisted that he remain at the front gate and he was then sent to buy sweets, which he gave to Accused No.5 on his return. When the bungalow of the deceased was examined, at number of places, blood marks were found sprinkled on the wall and the floor had become sticky as it had been washed with phenyl and acid. Since accused No.1 failed to explain all these suspicious circumstances, he was arrested and it is the case of the prosecution that he finally confessed to the offence on 19th March, 2003, upon interrogation conducted in the presence of two mediators. He also admitted that the offence was committed with the assistance of Accused Nos.2 to 4 and Accused No.5. The cell phone and the knife which were used in the commission of the crime were thrown by the accused in the dustbin near the church at Mettuguda. In furtherance to the confessional statement of the accused and at his instance, the cell phone, a portion of the gold ornaments, cash and knife were recovered. On the basis of the information supplied by accused No.1, accused No.5 was also arrested and gold ornaments were seized from her. At the instance of Accused No.2, one country made revolver and one 7.62 M rib and OFV 9208 live cartridge, which were hidden near the railway track, were recovered and seized along with the portion of the gold ornaments recovered from him. The detailed confessional statement and seizure reports were prepared in the presence of witnesses. Finger prints of accused Nos.1 to 5 were collected and sent for comparison with that of chance prints obtained from the house of Baldevraj Seth. Upon recognition, forensic science experts, headed by Dr. Rajagopal Reddy,

Professor of Forensic Medicine, Gandhi Medical College, Hyderabad visited the spot and held autopsy. The incriminating articles and other collected materials were also sent for DNA Analysis to the laboratory. The investigating officer recorded the statement of a number of witnesses, obtained the report from the laboratory and finally filed the charge-sheet before the court of competent jurisdiction. All the accused were committed to the Court of Sessions, which charged the accused as follows:-

"Against A1 - Under Sections 302, 201, 435, 380 or alternatively U/s 411 IPC and U/s 25(1)(a) and 27 of Arms Act.

Against A2 - Under section 302, 302 R/w 34, 201, 435, 380 or alternatively 411 IPC.

Against A3 - Under section 302, 380 or alternatively 411 IPC and 25(1)(a) and 27 of Arms Act.

Against A4 - Under Section 302, 302 R/w 34, 201, 380 or alternatively U/s 411 IPC.

Against A5 - Under Section 201, 380 or alternatively U/s 411 IPC."

7. They were tried in accordance with law and by a very detailed judgment dated 24th January, 2007, the trial court found all the accused guilty of different offences as charged and punished them as follows:-

"a) A1 (Chandra Bushan Upadhyay) is sentenced to death for the offence U/s 302 IPC. A1 is also sentenced to suffer R.I. for 3 years each for the other offences U/ss. 201, 435, 411 IPC and section 25(1) (a) and 27(1) of Arms Act. All these sentences shall run concurrently.

b) A2 (Munna Kumar Upadhyay @ Munna Upadhyaya) is sentenced to suffer imprisonment for life for the offence U/s. 302 R/w 34 IPC. He is also sentenced to suffer RI for 3

years each for the offences U/ss. 201, 435 and 411 IPC. All the sentences shall run concurrently.

c) A3 (Monu Singh) is sentenced to suffer imprisonment for life for the offence U/s. 302 R/w 34 IPC. He is also sentenced to suffer R.I. for 3 years each for the offences U/ss. 411 IPC and 25(1)(a), 27 of the Arms Act. All the sentences shall run concurrently.

d) A4 (Maheshwar Upadhyay) is sentenced to suffer imprisonment for life for the offence U/s. 302 R/w 34 IPC. He is also sentenced to suffer R.I. for 3 years each for the offences U/ss. 201, and 411 IPC. All the sentences shall run concurrently.

e) A5 (Smt. Anju Choubey) is sentenced to suffer R.I. for 3 years each for the offence U/s 201 and 411 IPC respectively. The period of detention already undergone by A5 shall be given set off against the sentence imposed as per Sec. 428 Cr.PC. Both the sentences shall run concurrently."

8. Being aggrieved from the judgment of the trial court, all the accused preferred an appeal before the High Court. The High Court, vide its judgment dated 28th March, 2007, acquitted the Accused Nos 3 and 4, namely, Monu Singh and Maheshwar Upadhyay, of all offences with which they were charged. However, it affirmed the conviction of accused No.1, Chandra Bhushan Upadhyay, accused No.2, Munna Kumar Upadhyay and accused No.5, Anju Choubey.

9. While dealing with the order of sentence, the High Court partially accepted the plea of accused No. 1 and commuted the death sentence awarded to him by the trial court, to life imprisonment. Accused No. 5 had only been convicted for the offence under Sections 201 and 411 IPC and she has not preferred any appeal before this Court. The State has also not preferred any appeal before this Court against the acquittal of

accused Nos. 3 and 4. Accused No. 1, Chandra Bhushan Upadhyay, had filed an appeal challenging the judgment of the High Court, but the same was dismissed at the SLP stage itself, as being withdrawn, vide order of this Court dated 6th August, 2007. Thus, in the present appeal, we are only concerned with the contentions raised on behalf of accused No. 2. The learned counsel appearing for the said appellant has contended :

A. The case being one of circumstantial evidence, the entire evidence is of very weak nature. The prosecution has not been able to establish the chain of circumstances which undoubtedly points only towards the guilt of the accused.

B. The High Court has entirely based its order of conviction on the finger prints found at the place of occurrence and there is no evidence as to how the finger prints of the accused persons were collected by the Police and how they were dispatched to the forensic laboratory for the purposes of comparison. The vital link in the evidence relating to finger prints is missing and as such, the judgment of the High Court is liable to be set aside.

C. The test identification parade, firstly, was not held in accordance with law and secondly, it was held after considerable unexplained delay, that too, when the photographs of the accused had been published in the newspapers. Thus, the courts could not have relied upon the identification parade in returning a finding of guilt against the accused.

D. Lastly, the contention is that the acquittal of accused Nos. 3 and 4 by the High Court on merits is clear indication that the prosecution has failed to prove its case beyond reasonable doubt. Thus, the High Court ought to have acquitted the present appellant as well.

10. There can be no doubt that the present case is one of circumstantial evidence. There is no witness to the commission of crime. Thus, there is a definite requirement of law that a heavy onus upon the prosecution be discharged to prove the complete chain of events and circumstances which will establish the offence and would undoubtedly only point towards the guilt of the accused. To prove this chain of events, prosecution had examined as many as 49 witnesses. This included the persons who were working at the bungalow, neighbours, the worker at the petrol pump from which Accused no.2 purchased petrol, the doctors, forensic experts, fingerprint expert and the only surviving member of the family i.e., daughter Meenal Seth, PW12. This ocular evidence is obviously in addition to the documentary and expert evidence brought by the prosecution on record. A case of circumstantial evidence is primarily dependent upon the prosecution story being established by cogent, reliable and admissible evidence. Each circumstance must be proved like any other fact which will, upon their composite reading, completely demonstrate how and by whom the offence had been committed. This Court has clearly stated the principles and the factors that would govern judicial determination of such cases. Reference can be made to the case of *Sanatan Naskar and Anr. Vs. State of West Bengal* [(2010) 8 SCC 249], where the Court held as follows:-

> "27. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eyewitness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eyewitness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial

evidence subject to satisfaction of the accepted principles in that regard.

28. A three-Judge Bench of this Court in *Sharad Birdhichand Sarda v. State of Maharashtra* held as under: (SCC pp. 184-85, paras 152-54)

> "152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant Govind Nargundkar v. State of M.P.* This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail v. State of U.P. and Ram Gopal v. State of Maharashtra.* It may be useful to extract what Mahajan, J. has laid down in Hanumant case: (AIR pp. 345-46, para 10)
>
> > '10. … It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been

done by the accused.'

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra*[9] where the observations were made: [SCC p. 807, para 19 : SCC (Cri) p. 1047]

'19. … Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.'

(emphasis in original)

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

11. Now, let us examine the prosecution evidence in this case before considering the contentions raised on behalf of the appellant. PW-47 is the police officer who had registered the First Information Report, Ext.P-134. PW-48 and 49 are the investigating officers who conducted the investigation of the case. The identity of all the deceased and the fact that they were residents of the bungalow in question, that accused Nos. 1 and 5 were living in the premises and that accused No. 2 was nephew of accused No. 1 have been fully established on record by the statements of PW-3 to PW-8 and PW-12, Meenal Seth, daughter of Baldevraj Seth.

12. The identity of the deceased persons as well as the connection of accused No. 3 with the commission of crime has duly been proved by Ext. P-96, the DNA Report from the Forensic Science Laboratory Hyderabad, Andhra Pradesh which was specifically recorded and supported by the evidence of PW-39, Dr. G.V. Jagdamba. According to this witness, he had received the requisition from the Commissioner of Police, Cyberabad for performing DNA test. He stated that he conducted the DNA test on the items which were received by him. The analysis was taken up by organic extraction process and thereby he could establish the identity of deceased, Kanika Seth and Prabha Seth as also the involvement of Monu Singh, accused No. 3 after examination of the submitted blood samples.

13. In fact, there can be no doubt as to the fact that the

accused No. 1 was working as domestic servant of Baldevraj Seth and living in the servant quarters. The reason for commission of crime, as per the case of the prosecution, was the persistent grudge of accused No. 1 towards Prabha Seth, the deceased.

14. All the accused planned and then killed all the four members of the family, one by one. They committed the crime in a most brutal manner by cutting the throat of each one of the deceased. Of course, in the process, when accused No. 3 wanted to shoot Prabha Seth in the scuffle, he suffered the gun injury and later they killed Prabha Seth by causing a knife injury at her throat.

15. To this entire occurrence, there is no eye-witness but the attendant circumstances have fully been established by the prosecution. The forensic expert as well as the neighbours and the Investigating Officers had seen the blood stained walls, the floor, having been washed with phenyl and acid, which was sticky and various incriminating items seized in the presence of the witnesses after confessions of the accused.

16. Furthermore, PW-8, Pandu clearly stated that when he had come to the bungalow, it was accused No. 1 who did not permit him to go inside the house and asked him to wait outside at the main gate and then, had even sent him to get the sweets from the market, which he brought and gave to accused No. 5. Similarly, Janagana Maheshwar, carpenter, PW-23, who had come to repair the wooden bedsteads was again not allowed admission into the house and was sent away to work outside, on the pretext that Prabha Seth was not feeling well and did not want to be disturbed. PW-3 identified accused No.1, accused No.2 and accused No.5 as he had seen them in the bungalow on various occasions. PW-4, Sabita also stated that she was working as a maid servant for sweeping and mopping the floor of the bungalow and on the fateful day, was not permitted by accused No.1 to do her routine job. She found that the rear door from where she used to enter the house normally

had been closed from inside and after she called for the accused, he asked her to go away because Prabha Seth was not feeling well. On similar lines were the statements of PW5 and PW6. The following portion of the statement of PW-6, in fact, completely brings out the involvement of accused No. 1 in the commission of the crime.

> "Then A1 asserted that madam had gone to a movie, got wild and in an angry mood asked me to go away. I noticed the floor of the hall sticky and wet. Then I asked A1 why the floor in the hall is sticky and wet. A1 replied me that madam asked him to clean the floor of the hall with an acid and accordingly he washed the floor of the hall with an acid and asked me to go away, in an angry mood. Then I returned home. As soon as I came out of the house, A1 closed the rear door from inside. I returned to my house. On the next day i.e. on 18-03-2003 at about 7.30 a.m., I was returning home by purchasing milk from a nearby milk booth. I found A1 and the wife of PW3 talking with each other. She was asking A1 whether B.R. Seth and his family members had come back or they gave any information through telephone, for which A1 replied her that Seth and his family members have not come back. I returned to my house. At about 11.00 a.m. on 18-03-2003, police officials and railway official came to the official bungalow of B.R. Seth. Then I came to know about the death of B.R. Seth and his family."

17. Besides all this is the statement of PW-12, the sole surviving member of Seth family, which has fully corroborated the statement of all these witnesses, as well as that of neighbour PW3. She was travelling from Delhi to Secunderabad by train. A number of times, she claims to have called up the numbers of her father and other family members, but none responded. Upon this, she had rang up PW-3 to find out what had happened. It was only on her arrival at Secunderabad that she came to know about the unfortunate event where her entire

family had been murdered by the accused. Accused had disappeared from the premises in question. Prior thereto, he had even told the neighbour, who made enquiry in furtherance to the phone calls by PW-12, that Baldevraj Seth and the family had gone out in the car on the evening of 17th March, 2003, but had never returned back. There is no occasion for so many witnesses to depose falsely implicating the accused in the commission of crime. The statement of these witnesses seen in conjunction with the circumstance that the accused had given different and conflicting versions to different persons (servants and neighbours) at different times, either for not permitting their entry into the house, or claiming that the family had gone out on 17th March, 2003, fully support the case of the prosecution.

18. PW25 is again a very material witness, who has proved the involvement of accused No. 2 in the commission of the crime. According to this witness, he was working as a helper in the University Filling Station petrol pump. He knew only accused No.2. On the evening of 17/18th March, 2003, at about 12.30 - 1.00 a.m. accused No. 2 had come to the petrol pump and asked for 10 litres of petrol. Accused No. 2 was carrying a plastic container for that purpose. Upon enquiry from this witness, he told this witness that he needed the petrol because his family was travelling in a car and the petrol in the car had finished. On this pretext, he purchased 10 litres of petrol. Accused No. 2 paid this witness Rs.350/- and had to collect Rs.3 as change. When PW-25 was looking for the change, the accused did not wait and went away. This witness duly identified MO 74, the plastic cane in which he had given petrol to the accused. This petrol, according to the prosecution, had been used in burning the car as well as the dead bodies of the deceased persons. PW36, M. Sanjiv Kumar, is the forensic expert who had been sent various items collected from the scene of the car. According to him, he was asked to analyze for detection of flammable material on these items. Upon analysis, he gave a report that the items 1 to 8, 24 and 31 were detected for flammable material. From the burnt clothes, he

reported that they bore traces of flammable material. Smell of petrol was also present at the scene and this fact stood confirmed by the statement of PW48, the Investigating Officer. Thus, it is clear that accused No. 2 had taken the petrol from the petrol pump and used it, along with other accused, for the purpose of putting the car and the dead bodies of the deceased persons on fire.

19. PW45, another forensic expert, had found human blood in the rooms where the crime was committed and also on the items which were sent to him for his opinion. The presence of human blood (B+) on these items, including the clothes which were sent for serological examination, clearly indicates that in that house, murder of some human being had been committed. Identities of those human beings stands completely established not only by expert evidence but by the evidence of the neighbours also.

20. The prosecution had also examined the ballistics expert as PW-37. He expressed his opinion that item No. 2 was a live cartridge and he opined that it was a country made pistol with 7.62 MM calibre and that the cartridges recovered had been fired from the recovered pistol. The cartridges were recovered from the bungalow while the pistol and live cartridge was recovered in furtherance to the confessional statements made by accused Nos.2 and 3.

21. The learned counsel appearing for the appellant had argued with some vehemence that the reliance placed by the High Court on the evidence relating to finger prints is misplaced, as it has not even been proved in accordance with law. Firstly, we may notice that the judgments of the Courts below do not solely rely upon the evidence of finger prints, but this was only one of the factors which were taken into consideration by the trial Court. Secondly, the contention itself is without any substance.

22. PW-38, the finger print expert had visited the site and

lifted some chance finger prints on the steel almirahs from near the inner lock door and another set of finger prints from the rear side of the bathroom. During the course of investigation, the investigating officer PW-48, with the leave of the Court, had taken the sample finger prints of all the accused, i.e., accused No.1 to accused No.5. These finger prints were sent to the forensic laboratory to be compared with the chance finger prints that had been lifted by the expert. The Investigating Officer had sent them vide Ext. P52 to the finger print expert. These were examined by the expert, who submitted his Report vide Ext. P73 to the Court and in particular vide Ext. P38, he clearly stated that the chance finger prints matched with the finger prints of accused Nos.1 and 2. This expert was examined as PW38 in the Court. In his statement, he clearly stated that he had not found any chance print, either on the plastic tin or on the burnt car, but with regard to the chance finger prints collected from the bungalow, i.e. inner lock door of steel almirah and the back door of the house, he clearly stated that those matched the finger print slip containing the finger prints of Munna Kumar Upadhyay (accused No. 2), which are marked as "P". This witness was cross-examined at length, without any material to favour the accused. Even in his cross-examination, he clearly stated that when they went to the bungalow, the steel almirah of the bedroom was open. He also examined the wooden door planks of the rear side bathroom and had taken a chance print from there, which was later proved to match the prints of accused No.1.

23. No suggestion was put to this witness in his cross-examination that he never went to the site, never collected the finger prints or that the finger prints of the accused were never sent by the police to him. We may also notice that, even to the investigating officer, this suggestion was never put. The attempt on behalf of the accused to object to the evidence of the finger prints on the ground that the investigating officer has not told in his examination-in-chief that he had taken the finger prints of the accused and sent them to the expert does not carry much

weight in view of the above documentary, ocular and expert evidence. It was expected of the Investigating Officer to make a statement in that behalf, but absence of such statement would not weight so much against the prosecution that the court should be persuaded to reject the evidence of PW38 along with the clinching evidence of Ext. P-52, P-72 and P-73 respectively.

24. Equally without merit is the submission on behalf of the appellant that the finger print could be there upon the almirah in the normal course of business, as accused No. 1 was the domestic servant working in the bungalow. What is important is that the presence of finger prints of accused No. 2 found in the house and particularly on the almirah in the bedroom of the deceased, remain unexplained and secondly, no attempt was made by any of the accused persons to take a stand to explain their conduct.

25. The reliance upon the case of Chandran @ Surendran and Anr. Vs. State of Kerala [1991 Supp. (1) SCC 39, para 21 and 24] is again not of help to the accused inasmuch as the facts of that case were totally different and the accused had taken up the plea that the finger prints upon the glass had been taken by the police by coercion. The Court, on the facts of that case and upon the evidence before the Court, came to the conclusion that finger print evidence was not reliable because among all glass pieces, only two had matching finger prints and no appropriate explanation has been given.

26. In the present case, lifting of chance finger prints and on comparison being found to be matching with the sample finger prints of the accused, taken by the Police, is not the only piece of evidence. There is corroborating evidence of the prosecution witnesses on the one hand, and on the other, evidence of PW-12, the daughter of the deceased, who identified the gold ornaments, which were stolen by the accused from the almirah, as belonging to her deceased mother and which were recovered from the possession of accused persons.

27. This Court, in the case of *B.A. Umesh v. Registrar General, High Court of Karnataka* [(2011) 3 SCC 85], where the finger prints were found on the handle of a steel almirah to which the persons from outside had no access, held as under:-

> "75. The aforesaid position is further strengthened by the forensic report and that of the fingerprint expert to establish that the fingerprints which had been lifted by PW 13 from the handle of the steel almirah in the room, matched the fingerprint of the appellant which clearly established his presence inside the house of the deceased. The explanation attempted to be given for the presence of the fingerprints on the handle of the almirah situated inside the room of the deceased does not inspire any confidence whatsoever. In a way, it is the said evidence which scientifically establishes beyond doubt that the appellant was present in the room in which the deceased was found after her death and had been identified as such not only by PW 2, who actually saw him in the house immediately after Jayashri was murdered, but also by PWs 10 and 11, who saw him coming out of the house at the relevant point of time with the bag in his hand. The fingerprint of the appellant found on the handle of the almirah in the room of the deceased proves his presence in the house of the deceased and that he and no other caused Jayashri's death after having violent sexual intercourse with her against her will."

28. In light of the above, we have no hesitation in rejecting this contention of the appellant. The prosecution has by other evidence, clearly been able to establish the physical contact between the accused and the articles within the almirah, and therefore, the almirah door also.

29. In the present case, as far as the deceased persons are concerned, because of the burnt condition of bodies, there could be no other evidence of cause of death except identification of the deceased persons, which has already been

established by the prosecution. The accused persons, particularly, accused Nos. 1, 2 and 3 have suffered physical injury. Accused No. 3 had even suffered bullet injury which has been proved on record by the statement of PW-46, the doctor, as also PW-33 and PW-43, all doctors. PW-18, who was running a clinic in the name of "Baba Clinic" NFC Main Road, stated that he knew the accused and on 17th March, 2003, the accused persons had come to his residence and informed him that accused No.3 had suffered injury on account of a fall due to drunken stage. After examining accused No.3, he found two bullet gun shots on the left leg of accused No.3, who was also in intoxicated condition. They were sent to hospital for treatment and they paid money for treatment. Thereafter, leaving Accused No. 3 in the hospital, the rest of the accused went missing. These are the circumstances which connect the accused persons with the crime.

30. The High Court has declined to rely upon any of the extra judicial confessions made by the accused persons to various other persons. It is stated by the prosecution that the Panch witnesses P. Chiranjeevi, PW-41 and Sudarshan Rao, PW-34 were called to the bungalow by the investigating officer PW-49, and it was this mediator Shri P. Chiranjeevi, PW-41 who made inquiries. When the inquiry was made from Accused No. 1, Accused No. 1 is voluntarily stated to have confessed to opening the almirah and taking out the cash and jewellery. He also confessed that he had murdered the deceased and had hid the knife and cell phone in the MCH dustbin near Mettuguda. In furtherance to his statement Ext. P-37, recoveries were also effected.

31. Accused No. 2 had also made a confessional statement to Panchas. From the statements of accused No. 2, they had got recovered the cartridges and pistol, etc. also.

32. PW33, Dr. D. Sudha Rani who had treated the accused for their injuries, stated in her statement that the accused persons had told her that they had suffered injuries on

17th March, 2003 while committing the murder and at different times, when they killed each of the deceased.

33. The High Court was right in not relying upon such confessions, but it ought to have rejected only the part which is inadmissible in accordance with the provisions of Section 27 of the Indian Evidence Act, 1872.

34. The statements in so far as they concern the use of various articles in commission of crime and recovery of such articles and stolen items, would form a valid and admissible piece of evidence for the consideration of the court. The history given to the doctor at the time of treatment would not be strictly an extra judicial confession, but would be a relevant piece of evidence, as these documents had been prepared by PW33 in the normal course of her business. Even the accused do not dispute that they were given treatment by the doctor in relation to these injuries. Thus, it was for the accused to explain this aspect. This Court has had the occasion to discuss the effect of extra-judicial confessions in a number of decisions.

35. In *Balwinder Singh v. State of Punjab* [1995 Supp. (4) SCC 259], this Court stated the principle that an extra-judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.

36. In *Pakkirisamy v. State of T.N. [(1*997) 8 SCC 158], the Court held that it is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession.

37. Again, in *Kavita v. State of T.N.* [(1998) 6 SCC 108], the Court stated the dictum that there is no doubt that conviction can be based on extrajudicial confession, but it is well settled

that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon veracity of the witnesses to whom it is made.

38. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in the case of *State of Rajasthan v. Raja Ram* [(2003) 8 SCC 180] stated the principle that an extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The Court further expressed the view that such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused.

39. In the case of *Aloke Nath Dutta v. State of W.B.* [(2007) 12 SCC 230], the Court, while holding that reliance on extra-judicial confession by the lower courts in absence of other corroborating material, was unjustified, observed:

> "87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.
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> XXX XXX XXX
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> 89. A detailed confession which would otherwise be within

the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof."

40. Accepting the admissibility of the extra-judicial confession, the Court in the case of *Sansar Chand v. State of Rajasthan* [(2010) 10 SCC 604] held that :-

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimma Raju v. State of Mysore, Mulk Raj v. State of U.P., Sivakumar v. State (SCC paras 40 and 41 : AIR paras 41 & 42), Shiva Karam Payaswami Tewari v. State of Maharashtra and Mohd. Azad v. State of W.B.]

30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872."

41. Dealing with the situation of retraction from the extra judicial confession made by an accused, the Court in the case of *Rameshbhai Chandubhai Rathod v. State of Gujarat* [(2009) 5 SCC 740], held as under :

"It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence

comes to a definite conclusion that the retracted confession is true."

42. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. [Ref. *Sk. Yusuf v. State of W.B.* [(2011) 11 SCC 754] and *Pancho v. State of Haryana* [(2011) 10 SCC 165].

43. Thus, all the above circumstances have to be examined in light of the above principles. We have discussed in some detail the evidence led by the prosecution and the above cases would squarely apply to the present case.

44. Another contention of the accused is in relation to the identification of the accused being conducted in a manner contrary to law. The counsel, while relying upon the case of Rajesh Govind Jagesha Vs. State of Maharashtra [(1999) 8 SCC 428], submitted that the identification parade of the accused was conducted much after their arrest. They were arrested on 19th March, 2003 and the identification parade of the accused was conducted on 20th June, 2003. Furthermore, the photograph of the accused had been published in the newspaper on 19th March, 2003. In the case relied upon by the appellant, the accused who was stated to be having a beard and long hair and was so described in the First Information Report was required to be clean-shaven by the police. The fact that no person similar to the person whose description was given in FIR was included in the Test Identification Parade, the Court expressed dissatisfaction and held that it was required for the prosecution to show how and under what circumstances the complainant and the witnesses came to recognise the

accused. This case on facts, therefore, is of no assistance to the accused.

45. There was some delay in holding the identification parade. But the delay per se cannot be fatal to the validity of holding an identification parade, in all cases, without exception. The purpose of the identification parade is to provide corroborative evidence and is more confirmatory in its nature. No other infirmity has been pointed out by the learned counsel appearing for the appellant, in the holding of the identification parade. The identification parade was held in accordance with law and the witnesses had identified the accused from amongst a number of persons who had joined the identification parade. There is nothing on record before us to say that the photographs of the accused were actually printed in the newspaper. Even if that be so, they were printed months prior to the identification parade and would have lost their effect on the minds of the witnesses who were called upon to identify an accused.

46. However, we hasten to clarify that it is always appropriate for the investigating agency to hold identification parade at the earliest, in accordance with law, so that the accused does not face prejudice on that count. We may refer to the judgment of this Court in a more recent judgment in the case of *Sidhartha Vashisht alias Manu Sharma Vs. State (NCT of Delhi)* [(2010) 6 SCC 1], where law in relation to purpose of holding an identification parade, the effect of delay and its evidentiary value were discussed. The Court held as under:-

> "256. The law as it stands today is set out in the following decisions of this Court which are reproduced as hereinunder:
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> *Munshi Singh Gautam v. State of M.P.*: (SCC pp. 642-45, paras 16-17 & 19)
>
> "16. As was observed by this Court in *Matru v. State of U.P.* identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See Santokh Singh v. Izhar Hussain.) The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.
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> 17. It is trite to say that the substantive evidence is

the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is, accordingly, considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad v. Delhi Admn., Vaikuntam Chandrappa v. State of A.P., Budhsen v. State of U.P.* and *Rameshwar Singh v. State of J&K.*)

19. In *Harbajan Singh v. State of J&K,* though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in court corroborated by other circumstantial evidence. In that case it was found that the appellant and one Gurmukh Singh were absent at the time of roll call and when they were arrested on the night of 16-12-1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held: (SCC p. 481, para 4)

> '4. In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the investigating officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in Jadunath Singh v. State of U.P. absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villagers only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant.'

Malkhansingh v. State of M.P.: (SCC pp. 751-52, para 7)

"7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification

should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration."

259. In Mullagiri Vajram v. State of A.P.62 it was held that though the accused was seen by the witness in custody, any infirmity in TIP will not affect the outcome of the case, since the depositions of the witnesses in court were reliable and could sustain a conviction. The photo identification and TIP are only aides in the investigation and does not form substantive evidence. The substantive evidence is the evidence in the court on oath."

47. In the facts and circumstances of the present case, we are unable to accept the plea that merely because of delay, the Court should reject the entire evidence of identification of the accused in the present case. More so, the accused persons were duly identified by these very witnesses in the upon court, while they were deposing.

48. From the above discussion, it is clear that the prosecution had been able to comprehensively and reliably establish the chain of circumstances. The evidence produced on record does not leave any major loopholes in the case of the prosecution. With the help of the prosecution witnesses, the presence of the accused in the bungalow, their intention of committing such heinous crime, the manner in which the accused persons had destroyed the evidence, i.e., the car, dead bodies and blood stained cloths of the deceased and the accused themselves, from where and how they had procured the incriminating articles which they used in the crime, like knife, petrol etc. and finally the conduct of the accused prior to and after commission of the crime have been established by the prosecution.

49. Most importantly, the recovery of incriminating articles, cash and jewellery belonging to the deceased, the finger prints

of the accused and the false stories given by the accused to different persons who came to the bungalow of the deceased during 17th/18th March, 2003, to ensure that none of them enter the house of the deceased stand unequivocally established. Besides all this circumstantial evidence, another very significant aspect of the case is that none of the accused, particularly accused No.2, offered any explanation during the recording of their statements under Section 313 CrPC. It is not even disputed before us that the material incriminating evidence was put to accused No. 2 while his statement under Section 313 CrPC was recorded. Except for a vague denial, he stated nothing more. In fact, even in response to a question relating to the injuries that he had suffered, he opted to make a denial, which fact had duly been established by the statements of the investigating officers, doctors and even the witnesses who had seen him immediately after the crime. It is a settled law that the statement of Section 313 CrPC is to serve a dual purpose, firstly, to afford to the accused an opportunity to explain his conduct and secondly to use denials of established facts as incriminating evidence against him. In this regard, we may refer to some recent judgements of this Court.

This Court in the case of *Asraf Ali v. State of Assam* [(2008) 16 SCC 328] has observed as follows :

> "21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.
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> 22. The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. If a

> point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in *S. Harnam Singh v. State (Delhi Admn.)* while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facts by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

Again, in its recent judgment in Manu Sao v. State of Bihar [(2010) 12 SCC 310], a Bench of this Court to which one of us, Swatanter Kumar, J., was a member, has reiterated the above-stated view as under :

> "12. Let us examine the essential features of this Section 313 CrPC and the principles of law as enunciated by judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 of the Code.
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> 13. As already noticed, the object of recording the statement of the accused under Section 313 of the Code is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to examine

the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and besides ensuring the compliance therewith the court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or in the alternative to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

14. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in

consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution."

50. In view of the above principles, it was expected of the accused to render proper explanation for his injuries and his conduct. However, he opted to deny the same and in fact even gave false replies to the questions posed to him.

51. If the accused gave incorrect or false answers during the course of his statement under Section 313 CrPC, the Court can draw an adverse inference against him.

52. In the present case, we are of the considered opinion that the accused has not only failed to explain his conduct, in the manner in which every person of normal prudence would be expected to explain but had even given incorrect and false answers. In the present case, the Court not only draws an adverse inference, but such conduct of the accused would also tilt the case in favour of the prosecution.

53. For the above reasons, we see no infirmity in the judgments under appeal. There is no merit in the submissions raised on behalf of the accused. Resultantly, the appeal is dismissed.

B.B.B. Appeal dismissed.

STATE OF M.P.
v.
RAKESH KOHLI & ANR.
(Civil Appeal No. 684 of 2004)

MAY 11, 2012

[R.M. LODHA AND H.L. GOKHALE, JJ.]

Stamp Act, 1899 - Article 45(d) of Schedule 1-A [as introduced by Stamp (Madhya Pradesh Amendment) Act, 2002] - Constitutional validity of - Test of classification - Power of Attorney to sell/transfer immovable property situated in the State of Madhya Pradesh - Article 45(d) prescribing stamp duty on market value of property when power of attorney given without consideration to a person other than the kith and kin - Distinction carved out in Article 45(d) between an agent who was a blood relation and who was an outsider - Challenge to - High Court held Article 45(d) as violative of Article 14 of the Constitution - Justification of - Held: Not justified - By creating two categories, namely, an agent who is a blood relation and an agent other than the kith and kin, without consideration, the Legislature sought to curb inappropriate mode of transfer of immovable properties - The legislative idea behind Article 45(d) was to curb tendency of transferring immovable properties through power of attorney and inappropriate documentation - In effect, by bringing in this law, the Madhya Pradesh State Legislature sought to levy stamp duty on such ostensible document, the real intention of which was transfer of immovable property - Classification between blood relative and outsider not without any rationale - It has a direct nexus to the object of the Act - Constitution of India, 1950 - Article 14.

Constitution of India, 1950 - Part III and Article 245 - Statute enacted by Parliament or State Legislature - Constitutional validity of - Judicial review - Scope - Held: Sans

flagrant violation of the constitutional provisions, the law made by Parliament or a State Legislature cannot be declared bad - Legislative enactment can be struck down by Court only on two grounds, namely (i), that the appropriate Legislature did not have competency to make the law and (ii), that it did not take away or abridge any of the fundamental rights enumerated in Part - III of the Constitution or any other constitutional provisions.

Constitution of India, 1950 - Article 14 - Constitutional validity of a statute - Judicial review - Scope - Held: When provision enacted by the State Legislature is not found to be discriminatory, it cannot be struck down on the ground that it was arbitrary or irrational.

Tax / Taxation - Constitutional validity of taxation law - Scope of Judicial review - Guiding principles stated viz.(i) presumption in favour of constitutionality of a law made by Parliament or State Legislature, (ii) no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational, unless some constitutional infirmity found, (iii) Court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as the Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent, (iv) hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law and (v) in the field of taxation, the Legislature enjoys greater latitude for classification - Interpretation of Statutes - Fiscal statute.

By the Indian Stamp (Madhya Pradesh Amendment) Act, 2002 [M.P. 2002 Act], stamp duty relating to power of attorney has been prescribed in Article 45 of Schedule 1-A of the Indian Stamp Act,1899. Clause(d) thereof prescribes stamp duty @ 2% on the market value of the property which is subject matter of power of attorney when power of attorney is given without consideration to a person other than father, mother, wife or husband,

son or daughter, brother or sister in relation to the executant and authorizing such person to sell immovable property situated in Madhya Pradesh. The validity of the said provision was challenged. It was contended that the distinction carved out in Article 45, Clause (d) between an agent who was a blood relation and who was an outsider is legally impermissible; and that the impugned provision violates Article 14 of the Constitution. The High Court held Article 45,Clause (d) as violative of Article 14 of the Constitution being arbitrary, unreasonable and irrational. The said decision of the High Court was challenged in the instant appeals.

Allowing the appeals, the Court

HELD: 1.1. The High Court was clearly in error in declaring Clause (d), Article 45 of Schedule 1-A of the Indian Stamp Act, 1899 as violative of Article 14 of the Constitution. It is very difficult to approve the reasoning of the High Court that the provision may pass the test of classification but it would not pass the requirement of the second limb of Article 14 of the Constitution which ostracises arbitrariness, unreasonable and irrationality. The High Court failed to keep in mind the well defined limitations in consideration of the constitutional validity of a statute enacted by Parliament or a State Legislature. The statute enacted by Parliament or a State Legislature cannot be declared unconstitutional lightly. The court must be able to hold beyond any iota of doubt that the violation of the constitutional provisions was so glaring that the legislative provision under challenge cannot stand. Sans flagrant violation of the constitutional provisions, the law made by Parliament or a State Legislature is not declared bad. Legislative enactment can be struck down by Court only on two grounds, namely (i), that the appropriate Legislature does not have competency to make the law and (ii), that it does not take

away or abridge any of the fundamental rights enumerated in Part - III of the Constitution or any other constitutional provisions. [Paras 13, 14] [676-D-H; 677-A]

1.2. The High Court has not given any reason as to why the provision contained in clause (d) was arbitrary, unreasonable or irrational. The basis of such conclusion is not discernible from the judgment. The High Court has not held that the provision was discriminatory. When the provision enacted by the State Legislature has not been found to be discriminatory, such enactment could not have been struck down on the ground that it was arbitrary or irrational. [Para 16] [679-A-C]

1.3. Stamp duty is a tax and hardship is not relevant in interpreting fiscal statutes. While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles: (i), there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature (ii), no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found (iii), the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as the Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence (iv), hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law and (v), in the field of taxation, the Legislature enjoys greater latitude for classification. Had the High Court kept in view the above well-known and important principles in law, it would not have declared Clause (d), Article 45 of Schedule 1-A as violative of Article 14 of the Constitution being arbitrary, unreasonable and irrational while holding

that the provision may pass test of classification. By creating two categories, namely, an agent who is a blood relation, i.e. father, mother, wife or husband, son or daughter, brother or sister and an agent other than the kith and kin, without consideration, the Legislature has sought to curb inappropriate mode of transfer of immovable properties. Ordinarily, where executant himself is unable, for any reason, to execute the document, he would appoint his kith and kin as his power of attorney to complete the transaction on his behalf. If one does not have any kith or kin who he can appoint as power of attorney, he may execute the conveyance himself. The legislative idea behind Clause (d), Article 45 of Schedule 1-A is to curb tendency of transferring immovable properties through power of attorney and inappropriate documentation. By making a provision like this, the State Government has sought to collect stamp duty on such indirect and inappropriate mode of transfer by providing that power of attorney given to a person other than kith or kin, without consideration, authorizing such person to sell immovable property situated in Madhya Pradesh will attract stamp duty at two per cent on the market value of the property which is subject matter of power of attorney. In effect, by bringing in this law, the Madhya Pradesh State Legislature has sought to levy stamp duty on such ostensible document, the real intention of which is the transfer of immovable property. The classification, thus, cannot be said to be without any rationale. It has a direct nexus to the object of the Indian Stamp Act,1899. The conclusion of the High Court, therefore, that the impugned provision is arbitrary, unreasonable and irrational is unsustainable. [Paras 17, 29, 30] [679-C-D; 686-A-H; 687-A-C]

State of A.P. and others v. Mcdowell and Co. and others **(1996) 3 SCC 709: 1996 (3) SCR 721;** *Government of Andhra Pradesh and others v. P. Laxmi Devi (Smt.)* **(2008) 4**

SCC 720: 2008 (3) SCR 330; *Mohd. Hanif Quareshi and others v. State of Bihar* **AIR 1958 SC 731: 1959 SCR 629;** *Mahant Moti Das v. S.P. Sahi,* **AIR 1959 SC 942;** *Hamdard Dawakhana and another v. The Union of India and others* **AIR 1960 SC 554: 1960 SCR 671;** *Karnataka Bank Limited v. State of Andhra Pradesh and others* **(2008) 2 SCC 254: 2008 (1) SCR 986;** *M/s.Steelworth Limited v. State of Assam* **1962 Supp (2) SCR 589;** *Gopal Narain v. State of Uttar Pradesh and another* **AIR 1964 SC 370: 1964 SCR 869***; Ganga Sugar Corporation Limited v. State of Uttar Pradesh and others* **(1980) 1 SCC 223: 1980 (1) SCR 769;** *R.K. Garg v. Union of India and others* **(1981) 4 SCC 675: 1982 (1) SCR 947 and** *State of W.B. and another v. E.I.T.A. India Limited and others* **(2003) 5 SCC 239: 2003 (2) SCR 668 - relied on.**

State of T.N. and others v. Ananthi Ammal and others **(1995) 1 SCC 519: 1994 (5) Suppl. SCR 666;** *Commissioner of Income Tax, Madras v. R.SV. Sr. Arunachalam Chettiar* **AIR 1965 SC 1216: 1965 SCR 815;** *Income Tax Officer, Tuticorin v. T.S. Devinatha Nadar etc.* **AIR 1968 SC 623: 1968 SCR 33;** *Rt. Rev. Msgr. Mark Netto v. State of Kerala and others* **(1979) 1 SCC 23: 1979 (1) SCR 609;** *Bengal Immunity Co.Ltd. v. State of Bihar and others* **AIR 1955 SC 661: 1955 SCR 603;** *Charanjit Lal Chowdhury v. Union of India and others* **AIR 1951 SC 41: 1950 SCR 869 and** *The State of Bombay and another v. F.N. Balsara* **AIR 1951 SC 318: 1951 SCR 682 - referred to.**

Balaji v. Income Tax Officer, Special Investigation Circle, Akola andothers **AIR 1962 SC 123: 1962 SCR 983;** *Ramesh Chand Bansal andOthers v. District Magistrate/ Collector Ghaziabad and others* **(1999)5 SCC 62: 1999 (3) SCR 462;** *Veena Hasmukh Jain and another v. State of Maharashtra and others* **(1999) 5 SCC 725: 1999 (1) SCR 302;** *Hanuman Vitamin Foods Private Limited and others v. State ofMaharashtra and another* **(2000) 6 SCC 345: 2000 (1) Suppl. SCR623 ;** *Union of India v. R. Gandhi, President;*

Madras Bar Association **(2010) 11 SCC 1: 2010 (6) SCR 857 and** *Suraj Lamp and Industries Private Limited v. State of Haryana and another* **(2012) 1 SCC 656: 2011 (11) SCR 848 - cited.**

Case Law Reference:

1962 SCR 983	**cited**	**Para 6**
1996 (3) SCR 721	**relied on**	**Paras 6, 15**
1999 (3) SCR 462	**cited**	**Para 6**
1999 (1) SCR 302	**cited**	**Para 6**
2000 (1) Suppl. SCR 623	**cited**	**Para 6**
2008 (1) SCR 986	**relied on**	**Paras 6, 26**
2008 (3) SCR 330	**relied on**	**Paras 6, 20**
2010 (6) SCR 857	**cited**	**Para 6**
2011 (11) SCR 848	**cited**	**Para 6**
1994 (5) Suppl. SCR 666	**referred to**	**Para 15**
1955 SCR 603	**referred to**	**Paras 17, 24**
1965 SCR 815	**referred to**	**Para 18**
1968 SCR 33	**referred to**	**Para 19**
1979 (1) SCR 609	**referred to**	**Para 20**
1959 SCR 629	**relied on**	**Para 23**
AIR 1959 SC 942	**relied on**	**Para 23**
1960 SCR 671	**relied on**	**Paras 24, 27**
1950 SCR 869	**referred to**	**Para 25**
1951 SCR 682	**referred to**	**Para 25**

1962 Supp (2) SCR 589	**relied on**	**Para 27**
1964 SCR 869	**relied on**	**Para 27**
1980 (1) SCR 769	**relied on**	**Para 27**
1982 (1) SCR 947	**relied on**	**Paras 27, 28**
2003 (2) SCR 668	**relied on**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 684 of 2004 etc.

From the Judgment & Order dated 15.09.2003 of the High Court of Judicature Jabalpur (M.P.) in Writ Petition No. 4683 of 1999.

WITH

C.A. No. 1270 of 2004.

Vibha Dattta Makhija, B.S. Banthia for the Appellant.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The only point for consideration here is, whether or not the Division Bench of the Madhya Pradesh High Court was justified in declaring Clause (d), Article 45 of Schedule 1-A of the Indian Stamp Act, 1899 (for short, '1899 Act') which was brought in by the Indian Stamp (Madhya Pradesh Amendment) Act, 2002 (for short, 'M.P. 2002 Act') as unconstitutional being violative of Article 14 of the Constitution of India.

2. The above point arises in this way. Two writ petitions came to be filed before the Madhya Pradesh High Court. In both writ petitions initially it was prayed that Clauses (f) and (f-1), Article 48, Schedule 1-A brought in the 1899 Act by Section 3 of the Indian Stamp (Madhya Pradesh Amendment) Act, 1997 (for short, 'M.P. 1997 Act') be declared ultra vires. During the pendency of these petitions, the 1899 Act as applicable to Madhya Pradesh was further amended by the M.P. 2002 Act.

The respondents, referred to as writ petitioners, amended their writ petitions and prayed that Clause (d), Article 45 of Schedule 1-A of the 1899 Act as substituted by M.P. 2002 Act be declared ultra vires. The writ petitioners set up the case that original Article 48 of the 1899 Act, Schedule 1-A prescribed stamp duty payable at Rs. 10/- if attorney was appointed for a single transaction. By M.P. 1997 Act, Article 48 Clause (f) was substituted by Clauses (f) and (f-1). Clause (f-1) provided that where power of attorney was executed without consideration in favour of person who is not his or her spouse or children or mother or father and authorizes him to sell or transfer any immovable property, the stamp duty would be leviable as if the transaction is conveyance under Article 23. Explanation II inserted by M.P. 1997 Act provided that where under Clauses (f) and (f-1), duty had been paid on the power of attorney and a conveyance relating to that property was executed in pursuance of power of attorney between the executant of the power of attorney and the person in whose favour it was executed, the duty on conveyance should be the duty calculated on the market value of the property reduced by duty paid on the power of attorney. By M.P. 2002 Act, stamp duty relating to power of attorney has been prescribed in Article 45 of Schedule 1-A. Clause (d) thereof prescribes stamp duty at two per cent on the market value of the property which is subject matter of power of attorney when power of attorney is given without consideration to a person other than father, mother, wife or husband, son or daughter, brother or sister in relation to the executant and authorizing such person to sell immovable property situated in Madhya Pradesh. The writ petitioners pleaded, inter alia, that the distinction between an agent who was a blood relation and who was an outsider carved out in Article 45, Clause (d) was legally impermissible. The provision violates Article 14 of the Constitution as it has sought to create unreasonable classification.

3. The State of Madhya Pradesh stoutly defended the challenge to the above provisions and stated before the High

Court that the matter of rate of stamp duty was solely in the domain of State Legislature and none of the provisions of the Constitution was offended by the above provisions.

4. The Division Bench of the High Court has accepted the constitutional challenge to Clause (d), Article 45 of Schedule 1-A brought in the 1899 Act by M.P. 2002 Act and held that the said provision was violative of Article 14 of the Constitution of India. The Division Bench gave the following reasoning:

> "11. As far as clauses (d) is concerned, it lays a postulate that postulate [sic] that when the power of authority is given without consideration to a person other than the father, mother, wife or husband, son or daughter, brother or sister in relation to the executant and authorizing such person to sell immovable property, 2% on the market value of the property is to be collected. Submission of Mr. Agrawal is that this clause is absolutely unreasonable and smacks of arbitrariness, as there is no rationale to include the category of persons who have been included and to leave out to all other persons. Mr. S.K. Yadav, learned Government Advocate submitted that near relatives can constitute a class by itself and all others can fit into a different category and, therefore, the said provision does not offend the concept of classification, as there is intelligible differentia. On a first blush the aforesaid submission of the learned counsel for the State appears to be quite attractive, but on a deeper probe it is not what it is. In the guise of the classification something has been stated in the said provision. One can give certain examples. One may not have kith or kin and intact [sic] even that case to deprive him to execute the power of attorney for selling the property, unless 2% is paid on the market value is arbitrary. The provisions may pass the test of classification but it would not pass the requirement of the second limb of Article 14 of the Constitution which ostracises arbitrariness, unreasonable and irrationality.

The State may have a laudable purpose but the laudable purpose alone cannot sustain the provision. The matter would been [sic] different had it included a rider that it is executed in favour of any other for consideration or some other purposes is not the situation. In view of the same, we are of the considered opinion, the aforesaid provision is defiant of Article 14 of the Constitution. Accordingly, we have no hesitation to declare the same as violative of Article 14 of the Constitution."

5. Ms. Vibha Datta Makhija, learned counsel for the appellant - State of Madhya Pradesh - submitted that the High Court was in error in declaring Clause (d), Article 45, Schedule 1-A as violative of Article 14 of the Constitution of India. She would submit that the test of challenge to a legislative provision was completely different from that of an administrative action. A legislative provision cannot be struck down as being arbitrary, irrational or unreasonable. She further submitted that the classification made in Clause (d) of Article 45, Schedule 1-A had intelligible differentia with a direct nexus to the object of the 1899 Act. The object of the 1899 Act is to collect proper stamp duty on an instrument or conveyance on which such duty is payable. This is to protect the State revenue. The legislative wisdom took into consideration that genuine power of attorney documents would be executed by the executants without consideration mostly in favour of kith and kin to complete sale transactions on behalf of the executants. The said category attracts lower stamp duty than power of attorney executed in favour of third parties/strangers since such power of attorney document would be for extraneous reasons.

6. Learned counsel for the State of M.P. also submitted that the wisdom of the Legislature in protecting the revenue and carving out genuine classes from others had been well recognized. The court cannot sit in judgment over their wisdom. She relied upon decisions of this Court in *Balaji v. Income Tax Officer, Special Investigation Circle, Akola and others*[1]*; State of A.P. and others v. Mcdowell and Co. and others*[2]*; Ramesh Chand Bansal and Others v. District Magistrate/Collector Ghaziabad and others*[3]*; Veena Hasmukh Jain and another v. State of Maharashtra and others*[4]*; Hanuman Vitamin Foods Private Limited and others v. State of Maharashtra and another*[5]*; Karnataka Bank Limited v. State of Andhra Pradesh and others*[6]*; Government of Andhra Pradesh and others v. P. Laxmi Devi (Smt.)*[7]*; Union of India v. R. Gandhi, President; Madras Bar Association*[8] and *Suraj Lamp and Industries Private Limited v. State of Haryana and another*[9].

7. The respondents despite service have not chosen to appear.

8. The definition of 'conveyance' is contained in Section 2(10) of the 1899 Act which reads as under:

"S.2. Definitions.-In this Act, unless there is something repugnant in the subject or context,--

(10) "Conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred *inter vivos* and which is not otherwise specifically provided for by Schedule I.

9. Section 2(21) defines 'power of attorney'. It reads as follows :

1. AIR 1962 SC 123.
2. (1996) 3 SCC 709.
3. (1999) 5 SCC 62.
4. (1999) 5 SCC 725.
5. (2000) 6 SCC 345.
6. (2008) 2 SCC 254.
7. (2008) 4 SCC 720.
8. (2010) 11 SCC 1.
9. (2012) 1 SCC 656.

"S. 2(21) "Power-of-attorney" includes any instrument (not chargeable with a fee under the law relating to court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it;"

10. The 1899 Act has been amended from time to time by the Madhya Pradesh State Legislature insofar as its application to the State of Madhya Pradesh is concerned. The stamp duty on power of attorney was originally prescribed in Article 48, Schedule - 1-A of the 1899 Act. Clause (f) in original Article 48, Schedule 1-A read as under:

"SCHEDULE-1A
Stamp Duty on Instruments
(See section 3)

Description of Instruments	Proper Stamp Duty
(1)	(2)
48.Power of Attorney, as defined by Section 2(21), not being a Proxy [No. 52].	
(f) when giving for consideration and authorizing the attorney to sell any immovable property;	The same duty as Conveyance (No. 23) for a market value equal to the amount of the consideration."

11. Section 3 of the M.P. 1997 Act brought in amendment in the 1899 Act, inter alia, as under :

"In Schedule 1-A of the Principal Act, in Article 48,--

(i)For clause (f), the following clauses shall be substituted, namely:-

(f) when given for consideration and authorizing the attorney to sell or transfer any immovable property.	The same duty as a conveyance under Article 23 on the market value of the property

(f-1) when given without consideration in favour of persons who are not his or her spouse or Children, or mother or father and authorizing the attorney to sell or transfer any immovable property	The same duty as a conveyance under Article 23 on the market value of the property

(ii) the existing explanation shall be renumbered as explanation I thereof and after explanation I as so renumbered, the following explanation shall be inserted, namely :-

"Explanation II:--Where under clause (f) and (f-1) duty has been paid on the power of attorney and a conveyance relating to that property is executed in pursuance of power of attorney between the executant of power of attorney and the person in whose favour it is executed, the duty on conveyance shall be the duty calculated on the market value of the property reduced by duty paid on the power of attorney".

The Objects and Reasons for the above amendment were to check the tendency to execute power of attorney authorising the attorney to sell or transfer immovable property in place of a conveyance deed and to increase the revenue of the Government in the State of Madhya Pradesh.

12. Article 48 in the 1899 Act as amended by M.P. 1997 Act was substituted by M.P. 2002 Act. The new provision, Article 45 in respect of power of attorney in Schedule 1-A which was brought in by M.P. 2002 Act reads as follows :

"SCHEDULE-1A
Stamp Duty on Instruments
(See section 3)

Description of Instrument	Proper Stamp Duty
(1)	(2)
45. Power of attorney [as defined by section 2(21)] not being a proxy:-	
(a)when authorizing one person or more to act in single transaction, including a power of attorney executed for procuring the registration of one or more documents in relation to a single transaction or for admitting execution of one or more such documents;	Fifty rupees.
(b)when authorizing one person to act in more than one transaction or generally; or not more than ten persons to act jointly or severally in more than one transaction or generally;	One hundred rupees.
(c)when given for consideration and authorizing the agent to sell any immovable property.	The same duty as a conveyance (No. 22) on the market value of the property.
(d)when given without consideration to a person other than the father, mother, wife or husband, son or daughter, brother or sister in relation to the executant and authorizing such person to sell immovable property situated in Madhya Pradesh.	Two percent on the market value of the property which is the subject matter of power of attorney.
(e)In any other case;	Fifty rupees for each person authorized

Explanation-I.-For the purpose of this article, more persons than one when belonging to the same firm shall be deemed to be one person.

Explanation-II.-The term 'registration' includes every operation incidental to registration under the Registration Act, 1908 (16 of 1908)."

13. In our opinion, the High Court was clearly in error in declaring Clause (d), Article 45 of Schedule 1-A of the 1899 Act which as brought in by the M.P. 2002 Act as violative of Article 14 of the Constitution of India. It is very difficult to approve the reasoning of the High Court that the provision may pass the test of classification but it would not pass the requirement of the second limb of Article 14 of the Constitution which ostracises arbitrariness, unreasonable and irrationality. The High Court failed to keep in mind the well defined limitations in consideration of the constitutional validity of a statute enacted by Parliament or a State Legislature. The statute enacted by Parliament or a State Legislature cannot be declared unconstitutional lightly. The court must be able to hold beyond any iota of doubt that the violation of the constitutional provisions was so glaring that the legislative provision under challenge cannot stand. Sans flagrant violation of the constitutional provisions, the law made by Parliament or a State Legislature is not declared bad.

14. This Court has repeatedly stated that legislative enactment can be struck down by Court only on two grounds,

namely (i), that the appropriate Legislature does not have competency to make the law and (ii), that it does not take away or abridge any of the fundamental rights enumerated in Part - III of the Constitution or any other constitutional provisions.

15. In Mcdowell and Co.2 while dealing with the challenge to an enactment based on Article 14, this Court stated in paragraph 43 (at pg. 737) of the Report as follows :

> "……..A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground…….
>
> …….. if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. *No enactment can be struck down by just saying that it is arbitrary or unreasonable.* Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom……."
>
> (Emphasis supplied)

Then dealing with the decision of this Court in *State of T.N. and others v. Ananthi Ammal and others*[10], a three-Judge Bench

10. (1995) 1 SCC 519

in Mcdowell and Co.2 observed in paragraphs 43 and 44 [at pg. 739) of the Report as under :

> "……Now, coming to the decision in Ananthi Ammal, we are of the opinion that it does not lay down a different proposition. It was an appeal from the decision of the Madras High Court striking down the Tamil Nadu Acquisition of Land for Harijan Welfare Schemes Act, 1978 as violative of Articles 14, 19 and 300-A of the Constitution. On a review of the provisions of the Act, this Court found that it provided a procedure which was substantially unfair to the owners of the land as compared to the procedure prescribed by the Land Acquisition Act, 1894, insofar as Section 11 of the Act provided for payment of compensation in instalments if it exceeded rupees two thousand. After noticing the several features of the Act including the one mentioned above, this Court observed: (SCC p. 526, para 7)
>
> "7. When a statute is impugned under Article 14 what the court has to decide is whether the statute is so arbitrary or unreasonable that it must be struck down. At best, a statute upon a similar subject which derives its authority from another source can be referred to, if its provisions have been held to be reasonable or have stood the test of time, only for the purpose of indicating what may be said to be reasonable in the context. We proceed to examine the provisions of the said Act upon this basis."

44. It is this paragraph which is strongly relied upon by Shri Nariman. We are, however, of the opinion that the observations in the said paragraph must be understood in the totality of the decision. The use of the word 'arbitrary' in para 7 was used in the sense of being discriminatory, as the reading of the very paragraph in its entirety discloses. The provisions of the Tamil Nadu Act were contrasted with the provisions of the Land Acquisition Act and ultimately it was found that Section 11 insofar as it provided for payment of compensation in

instalments was invalid. The ground of invalidation is clearly one of discrimination. It must be remembered that an Act which is discriminatory is liable to be labelled as arbitrary. It is in this sense that the expression 'arbitrary' was used in para 7."

16. The High Court has not given any reason as to why the provision contained in clause (d) was arbitrary, unreasonable or irrational. The basis of such conclusion is not discernible from the judgment. The High Court has not held that the provision was discriminatory. When the provision enacted by the State Legislature has not been found to be discriminatory, we are afraid that such enactment could not have been struck down on the ground that it was arbitrary or irrational.

17. That stamp duty is a tax and hardship is not relevant in interpreting fiscal statutes are well known principles. In *Bengal Immunity Co. Ltd. v. State of Bihar and others*[11], a seven-Judge Bench speaking through majority in paragraph 43 (at pg. 685) of the Report while dealing with hardship in the statutes stated as follows :

> "…….If there is any real hardship of the kind referred to, there is Parliament which is expressly invested with the power of lifting the ban under cl. (2) either wholly or to the extent it thinks fit to do. Why should the Court be called upon to discard the cardinal rule of interpretation for mitigating a hardship, which after all may be entirely fanciful, when the Constitution itself has expressly provided for another authority more competent to evaluate the correct position to do the needful?"

18. In *Commissioner of Income Tax, Madras v. R.SV. Sr. Arunachalam Chettiar*[12], a three-Judge Bench of this Court, inter alia, observed in paragraph 13 (at pgs. 1220-21) of the

11. AIR 1955 SC 661.

12. AIR 1965 SC 1216.

Report, "equity is out of place in tax law; a particular income is either exigible to tax under the taxing statute or it is not."

19. In the *Income Tax Officer, Tuticorin v. T.S. Devinatha Nadar etc.*[13], this Court in paragraph 30 (at pg. 635) of the Report observed as follows :

> "30. From the foregoing decisions it is clear that the consideration whether a levy is just or unjust, whether it is equitable or not, a consideration which appears to have greatly weighed with the majority, is wholly irrelevant in considering the validity of a levy. The courts have repeatedly observed that there is no equity in a tax. The observations of Lord Hatherley, L.C. in (1869) 4 Ch. A 735. "In fact we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the legislature contemplated," were made while construing, a non-taxing statute. The said rule has only a limited application in the interpretation of a taxing statute. Further, as observed by that learned Judge in that very case the question in each case is "whether the legislature had sufficiently expressed its intention" on the point in issue."

The court highlighted that the court could not concern itself with the intention of the Legislature when the language expressing such intention was plain and unambiguous.

20. In *P. Laxmi Devi (Smt.)*[7], a two-Judge Bench of this Court was concerned with a judgment of the Andhra Pradesh High Court. The High Court had declared Section 47-A of the 1899 Act as amended by A.P. Act 8 of 1998 that required a party to deposit 50% deficit stamp duty as a condition precedent for a reference to a Collector under Section 47-A unconstitutional. The Court said in *P. Laxmi Devi (Smt.)*[7] as follows :

13. AIR 1968 SC 623.

"19. It is well settled that stamp duty is a tax, and hardship is not relevant in construing taxing statutes which are to be construed strictly. As often said, there is no equity in a tax vide *CIT v. V.MR.P. Firm Muar*. If the words used in a taxing statute are clear, one cannot try to find out the intention and the object of the statute. Hence the High Court fell in error in trying to go by the supposed object and intendment of the Stamp Act, and by seeking to find out the hardship which will be caused to a party by the impugned amendment of 1998.

20. xxx xxx xxx

21. It has been held by a Constitution Bench of this Court in *ITO v. T.S. Devinatha Nadar* (vide AIR paras 23 to 28) that where the language of a taxing provision is plain, the court cannot concern itself with the intention of the legislature. Hence, in our opinion the High Court erred in its approach of trying to find out the intention of the legislature in enacting the impugned amendment to the Stamp Act."

While dealing with the aspect as to how and when the power of the court to declare the statute unconstitutional can be exercised, this Court referred to the earlier decision of this Court in *Rt. Rev. Msgr. Mark Netto v. State of Kerala and others*[14] and held in para 46 (at pg. 740) of the Report as under:

"46. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways e.g. if a State Legislature makes a law which only Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision

14. (1979) 1 SCC 23.

of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide *Rt. Rev. Msgr. Mark Netto v. State of Kerala* SCC para 6 : AIR para 6. Also, it is none of the concern of the court whether the legislation in its opinion is wise or unwise."

Then in paras 56 and 57 (at pg. 744), the Court stated as follows:

"56. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimisation of the judges' personal preferences. The court must not invalidate a statute lightly, for, as observed above, invalidation of a statute made by the legislature elected by the people is a grave step. As observed by this Court in State of Bihar v. Kameshwar Singh: (AIR p. 274, para 52)

"52. … The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence…."

57. In our opinion, the court should, therefore, ordinarily defer to the wisdom of the legislature unless it enacts a law about which there can be no manner of doubt about its unconstitutionality."

21. The Constitution Bench of this Court in *Mohd. Hanif Quareshi and others v. State of Bihar*[15], while dealing with the

15. AIR 1958 SC 731.

meaning, scope and effect of Article 14, reiterated what was already explained in earlier decisions that to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differentia must have rational relation to the object sought to be achieved by the statute in question. The Court further stated that classification might be founded on different basis, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.

22. In *Mohd. Hanif Quareshi*[15], the Constitution Bench further observed that there was always a presumption in favour of constitutionality of an enactment and the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. It stated in paragraph 15 (at pgs. 740-741) of the Report as under :

> "……..The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation……."

23. The above legal position has been reiterated by a

Constitution Bench of this Court in *Mahant Moti Das v. S.P. Sahi*[16].

24. In *Hamdard Dawakhana and another v. The Union of India and others*[17], inter alia, while referring to the earlier two decisions, namely, *Bengal Immunity Company Ltd.*[11] and *Mahant Moti Das*[16], it was observed in paragraph 8 (at pg. 559) of the Report as follows:

> "8. Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary i.e. its subject-matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy."

25. In *Hamdard Dawakhana*[17], the Court also followed the statement of law in *Mahant Moti Das*[16] and the two earlier decisions, namely, *Charanjit Lal Chowdhury v. Union of India and others*[18] and *The State of Bombay and another v. F.N. Balsara*[19] and reiterated the principle that presumption was always in favour of constitutionality of an enactment.

26. In one of the recent cases in *Karnataka Bank Limited*[6], while referring to some of the above decisions, in para 19 (at pgs. 262-263) of the Report, this Court held as under :

> "19. The rules that guide the constitutional courts in

16. AIR 1959 SC 942.
17. AIR 1960 SC 554.
18. AIR 1951 SC 41.
19. AIR 1951 SC 318.

discharging their solemn duty to declare laws passed by a legislature unconstitutional are well known. There is always a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; "to doubt the constitutionality of a law is to resolve it in favour of its validity". Where the validity of a statute is questioned and there are two interpretations, one of which would make the law valid and the other void, the former must be preferred and the validity of law upheld. In pronouncing on the constitutional validity of a statute, the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law. If that which is passed into law is within the scope of the power conferred on a legislature and violates no restrictions on that power, the law must be upheld whatever a court may think of it. (See State of Bombay v. F.N. Balsara.)"

27. A well-known principle that in the field of taxation, the Legislature enjoys a greater latitude for classification, has been noted by this Court in long line of cases. Some of these decisions are : *M/s. Steelworth Limited v. State of Assam*[20]*; Gopal Narain v. State of Uttar Pradesh and another.*[21]*; Ganga Sugar Corporation Limited v. State of Uttar Pradesh and others*[22]*; R.K. Garg v. Union of India and others*[23] and *State of W.B. and another v. E.I.T.A. India Limited and others*[24].

28. In *R.K. Garg*[23], the Constitution Bench of this Court stated that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc.

20. 1962 Supp (2) SCR 589.
21. AIR 1964 SC 370.
22. (1980) 1 SCC 223.
23. (1981) 4 SCC 675.
24. (2003) 5 SCC 239.

29. While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles: (i), there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature (ii), no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found (iii), the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as the Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence (iv), hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law and (v), in the field of taxation, the Legislature enjoys greater latitude for classification.

30. Had the High Court kept in view the above well-known and important principles in law, it would not have declared Clause (d), Article 45 of Schedule 1-A as violative of Article 14 of the Constitution being arbitrary, unreasonable and irrational while holding that the provision may pass test of classification. By creating two categories, namely, an agent who is a blood relation, i.e. father, mother, wife or husband, son or daughter, brother or sister and an agent other than the kith and kin, without consideration, the Legislature has sought to curb inappropriate mode of transfer of immovable properties. Ordinarily, where executant himself is unable, for any reason, to execute the document, he would appoint his kith and kin as his power of attorney to complete the transaction on his behalf. If one does not have any kith or kin who he can appoint as power of attorney, he may execute the conveyance himself. The legislative idea behind Clause (d), Article 45 of Schedule 1-A is to curb tendency of transferring immovable properties through power of attorney and inappropriate documentation. By making a provision like this, the State Government has sought to collect stamp duty on such indirect and inappropriate mode

of transfer by providing that power of attorney given to a person other than kith or kin, without consideration, authorizing such person to sell immovable property situated in Madhya Pradesh will attract stamp duty at two per cent on the market value of the property which is subject matter of power of attorney. In effect, by bringing in this law, the Madhya Pradesh State Legislature has sought to levy stamp duty on such ostensible document, the real intention of which is the transfer of immovable property. The classification, thus, cannot be said to be without any rationale. It has a direct nexus to the object of the 1899 Act. The conclusion of the High Court, therefore, that the impugned provision is arbitrary, unreasonable and irrational is unsustainable.

31. Consequently, these appeals are allowed and the judgment of the Madhya Pradesh High Court passed on September 15, 2003 is set aside. Writ petitions filed by the present respondents before the High Court stand dismissed. No order as to costs.

B.B.B. Appeals allowed.

RAMESH HARIJAN
v.
STATE OF U.P.
(Criminal Appeal No. 1340 of 2007)

MAY 21, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Penal Code, 1860 - ss. 302 and 376 - Rape and murder of a minor girl aged 5-6 years - Deceased last seen with the accused by two witnesses - Recovery of the part of bed sheet having blood and semen, in the presence of panch witnesses - Medical evidence supporting prosecution case - Acquittal by trial court - Conviction by High Court - On appeal, held: Appellate court to interfere with acquittal order only in exceptional cases - In the instant case High Court rightly interfered with acquittal order - Acquittal order by trial court was illegal, unwarranted and was based on mis-appreciation of evidence as it gave undue weightage to unimportant discrepancies and inconsistencies which resulted in miscarriage of justice.

Criminal Trial - Benefit of doubt - Held: The doubt should be reasonable based upon reason and common sense and not an imaginary, trivial or merely possible doubt - The duty of the court is to ensure that miscarriage of justice is avoided.

Witness - Hostile witness - Evidentiary value - Held: Evidence of hostile witness cannot be discarded as a whole - Relevant parts thereof which are admissible in law, can be used - Evidence.

Maxim: 'Falsus in uno falsus in omnibus' - Applicability.

The appellant-accused was prosecuted for having raped and caused death of minor girl aged 5-6 years. The

prosecution case was that PW-2 (mother of the deceased) lodged an FIR alleging that the deceased was raped and killed by the appellant-accused, when the deceased with her blind grandmother was sleeping in the house of the accused. She also made a request to exhume the dead body of the decease as the same was buried. As per the post-mortem report of the dead body, death was due to shock and hemorrhage as a result of ante-mortem vaginal injuries. Case was registered against the accused u/ss. 302 and 376 IPC, on the basis of the post-mortem report. Trial Court acquitted the accused, of both the charges. The appeal preferred by the State was allowed by High Court, convicting the accused for both the charges. Hence, the present appeal by the accused.

Appellant-accused contended that the High Court committed an error in reversing the acquittal order; that there was no evidence to establish that the deceased used to sleep in the house of appellant or the appellant had the opportunity to commit the offence; that the evidence of PW1 (the scribe of the FIR), PWs 7 and 8 (the alleged eye-witnesses to the commission of offence) which have been relied upon by the High Court, cannot stand judicial scrutiny as these witnesses were motivated; that depositions of PWs 7 and 8 was liable to be discarded as a whole as there were improvements in their depositions, and that other witnesses also could not be relied upon as they turned hostile.

Dismissing the appeal, the Court

HELD: 1. Only in exceptional cases, where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters

the presumption of innocence. Interference in a routine manner where the other view is possible, should be avoided, unless there are good reasons for interference. The acquittal in the instant case by the trial court was totally illegal, unwarranted and based on mis-appreciation of evidence for the reason that the court had given undue weightage to unimportant discrepancies and inconsistencies which resulted in miscarriage of justice. Thus, the High Court was fully justified in reversing the order of acquittal. [Paras 16 and 27] [703-A-B; 709-A-B]

State of Rajasthan v. Talevar and Anr. **AIR 2011 SC 2271: 2011 (6)SCR 1050;** *State of U.P. v. Mohd. Iqram and Anr.* **AIR 2011 SC 2296: 2011 (6) SCR 1017;** *Govindaraju @ Govinda v. State by Srirampuram Police Station and Anr.* **(2012) 4 SCC 722;** *State of Haryana v. Shakuntla and Ors.* **(2012) 4 SCALE 526 - relied on.**

2. The trial court committed an error in recording the finding of fact that the thatched house of roof of the maternal grandmother of the deceased had fallen and she as well as the deceased used to sleep in the house of the appellant/accused which was in very close vicinity. The trial court has not made any reference to the depositions of PW.2 and also of PW.1 in respect to this fact. DW.1 has stated that on the day of occurrence, the deceased and her grandmother did not sleep in the house of the accused, cannot be taken into consideration so far as this issue is concerned, because he did not say that he was present on that day in the village. The defence also did not cross-examine PW. 1 and P.W. 2 on this issue. [Para 17] [703-E-H]

3. The trial court ought not to have drawn adverse inference for not examining the grandmother of the prosecution. It has come on record that she was an old, infirm and totally blind woman and it was for this reason

that the deceased was left for her assistance. Thus, the adverse inference drawn by the trial court on this count is unwarranted and uncalled for. [Para 17] [704-A-B]

4. The trial court held that PW.1 had been inimical to the accused/appellant and his family for the reason that appellant's father had been working in the agricultural field of the said witness and after joining the service, appellant's father had rendered financial help to other poor persons of the village and thus those poor persons were not available for work to the said witness. In this regard, the defence has examined DW.1 who had deposed that his family was also looking after the agricultural work of PW 1, but 8 years prior to the date of incident. He had also left the village and opened a beetle shop in the city after getting financial aid from appellant's father. Such an evidence is required to be examined in the light of attending circumstances and particularly taking into consideration the proximity of time. In case the appellant's father had left working in the field of the witness 14 years prior to the date of incident and the family of DW 1 has left 8 years prior to the said date, the time gap itself falsifies the testimony, for the reason that the time gap is a factor of paramount importance in this regard. More so, it is not the defence case that any other family or labour was available in the village to look after the agricultural work of the said witness. [Para 17] [704-B-G]

5. The recovery of part of the sheet and white clothes having blood and semen as per the FSL report has been dis-believed by the trial court in view of the fact that PW.5 and PW.10 did not support the prosecution case like other witnesses who did not support the last seen theory. The trial court failed to appreciate that both the said witnesses, had admitted their signature/thumb impression on the recovery. The factum of taking the material exhibits and preparing of the recovery memo

with regard to the same and sending the cut out portions to the Serologist who found the blood and semen on them is not disputed. The serological report also revealed that the vaginal swab which was taken by the doctor was also human blood and semen stained. [Para 17] [704-H; 705-A-C]

6. The evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether, but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. [Para 18] [705-D-E]

Bhagwan Singh v. The State of Haryana **AIR 1976 SC 202: 1976 (2) SCR 921;** *Rabindra Kumar Dey v. State of Orissa* **AIR 1977 SC 170: 1977 (1) SCR 439;** *Syad Akbar v. State of Karnataka* **AIR 1979 SC 1848: 1980 (1) SCR 95;** *Khujji @ Surendra Tiwari v. State of Madhya Pradesh* **AIR 1991 SC 1853: 1991 (3) SCR 1;** *State of U.P. v. Ramesh Prasad Misra and Anr.* **AIR 1996 SC 2766: 1996 (4) Suppl. SCR 631;** *Balu Sonba Shinde v. State of Maharashtra* **(2002) 7 SCC 543: 2002 (2) Suppl. SCR 135;** *Gagan Kanojia and Anr. v. State of Punjab* **(2006) 13 SCC 516;** *Radha Mohan Singh @ Lal Saheb and Ors. v. State of U.P.* **AIR 2006 SC 951: 2006 (1) SCR 519;** *Sarvesh Narain Shukla v. Daroga Singh and Ors.* **AIR 2008 SC 320: 2007 (11) SCR 300;** *Subbu Singh v. State by Public Prosecutor* **(2009) 6 SCC 462: 2009 (7) SCR 383;** *C. Muniappan and Ors. v. State of Tamil Nadu* **AIR 2010 SC 3718: 2010 (10) SCR 262;** *Himanshu @ Chintu v. State (NCT of Delhi)* **(2011) 2 SCC 36: 2011 (1) SCR 48 - relied on.**

7. Undoubtedly, there may be some exaggeration in the evidence of the prosecution witnesses, particularly, that of PW.1, PW.7 and PW.8. However, it is the duty of

the court to unravel the truth under all circumstances. Even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. [Paras 20 and 24] [706-C-D; 787-E-H; 708-A]

Balka Singh and Ors. v. State of Punjab **AIR 1975 SC 1962: 1975 (0) Suppl. SCR 129;** *Zwinglee Ariel v. State of Madhya Pradesh* **AIR 1954 SC 15;** *Sukhdev Yadav and Ors. v. State of Bihar* **AIR 2001 SC 3678: 2001 (3) Suppl. SCR 91;** *Appabhai and Anr. v. State of Gujarat* **AIR 1988 SC 696;** *Sucha Singh v. State of Punjab* **AIR 2003 SC 3617: 2003 (2) Suppl. SCR 35 - relied on.**

8. The benefit of doubt, particularly in every case may not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. In such a case, the paramount importance of the court is to ensure that miscarriage of justice is avoided. [Para 26] [708-F-H]

Shivaji Sahebrao Bobade and Anr. v. State of

Maharashtra **AIR 1973 SC 2622: 1974 (1) SCR 489;** *Bhagwan Singh and Ors. v. State of M.P.* **AIR 2002 SC 1621;** *Gangadhar Behera and Ors. v. State of Orissa* **AIR 2002 SC 3633;** *Sucha Singh v. State of Punjab* **AIR 2003 SC 3617: 2003 (2) Suppl. SCR 35;** *S. Ganesan v. Rama Raghuraman and Ors.* **(2011) 2 SCC 83: 2011 (1) SCR 27 - relied on.**

Case Law Reference:

2011 (6) SCR 1050	**Relied on**	**Para 16**
2011 (6) SCR 1017	**Relied on**	**Para 16**
(2012) 4 SCC 722	**Relied on**	**Para 16**
(2012) 4 SCALE 526	**Relied on**	**Para 16**
1976 (2) SCR 921	**Relied on**	**Para 18**
1977 (1) SCR 439	**Relied on**	**Para 18**
1980 (1) SCR 95	**Relied on**	**Para 18**
1991 (3) SCR 1	**Relied on**	**Para 18**
1996 (4) Suppl. SCR 631	**Relied on**	**Para 19**
2002 (2) Suppl. SCR 135	**Relied on**	**Para 19**
(2006) 13 SCC 516	**Relied on**	**Para 19**
2006 (1) SCR 519	**Relied on**	**Para 19**
2007 (11) SCR 300	**Relied on**	**Para 19**
2009 (7) SCR 383	**Relied on**	**Para 19**
2010 (10) SCR 262	**Relied on**	**Para19**
2011 (1) SCR 48	**Relied on**	**Para 19**
1975 (0) Suppl. SCR 129	**Relied on**	**Para 21**
AIR 1954 SC 15	**Relied on**	**Para 21**

2001 (3) Suppl. SCR 91	**Relied on**	**Para 22**
AIR 1988 SC 696	**Relied on**	**Para 23**
2003 (2) Suppl. SCR 35	**Relied on**	**Paras 24 and 25**
1974 (1) SCR 489	**Relied on**	**Para 25**
AIR 2002 SC 1621	**Relied on**	**Para 25**
AIR 2002 SC 3633	**Relied on**	**Para 25**
2011 (1) SCR 27	**Relied on**	**Para 25**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1340 of 2007.

From the Judgment and Order dated 23.03.2007 of the High Court of Judicature at Allahabad in Government Appeal No. 1246 of 1999.

Rajender Pd. Saxena for the Appellant.

Vikrant Yadav, Jyoti Sharma, Vinay Kumar Garg, Gunnam Venkateswara Rao for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This criminal appeal has been preferred against the judgment and order dated 23.3.2007 passed by the High Court of Allahabad in Government Appeal No. 1246 of 1999 by which the High Court has reversed the judgment of Additional District and Sessions Judge, Basti in Sessions Trial No. 312 of 1996 dated 2.2.1999 acquitting the appellant. Thus, the High Court has convicted the appellant for the offence punishable under Sections 302 and 376 of Indian Penal Code, 1860 (hereinafter called as `IPC') and awarded him the life imprisonment for both the offences. However, both the sentences have been directed to run concurrently.

2. Facts and circumstances giving rise to this appeal are that:

A. One Smt. Batasi Devi (PW.2) lodged an FIR on 2.2.1996 in Haraiya Police Station alleging that her daughter Renu, aged 5-6 years, was found dead on her cot in Muradipur, the village of her maternal grandmother on 30.1.1996 at about 9.00 p.m. Initially, she had been told that her daughter died of paralysis and she was buried at the bank of Manorama river. Later on she got information from Shitla Prasad Verma (PW.8), Jata Shankar Singh (PW.7) and other persons of the same village that her daughter had been raped and killed by Ramesh, appellant. She also made a request that the dead body of the child be exhumed and sent for post-mortem.

B. On the order of the concerned Sub-Divisional Magistrate, the dead body of Renu was dug out from the grave and sent for post-mortem on 3.2.1996. The autopsy was conducted by Dr. Ajay Kumar Verma and Dr. S.S. Dwedi of District Hospital. In their opinion, death was due to shock and haemorrhage as a result of ante-mortem vaginal injuries.

C. On the basis of the post-mortem report, Case Crime No. 22 of 1996 was registered against the appellant under Sections 302 and 376 IPC. After having the investigation, the police filed the chargesheet against the appellant. During the trial prosecution examined 14 witnesses to prove its case including Kunwar Dhruv Narain Singh (PW.1), the scribe of the FIR, Batasi Devi (PW.2), mother of the deceased Renu, Jata Shankar Singh (PW.7), Shitla Prasad Verma (PW.8) and after conclusion of the trial and considering the evidence on record, the trial court vide its judgment and order dated 2.2.1999 acquitted the appellant of both the aforesaid charges.

D. Being aggrieved, the State preferred Criminal Appeal No. 1246 of 1999 which has been allowed by the High Court vide judgment and order dated 23.3.2007 and the appellant has been convicted and awarded the sentence of life imprisonment on both counts.

Hence, this appeal.

3. Shri Rajender Parsad Saxena, learned counsel appearing for the appellant, has submitted that High Court has committed an error by reversing the well-reasoned judgment of acquittal by the trial court. There is no iota of evidence against the appellant on the basis of which the conviction can be sustained. The evidence relied upon by the High Court particularly that of Kunwar Dhruv Narain Singh (PW.1), Jata Shankar Singh (PW.7) and Shitla Prasad Verma (PW.8) cannot stand judicial scrutiny as these witnesses had been motivated; improvement in the depositions of Jata Shankar Singh (PW.7) and Shitla Prasad Verma (PW.8) had been to the extent that it is liable to be discarded as a whole. The other witnesses have turned hostile, therefore, there is nothing on record to show that the appellant was connected with the crime by any means. There is no evidence on record on the basis of which it can be established that Renu (deceased) used to sleep in the house of the appellant or the appellant had an opportunity to commit the offence. The findings recorded by the High Court are perverse not being based on evidence on record. Thus, the appeal deserves to be allowed.

4. On the contrary, Shri Manoj Kumar Dwivedi, learned counsel appearing for the State has vehemently opposed the appeal contending that the judgment of the trial court has rightly been reversed by the High Court being contrary to the evidence on record. The High Court has recorded the findings of fact on correct appreciation of evidence. Thus, no interference is warranted. The appeal is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the records.

6. Admittedly, Renu, aged 5-6 years of age, died of vaginal injuries. The post-mortem report disclosed the following ante-mortem injuries:

(1) Contusion 4 cm x 2 cm over the right side face below the right ear lobules on upper part of the neck.

(2) Contusion 5 cm x 3 cm over the left side face in front and above tragus of the left ear.

(3) Abraded contusion 4 cm X 3 cm over the back of the right shoulder joint and scapular region.

(4) Contusion 3 cm x 2 cm over the upper part of the left scapula and back portion of the shoulder tip.

(5) Abraded contusion 4 cm x 1 cm on each side of office and labia majora.

(6) Abraded with tearing of labia majora of both side 2 cm x 1 cm.

(7) Hymen absent, lower part of vagina badly lacerated and pubic lower part upper abdomen, and vaginal tear up to upper part of Guel orifice.

The internal examination of the supra pubic region on opening the abdomen revealed that blood and gases were present and the lower part of the uterus had a bloodstained tear 1 cm x 1 cm. The cause of death was shock and haemorrhage. The death could have taken place on 30.1.1996 between 9.00 or 9.30 pm. If a hard object like a human penis was inserted in the vagina it could have caused the injuries Nos. 6 and 7."

7. The prosecution has examined Kunwar Dhruv Narain Singh (PW.1), the scribe of the FIR lodged by Batasi Devi (PW.2), mother of the deceased Renu. He deposed that Renu was living with her maternal grandmother Smt. Phulpatta Devi who was totally blind and a very poor woman. Her thatched house had fallen down so she used to sleep in the house of Ramesh, appellant which was adjacent to her house. Renu was found dead on 30.1.1996 in the night on her cot in the house of Ramesh, appellant. Ramesh, appellant made the extra-judicial confession before him in presence of Jata Shankar Singh (PW.7) and Shitla Prasad Verma (PW.8). The father of

Ramesh used to work in his house, however, at the relevant time, he was working in Sidharth Nagar. Batasi Devi (PW.2) had come to him and asked him to write the FIR so that she can lodge the same with the police station. However, he denied the suggestion that he had a grudge against Ramesh, appellant as it was because of the appellant and his father that other persons of the village were not working at his house.

8. Batasi Devi (PW.2), mother of Renu, deceased, deposed that her mother was very poor and her house was having a thatched roof which had fallen down so she used to sleep in the house of Ramesh, appellant which is in very close proximity of her house. In the fateful night, Renu slept with her maternal grandmother in the house of Ramesh, appellant. She had been informed that her daughter died of paralysis. Renu had been buried at the bank of Manorama river. However, on the next day, the rumour broke out that Ramesh, appellant, had committed rape and she died of the same. Then, she lodged the FIR.

9. Jata Shankar Singh (PW.7) deposed that he was originally of another village but was living in the house of Kunwar Dhruv Narain Singh (PW.1), in the same village for 15-16 years. He told that on 30.1.1996 when he was returning alongwith Shitla Prasad Verma (PW.8), to his house after marketing at about 9.00 p.m., he heard some whispering near the house of appellant Ramesh. He was having a torch so he focussed it in the same direction and found that Ramesh, appellant was committing rape on a little girl of 6 years beneath a tree situated outside his house. His associate Shitla Prasad Verma (PW.8) raised a cry as a result of which some persons from the village gathered but appellant Ramesh ran out. The girl had died of rape.

10. Shitla Prasad Verma (PW.8). has supported the prosecution case narrating the similar facts as stated by Jata Shankar Singh (PW.7).

11. Doctor Ajay Kumar Verma (PW.11) who has conducted the autopsy on the body of Renu, deceased, supported the prosecution case to the extent that deceased was having the ante-mortem injuries as mentioned hereinabove on her body.

12. Sharafat Hussain, S.I., (PW.13), the Investigating Officer, deposed that he had recovered a part of Khatari (thin mattress) and white sheet with which Renu was covered. He tried to search the appellant/accused, however, the appellant could be arrested at 3.35 a.m. in the intervening night of 3/4.2.1996 from the junction of three roads at Mahulghat when he was waiting for some transport to leave the area.

13. The prosecution also examined Sumaiya Devi (PW.3), Urmila Devi (PW.4), Hira Devi (PW.6), Sona Devi (PW.9). However, they did not support the prosecution case and had been declared hostile. According to the aforesaid witnesses, they reached the place of occurrence after having the information of Renu's death and they found her dead body lying at the house of her maternal grandmother Smt. Phulpatta Devi.

14. The learned trial court after appreciating the evidence on record acquitted the appellant on the following grounds:

I) The prosecution could not produce any evidence to prove that in the night of the incidence, Renu, deceased, had been sleeping in the house of the appellant Ramesh or her dead body had been lying on the cot in his house.

II) Smt. Phulpatta, maternal grandmother of Renu, deceased, was neither examined, nor any satisfactory explanation had been given for not examining her.

III) The deposition of Kunwar Dhruv Narain Singh (PW.1) was not worthy of reliance as he has deposed that the appellant had made extra-judicial

confession before him for committing the aforesaid crime in the presence of Jata Shankar Singh (PW.7) and Shitla Prasad Verma (PW.8). Such statement had not been made by either of the said witnesses.

IV) Kunwar Dhruv Narain Singh (PW.1) was a Jamindar and it was because of the appellant's father that other poor persons were not rendering service to him and Kunwar Dhruv Narain Singh (PW.1) had been inimical to the appellant.

V) The deposition of Sumaiya Devi (PW.3), Urmila Devi (PW.4), Hira Devi (PW.6) and Sona Devi (PW.9) was not in support of the prosecution case and all the aforesaid four witnesses had been cross-examined but they could not be held to be hostile witnesses.

VI) Sharafat Hussain, S.I., (PW.13), the Investigating Officer, had recovered a part of the bed sheet and it had been sent for CFSL report and to the said recovery Ram Prasad alias Parsadi (PW.5) and Bhikari (PW.10) did not support the recovery and, therefore, recovery of the aforesaid incriminating material is to be disbelieved.

VII) The evidence of Jata Shankar Singh (PW.7) and Shitla Prasad Verma (PW.8) could not be relied upon as they had made knowingly improvements in the case of having last seen Renu, deceased, with the appellant rather distorted the whole case of the prosecution totally as both of them had deposed that they had seen the appellant committing rape on Renu, deceased.

15. In the appeal, the High Court has reversed the findings recorded by the trial court on the following grounds:

(I) There was sufficient evidence on record to show that Smt. Phulpatta Devi, maternal grandmother of Renu, deceased, was totally blind and a very poor woman and the roof of her thatched house had fallen and she used to sleep in the house of the appellant Ramesh in her neighbourhood with Renu, deceased.

(II) It was no one's case that Kunwar Dhruv Narain Singh (PW.1) was inimical to the appellant for any reason whatsoever as none of the witnesses had deposed that after the appellant's father joined the service, he had supported the other villagers financially and, therefore, they stopped working at the house of Kunwar Dhruv Narain Singh (PW.1).

(III) The witnesses Sumaiya Devi (PW.3), Urmila Devi (PW.4), Hira Devi (PW.6) and Sona Devi (PW.9), once had been cross-examined by the prosecution as they had not supported the case of the prosecution, the trial court was wrong that they were not hostile witnesses. Similarly remained the position of the witnesses of the recovery of sheet cover and bichona i.e. of Ram Prasad alias Parsadi (PW.5) and Bhikari (PW.10).

(IV) The evidence of Kunwar Dhruv Narain Singh (PW.1), Jata Shankar Singh (PW.7) and Shitla Prasad Verma (PW.8) could be relied upon at least to the extent that deceased was last seen in the company of the appellant.

(V) The trial court had given undue importance to the minor contradictions in the depositions of the witnesses. In fact, there was evidence that after committing the crime outside, the appellant brought the corpus of the child and placed it on the cot.

16. The law of interfering with the judgment of acquittal is well-settled. It is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference. (Vide: *State of Rajasthan v. Talevar & Anr.,* AIR 2011 SC 2271; *State of U.P. v. Mohd. Iqram & Anr.,* AIR 2011 SC 2296; *Govindaraju @ Govinda v. State by Srirampuram Police Station & Anr.,* (2012) 4 SCC 722; and *State of Haryana v. Shakuntla & Ors.,* (2012) 4 SCALE 526).

17. In the aforesaid fact-situation, we have to weigh as to whether the High Court is justified in reversing the judgment and order of acquittal recorded by the trial court.

We have been taken through the entire evidence on record and after re-appreciating the same we can unhesitatingly record that:

(i) Undoubtedly, the trial court has not made any reference to the depositions of Batasi Devi (PW.2) and also of Kunwar Dhruv Narain Singh (PW.1) in respect to the fact that the thatched house of roof of Smt. Phulpatta Devi, maternal grandmother of Renu, deceased had fallen and she as well as Renu used to sleep in the house of Ramesh, appellant which was in very close vicinity of Smt. Phulpatta's house. Ganga Ram (DW.1) has stated that on the day of occurrence, Smt. Phulpatta Devi and Renu did not sleep in the house of Ramesh, however, as he was living permanently in the city and did not say that he was present on that day in the village, his evidence cannot be taken into consideration so far as this issue is concerned. The defence did not cross-examine Kunwar Dhruv Narain Singh (PW.1) and Batasi Devi (PW.2) on this issue. Thus, the trial court committed an error recording such finding of fact.

(ii) It has come on record that Smt. Phulpatta Devi was an old, infirm and totally blind woman and it was for this reason that Renu, deceased was left for her assistance. The trial court ought not to have drawn adverse inference for not examining Smt. Phulpatta Devi by the prosecution. Thus, the adverse inference drawn by the trial court on this count is unwarranted and uncalled for.

(iii) The trial court has held that Kunwar Dhruv Narain Singh (PW.1) had been inimical to Ramesh and his family for the reason that appellant's father had been working in the agricultural field at the said witness and after joining the service appellant's father had rendered financial help to other poor persons of the village and thus those poor persons were not available for work to the said witness. In this regard, the defence has examined Ganga Ram (DW.1) who had deposed that the appellant's father had been looking after the agricultural work of that witness, however, joined the service in court 14 years prior to the date of incident and Ganga Ram's family was also looking after the agricultural work of the said witness but 8 years prior to the date of incident. He had also left the village and opened a beetle shop in the city after getting financial aid from appellant's father.

Such an evidence is required to be examined in the light of attending circumstances and particularly taking into consideration the proximity of time. Time is the greatest heeler. In case the appellant's father had left working in the field of the witness 14 years prior to the date of incident and Ganga Ram's (DW.1) family has left 8 years prior to the said date, the time gap itself falsifies the testimony for the reason that the time gap is a factor of paramount importance in this regard. More so, it is not the defence case that any other family or labour was available in the village to look after the agricultural work of the said witness.

(iv) The recovery of part of the sheet and white clothes

having blood and semen as per the FSL report has been disbelieved by the trial court in view of the fact that Ram Prasad alias Parsadi (PW.5) and Bhikari (PW.10) did not support the prosecution case like other witnesses who did not support the last seen theory. The trial court failed to appreciate that both the said witnesses, Ram Prasad alias Parsadi (PW.5) and Bhikari (PW.10) had admitted their signature/thumb impression on the recovery

The factum of taking the material exhibits and preparing of the recovery memo with regard to the same and sending the cut out portions to the Serologist who found the blood and semen on them vide report dated 21.3.1996 (Ext. Ka 21) is not disputed. The serological report also revealed that the vaginal swab which was taken by the doctor was also human blood and semen stained.

18. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide: *Bhagwan Singh v. The State of Haryana,* AIR 1976 SC 202; *Rabindra Kumar Dey v. State of Orissa,* AIR 1977 SC 170; *Syad Akbar v. State of Karnataka,* AIR 1979 SC 1848; and *Khujji @ Surendra Tiwari v. State of Madhya Pradesh,* AIR 1991 SC 1853).

19. In *State of U.P. v. Ramesh Prasad Misra & Anr.,* AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde v. State of Maharashtra,* (2002) 7 SCC

543; *Gagan Kanojia & Anr. v. State of Punjab,* (2006) 13 SCC 516; *Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P.,* AIR 2006 SC 951; *Sarvesh Narain Shukla v. Daroga Singh & Ors.,* AIR 2008 SC 320; and *Subbu Singh v. State by Public Prosecutor,* (2009) 6 SCC 462.

Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. (See also: *C. Muniappan & Ors. v. State of Tamil Nadu,* AIR 2010 SC 3718; and *Himanshu @ Chintu v. State (NCT of Delhi),* (2011) 2 SCC 36)

20. Undoubtedly, there may be some exaggeration in the evidence of the prosecution witnesses, particularly, that of Kunwar Dhruv Narain Singh (PW.1), Jata Shankar Singh (PW.7) and Shitla Prasad Verma (PW.8). However, it is the duty of the court to unravel the truth under all circumstances.

21. In *Balka Singh & Ors. v. State of Punjab,* AIR 1975 SC 1962, this Court considered a similar issue, placing reliance upon its earlier judgment in *Zwinglee Ariel v. State of Madhya Pradesh,* AIR 1954 SC 15 and held as under:

> "The Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the true is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation, the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."

22. In *Sukhdev Yadav & Ors. v. State of Bihar,* AIR 2001 SC 3678, this Court held as under:

> "It is indeed necessary however to note that there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment, sometimes there would be a deliberate attempt to offer the same and sometimes the witnesses in their over anxiety to do better from the witness-box details out an exaggerated account."

23. A similar view has been re-iterated in *Appabhai & Anr. v. State of Gujarat,* AIR 1988 SC 696, wherein this Court has cautioned the courts below not to give undue importance to minor discrepancies which do not shake the basic version of the prosecution case. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness for the reason that witnesses now-a-days go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. However, the courts should not dis-believe the evidence of such witnesses altogether if they are otherwise trustworthy.

24. In *Sucha Singh v. State of Punjab,* AIR 2003 SC 3617, this Court had taken note of its various earlier judgments and held that even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent

the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.

25. In *Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra,* AIR 1973 SC 2622, this Court held :

> "…Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent ..." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analysing the evidence and appraising the soundness of the contrary conclusions reached by the courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant…"

(See also: *Bhagwan Singh & Ors. v. State of M.P.,* AIR 2002 SC 1621; *Gangadhar Behera & Ors. v. State of Orissa,* AIR 2002 SC 3633; *Sucha Singh* (supra); and *S. Ganesan v. Rama Raghuraman & Ors.,* (2011) 2 SCC 83).

26. Therefore, in such a case the paramount importance of the court is to ensure that miscarriage of justice is avoided. The benefit of doubt particularly in every case may not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. A reasonable doubt is not an imaginary trivial or merely possible doubt, but a fair doubt based upon reason and common sense.

27. In view of the above, we are of the considered opinion that the acquittal in the instant case by the trial court was totally illegal, unwarranted and based on mis-appreciation of evidence for the reason that the court had given undue weightage to unimportant discrepancies and inconsistencies which resulted in miscarriage of justice. Thus, the High Court was fully justified in reversing the order of acquittal.

In view of the above, the appeal lacks merit and is accordingly dismissed.

K.K.T. Appeal dismissed.

MUKUT BIHARI & ANR.
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 870 of 2012)

MAY 25, 2012

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Prevention of Corruption Act, 1988:

ss. 7 and 13(1)(d) r/w. s. 13(2) - Prosecution under r/w s. 120B IPC - Demand and acceptance of bribe - Trap - Seizure of tainted money - Conviction by trial court and sentence of 2 years RI - Conviction and sentence confirmed by High Court - On appeal, held: Conviction justified - Demand as well as acceptance of bribe adequately proved - The trap was proved by the depositions of prosecution witnesses including independent witnesses - Sentence reduced to 1 year in view of the fact that the accused lost their services; that the case was two decades old; that the accused were suffering from serious ailments and that the accused had already served six months imprisonment - Penal Code, 1860 - s. 120B - Sentence/Sentencing.

ss. 7, 13 and 20 - Demand of illegal gratification is sine qua non for constituting an offence under the Act - Mere receipt of amount is not sufficient for fasten the guilt, in absence of any evidence with regard to demand and acceptance of the amount as illegal gratification - The burden rests on the accused to displace the statutory presumption raised u/s. 20 through direct or circumstantial evidence that the money was accepted other than as a motive or reward as referred to in s. 7 of the Act - The court is required to consider the explanation of the accused, on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt - Evidence Presumption.

Criminal Trial - Bribery case - Need for corroboration of complainant's version by another witness - Held: A shadow witness is desirable in a trap party, but its mere absence would not vitiate the whole trap proceedings - Evidence.

Appellants-accused were prosecuted u/ss. 7 and 13(1)(d) r/w s. 13(2) and s. 120B IPC. The prosecution case was that PW-1 filed a complaint against the accused-appellant No. 1 that he demanded Rs. 100/- as bribe for issuing discharge ticket for his (complainant's) father, as he was discharged from the hospital in which the appellants-accused were the employees. A trap was arranged, whereby the complainant met appellant No. 1 and had conversation with him, and thereafter the complainant handed over the tainted money to appellant No. 2 at the instance of appellant No. 1. The trap party arrested both the appellants immediately. Trial court convicted the appellants and sentenced them to 2 years RI. High Court confirmed the conviction and sentence. Hence the present appeal.

In appeal to this Court appellants contended that for constituting an offence under Prevention of Corruption Act, the prosecution has to prove the demand of illegal gratification; that recovery of tainted money or mere acceptance thereof is not sufficient to fasten the criminal liability; that the trap should be supported by an independent eye-witness; that interested witness should be corroborated; that the conversation between the complainant and the accused should have been heard by the Panch witness; and that if two views are possible, the one in favour of the accused should prevail.

Dismissing the appeal, the Court

HELD: 1.1 Demand of illegal gratification is sine qua non for constituting an offence under the Prevention of

Corruption Act, 1988. Mere recovery of tainted money is not sufficient to convict the accused, when the substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification, but the burden rests on the accused to displace the statutory presumption raised u/s. 20 of the Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness and in a proper case, the court may look for independent corroboration before convicting the accused person. [Para 8] [719-A-F]

Ram Prakash Arora v. The State of Punjab **AIR 1973 SC 498;** *SurajMal v. The State (Delhi Admn.)* **AIR 1979 SC 1408;** *T. Subramanianv. The State of T.N.* **AIR 2006 SC 836:2006 (1) SCR 180;** *A. Subairv. State of Kerela* **(2009) 6 SCC 587;** *State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede* **(2009) 15 SCC 200: 2009 (11) SCR 513;** *C.M. Girish Babu v. CBI, Cochin, High Court of Kerala* **AIR 2009**

SC 2022: 2009 (2) SCR 1021; *State of Kerala and Anr. v. C.P. Rao* **(2011) 6 SCC 450: 2011 (6) SCR 864 - Referred to.**

1.2 In the instant case, there are concurrent finding of facts that appellant No. 1 asked for bribe as stated by PW.1. It is duly supported by S.H.O. (PW.10), the leader of the trap party as he deposed that persons sitting there asked for money. The acceptance had duly been corroborated by PW.3, who deposed that the money was lying on the table. Constable (PW.7) stated that he saw appellant No. 2 counting the money. The trap stood proved by the depositions of PW.1, PW.3, PW.6, PW.7 and PW.10. All the witnesses narrated fully how the trap was conducted from the very beginning till the seizure of the tainted money including the making of seizure memos etc. PW.5 admitted the practice of donations by patients. PW.3 and PW.6 were independent witnesses. [Para 6] [718-C-E]

1.3 The plea that complainant's version required corroboration in all circumstances, in abstract, would encourage the bribe taker to receive illegal gratification in privacy and then insist for corroboration in case of the prosecution. Law cannot countenance such situation. Thus, it is not necessary that the evidence of a reliable witness is necessary to be corroborated by another witness, as such evidence stands corroborated from the other material on record. Therefore, it is always desirable to have a shadow witness in the trap party but mere absence of such a witness would not vitiate the whole trap proceedings. [Paras 10 and 14] [720-F-H; 722-A-B]

Panalal Damodar Rathi v. State of Maharashtra **AIR 1979 SC 1191;** *Smt. Meena Balwant Hemke v. State of Maharashtra* **AIR 2000 SC 3377: 2000 (3) SCR 12;** *Chief Commercial Manager, South Central Railway, Secunderabad and Ors. v. G. Ratnam and Ors.* **AIR 2007 SC 2976: 2007**

(9) SCR 259; *Moni Shankar v. Union of India and Anr.* **(2008) 3 SCC 484:2008 (3) SCR 871 - referred to.**

1.4 In the instant case, there is no contradiction in the deposition of the witnesses. The witnesses have truthfully deposed that they did not hear the conversation between the accused and the complainant. Therefore, their version is without any embellishment and improvement. There could be no reason/motive for PW.1 to falsely enrope the appellants in the case. [Para 15] [722-A-C]

1.5 The courts below considered the facts properly and appreciated the evidence in correct perspective and then reached the conclusion that the charges stood fully proved against the appellants. The explanation furnished by the appellants that they had falsely been enroped due to enmity could not be proved for the reason that no evidence could be brought on record indicating any previous enmity between the complainant and the appellants nor any evidence was available to show that the complainant was not satisfied with the treatment given to his father and he could act with some oblique motive in order to falsely implicate the appellants. Thus, under the garb of donation, he had offered the tainted money to the appellants and got them arrested. [Para 7] [718-F-H; 719-A]

C.M. Sharma v. State of A.P. Th. I.P. **AIR 2011 SC 608: 2010 SCR 1105 - relied on.**

2. In view of the facts that the incident occurred about two decades ago and the appellants suffer from severe ailments, they have lost their service long ago and suffered the agony of protracted litigation, the appellant No.1 has been suffering from acute pancreatitis and both the appellants have served the sentence for more than six months, their sentence is reduced to one year. [Para 15] [722-E-F]

Case Law Reference:

AIR 1973 SC 498	**Referred to**	**Para 8**
AIR 1979 SC 1191	**Referred to**	**Para 8**
AIR 1979 SC 1408	**Referred to**	**Paras 8 and 10**
2000 (3) SCR 12	**Referred to**	**Paras 8 and 10**
2006 (1) SCR 180	**Referred to**	**Para 8**
2009 (11) SCR 513	**Referred to**	**Para 8**
2009 (2) SCR 1021	**Referred to**	**Para 8**
2011 (6) SCR 864	**Referred to**	**Para 8**
2010 SCR 1105	**Relied on**	**Para 9**
2007 (9) SCR 259	**Referred to**	**Para 12**
2008 (3) SCR 871	**Referred to**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 870 of 2012.

From the Judgment and Order dated 12.10.2011 of the High Court of Judicature for Rajasthan at Jaipur Bench in S.B. Criminal Appeal No. 726 of 2001.

Shobha, Raghav Pandey for the Appellants.

Kunal Verma, Irshad Ahmad for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 12.10.2011 passed by the High Court of Judicature at Rajasthan (Jaipur Bench) in S.B. Criminal Appeal No.726 of 2001, by which it has

affirmed the judgment and order of the trial Court dated 7.9.2001 passed by the Special Judge (ACD Cases), Jaipur in Regular Special Criminal Case No.26 of 1995 (State of Rajasthan v. Mukut Bihari etc.) whereby the appellant Mukut Bihari stood convicted for the offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 (hereinafter called the "Act 1988") and under Section 120B of Indian Penal Code, 1860 (hereinafter called 'IPC') and has been awarded the punishment of rigorous imprisonment for a period of 2 years for each count; whereas appellant Kalyan Mal has been convicted for the offences punishable under Section 13(1)(d) read with Section 13(2) of the Act 1988 and under Section 120B IPC and he has also been awarded the punishment of rigorous imprisonment for a period of 2 years on each count.

2. Facts and circumstances giving rise to this case are that:

A. Rafiq (PW.1) filed a complaint on 16.11.1994 before the Anti-Corruption Department (hereinafter called "ACD"), Tonk that his father Deen Mohd. (PW.8) underwent the treatment in Sahadat Hospital, Tonk for urinary infection from 24.10.1994 to 12.11.1994. He stood discharged on 12.11.1994, however he was not issued the discharge ticket and for which Mukut Bihari-accused demanded Rs.100/- as bribe for issuance of the same. The said demand was made on 14.11.1994 when the complainant (PW.1) offered Rs.75/- and 2 Kilogram of Ladoo.

B. In view of the aforesaid complaint, a trap was arranged and as per plan, the complainant met Mukut Bihari, appellant in the staff room of the surgical ward of the hospital and had conversation with him. Both of them went to the store room wherein the complainant handed over Rs.100/- to Kalyan Mal, appellant at the instance of Mukut Bihari, appellant. The trap party arrested both the appellants immediately and the case was registered against them. After completing the investigation,

charge sheet was filed against both of them. During the course of trial, a large number of witnesses were examined and on conclusion of the trial, the court found them guilty and imposed the punishment as referred to hereinabove vide judgment and order dated 7.9.2001.

C. Aggrieved, the appellants preferred Criminal Appeal No.726 of 2001 before the Rajasthan High Court which has been dismissed vide impugned judgment and order dated 12.10.2011.

Hence, this appeal.

3. Ms. Shobha, learned counsel appearing for the appellants, has submitted that for constituting an offence under the Act 1988, the prosecution has to prove the demand of illegal gratification. Recovery of tainted money or mere acceptance thereof is not enough to fasten the criminal liability as the money could be offered voluntarily and the accused may furnish a satisfactory explanation for receipt of the money. The trap case should be supported by an independent eye-witness. The deposition of an interested witness requires corroboration. The conversation between the accused and the complainant at the time of demand and accepting the money must be heard/ recorded by the Panch witness. If two views are possible, then the one in favour of the accused should prevail. In the instant case then the prosecution failed to prove the foundational fact beyond reasonable doubt. Therefore, the appeal deserves to be allowed.

4. On the contrary, Shri Kunal Verma, learned counsel for the State of Rajasthan, has vehemently opposed the appeal contending that acceptance of tainted money is an ample proof for conviction of the offences punishable under the Act 1988. It is not necessary in the trap cases that there must be a shadow witness and conversation between the complainant and the accused should be recorded or heard by the independent witness. In absence of the shadow witness, for any reason,

accused cannot insist that demand and acceptance is required by the statute to be proved by corroboration. In the instant case, the appellant no.2 has accepted the money at the instance and in the presence of appellant no.1. There is no reason to disbelieve the testimony of the complainant nor the recovery of the tainted money can be doubted. Thus, the appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. There are concurrent finding of facts that appellant Mukut Bihari asked for bribe as stated by Rafiq (PW.1). It is duly supported by Keshar Singh, S.H.O. (PW.10), the leader of the trap party as he deposed that persons sitting there asked for money. The acceptance had duly been corroborated by R.C. Pareek (PW.3), who deposed that the money was lying on the table. Zaheer Ahmed, Constable (PW.7) stated that he saw Kalyan Mal counting the money. The trap stood proved by the depositions of Rafiq (PW.1), R.C. Pareek (PW.3), Mohd. Rasheed (PW.6), Zaheer Ahmed (PW.7) and Keshar Singh (PW.10). All the witnesses narrated fully how the trap was conducted from the very beginning till the seizure of the tainted money including the making of seisure memos etc. Dr. Bavel (PW.5) admitted the practice of donations by patients. Mr. R.C. Pareek (PW.3) and Mohd. Rasheed (PW.6) have been independent witnesses.

7. The courts below considered the facts properly and appreciated the evidence in correct perspective and then reached the conclusion that the charges stood fully proved against the appellants. The explanation furnished by the appellants that they had falsely been enroped due to enmity could not be proved for the reason that no evidence could be brought on record indicating any previous enmity between the complainant and the appellants nor any evidence was available to show that the complainant was not satisfied with the treatment given to his father and he could act with some oblique

motive in order to falsely implicate the appellants. Thus, under the garb of donation, he had offered the tainted money to the appellants and got them arrested.

8. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the Act 1988. Mere recovery of tainted money is not sufficient to convict the accused, when the substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification, but the burden rests on the accused to displace the statutory presumption raised under Section 20 of the Act 1988, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the Act, 1988. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness and in a proper case the court may look for independent corroboration before convicting the accused person.

(Vide: *Ram Prakash Arora v. The State of Punjab* AIR 1973 SC 498; *Panalal Damodar Rathi v. State of Maharashtra* AIR 1979 SC 1191; *Suraj Mal v. The State (Delhi Admn.)* AIR 1979 SC 1408; *Smt. Meena Balwant Hemke v. State of Maharashtra* AIR 2000 SC 3377; *T. Subramanian v. The*

State of T.N., AIR 2006 SC 836; *A. Subair v. State of Kerela* (2009) 6 SCC 587; *State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede* (2009) 15 SCC 200; *C.M. Girish Babu v. CBI, Cochin, High Court of Kerala,* AIR 2009 SC 2022; and *State of Kerala and Anr. v. C.P. Rao* (2011) 6 SCC 450)

9. The case of the appellants has no merit as the case is squarely covered by the judgment of this Court in *C.M. Sharma v. State of A.P. TH. I.P.,* AIR 2011 SC 608, wherein a similar issue had been raised that the complainant alongwith the shadow witness went to the office of the accused but the accused asked the shadow witness to go out of the chamber. Shadow witness left the chamber. However, the complainant brought the shadow witness in the chamber and explained to the accused that he was his financer. Despite that the accused again asked the shadow witness to leave the chamber and thus, he went out. The accused demanded the money and the complainant paid over the tainted money to him, which he received from his right hand and kept in right side pocket of the trouser. A signal was given, whereupon he was trapped by the team which apprehended the accused and conducted sodium carbonate test on the fingers of the right hand and right trouser pocket of the accused, which turned pink. The tainted notes were lying on the floor of the office, which were recorded.

10. This Court, after considering various judgments of this Court including *Panalal Damodar Rathi* (supra) and *Smt. Meena Balwant Hemke* (supra) held that acceptance of the submission of the accused that the complainant's version required corroboration in all circumstances, in abstract would encourage the bribe taker to receive illegal gratification in privacy and then insist for corroboration in case of the prosecution. Law cannot countenance such situation. Thus, it is not necessary that the evidence of a reliable witness is necessary to be corroborated by another witness, as such evidence stands corroborated from the other material on record.

The court further distinguished the case of *Panalal Damodar Rathi* (supra) on the ground that in that case the Panch witness had not supported the prosecution case and therefore, the benefit of doubt was given to the accused. In *Smt. Meena Balwant Hemke* (supra) as the evidence was contradictory, the corroboration was found necessary.

11. Undoubtedly, in *Smt. Meena Balwant Hemke* (supra), this Court held that law always favours the presence and importance of a shadow witness in the trap party not only to facilitate such witness to see but also overhear what happens and how it happens.

12. This Court in *Chief Commercial Manager, South Central Railway, Secunderabad & Ors. v. G. Ratnam & Ors.,* AIR 2007 SC 2976, considered the issue as to whether non-observance of the instructions laid down in para nos. 704-705 of the Railway Vigilance Manual would vitiate the departmental proceedings. The said manual provided for a particular procedure in respect of desirability/necessity of the shadow witness in a case of trap. This Court held that these were merely executive instructions and guidelines and did not have statutory force, therefore, non-observance thereof would not vitiate the proceedings. Executive instructions/orders do not confer any legally enforceable rights on any person and impose no legal obligation on the subordinate authorities for whose guidance they are issued.

13. In *Moni Shankar v. Union of India & Anr.,* (2008) 3 SCC 484, this Court held that instructions contained in Railway Vigilance Manual should not be given a complete go-bye as they provide for the safeguards to avoid false implication of a railway employee.

14. So far as the instant case is concerned, the appellants had been working under the health department of the State of Rajasthan. No provision analogous to the paragraphs contained in Railway Vigilance Manual, applicable in the health

department of the State of Rajasthan at the relevant time had been brought to the notice of the courts below, nor had been produced before us.

Therefore, it can be held that it is always desirable to have a shadow witness in the trap party but mere absence of such a witness would not vitiate the whole trap proceedings.

15. In the instant case, there is no contradiction in the deposition of the witnesses. The witnesses have truthfully deposed that they did not hear the conversation between the accused and the complainant.

Therefore, their version is without any embellishment and improvement. There could be no reason/motive for Rafiq (PW.1) to falsely enrope the appellants in the case.

The appeal is devoid of any merit and is, accordingly, dismissed.

However, considering the fact that the incident occurred about two decades ago and the appellants suffer from severe ailments, they have lost their service long ago and suffered the agony of protracted litigation, the appellant no.1 has been suffering from acute pancreatitis and both the appellants have served the sentence for more than six months, in the facts and circumstances of the case, their sentence is reduced to one year.

K.K.T. Appeal dismissed.

NUPUR TALWAR

v.

CENTRAL BUREAU OF INVESTIGATION & ANR.

(Review Petition (Crl.) No. 85 of 2012)

IN

(Criminal Appeal No. 68 of 2012)

JUNE 07, 2012

[JAGDISH SINGH KHEHAR AND A.K. PATNAIK, JJ.]

Supreme Court Rules, 1966 - Or. XL - Review Petition - Double murder - First Information Report by the petitioner's husband (father of deceased) - Investigation handed over to CBI by State police - During investigation, suspicion against petitioner's husband and three others - CBI submitting report for closure of investigation before Special Judicial Magistrate (CBI) in absence of sufficient evidence against first informant - The informant filing protest petition objecting to closure report and seeking further investigation - The Magistrate rejected the closure report as well as the protest petition - Took cognizance and issued process to the informant and the petitioner for committing the murder of their daughter and the servant and also for tampering with the evidence - Revision petition challenging the order of the Magistrate dismissed by High Court - Special Leave Petition dismissed - Review Petition - Held: The review petition is uncalled for - The petitioner has not pointed out any error in the order of which the review was sought but with the order of the Magistrate - This amounts to misuse of jurisdiction of Supreme Court - Right to avail remedy under law, is the right of every citizen, but such right cannot extend to misuse of jurisdiction - The petitioner cautioned against frivolous litigation - Any uncalled for, frivolous litigation by the petitioner in future might evoke exemplary costs - Administration of Justice - Code of Criminal Procedure, 1970 - ss. 190 and 204.

Code of Criminal Procedure, 1973:

ss. 190 and 204 - Double murder - First Information report - Investigation by CBI-Closure report by CBI - Informant filing protest petition and seeking further investigation - Magistrate rejecting the closure report as well as protest petition - Taking cognizance and issuing process against the informant and his wife for having murdered their daughter and servant and also for tampering with the evidence - Accused objecting to the order of Magistrate stating that the Magistrate overlooked certain vital factual aspects of the matter - Held: Per Jagdish Singh Khehar: The order of the Magistrate issuing process u/s. 204 having taken into consideration the factual position based on the statements recorded u/ss. 161 and 164 Cr.P.C. and documents appended to the charge-sheet and other materials on the file, is justified - For the purpose of issuing process, all that the court has to determine is whether the material placed before it 'is sufficient to proceed' which is different from the term 'sufficient to prove and establish guilt' - The material taken into consideration by the Magistrate as well as the facts on which reliance was placed by the accused have to be substituted by cogent evidence recorded during the trial -Per A.K. Patnaik: In a case exclusively triable by Sessions Court, the Magistrate at the stage of s. 204 is to see only that there is 'sufficient ground for proceeding against the accused', and is not required to scrutinize the evidence as scrutinized at the time of framing charges.

Per: Jagdish Singh Khehar,J.:

Chandra Deo vs. Prokash Chandra Bose alias Chabi Bose and Anr. **AIR1963 SC 1430:1964 SCR 639;** *M/s. India Carat Pvt. Ltd. vs. State of Karnataka and Anr.* **(1989) 2 SCC 132: 1989 (1) SCR 718;** *Jagdish Ram vs. State of Rajasthan and Anr.* **(2004) 4 SCC 432: 2004 (2) SCR 846;** *CREF Finance Ltd. vs. Shree Shanthi Homes (P) Ltd. and Anr.* **(2005) 7 SCC 467: 2005 (2) Suppl. SCR 873 - relied on.**

Per: A.K. Patnaik, J.:

Kewal Krishan v. Suraj Bhan and Anr. **1980 (Supp) SCC 499 - relied on.**

ss.190 and 204 - Double murder - Investigation by CBI - Closure report of investigation - First informant filing protest petition and seeking further investigation - Closure report as well as protest petition rejected and cognizance taken by Magistrate and issuing process against the first informant and his wife for murdering their daughter and servant - Order of Magistrate upheld by High Court and Supreme Court - Plea of further investigation - Propriety of - Held: Per Jagdish Singh Khehar, J: The order of Magistrate rejecting plea of further investigation attained finality as the accused did not assail the order passed by the Magistrate before High Court on this ground - Per A.K. Patnaik, J.: Order of Magistrate taking cognizance u/s. 190 Cr.P.C. and issuing process u/s. 204 Cr.P.C. could not have been interfered with by the High Court in the Revision Petition - Once the order of Magistrate taking cognizance and issuing process was sustained, there is no scope for granting relief of further investigation.

Per: A.K. Patnaik, J.:

Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Ors. **(1976) 3SCC 736: 1976 (0) Suppl. SCR 123;** *Randhir Singh Rana v. State (Delhi Administration)* **(1997) 1 SCC 361: 1996 (10) Suppl. SCR880 - relied on.**

State of Karnataka v. L. Muniswamy and Ors. **(1977) 2 SCC 699:1977(3) SCR 113 - distinguished.**

s. 204 and 461 - Order issuing process - Recording of reasons - Necessity - Held: s. 204 does not require recording of reasons while issuing process - But in the

facts and circumstances of the case viz. informant himself was being summoned as accused; whilst the rival parties were pleading insufficient evidence the Magistrate found sufficient material to proceed against the accused, it was essential for the Magistrate to highlight reasons for perusal of the Committal Court - Recording of reasons cannot be said to be an irregularity which would vitiate the proceedings as envisaged u/s. 461 Cr.P.C. - The order being a speaking order cannot be stated to have occasioned failure of justice.

Per: Jagdish Singh Khehar, J.:

Kanti Bhadra Shah vs. State of West Bengal **(2000) 1 SCC 722: 2000 (1) SCR 27;** *U.P. Pollution Control Board vs. M/s. Mohan Meakins Ltd. and Ors.* **(2000) 3 SCC 745: 2000 (2) SCR 566;** *Dy. Chief Controller of Importsand Exports vs. RoshanlalAgarwal and Ors.* **(2003) 4 SCC 139: 2003 (2) SCR 621;** *Bhushan Kumar and Anr. vs. State (NCT of Delhi) and Anr.***Criminal Appeal No. 612 of 2012 decided on 4.4.2012 by Supreme Court;***Rupan Deol Bajaj and Anr. vs. KPS Gill and Anr.* **(1995) 6 SCC 194: 1995(4) Suppl. SCR 237 - relied on.**

Per: A.K. Patnaik, J.

*U.P. Pollution Control Board v. Mohan Meakins Ltd. and Ors.***(2000) 3 SCC 745: 2000 (2) SCR 566;** *Deputy Chief Controller ofImprots and Exports v. Roshallal Agarwal and Ors.* **(2003) 4 SCC 139: 2003 (2) SCR 621- referred to.**

Case Law Reference:

In the Judgment of Jagdish Singh Khehar, J.

2000 (1) SCR 27	**Relied on**	**Para 9**
2000 (2) SCR 566	**Relied on**	**Para 9**

2003 (2) SCR 621 Relied on Para 9

(Criminal Appeal No. 612 of 2012 decided on 4.4.2012 by Supreme Court) Relied on. Para 9

1995 (4) Suppl. SCR 237 Relied on Para 11

1964 SCR 639 Relied on Para 17

1989 (1) SCR 718 Relied on Para 17

2004 (2) SCR 846 Relied on Para 17

2005 (2) Suppl. SCR 873 Relied on Para 17

In the Judgment of A.K. Patnaik, J.

1980 (Supp) SCC 499 Relied on Para 5

2000 (2) SCR 566 Referred to Para 7

2003 (2) SCR 621 Referred to Para 7

1976 (0) Suppl. SCR 123 Relied on Para 8

1977 (3) SCR 113 Distinguished Para 9

1996 (10) Suppl. SCR 880 Relied on Para 10

CRIMINAL APPELLATE JURISDICTION : Review Petition (Crl.) No. 85 of 2012.

IN

Criminal Appeal No. 68 of 2012.

From the Judgment & Order dated 18.03.2011 of the High Court of Judicature at Allahabad in Criminal Revision No. 1127 of 2011.

Pinaki Misra, Rebecca M. John, Viresh B. Saharya, Tarannum Cheema, Dr. Kailash Chand for the Petitioner.

Siddharth Luthra, Rajiv Nanda, A.K. Sharma, Pramod Kumar, Dubey, Shri Singh, Devina Sehgal, Arvind Kumar Sharma for the Respondents.

The Order of the Court was delivered by

A.K. PATNAIK, J. 1. I have carefully read the order of my learned brother Khehar, J. and I agree with his conclusion that this Review Petition will have to be dismissed, but I would like to give my own reasons for this conclusion.

2. As the facts have been dealt with in detail in the order of my learned brother, I have not felt the necessity of reiterating those facts in my order, except stating the following few facts: The Magistrate by a detailed order dated 09.02.2011 rejected the closure report submitted by the CBI and took cognizance under Section 190 Cr.P.C. and issued process under Section 204, Cr.P.C. to the petitioner and her husband, Dr. Rajesh Talwar, for the offence of murder of their daughter Aarushi Talwar and their domestic servant Hemraj on 16.05.2008 under Section 302/34 IPC and for the offence of causing disappearance of evidence of offence under Section 201/34 IPC. The order dated 09.02.2011 of the Magistrate was challenged by the petitioner in Criminal Revision No.1127 of 2009 before the High Court of Judicature at Allahabad, but the High Court dismissed the Criminal Revision by order dated 18.03.2011. The order of the High Court was thereafter challenged by the petitioner in S.L.P. (Crl.) No.2982 of 2011 in which leave was granted by this Court and the S.L.P. was converted to Criminal Appeal No. 68 of 2012. Ultimately, however, by order dated 06.01.2011, this Court dismissed the Criminal Appeal and the petitioner has filed the present Review Petition against the order dismissing the Criminal Appeal.

3. The petitioner is aggrieved by the order dated 09.02.2011 of the Magistrate taking cognizance under Section under Section 190 Cr. P.C. and issuing process under Section 204 Cr.P.C. against her and her husband. As admittedly there are offences committed in respect of the two deceased

persons, Aarushi and Hemraj, there cannot be any infirmity in the order of the Magistrate taking cognizance. Hence, the only question that we are called upon to decide is whether the Magistrate was justified in issuing the process to the petitioner and her husband by her order dated 09.02.2011.

4. Sub-section (1) of Section 204 Cr.P.C. under which the Magistrate issued the process against the petitioner is extracted hereinbelow:

> "Section 204(1). If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-
>
> (a) a summons-case, he shall issue his summons for the attendance of the accused, or
>
> (b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction."

It is clear from sub-section (1) of Section 204, Cr.P.C. that the Magistrate taking cognizance of an offence shall issue the process against a person if in his opinion there is sufficient ground for proceeding against him.

5. The standard of scrutiny of the evidence which the Magistrate has to adopt for deciding whether or not to issue process under Section 204 Cr.P.C. in a case exclusively triable by the Sessions Court has been laid down by this Court in *Kewal Krishan v. Suraj Bhan & Anr.* [1980 (Supp) SCC 499] this Court thus:

> "At the stage of Sections 203 and 204, Criminal Procedure Code in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202, Criminal Procedure Code, there is prima facie evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding" against the accused. At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial court. The standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges. This Court has held in Ramesh Singh case that even at the stage of framing charges the truth, veracity and effect of the evidence which the complainant produces or proposes to adduce at the trial, is not to be meticulously judged. The standard of proof and judgment, which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of framing charges. A fortiori, at the stage of Sections 202/204, if there is prima facie evidence in support of the allegations in the complaint relating to a case exclusively triable by the Court of Session, that will be a sufficient ground for issuing process to the accused and committing them for trial to the Court of Session."

Thus, in a case exclusively triable by the Court of Session, all that the Magistrate has to do at the stage of Section 204 Cr.P.C. is to see whether on a perusal of the evidence there is "sufficient ground for proceeding" against the accused and at this stage, the Magistrate is not required to weigh the evidence meticulously as if he was the trial court nor is he required to scrutinise the evidence by the same standard by which the Sessions Court scrutinises the evidence to decide whether to frame or not to frame charges under Section 227/228, Cr.P.C.

6. Keeping in mind these distinctions between the standards of scrutiny at the stages of issue of process, framing of charges and the trial, the contentions of the parties can be now considered. Learned senior counsel for the petitioner, Mr.

Harish Salve, produced before us the materials which were collected during the investigation and submitted that had the Magistrate considered all the relevant materials, she would have come to the conclusion that sufficient grounds did not exist for proceeding against the petitioner and her husband and would have directed further investigation as prayed by Dr. Rajesh Talwar, but unfortunately the order dated 09.02.2011 does not disclose that the Magistrate considered all relevant materials collected during investigation. The relevant materials on which the petitioner relies upon have been discussed in the order of my learned Brother at length. Mr. Siddharth Luthra, learned senior counsel for the CBI, on the other hand, submitted that the entire case diary including all the materials (statements recorded under Section 161 Cr.P.C., the post mortem and scientific reports and material objects) collected in the course of investigation were placed before the Magistrate and, therefore, the argument of Mr. Salve that the Magistrate has not looked into all the materials collected during investigation is misconceived.

7. By writing a long order dated 09.02.2011 and not referring to some of the relevant materials on which the petitioner relies upon, the Magistrate has exposed herself to the criticism of learned counsel for the petitioner that she had applied her mind only to the materials referred to in her order and not to other relevant materials collected in course of investigation. Sub-section (1) of Section 204, Cr.P.C. quoted above itself does not impose a legal requirement on the Magistrate to record reasons in support of the order to issue a process and in *U.P. Pollution Control Board v. Mohan Meakins Ltd. & Ors.* [(2000) 3 SCC 745] and *Deputy Chief Controller of Improts & Exports v. Roshallal Agarwal & Ors.* [(2003) 4 SCC 139] this Court has held that the Magistrate is not required to record reasons at the stage of issuing the process against the accused. In the absence of any legal requirement in Section 204 Cr.P.C. to issue process, it was not legally necessary for the Magistrate to have given detailed

reasons in her order dated 09.02.2011 for issuing process to the petitioner and her husband Dr. Rajesh Talwar.

8. The fact, however, remains that the Magistrate has given detailed reasons in the order dated 09.02.2011 issuing process and the order dated 09.02.2011 itself does not disclose that the Magistrate has considered all the relevant materials collected in course of investigation. Yet from the mere fact that some of the relevant materials on which the petitioner relies on have not been referred to in the order dated 09.02.2011, the High Court could not have come to the conclusion in the revision filed by the petitioner that these relevant materials were not considered. Moreover, this Court has held in *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi & Ors.* [(1976) 3 SCC 736] that whether the reasons given by the Magistrate issuing process under Section 202 or 204 Cr.P.C. were good or bad, sufficient or insufficient, cannot be examined by the High Court in the revision. All that the High Court, however, could do while exercising its powers of revision under Section 397/401 Cr.P.C when the order issuing process under Section 204 Cr.P.C. was under challenge was to examine whether there were materials before the Magistrate to take a view that there was sufficient ground for proceeding against the persons to whom the processes have been issued under Section 204 Cr.P.C. In the present case, the High Court has not examined whether there were materials before the Magistrate to take a view that there was sufficient ground for proceeding against the petitioner and her husband, but while hearing the Review Petition, we have perused the relevant materials collected in the course of the investigation and we cannot hold that the opinion of the Magistrate that there was sufficient ground to proceed against the petitioner and her husband under Section 204 Cr.P.C was not a plausible view on the materials collected in course of investigation and placed before her along with the closure report. As we have seen, sub-section (1) of Section 204 Cr.P.C. provides that the Magistrate shall issue the process (summons or warrant) if in his opinion there was sufficient ground for

proceeding and therefore so long as there are materials to support the opinion of the Magistrate that there was sufficient ground for proceeding against the persons to whom the processes have been issued, the High Court in exercise of its revisional power will not interfere with the same only because it forms a different opinion on the same materials.

9. Mr. Harish Salve, however, cited the judgment of this Court in *State of Karnataka v. L. Muniswamy & Ors.* [(1977) 2 SCC 699] in which the High Court in exercise of its power under Section 482 Cr.P.C. has quashed the proceedings before the Sessions Court on the ground of insufficiency of evidence and this Court agreed with the view of the High Court and dismissed the appeal. The decision of this Court in the case of *State of Karnataka v. L. Muniswamy & Ors.* (supra) does not relate to a case at the stage of issue of process by the Magistrate under Section 204 Cr.P.C., and as the facts of that case indicate, that was a case where the High Court was of the view that the material on which the prosecution proposed to rely against the respondents in that case was wholly inadequate to sustain the charge against them in the case which was pending before the Sessions Court. As has been clarified by this Court in *Kewal Krishan v. Suraj Bhan & Anr.* (supra), at the stage of Section 204 Cr.P.C. the standard to be adopted by the Magistrate in scrutinizing the evidence is not the same as the one which is to be kept in view at the stage of framing of charges by the Sessions Court.

10. The result of the aforesaid discussion is that the order dated 09.02.2011 of the Magistrate taking cognizance under Section 190 Cr.P.C. and issuing process against the petitioner and her husband under Section 204 Cr.P.C. could not have been interfered with by the High Court in the Revision filed by the petitioner. Moreover, once the order of the Magistrate taking cognizance and issuing process against the petitioner and her husband was sustained, there is no scope for granting the relief of further investigation for the purpose of finding out whether

someone other than the petitioner and her husband had committed the offences in respect of the deceased persons Aarushi and/or Hemraj. As has been held by this Court in Randhir Singh Rana v. State (Delhi Administration) [(1997) 1 SCC 361], once a Magistrate takes cognizance of an offence under Section 190 Cr.P.C., he cannot order of his own further investigation in the case under Section 156(3) Cr.P.C. but if subsequently the Sessions Court passes an order discharging the accused persons, further investigation by the police on its own would be permissible, which may also result in submission of fresh charge-sheet.

11. For these reasons, I agree with my learned brother Khehar, J. that this Review Petition has no merit and should be dismissed.

JAGDISH SINGH KHEHAR

1. The instant controversy emerges out of a double murder, committed on the night intervening 15-16.5.2008. On having found the body of Aarushi Talwar in her bedroom in house no. L-32, Jalvayu Vihar, Sector 25, Noida, her father Dr. Rajesh Talwar got a first information report registered at Police Station Sector 20, Noida, on 16.5.2008. In the first information report Dr. Rajesh Talwar pointed the needle of suspicion at Hemraj, a domestic help in the household of the Talwars. On 17.5.2008 the dead body of Hemraj was recovered from the terrace of the same house, i.e., house no. L-32, Jalvayu Vihar, Sector 25, Noida, where Aarushi's murder had also allegedly been committed.

2. The initial investigation into the double murder was carried out by the U.P. Police. On 29.5.2008 the State of Uttar Pradesh handed over the investigation to the Central Bureau of Investigation (hereinafter referred to as, the CBI), thereupon investigation was conducted by the CBI.

3. During the course of investigation, besides Dr. Rajesh

Talwar, the needle of suspicion came to be pointed towards Krishna Thadarai, Rajkumar and Vijay Mandal. Dr. Rajesh Talwar was arrested on 23.5.2008. Originally a three days' remand was granted to interrogate him to the U.P. Police. Dr. Rajesh Talwar remained in police and judicial custody from time to time, wherefrom, he was eventually released on bail on 11.7.2008. The other three individuals, namely, Krishna Thadarai, Rajkumar and Vijay Mandal were also arrested by the police. Since investigation against the aforesaid three could not be completed within the period of 90 days, they were ordered to be released on bail.

4. Having investigated into the matter for a considerable length of time, the CBI submitted a closure report on 29.12.2010. The reasons depicted in the closure report indicated the absence of sufficient evidence to prove the alleged offences against the accused Dr. Rajesh Talwar, beyond reasonable doubt. A summary of the reasons recorded in the said report itself, are being extracted hereunder:

"Despite best efforts by investigating team, some of the major shortcomings in the evidence are :-

i. No blood of Hemraj was found on the bed sheet and pillow of Aarushi. There is no evidence to prove that Hemraj was killed in the room of Aarushi.

ii. Dragging mark on steps only indicate that murder has taken place somewhere other than the terrace.

iii. On the clothes of Dr. Rajesh Talwar, only the blood of Aarushi was found but there was no trace of blood of Hemraj.

iv. The clothes that Dr. Nupur Talwar was wearing in the photograph taken by Aarushi in the night of the incident were seized by CBI but no blood was found during forensic examination.

v. Murder weapons were not recovered immediately after the offence. One of the murder weapon i.e. sharp edged instrument could not be recovered till date and expert could not find any blood stain or DNA of victims from golf stick to directly link it to the crime.

vi. There is no evidence to explain the finger prints on the scotch bottle (which were found along with blood stains of both the victims on the bottle). As per police diary, it was taken into possession on 16th morning itself. In spite of best efforts, the fingerprint(s) could not be identified.

vii. The guards of the colony are mobile during night and at the entrance they do not make any entry. Therefore, their statements regarding movement of persons may not be foolproof.

viii. Scientific tests on Dr. Rajesh Talwar and Dr. Nupur Talwar have not conclusively indicated their involvement in the crime.

ix. The exact sequence of events between (in the intervening night of 15-16/05/2008) 00.08 mid night to 6:00 AM in the morning is not clear. No evidence has emerged to show the clear role of Dr. Rajesh Talwar and Dr. Nupur Talwar, individually, in the commission of crime.

x. A board of experts constituted during earlier investigation team has given an opinion that the possibility of the neck being cut by khukri cannot be ruled out, although doctors who have conducted postmortem have said that cut was done by surgically trained person with a small surgical instrument.

xi. There is no evidence to explain the presence of Hemraj's mobile in Punjab after murder.

xii. The offence has occurred in an enclosed flat hence no eye witness are available.

xiii. The blood soaked clothes of the offenders, clothes used to clean the blood from the flat and stair case, the sheet on which the Hemraj was carried and dragged on the roof, the bed cover which was used to cover the view from the steel iron grill on the roof are not available and hence could not be recovered.

26. The investigation revealed several suspicious actions by the parents post occurrence, but the circumstantial evidence collected during investigation has critical and substantial gaps. There is absence of a clear cut motive and incomplete understanding of the sequence of events and non-recovery of the weapon of offence and their link to either the servants or the parents.

In view of the aforesaid shortcomings in the evidence, it is felt that sufficient evidence is not available to prove the offence(s) U/s 302/201 IPC against accused Dr. Rajesh Talwar beyond reasonable doubt. It is, therefore, prayed that the case may be allowed to be closed due to insufficient evidence."

5. On the receipt of the closure report submitted by the CBI, the Special Judicial Magistrate (CBI), Ghaziabad (hereinafter referred to as "the Magistrate") issued notice to the Dr. Rajesh Talwar in his capacity as the first informant. In response to the notice received by Dr. Rajesh Talwar, he submitted a detailed protest petition dated 25.1.2011, wherein, he objected to the closure report (submitted by the CBI). In the protest petition he prayed for further investigation, to unravel the identity of those responsible for the twin murders of Aarushi

Talwar and Hemraj.

6. On 9.2.2011, the Magistrate rejected the closure report submitted by the CBI. The Magistrate also rejected, the prayer made in the protest petition for further investigation (by Dr. Rajesh Talwar). Instead, having taken cognizance, the Magistrate summoned Dr. Rajesh Talwar (father of Aarushi Talwar) and his wife Dr. Nupur Talwar (mother of Aarushi Talwar) for committing the murders of Aarushi Talwar and Hemraj, as also, for tampering with the evidence.

7. The aforestated summoning order dated 9.2.2011, was assailed by Dr. Nupur Talwar by filing a revision petition before the High Court of judicature at Allahabad (Criminal Revision Petition no. 1127 of 2011). The aforesaid Criminal Revision Petition came to be dismissed by the High Court vide an order dated 18.3.2011. Dissatisfied with the order passed by the High Court dated 18.3.2011, Dr. Nupur Talwar approached this Court by filing Special Leave Petition (Criminal) no. 2982 of 2011 (renumbered as Criminal Appeal no. 68 of 2012). The aforesaid Criminal Appeal was dismissed by this Court by an order dated 6.1.2012. Through the instant review petition, the petitioner Dr. Nupur Talwar has expressed the desire, that this Court reviews its order dated 6.1.2012 (dismissing Criminal Appeal no. 68 of 2012). The instant Review Petition was entertained, and notice was issued to the respondents. Lengthy arguments were advanced at the hands of the learned counsel representing the review petitioner. Learned counsel representing the CBI also went to great lengths, to repudiate the same. It emerged from the submissions advanced at the hands of the rival parties, that the focus of attack was against the order passed by the Magistrate dated 9.2.2011.

8. The order passed by the Magistrate on 9.2.2011 was startlingly criticized for being unnecessarily exhaustive. The Magistrate was accused of discussing the evidence in minute detail, and thereby, for having evaluated the merits of the controversy, well before the beginning of the trial. It was sought

to be canvassed, that even if the Magistrate having taken cognizance, was satisfied that process deserved to be issued, he ought not have examined the factual intricacies of the controversy. The Magistrate, it was submitted, has the authority only to commit the controversy in hand, to a Court of Session, as the alleged offences emerging out of the first information report dated 16.5.2008, and the discovery of the murder of Hemraj thereafter, are triable only by a Court of Session. It was submitted, that the controversy had been examined as if, the Magistrate was conducting the trial. It was asserted, that a perusal of the order passed by the Magistrate dated 9.2.2011, gives the impression of the passing of a final order, on the culmination of trial. It was, therefore, submitted, that the order dated 9.2.2011 be set aside, as all the inferences, assumptions and conclusions recorded therein, were totally uncalled for.

9. Undoubtedly, merely for taking cognizance and/or for issuing process, reasons may not be recorded. In *Kanti Bhadra Shah vs. State of West Bengal,* (2000) 1 SCC 722, this Court having examined sections 227, 239 and 245 of the Code of Criminal Procedure, concluded, that the provisions of the Code mandate, that at the time of passing an order of discharge in favour of an accused, the provisions referred to above necessitate reasons to be recorded. It was, however, noticed, that there was no such prescribed mandate to record reasons, at the time of framing charges against an accused. In *U.P. Pollution Control Board vs. M/s. Mohan Meakins Ltd. and others,* (2000) 3 SCC 745, the issue whether it was necessary for the trial court to record reasons while issuing process came to be examined again, and this Court held as under:-

> "2. Though the trial court issued process against the accused at the first instance, they desired the trial court to discharge them without even making their first appearance in the court. When the attempt made for that purpose failed they moved for exemption from appearance in the court. *In the meanwhile the Sessions Judge, Lucknow (Shri Prahlad Narain) entertained a revision moved by the accused against the order issuing process to them and, quashed it on the erroneous ground that the magistrate did not pass "a speaking order" for issuing such summons.*

3. The Chief Judicial Magistrate, (before whom the complaint was filed) thereafter passed a detailed order on 25.4.1984 and again issued process to the accused. That order was again challenged by the accused in revision before the Sessions Court and the same Sessions Judge (Shri Prahlad Narain) again quashed it by order dated 25.6.1984.

5. *We may point out at the very outset that the Sessions Judge was in error for quashing the process at the first round merely on the ground that the Chief Judicial Magistrate had not passed a speaking order.* In fact it was contended before the Sessions judge, on behalf of the Board, that there is no legal requirement in Section 204 of the Code of Criminal Procedure (For short the 'Code') to record reasons for issuing process. But the said contention was spurned down in the following words:

> My attention has been drawn to Section 204 of the Code of Criminal Procedure and it has been argued that no reasons for summoning an accused person need be given. I feel that under Section 204 aforesaid, a Magistrate has to form an opinion that there was sufficient ground for proceeding and, if an opinion had to be formed judicially, the only mode of doing so is to find out express reasons for coming to the conclusions. In the impugned order, the learned Magistrate has

neither specified any reasons nor has he even formed an opinion much less about there being sufficient ground for not proceeding with the case.

6. In a recent decision of the Supreme Court it has been pointed out that the legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. *There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons* vide *Kanti Bhadra Shah v. State of W.B.,* (2000) 1 SCC 722. The following passage will be apposite in this context:

> "12. *If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with such an extra work.* The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in trial courts would further be slowed down. We are coming across interlocutory orders of Magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges,

> passing over to next stages in the trial."

12. In the above context what is to be looked at during the stage of issuing process is whether there are allegations in the complaint by which the Managers or Directors of the company can also be proceeded against, when the company is alleged to be guilty of the offence. Paragraph 12 of the complaint read thus:

> "That the accused persons from 2 to 11 are Directors/Managers/Partners of M/s. Mohan Meakins Distillery, Daliganj, Lucknow, as mentioned in this complaint are responsible for constructing the proper works and plant for the treatment of their highly polluting trade effluent so as to conform the standard laid down by the Board. Aforesaid accused persons are deliberately avoiding to abide by the provisions of Sections 24 and 26 of the aforesaid Act which are punishable respectively under Sections 43 and 44 of the aforesaid Act, for which not only the company but its Directors, Managers, Secretary and all other responsible officers of the accused company, responsible for the conduct of its business are also liable in accordance with the provision of the Section 47 of the Act."

The appellant has further stated in paragraph 23 of the complaint that "the Chairman, Managing Directors and Directors of the company are the persons responsible for the act and therefore, they are liable to be proceeded against according to the law."

(emphasis is mine)

Whether an order passed by a Magistrate issuing process

required reasons to be recorded, came to be examined by this Court again, in *Dy. Chief Controller of Imports and Exports vs. Roshanlal Agarwal & Ors.,* (2003) 4 SCC 139, wherein this Court concluded as below:-

> "9. *In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons.* This question was considered recently in *U.P. Pollution Control Board v. M/s. Mohan Meakins Ltd. & Ors.,* (2000) 3 SCC 745, and after noticing the law laid down in Kanti Bhadra Shah v. State of West Bengal, (2000) 1 SCC 722, it was held as follows:
>
> "The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. *There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order.*"
>
> (emphasis is mine)

Recently, in *Bhushan Kumar and another vs. State (NCT of Delhi) and another* (Criminal Appeal no. 612 of 2012, decided on 4.4.2012) the issue in hand was again considered. The observations of this Court recorded therein, are being placed below:-

> "9. A summon is a process issued by a Court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person must appear in Court. A person who is summoned is legally bound to appear before the Court on the given date and time. Willful disobedience is liable to be punished Under Section 174 Indian Penal Code. It is a ground for contempt of Court.
>
> 10. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.
>
> 11. Time and again it has been stated by this Court that the summoning order Under Section 204 of the Code requires no explicit reasons to be stated because it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the materials filed therewith."
>
> (emphasis is mine)

It is therefore apparent, that an order issuing process, cannot be vitiated merely because of absence of reasons.

10. The matter can be examined from another perspective. The Code of Criminal Procedure expressly delineates irregularities in procedure which would vitiate proceedings. Section 461 thereof, lists irregularities which would lead to annulment of proceedings. Section 461 aforesaid is being extracted hereunder:-

"461. *Irregularities which vitiate proceedings*-

If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:-

(a) attaches and sells property under section 83;

(b) issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;

(c) demands security to keep the peace;

(d) demands security for good behaviour;

(e) discharges a person lawfully bound to be of good behaviour;

(f) cancels a bond to keep the peace;

(g) makes an order for maintenance;

(h) makes an order under section 133 as to a local nuisance;

(i) prohibits, under section 143, the repetition or continuance of a public nuisance;

(j) makes an order under Part C or Part D of Chapter X;

(k) takes cognizance of an offence under clause (c) of sub-section (1) of section 190;

(l) tries an offender;

(m) tries an offender summarily;

(n) passes a sentence, under section 325, on proceedings recorded by another Magistrate;

(o) decides an appeal;

(p) calls, under section 397, for proceedings; or

(q) revises an order passed under section 446,

his proceedings shall be void."

In the list of irregularities indicated in Section 461 of the Code of Criminal Procedure, orders passed under Section 204 thereof, do not find a mention. In a situation, as the one in hand, Section 465(1) of the Code of Criminal Procedure, protects orders from errors omissions or irregularities, unless "a failure of justice" has been occasioned thereby. Most certainly, an order delineating reasons cannot be faulted on the ground that it has occasioned failure of justice. Therefore, even without examining the matter any further, it would have been sufficient to conclude the issue. The present situation, however, requires a little further elaboration. Keeping in mind the peculiarity of the present matter and the special circumstances arising in this case, some observations need to be recorded. Accordingly, to determine whether reasons ought to have been recorded by the Magistrate, in this case, is being dealt with in the succeeding paragraphs.

11. On the basis of the foundational facts already recorded above, I shall examine the merits of the first submission advanced before the Court. First and foremost it needs to be remembered, that the CBI had submitted a closure report on

29.12.2010. The Magistrate could have accepted the report and dropped proceedings. The Magistrate, however, chose not to accept the CBI's prayer for closure. Alternatively, the Magistrate could have disagreed with the report, by taking a view (as she has done in the present case) that there were sufficient grounds for proceeding further, and thereby, having taken cognizance, could have issued process (as has been done vide order dated 9.2.2011). A third alternative was also available to the Magistrate. The Magistrate could have directed the police to carry out further investigation. As noticed hereinabove, the Magistrate inspite of the submission of a closure report, indicating the absence of sufficient evidence, having taken cognizance, chose to issue process, and thereby, declined the third alternative as well. Since the CBI wanted the matter to be closed, it was appropriate though not imperative for the Magistrate to record reasons, for differing with the prayer made in the closure report. After all, the CBI would have surely wished to know, how it went wrong. But then, there are two other important factors in this case, which further necessitated the recording of reasons. Firstly, the complainant himself (Dr. Rajesh Talwar, who authored the first information report dated 16.5.2008) was being summoned as an accused. Such an action suggests, that the complainant was really the accused. The action taken by the Magistrate, actually reversed the position of the adversaries. The party which was originally pointing the finger, is now sought to be pointed at. Certainly, the complainant would want to know why. Secondly, the complainant (Dr. Rajesh Talwar) had filed a protest petition dated 25.1.2011, praying for a direction to the police to carry out further investigation. This implies that the CBI had not been able to procure sufficient evidence on the basis whereof, guilt of the perpetrators of the twin murders of Aarushi Talwar and Hemraj could be established. Whilst, the rival parties were pleading insufficient evidence, the Magistrate's order dated 9.2.2011 issuing process, implies the availability of sufficient material to proceed against the accused. This second aspect in the present controversy, also needed to be explained, lest

the Magistrate who had chosen to issue process against all odds, would have been blamed of having taken the decision whimsically and/or arbitrarily. Before rejecting the prayer made in the closure report, as also, the prayer made in the protest petition, it was appropriate though not imperative for the Magistrate to narrate, why she had taken a decision different from the one sought. Besides the aforesaid, there is yet another far more significant reason for recording reasons in the present matter. The incident involving the twin murders of Aarushi Talwar and Hemraj are triable by a Court of Session. The authority of the Magistrate was limited to taking cognizance and issuing process. A Magistrate in such a situation, on being satisfied, has the authority to merely commit the case for trial to a Court of Session, under Section 209 of the Code of Criminal Procedure. Section 209 is being extracted hereunder:

> *"Commitment of case to Court of Session when offence is triable exclusively by it* - When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall -
>
> (a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;
>
> (b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;
>
> (c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session."

In this background, it was essential for the Magistrate to highlight, for the perusal of the Court of Session, reasons which had weighed with her, in not accepting the closure report submitted by the CBI, as also, for not acceding to the prayer made in the protest petition, for further investigation. It was also necessary to narrate what prompted the Magistrate to summon the complainant as an accused. For, it is not necessary that the Court of Session would have viewed the matter from the same perspective as the Magistrate. Obviously, the Court of Session would in the first instance, discharge the responsibility of determining whether charges have to be framed or not. Merely because reasons have been recorded, the Court of Session will have an opportunity to view the matter, in the manner of understanding of the Magistrate. If reasons had not been recorded, the Court of Session may have overlooked, what had been evaluated, ascertained and comprehended by the Magistrate. Of course, a Court of Session, on being seized of a matter after committal, being the competent court, as also, a court superior to the Magistrate, has to examine all issues independently, within the four corners of law, without being influenced by the reasons recorded in the order issuing process. In the circumstances mentioned hereinabove, it was befitting for the Magistrate to pass a well reasoned order, explaining why she was taking a view different from the one prayed for in the closure report. It is also expedient for the Magistrate to record reasons why the request made by the complainant (Dr. Rajesh Talwar) praying for further investigation, was being declined. Even the fact, that the complainant (Dr. Rajesh Talwar) was being summoned as an accused, necessitated recording of reasons. An order passed in the circumstances noted hereinabove, without outlining the basis therefor, would have been injudicious. Certainly the Magistrate's painstaking effort needs a special commendation. At this juncture, it would be apposite to notice the observations

recorded by this Court in *Rupan Deol Bajaj and another vs. KPS Gill and another,* (1995) 6 SCC 194, wherein this Court remarked as under:-

"28. *Since at the time of taking cognizance the Court has to exercise its judicial discretion it necessarily follows that if in a given case - as the present one - the complainant, as the person aggrieved raises objections to the acceptance of a police report which recommends discharge of the accused and seeks to satisfy the Court that a case for taking cognizance was made out, but the Court overrules such objections, it is just and desirable that the reasons therefore be recorded. Necessity to give reasons which disclose proper appreciation of the issues before the Court needs no emphasis. Reasons introduce clarity and minimize chances of arbitrariness.* That necessarily means that recording of reasons will not be necessary when the Court accepts such police report without any demur from the complainant. *As the order of the learned Magistrate in the instant case does not contain any reason whatsoever, even though it was passed after hearing the objections of the complainant, it has got to be set aside and we do hereby set it aside.* Consequent thereupon, two courses are left open to us; to direct the learned Magistrate to hear the parties afresh on the question of acceptance of the police report and pass a reasoned order or to decide for ourselves whether it is a fit case for taking cognizance under Section 190(1)(b) Cr.P.C. Keeping in view the fact that the case is pending for the last seven years only on the threshold question we do not wish to lake the former course as that would only delay the matter further. Instead thereof we have carefully looked into the police report and its accompaniments keeping

in view the following observations of this Court in *H.S. Bains. v. State,* (1980) 4 SCC 631, with which we respectfully agree:

> "The Magistrate is not bound by the conclusions arrived at by the police even as he is not bound by the conclusions arrived at by the complainant in a complaint. If a complainant states the relevant facts in his complaint and alleges that the accused is guilty of an offence under Section 307, Indian Penal Code the Magistrate is not bound by the conclusion of the complainant. He may think that the facts disclosed an offence under Section 324, Indian Penal Code only and he may take cognizance of an offence under Section 324 instead of Section 307. Similarly if a police report mentions that half a dozen persons examined by them claim to be eye witnesses to a murder but that for various reasons the witnesses could not be believed, the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses. He may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report."

29. *Our such exercise persuades us to hold that the opinion of' the Investigating Officer that the allegations contained in the F.I.R. were not substantiated by the statements of witnesses recorded during investigation is not a proper one for we find that there are sufficient materials for*

taking cognizance of the offences under Sections 354 and 509 I.P.C. We, however, refrain from detailing or discussing those statements and the nature and extent of their corroboration of the F.I.R. lest they create any unconscious impression upon the Trial Court, which has to ultimately decide upon their truthfulness, falsity or reliability, after those statements are translated into evidence during trial. For the selfsame reasons we do not wish to refer to the arguments canvassed by Mr. Sanghi, in support of the opinion expressed in the police (final) report and our reasons in disagreement thereto."

(emphasis is mine)

Therefore, even though the Magistrate was not obliged to record reasons, having passed a speaking order while issuing process, the Magistrate adopted the more reasonable course, though the same was more ponderous, cumbersome and time consuming.

12. Therefore, in the present set of circumstances, the Magistrate having examined the statements recorded during the course of investigation under Sections 161 and 164 of the Code of Criminal Procedure, as also, the documents and other materials collected during the process of investigation, was fully justified in recording the basis on which, having taken cognizance, it was decided to issue process. I, therefore, hereby find absolutely no merit in the criticism of the Magistrate's order, in being lengthy and detailed. In passing the order dated 9.2.2011 the Magistrate merely highlighted the circumstances emerging out of the investigation carried out in the matter, which constituted the basis of her decision to issue process. The Magistrate's order being speaking, cannot be stated to have occasioned failure of justice. The order of the Magistrate, therefore, cannot be faulted on the ground that it was a reasoned order.

13. During the course of hearing, the primary ground for assailing the order of the Magistrate dated 9.2.2011 was focused on projecting, that the Magistrate had not only drawn incorrect conclusions, but had also overlooked certain vital factual aspects of the matter. Before examining the details on the basis whereof the order passed by the Magistrate (dated 9.2.2011) can be assailed, it will be necessary to first summarize the basis whereon the Magistrate perceived, that there was sufficient material for proceeding against the accused in the present controversy. Different aspects taken into consideration by the Magistrate are accordingly being summarized hereunder:

Firstly, based on the statements of Umesh Sharma and Bharti recorded during the course of investigation, coupled with the factual position depicted in the first information report, it was sought to be inferred, that on the night of the incident Dr. Rajesh Talwar, Dr. Nupur Talwar, Aarushi Talwar and Hemraj only were present at the place of the occurrence, namely, house no. L-32 Jalvayu Vihar, Sector 25, Noida. Being last seen together, the needle of suspicion would point at the two surviving persons, specially if it could be established, that the premises had not been broken into.

Secondly, on the basis of the statement of Mahesh Kumar Mishra, recorded during the course of investigation, who alleged that he was told by Dr. Rajesh Talwar, that he had seen his daughter Aarushi Talwar on the fateful night upto 11:30 p.m., whereafter, he had locked the room of his daughter from outside, and had kept the key near his bed head. Coupled with the fact, that the lock on Aarushi Talwar's room was of a kind which could be opened from inside without a key but, needed a key to be opened from outside. And further, coupled with the fact, that the outer exit/entry door(s) to the flat of the Talwars, had not been broken into. It was assumed, that there was no outside forced entry, either into the bedroom of Aarushi Talwar or the flat of the Talwars, on the night of the twin murders of Aarushi Talwar and Hemraj.

Thirdly, the Magistrate noticed from the investigation carried out, that the dead body of Hemraj was covered with a panel of a cooler, and on the grill a bed sheet had been placed. Likewise, from the fact that Aarushi Talwar's body was found murdered on her own bed, yet her toys were found arranged "as such" behind the bed and also, there were no wrinkles on the bed sheet. On the pillow kept behind Aarushi Talwar, there ought to have been blood stains when she was attacked (as she was hit on her head, and her neck had been slit), but the same were absent. These facts were highlighted by the Magistrate to demonstrate the dressing up of the place(s) of occurrence, to further support the assumption of the involvement of an insider, as against, an outsider.

Fourthly, based on the statements of Virendera Singh, Sanjay Singh, Raj Kumar, Chandra Bhushan, Devender Singh, Ram Vishal and Punish Rai Tandon, recorded during the course of investigation, it was sought to be assumed, that no outsider was seen either entering or leaving house no. L-32, Jalvayu Vihar, Sector 25, Noida, on the night intervening 15-16.5.2008. This also, according to the Magistrate, affirmed the main deduction, that no outsider was involved.

Fifthly, based on the statements of Dr. Anita Durrani, Punish Rai Tandon and K.N. Johri, recorded during the course of investigation, it was sought to be inferred, that the other servants connected with the household of the Talwar family, namely, Raj Kumar, Vijay Mandal and Krishna Thadarai, were present elsewhere at the time of the commission of the twin murders, and also that, there was no material depicting their prima facie involvement or motive in the crime, specially because, no "… precious things like jewellery or any other thing from the house of Talwars couple …" was found missing and further that "… no rape on Aarushi Talwar had been confirmed …". Accordingly, it was sought to be reasoned, that no outsider had entered the premises.

Sixthly, from the statements of Deepak Kanda, Bhupender Singh and Rajesh Kumar, recorded during the course of investigation, it was felt that on the night when the murder was committed, i.e. the night intervening 15-16.5.2008 the internet connection was regularly used by Dr. Rajesh Talwar from 11:00 p.m. to 12:08 a.m. In fact, both Dr. Rajesh Talwar, as also, Dr. Nupur Talwar themselves confirmed to the witnesses whose statements were recorded during the course of investigation, that the internet router was switched on at 11:00 p.m. and Dr. Rajesh Talwar had thereafter used the internet facility. Based on this factual position it was gathered, that both Dr. Rajesh Talwar and Dr. Nupur Talwar were awake and active at or around the time of occurrence (determined in the post-mortem report).

Seventhly, from the statements of Sunil Kumar Dorhe, Naresh Raj, Ajay Kumar and Dinesh Kumar recorded during the course of investigation, it was sought to be inferred, that the private parts of the deceased Aarushi Talwar were tampered with, inasmuch as, the white discharge was found only in the vaginal area of Aarushi Talwar indicating, that her private parts were cleaned after her death. The said white discharge was found not to be originating from the body of the deceased. The aforesaid inference was sought to be further supported by assertions, that the vaginal opening of Aarushi Talwar, at the time of the post mortem examination, was unusually wide. Accordingly, a deduction was made, that evidence had been tampered with, by those inside the flat, after the occurrence.

Eighthly, it was also sought to be assumed, that the death of Aarushi Talwar and Hemraj was occasioned as a consequence of injuries caused by an iron 5 golf club (on the head of both the deceased), as also, "… injury on the neck of both the deceased … caused by a surgically trained person …". Since the golf club in question was not immediately produced, and since, the accused themselves were surgically trained, it was gathered that Dr. Rajesh Talwar and Dr. Nupur

Talwar were themselves responsible for the twin murders.

Ninthly, in paragraph 15 of the Magistrate's order dated 9.2.2011 it is noticed, that a request was made to Dr. Sunil Kumar Dhore for not mentioning the word "rape" in the post mortem proceedings. Investigation also established, that Dr. Dinesh Talwar (brother of Dr. Rajesh Talwar), had spoken to Dr. Sunil Kumar Dhore and exerted influence over Dr. Sunil Kumar Dhore through Dr. Dogra who allegedly instructed Dr. Sunil Kumar Dhore in connection with the post mortem examination. On the basis of the aforesaid material highlighted in the order dated 9.2.2011, the Magistrate further expressed the view, that influence was allegedly being exerted on behalf of the accused, on the doctor who was conducting the post mortem examination.

Tenthly, based on the statements of Umesh Sharma, Kalpana Mondal, Vimla Sarkar and Punish Tandon, recorded during the course of investigation, it was sought to be concluded, that the door leading to the terrace of house no.L-32, Jalvayu Vihar, Sector 25, Noida, had always remained open prior to the date of occurrence. It was gathered therefrom, that the lock on the door leading to the terrace of the house in question on the date of occurrence, was affixed so that the investigating agency would not immediately recover the body of Hemraj, so as to hamper the investigation. These facts allegedly spell out the negative role played by Dr. Rajesh Talwar in causing hindrances in the process of investigation.

Eleventhly, based on the statements of Rohit Kocchar and Dr. Rajeev Varshney, recorded under Section 164 of the Code of Criminal Procedure, disclosing, that they had informed Dr. Rajesh Talwar, that the terrace door, the lock on the terrace door, as also, the upper steps of the staircase had blood stains. They also asserted, that Dr. Rajesh Talwar "… climbed up some steps but immediately came down and did not say anything about keys and went inside the house …". The aforesaid

narration, coupled with the fact, that Dr. Prafull Durrani one of the friends of Dr. Rajesh Talwar stated, that he was "… told by Dr. Rajesh Talwar, that the key of the terrace used to be with Hemraj. He did not know about the key …" was the basis for assuming, that Dr. Rajesh Talwar was preventing the investigating agency from tracing the body of Hemraj, which was eventually found from the terrace, after breaking open the lock on the terrace door.

Twelfthly, Umesh Sharma the driver of the Talwars, stated during the course of investigation, that he had placed two golf clubs, i.e. irons 4 and 5 in the room of Hemraj, when the Santro car owned by the Talwars, was given for servicing. The iron 5 club, which is alleged to be the weapon of crime (which resulted in a V shaped injury on the heads of both Aarushi Talwar and Hemraj), remained untraced during the course of active investigation. The same was recovered from the loft of the house of Dr. Rajesh Talwar, and handed over to the investigating agency, more than a year after the occurrence on 30.10.2009. The Magistrate noticed, that the loft from where it was allegedly found, had been checked several times by the CBI. To which the explanation of Dr. Rajesh Talwar allegedly was, that one golf club might have dropped from the golf kit, and might have been left there. This factual aspect lead to the inference, that the weapon used in the crime, was deliberately not handed over to the investigating agency, after the occurrence.

Thirteenthly, another factual aspect emerging during the course of investigation was, that the body of Hemraj was recovered on the day following the murder of Aarushi Talwar, i.e., on 17.5.2008. When Dr. Rajesh Talwar was shown the body, he could not identify it as that of Hemraj. The dead body was identified by one of Hemraj's friend. Dr. Nupur Talwar confirmed, that the body recovered from the terrace was of Hemraj, on the basis of the inscription on the shirt worn by him. From the fact that, neither Dr. Rajesh Talwar nor Dr. Nupur

Talwar could identify the body of Hemraj, from its appearance, it was sought to be figured, that they were not cooperating with the investigation.

Besides the aforesaid conspicuous facts depicted in the order passed by the Magistrate, a large number of other similarly significant facts, have also been recorded, in the order dated 9.2.2011. The same are not being mentioned herein, as the expressive and weighty ones, essential to arrive at a determination on the issue in hand, have already been summarized above. Based inter alia on the inferences and the assumptions noticed above, the Magistrate issued process by summoning Dr. Rajesh Talwar and Dr. Nupur Talwar.

14. The facts noticed in the foregoing paragraph and the impressions drawn thereupon by the Magistrate, are based on statements recorded under Section 161 of Code of Criminal Procedure (and in a few cases, under Section 164 of the Code of Criminal Procedure), as also, on documents and other materials collected during the course of investigation. Neither the aforesaid statements, nor the documents and materials taken into consideration, can at the present juncture be treated as reliable evidence which can be taken into consideration, for finally adjudicating upon the guilt or innocence of the accused. It is only when the witnesses appear in court, and make their statements on oath, and their statements have been tested by way of cross examination; and only after the documents and other materials relied upon are proved in accordance with law, the same would constitute evidence which can be relied upon to determine the controversy. It is on the basis of such acceptable evidence, that final conclusions can be drawn to implicate the accused. That stage has not yet arisen. At the present juncture, the Magistrate was required to examine the materials collected by the investigating agencies, and thereupon, to determine whether the proceedings should be dropped (as was suggested by the investigating agency, through its closure report dated 29.12.2010), or whether, a

direction should be issued for further investigation (as was suggested in the protest petition filed by Dr. Rajesh Talwar), or whether, there was sufficient ground for proceeding further, by issuing process (as has been done in the present case). Having examined the material on the record, the Magistrate having taken cognizance issued process on 9.2.2011, and while doing so, recorded the following observations in the penultimate paragraphs of summoning order dated 9.2.2011:

> "From the analysis of evidence of all above mentioned witnesses prima facie it appears that after investigation, on the basis of evidence available in the case diary when this incident occurred at that time four members were present in the house - Dr. Rajesh Talwar, Dr. Nupur Talwar, Aarushi and servant Hem Raj; Aarushi and Hem Raj the two out four were found dead. In the case diary there is no such evidence from which it may appear that some person had made forcible entry and there is to evidence regarding involvement of the servants. In the night of the incident internet was switched on and off in the house in regard to which this evidence is available in the case diary that it was switched on or off by some person. Private parts of deceased Aarushi were cleaned and deceased Hem Raj was dragged in injured condition from the flat of Dr. Rajesh Talwar up to the terrace and the terrace was locked. Prior to 15.5.2008 terrace was not locked. According to documents available on the case diary blood stains were wiped off on the staircase, both the deceased were slit with the help of a surgical instrument by surgically trained persons and shape of injury on the head and forehead was V-shaped and according to the evidence available in the case diary that appeared to have been caused with a gold stick. A person coming from outside, during the presence of Talwar couple in the house could have neither used the internet nor could have taken the dead body of deceased Hem Raj to the terrace and then locked when the Talwar couple was present in the house. On the basis of evidence

> available in the case diary footprints stained with blood were found in the room of Aarushi but outside that room bloodstained footprints were not found. If the assailant would go out after committing murder then certainly his footprints would not be confined up to the room of Aarushi and for an outsider it is not possible that when Talwar couple were present in the house he would use liquor or would try to take dead body on the terrace. Accused after committing the offence would like to run away immediately so that no one could catch him.
>
> On the basis of evidence of all the above witnesses and circumstantial evidence available in case diary during investigation it was expected from the investigating officer to submit charge-sheet against Dr. Rajesh Talwar and Dr. Nupur Talwar. In such type of cases when offence is committed inside a house, there direct evidence cannot be expected. Here it is pertinent to mention that CBI is the highest investigating agency of the country in which the public of the country has full confidence. Whenever in a case if any one of the investigating agencies of the country remained unsuccessful then that case is referred to CBI for investigation. In such circumstances it is expected of CBI that applying the highest standards, after investigation it should submit such a report before the court which is just and reasonable on the basis of evidence collected in investigation, but it was not done so by the CBI which is highly disappointing. If I draw a conclusion from the circumstances of case diary, then I find that in view of the facts, the conclusion of the investigating officer that on account of lack of evidence, case may be closed; does not appear to be just and proper. When offence was committed in side a house, on the basis of evidence received from case diary, a link is made from these circumstances, and these links are indicating prima facie the accused Dr. Rajesh Talwar and Dr. Nupur Talwar to be guilty. The evidence of witness Shoharat that Dr. Rajesh

Talwar asked him to paint the wooden portion of a wall between the rooms of Aarushi and Dr. Rajesh Talwar, indicates towards the conclusion that he wants to temper with the evidence. From the evidence 3 so many in the case diary, prima facie evidence is found in this regard. Therefore in the light of above evidences conclusion of investigating officer given in the final report deserve to be rejected and there is sufficient basis for taking prima facie cognizance against Dr. Rajesh Talwar and Dr. Nupur Talwar for committing murder of deceased Aarushi and Hem Raj and for tempering with the proof. At this stage, the principle of law laid down by Hon'ble Supreme Court in the case of *Jugdish Ram vs. State of Rajasthan* reported in 2004 AIR 1734 is very important wherein the Hon'ble Supreme Court held that investigation is the job of Police and taking of cognizance is within the jurisdiction of the Magistrate. If on the record, this much of evidence is available that prima facie cognizance can be taken then the Magistrate should take cognizance, Magistrate should be convinced that there is enough basis for further proceedings rather for sufficient basis for proving the guilt."

15. In order to canvass the primary ground raised for assailing the order of the Magistrate dated 9.2.2011, it was submitted, that the Magistrate would have arrived at a conclusion, different from the one drawn in the order dated 9.2.2011, if the matter had been examined in its correct perspective, by taking a holistic view of the statements and materials recorded during investigation. It is sought to be canvassed, that a perusal of the impugned order reveals, that too much emphasis was placed on certain incorrect facts, and further, certain vital and relevant facts and materials were overlooked. In sum and substance it was submitted, that if the factual infirmities were corrected, and the facts overlooked were given due weightage, the conclusions drawn by the Magistrate in the order dated 9.2.2011, would be liable to be reversed. To appreciate the instant contention advanced at the hands of

the learned counsel for the petitioners, I am summarizing hereunder, the factual aspects highlighted by the learned counsel for the petitioner during the course of hearing:-

Firstly, it was submitted, that the inference drawn by the Magistrate to the effect, that there was no outsider other than Dr. Rajesh Talwar, Dr. Nupur Talwar, Aarushi Talwar and Hemraj in house no.L-32, Jalvayu Vihar, Sector 25, Noida, on the fateful day, is erroneous. It was submitted, that the said inference was drawn under the belief, that there was no forceful entry into the premises in question. To canvass the point, learned counsel drew the attention of this Court to the site plan of the flat under reference, which had been prepared by the U.P. Police (during the course of investigation by the U.P. Police), and compared the same with, the site plan prepared by the CBI (after the CBI took over investigation). It was pointed out, that a reference to the correct site plan would reveal, that there could have been free access, to and from the residence of Talwars, through Hemraj's room.

Secondly, it was pointed out, after extensively relying upon the statement of Bharti, that the grill and mash door latched from the outside clearly evidenced, that after committing the crime the culprits had bolted the premises from outside. The absurdity in the inference drawn by the Magistrate, it was submitted, was obvious from the fact, that the actual perpetrator of the murders, while escaping from the scene of occurrence, had bolted the Talwars from outside. It was also pointed out, that the iron mashing/gauze on the door which was bolted from outside, would make it impossible for an insider, to bolt the door from outside.

Thirdly, according to the learned counsel, the impression recorded in the investigation carried out by the CBI reveals, that the stairway leading to the terrace was from inside the flat (of the Talwars), was erroneous. This inference was sought to be shown to have been incorrectly recorded, as the stairs leading

to the terrace were from outside the flat, i.e., from the common area of the apartment complex beyond the outermost grill-door leading into the house no.L-32, Jalvayu Vihar, Sector 25, Noida. It was therefore submitted, that under no circumstances Dr. Rajesh Talwar or Dr. Nupur Talwar could be linked to the murder of Hemraj, since the body of Hemraj was found at a place, which had no internal connectivity from within the flat of the Talwars.

Fourthly, as noticed above, since the flat of the Talwars was bolted from the outside, neither Dr. Rajesh Talwar nor Dr. Nupur Talwar could have taken the body of Hemraj to the terrace, even if the inference drawn by the CBI, that the murder of Hemraj was committed at a place different from the place from where his body was found, is to be accepted as correct. It is sought to be suggested, that the accused cannot, in any case, be associated with the murder of Hemraj. And since, both murders were presumably the handiwork of the same perpetrator(s), the accused could not be associated with the murder of Aarushi Talwar as well.

Fifthly, substantial material was placed before the Court to suggest that the purple colored pillow cover belonging to Krishna Thadarai, was found smeared with the blood of Hemraj. In order to substantiate the instant contention reference was made to the seizure memo pertaining to Krishna Thadarai's pillow cover, and thereupon, the report of the CFSL dated 23.6.2008, as also, the report of the CFSL (Bio Division) dated 30.6.2008 depicting, that the blood found on the pillow cover was of human origin. It was the vehement contention of the learned counsel for the petitioner, that Krishna Thadarai could not have been given a clean chit, when the blood of Hemraj was found on his pillow cover. It is necessary to record, that a similar submission made before the High Court was turned down by the High Court, on the basis of a letter dated 24.3.2011 (even though the same was not a part of the charge papers). It was submitted, that the aforesaid letter could not have been taken

into consideration while examining the veracity of the inferences drawn by the Magistrate. In order to support the instant contention, it was also vehemently submitted, that during the course of investigation, neither the U.P. Police nor the CBI, found blood of Hemraj on the clothes of either Dr. Rajesh Talwar or Dr. Nupur Talwar. The presence of the blood of Hemraj on the pillow cover of Krishna Thadarai and the absence of the blood of Hemraj on the apparel of Dr. Rajesh Talwar and Dr. Nupur Talwar, according to learned counsel for the petitioners, not only exculpates the accused identified in the Magistrate's order dated 9.2.2011, but also reveals, that the investigation made by the U.P. Police/CBI besides being slipshod and sloppy, can also be stated to have been carried on without due application of mind.

Sixthly, in continuation of the preceding issue canvassed on behalf of the petitioners, it was submitted, that the finding recorded by the CBI in its closure report, that DNA of none of the servants was found on any of the exhibits collected from the scene of crime, was wholly fallacious. The Magistrate having assumed the aforesaid factually incorrect position, exculpated all the servants of blame, in respect of the twin murders of Aarushi Talwar and Hemraj. It was submitted, that as a matter of fact, scientific tests shorn of human considerations, clearly indicate the involvement of Krishna Thadarai with the crime under reference. In this behalf the Court's attention was also drawn to the narco analysis, brain mapping and polygraph tests conducted on Krishna Thadarai.

Seventhly, the investigating agency, it was contended, was guilty of not taking the investigative process to its logical conclusion. In this behalf it was submitted, that finger prints were found on a bottle of Ballantine Scotch Whiskey, found on the dining table, in the Talwar flat. The accused, according to learned counsel, had requested the investigating agency to identify the fingerprints through touch DNA test. The accused had also offered to bear the expenses for the same. According

to the learned counsel, the identification of the fingerprints on the bottle, would have revealed the identity of the perpetrator(s) to the murders of Aarushi Talwar and Hemraj. It is therefore sought to be canvassed, that the petitioner Dr. Nupur Talwar and her husband Dr. Rajesh Talwar, had unfairly been accused of the crime under reference, even though there was material available to determine the exact identity of the culprit(s) in the matter.

Eighthly, it was submitted, that footprints were found in the bedroom of Aarushi Talwar, i.e., from the room where her dead body was recovered. These footprints according to learned counsel, did not match the footwear impressions of shoes and slippers of Dr. Rajesh Talwar and Dr. Nupur Talwar. This according to the learned counsel for the petitioners also indicates, that neither Dr. Rajesh Talwar nor Dr. Nupur Talwar were involved in the murder of their daughter Aarushi Talwar. The murderer, according to learned counsel, was an outsider. And it was the responsibility of the CBI to determine the identity of such person(s) whose footwear matched the footprints found in the room of the Aarushi Talwar. Lack of focused investigation in the instant matter, according to the learned counsel for the petitioners, had resulted in a gross error at the hands of the Magistrate, who has unfairly summoned Dr. Rajesh Talwar and Dr. Nupur Talwar as the accused, rather than the actual culprit(s).

Ninthly, learned counsel for the petitioner also referred to the post mortem report of Aarushi Talwar dated 16.5.2008, and in conjunction therewith the statement of Dr. Sunil Kumar Dhore dated 18.7.2008, the report of the High Level Eight Member Expert Body dated 9.9.2008 (of which Dr. Sunil Kumar Dhore was a member), and the further statements of Dr. Sunil Kumar Dhore dated 3.10.2008, 30.9.2009 and 28.5.2010. Based thereon, learned counsel submitted, that in the post mortem report conducted by Dr. Sunil Kumar Dhore, he had expressly recorded NAD (No Abnormality Detected) against the column at serial no.7, pertaining to the private parts of Aarushi Talwar.

It was submitted, that the aforesaid position came to be substantially altered by the subsequent oral statements made by Dr. Sunil Kumar Dhore. It was submitted, that the different factual position narrated by Dr. Sunil Kumar Dhore, subsequent to the submission of the post mortem report, cannot be taken into consideration. Viewed from the instant perspective, it was also submitted, that the investigating agencies utterly failed in carrying out a disciplined and proper investigation. It was also asserted, that Dr. Sunil Kumar Dhore had been persuaded to turn hostile to the contents of his own document, i.e., the post mortem report dated 16.5.2008. Even though originally Dr. Sunil Kumar Dhore found, that there was no abnormality detected in the private parts of Aarushi Talwar, after the lapse of two years his supplementary statements depict a number of abnormalities. It was submitted, that the Magistrate having referred to the last of such statements dated 25.5.2010, inferred therefrom, that the private parts of Aarushi Talwar had been cleaned after her murder. It was submitted, that the absurdity and improbability of the assumption could be established from the fact, that the white discharge found from the vagina of Aarushi Talwar, was sent for pathological examination, which showed that no spermatozoa was detected therein. The instant inference of the Magistrate, according to learned counsel, had resulted in grave miscarriage of justice.

Tenthly, it was contended, that the dimension of the injury on the heads of Aarushi Talwar and Hemraj, was stated to match with the dimension of a 5 iron golf club. It was pointed out, that the 5 iron golf club recovered from the premises of the Talwars, did not have any traces of blood. It was submitted, that the said golf club as a possible weapon of offence, was introduced by the second team of the CBI in September/ October 2009. The Magistrate, according to learned counsel, had erroneously recorded in the impugned order dated 9.2.2011, that experts had opined that the injuries in question (on the heads of Aarushi Talwar and Hemraj) were possible with the golf club in question. It was sought to be highlighted, that

no expert had given any such opinion during the entire investigative process, and as such, the finding recorded by the Magistrate was contrary to the record.

Eleventhly, it was asserted, that the Magistrate ignored to take into consideration, the fact that the clothes of Dr. Rajesh Talwar were found only with the blood of Aarushi Talwar. But it was noticed, that there was no blood of Aarushi Talwar on the clothes of Dr. Nupur Talwar. This fact is also erroneous because the blood of Aarushi Talwar was actually found on the clothes of Dr. Nupur Talwar also. According to learned counsel, the discovery of blood of Aarushi Talwar on the clothes of her parents was natural. What is important, according to learned counsel, is the absence of blood of Hemraj, on the clothes of the accused. It was submitted, that the prosecution had never denied, that the blood of Hemraj was not found on the clothes of either Dr. Rajesh Talwar or Dr. Nupur Talwar. This factual position, for the same reasons as have been indicated at serial no. fourthly above establishes the innocence of the accused in the matter.

16. Just as in the case of the reasons depicted in the order of the Magistrate (based on the statements recorded during the course of investigation and the documents and other materials placed before her), the factual submissions advanced at the hands of the learned counsel for the petitioners (noticed in the foregoing paragraph), cannot be placed on the pedestal of reliable evidence. It is only when statements are recorded in defence, which are tested by way of cross examination, and only after documents and material relied upon (in defence), are proved in accordance with the law, the same would constitute evidence, which can constitute a basis, for determining the factual position in the controversy. It is only on the basis of such acceptable evidence, that final conclusions can be drawn. That stage has not arisen. Even though the demeanor of learned counsel representing the petitioners was emphatic, that no other inference beside the one suggested by them was possible, I

am of the view, that the stage is not yet right for such emphatic conclusions. Just as the learned counsel for the petitioner had endeavored to find fault with the factual inferences depicted in the order dated 9.2.2011 (which constituted the basis of issuing process), learned counsel for the CBI submitted, that the factual foundation raised by the petitioner (details whereof have been summarized above) were based on surmises and conjectures. Even though I have recorded a summary of the factual basis, on which the learned counsel for the petitioner have based their contentions, I am intentionally not recording the reasons whereby their veracity was assailed. That then, would have required me to further determine, which of the alternative positions were correct. I am of the view, that such an assessment at the present stage would be wholly inappropriate. My dealing with the factual contours of the present controversy, at a juncture well before evidence has been recorded by the trial court, would have adverse consequences against one or the other party. Even though, while dealing with issues as in the instant case, High Courts and this Court have repeatedly observed in their orders, that the trial court would determine the controversy uninfluenced by observations made. Yet, inferences and conclusions drawn by superior courts, on matters which are pending adjudication before trial courts (or other subordinate courts) cannot be easily brushed aside. I shall, therefore, endeavor not to pre-maturely record any inferences which could/would prejudice one or the other side.

17. Having recorded the aforesaid observations, in respect of the submissions advanced at the hands of the learned counsel for the petitioner, I shall now proceed to determine the validity of the order passed by the Magistrate on 9.2.2011, as also, the legitimacy of the defences raised by the learned counsel for the petitioner. Although it would seem, that there would be a common answer to the proposition canvassed, I am of the view, after having heard learned counsel for the rival parties, that the issue canvassed ought to compartmentalized under two heads. Firstly, I shall examine the validity of the order

dated 9.2.2011, and thereafter, I will deal with the substance of the defences raised at the hands of the petitioner. That is how the matter is being dealt with in the following paragraphs.

18. The basis and parameters of issuing process, have been provided for in Section 204 of the Code of Criminal Procedure. Section 204 aforementioned is extracted hereunder:

"204. Issue of process -

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be -

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate of (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the

Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

The criterion which needs to be kept in mind by a Magistrate issuing process, have been repeatedly delineated by this Court. I shall therefore, first examine the declared position of law on the subject. Reference in this behalf may be made to the decision rendered by this Court in *Cahndra Deo vs. Prokash Chandra Bose alias Chabi Bose and Anr.,* AIR 1963 SC 1430, wherein it was observed as under :

"(8) Coming to the second ground, we have no hesitation is holding that the test propounded by the learned single judge of the High Court is wholly wrong. *For determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is "sufficient ground for proceeding" and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry.* A number of decisions were cited at the bar in which the question of the scope of the enquiry under Section 202 has been considered. Amongst those decisions are : Parmanand Brahmachari v. Emperor, AIR 1930 Pat 20; Radha Kishun Sao v. S.K. Misra, AIR 1949 Pat 36; Ramkisto Sahu v. State of Bihar, AIR 1952 Pat 125; Emperor v. J.A. Finan, AIR 1931 Bom 524 and Baidya Nath Singh v. Muspratt, ILR 14 Cal 141. In all these cases, it has been held that the object of the provisions of Section 202 is to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the

consideration of the complainant's evidence on oath. The courts have also pointed out in these cases that what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant and not whether the evidence is sufficient to warrant a conviction. The learned Judges in some of these cases have been at pains to observe that an enquiry under Section 202 is not to be likened to a trial which can only take place after process is issued, and that there can be only one trial. No doubt, as stated in sub-section (1) of Section 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but *the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant.*"

(emphasis is mine)

The same issue was examined by this Court in *M/s. India Carat Pvt. Ltd. vs. State of Karnataka and Anr.,* (1989) 2 SCC 132, wherein this Court held as under :

"(16) *The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused.* The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that

a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. *The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit,* in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. *The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.*

(17) The fact that in this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner. Even if the appellant had preferred a compliant before the learned Magistrate and the Magistrate had ordered investigation under Section 156(3), the police would have had to submit a report under Section 173(2). It has been held in *Tula Ram v. Kishore Singh,* (1977) 4 SCC 459, that *if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of a case under Section 190(1)(b) and issue process or in the alternative he can take cognizance of the original*

complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he is of opinion that the case should be proceeded with."

(emphasis is mine)

The same issue was examined by this Court in *Jagdish Ram vs. State of Rajasthan and Anr.,* (2004) 4 SCC 432, wherein this Court held as under:

"(10) The contention urged is that though the trial court was directed to consider the entire material on record including the final report before deciding whether the process should be issued against the appellant or not, yet the entire material was not considered. From perusal of order passed by the Magistrate it cannot be said that the entire material was not taken into consideration. *The order passed by the Magistrate taking cognizance is a well-written order. The order not only refers to the witnesses recorded by the Magistrate under Sections 200 and 202 of the Code but also sets out with clarity the principles required to be kept in mind at the stage of taking cognizance and reaching a prima facie view. At this stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter.* It is well settled that notwithstanding the opinion of the police, a Magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The investigation is the exclusive domain of the police. *The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding for proceeding and not whether there is sufficient ground for*

conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. (*Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal,* (2003) 4 SCC 139)."

(emphasis is mine)

All along having made a reference to the words "there is sufficient ground to proceed" it has been held by this Court, that for the purpose of issuing process, all that the concerned Court has to determine is, whether the material placed before it "is sufficient for proceeding against the accused". The observations recorded by this Court extracted above, further enunciate, that the term "sufficient to proceed" is different and distinct from the term "sufficient to prove and established guilt". Having taken into consideration the factual position based on the statements recorded under Section 161 of Code of Criminal Procedure (as also, under Section 164 thereof), and the documents appended to the charge sheet, as also, the other materials available on the file; I have no doubt whatsoever in my mind, that the Magistrate was fully justified in issuing process, since the aforesaid statements, documents and materials, were most certainly sufficient to proceed against the accused. Therefore, the order issuing process under Section 204 passed by the Magistrate on 9.2.2011 cannot be faulted on the ground, that it had been passed in violation of the provisions of Code of Criminal Procedure, or in violation of the declared position of law on the subject. Despite my aforesaid conclusion, I reiterate, that the material taken into consideration by the Magistrate will have to be substituted by cogent evidence recorded during the trial; before any inferences, assumptions, views and deductions drawn by the Magistrate, can be made the basis for implicating the accused. As the matter proceeds to the next stage, all the earlier conclusions will stand effaced, and will have to be redrawn, in accordance with law.

19. Rolled along with the contention in hand, it was the submission of learned counsel representing the petitioner, that if the defences raised by the petitioner are taken into consideration, the entire case set up by the prosecution would fall. I shall now advert to the defences raised on behalf of the petitioner. All the defences raised on behalf of the petitioner have already been summarized above. Based on the said defences it was sought to be canvassed, that the Magistrate (while passing the order dated 9.2.2011) had taken into consideration some facts incorrectly (while the factual position was otherwise), and certain vital facts were overlooked. On the subject under reference, it would first be appropriate to examine the settled legal position. In this behalf reference may be made to the decision rendered by this Court in *Cahndra Deo vs. Prokash Chandra Bose alias Chabi Bose and Anr.,* AIR 1963 SC 1430, wherein it was observed as under :

> "(7) Taking the first ground, *it seems to us clear from the entire scheme of Ch. XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so.* It would follow from this, therefore, that it would not be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued; nor can he examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to

> the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go. It was, however, contended by Mr. Sethi for respondent No.1 that the very object of the provisions of Ch. XVI of the Code of Criminal Procedure is to prevent an accused person from being harassed by a frivolous complaint and, therefore, power is given to a Magistrate before whom complaint is made to postpone the issue of summons to the accused person pending the result of an enquiry made either by himself or by a Magistrate subordinate to him. A privilege conferred by these provisions, can according to Mr. Sethi, be waived by the accused person and he can take part in the proceedings. *No doubt, one of the objects behind the provisions of Section 202, Cr. P.C. is to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but als with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under Section 202 can in no sense be characterized as a trial for the simple reason that in law there can*

be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry. It is true that there is no direct evidence in th case before us that the two persons who were examined as court witnesses were so examined at the instance of respondent No.1 but from the fact that they were persons who were alleged to have been the associates of respondent No.1 in the first information report lodged by Panchanan Roy and who were alleged to have been arrested on the spot by some of the local people, they would not have been summoned by the Magistrate unless suggestion to that effect had been made by counsel appearing for respondent No.1. This inference is irresistible and we hold that on this ground, the enquiry made by the enquiring Magistrate is vitiated. In this connection, the observations of this court in *Vadilal Panchal v. Dattatraya Dulaji,* (1961) 1 SCR 1 at p.9 : (AIR 1960 SC 1113 at p. 1116) may usefully be quoted :

> "The enquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. *The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage, for the person complained against can be legally called upon to answer the accusation made against him only when a process has*

> *issued and he is put on trial.*"

(emphasis is mine)

Recently an examination of the defence(s) of an accused, at the stage of issuing process, came to be examined by this Court in *CREF Finance Ltd. vs. Shree Shanthi Homes (P) Ltd. and Anr.,* (2005) 7 SCC 467, wherein this Court held as under :

> "10. In the instant case, the appellant had filed a detailed complaint before the Magistrate. The record shows that the Magistrate took cognizance and fixed the matter for recording of the statement of the complainant on 1-6-2000. Even if we assume, though that is not the case, that the words "cognizance taken" were not to be found in the order recorded by him on that date, in our view that would make no difference. Cognizance is taken of the offence and not of the offender and, therefore, once the court on perusal of the complaint is satisfied that the complaint discloses the commission of an offence and there is no reason to reject the complaint at that stage, and proceeds further in the matter, it must be held to have taken cognizance of the offence. One should not confuse taking of cognizance with issuance of process. Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. *The issuance of process is at a later stage when after considering the material placed before it, the court decides to proceed against the offenders against whom a prima facie case is made out.* It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking

cognizance and examining the complainant on oath, the court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the court may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure. We can conceive of many other situations in which a Magistrate may not take cognizance at all, for instance, a case where he finds that the complaint is not made by the person who in law can lodge the complaint, or that the complaint is not entertainable by that court, or that cognizance of the offence alleged to have been committed cannot be taken without the sanction of the competent authority, etc. These are cases where the Magistrate will refuse to take cognizance and return the complaint to the complainant. But if he does not do so and proceeds to examine the complainant and such other evidence as the complainant may produce before him then, it should be held to have taken cognizance of the offence and proceeded with the inquiry. We are, therefore, of the opinion that in the facts and circumstances of this case, the High Court erred in holding that the Magistrate had not taken cognizance, and that being a condition precedent, issuance of process was illegal.

11. Counsel for the respondents submitted that cognizance even if taken was improperly taken because the Magistrate had not applied his mind to the facts of the case. According to him, there was no case made out for issuance of process. He submitted that the debtor was the Company itself and Respondent 2 had issued the cheques on behalf of the Company. He had subsequently

stopped payment of those cheques. He, therefore, submitted that the liability not being the personal liability of Respondent 2, he could not be prosecuted, and the Magistrate had erroneously issued process against him. We find no merit in the submission. *At this stage, we do not wish to express any considered opinion on the argument advanced by him, but we are satisfied that so far as taking of cognizance is concerned, in the facts and circumstances of this case, it has been taken properly after application of mind. The Magistrate issued process only after considering the material placed before him.* We, therefore, find that the judgment and order of the High Court is unsustainable and must be set aside. This appeal is accordingly allowed and the impugned judgment and order of the High Court is set aside. The trial court will now proceed with the complaint in accordance with law from the stage at which the respondents took the matter to the High Court."

(emphasis is mine)

A perusal of the legal position expressed by this Court reveals the unambiguous legal position, that possible defence(s) of an accused need not be taken into consideration at the time of issuing process. There may be a situation, wherein, the defence(s) raised by an accused is/are factually unassailable, and the same are also not controvertable, it would, demolish the foundation of the case raised by the prosecution. The Magistrate may examine such a defence even at the stage of taking cognizance and/or issuing process. But then, this is not the position in the present controversy. The defences raised by the learned counsel for the petitioner are factual in nature. As against the aforesaid defences, learned counsel for the CBI has made detailed submissions. In fact, it was the submission of the learned counsel for the CBI, that the defences raised by the

petitioner were merely conjectural. Each of the defences was contested and controverted, on the basis of material on the file. In this case it cannot be said that the defences raised were unassailable and also not controvertable. As already noticed above, I do not wish to engage myself in the instant disputed factual controversy, based on assertions and denials. The factual position is yet to be established on the basis of acceptable evidence. All that needs to be observed at the present juncture is, that it was not necessary for the Magistrate to take into consideration all possible defences, which could have been raised by the petitioner, at the stage of issuing process. Defences as are suggested by the learned counsel for the petitioner, which were based on factual inferences, certainly ought not to have been taken into consideration. Thus viewed, I find no merit in the instant contention advanced at the hands of the learned counsel for the petitioner. The instant determination of mine, should not be treated as a rejection of the defences raised on behalf of the petitioner. The defences raised on behalf of the accused will have to be substantiated through cogent evidence and thereupon, the same will be examined on merits, for the exculpation of the accused, if so made out.

20. The submissions dealt with hereinabove constituted the primary basis of challenge, on behalf of the petitioner. Yet, just before the conclusion of the hearing of the matter, learned counsel representing the petitioner stated, that the petitioner would be satisfied even if, keeping in mind the defences raised on behalf of the petitioner, further investigation could be ordered. This according to learned counsel will ensure, that vital aspects of the controversy which had remained unraveled, will be brought out with the possibility of identifying the real culprits. This according to the learned counsel for the petitioner would meet the ends of justice.

21. The contention advanced at the hands of the learned counsel for the petitioner, as has been noticed in the foregoing paragraph, seems to be a last ditch effort, to savage a lost

situation. The plea for further investigation, was raised by Dr. Rajesh Talwar in his protest petition dated 25.1.2011. The prayer for further investigation, was declined by the Magistrate in her order dated 9.2.2011. Dr. Rajesh Talwar who had raised the aforesaid prayer, did not assail the aforestated determination. The plea for further investigation therefore attained finality. Dr. Nupur Talwar, the petitioner herein, did not make a prayer for further investigation, when she assailed the order passed by the Magistrate dated 9.2.2011 before the High Court (vide Criminal Revision Petition no.1127 of 2011). Having not pressed the aforesaid prayer before the High Court, it is not open to the petitioner Dr. Nupur Talwar, to raise the same before this Court, in a proceeding which emerges out of the determination rendered by the High Court (in Criminal Revision Petition no.1127 of 2011). I, therefore, find no merit in the instant contention advanced by the learned counsel for the petitioner.

22. I shall now embark upon the last aspect of the matter, namely, the propriety of the petitioner in filing the instant Review Petition. The parameters within which an order taking cognizance and/or an order issuing process needs to be passed, have already been dealt with above. It is apparent from my determination, that the matter of taking cognizance and/or issuance of notice, is based on the satisfaction of the Magistrate. In the conclusions recorded hereinabove, while making a reference to past precedent, I have concluded, that it is not essential for the concerned Magistrate to record reasons or to pass a speaking order demonstrating the basis of the satisfaction, leading to issuance of process. Despite the same, the Magistrate while issuing process vide order dated 9.2.2011, had passed a detailed reasoned order. The order brings out the basis of the Magistrate's satisfaction. The aforesaid order dated 9.2.2011 came to be assailed by the petitioner before the High Court of judicature at Allahabad through Criminal Revision Petition no.1127 of 2011. The High Court having concluded, that the satisfaction of the Magistrate was well found, dismissed the Revision Petition vide an order

dated 18.3.2011. The High Court expressly affirmed that the order dated 9.2.2011 had been passed on the basis of record available before the High Court, and on the basis of the Magistrate's satisfaction, that process deserved to be issued. The petitioner approached this Court by filing Special Leave Petition (Criminal) no.2982 of 2011 (renumbered as Criminal Appeal no. 68 of 2012). While dismissing the aforesaid Criminal Appeal vide order dated 6.1.2012 this Court in paragraph 11 observed as under :

> "…Obviously at this stage we cannot weigh evidence. *Looking into the order of Magistrate, we find that he applied his mind in coming to the conclusion relating to taking of cognizance. The Magistrate has taken note of the rejection report and gave his prima facie observation on the controversy upon a consideration of the materials that surfaced in the case.* …"
>
> (emphasis is mine)

Thereafter, the matter was disposed of, by this Court, by recording the following observations :

> "24. In the above state of affairs, now the question is what is the jurisdiction and specially the duty of this Court in such a situation under Article 136?
>
> 25. We feel constrained to observe that at this stage, this Court should exercise utmost restrain and caution before interfering with an order of taking cognizance by the Magistrate, otherwise the holding of a trial will be stalled. The superior Courts should maintain this restrain to uphold the rule of law and sustain the faith of the common man in the administration of justice.
>
> 26. Reference in this connection may be made to a three Judge Bench decision of this Court in the case of *M/s India Carat Private Ltd. vs. State of*

Karnataka & Anr., (1989) 2 SCC 132. Explaining the relevant principles in paragraphs 16, Justice Natarajan, speaking for the unanimous three Judge Bench, explained the position so succinctly that we could rather quote the observation as under :-

> "The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of an order the issue of process to the accused. Section 190(1)(b) doest not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer; and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused…"

27. *These well settled principles still hold good. Considering these propositions of law, we are of the view that we should not interfere with the concurrent order of the Magistrate which is affirmed by the High Court.*

28. *We are deliberately not going into various factual*

aspects of the case which have been raised before us so that in the trial the accused persons may not be prejudiced. We, therefore, dismiss this appeal with the observation that in the trial which the accused persons will face, they should not be prejudiced by any observation made by us in this order or in the order of the High Court or those made in the Magistrate's order while taking cognizance. The accused must be given all opportunities in the trial they are to face. We, however, observe that the trial should expeditiously held.

29. The appeal is accordingly disposed of."

(emphasis is mine)

Unfortunately, while addressing submissions during the course of hearing no reference whatsoever was made either to the order passed by the High Court, and more significantly, to the order passed by this Court (dated 6.1.2012) of which review has been sought. No error whatsoever was pointed out in the order passed by this Court on 6.1.2012. Learned counsel for the CBI during the course of hearing, was therefore fully justified in repeatedly canvassing, that through the instant review petition, the petitioner was not finding fault with the order dated 6.1.2012 (of which review has been sought), but with the order passed by the Magistrate dated 9.2.2011. That, I may say, is correct. The order of this Court did not fall within the realm of the petitioner's rational acceptability. This, in my view, most certainly amounts to misuse of jurisdiction of this Court. It was sufficient for this Court, while determining a challenge to an order taking cognizance and/or issuing process to affirm, that the Magistrate's order was based on satisfaction. But that has resulted in the petitioner's lamentation. This Court has been required to pass a comprehensive order after hearing detailed submissions for days at end, just for the petitioner's satisfaction. I have noticed, that every single order passed by the Magistrate,

having any repercussion, is being assailed right up to this Court. Of course, the right to avail a remedy under law, is the right of every citizen. But such a right, cannot extend to misuse of jurisdiction. The petitioner's attitude expresses discomfort at every order not acceding to her point of view. Even at the earlier juncture, full dress arguments, as have been addressed now, had been painstakingly advanced. Determination on the merits of the main controversy, while dealing with the stage of cognizance and/or issuance of process, if deliberated upon, is bound to prejudice one or the other party. It needed extreme restraint not to deal with the individual factual aspects canvassed on behalf of the petitioner, as have been noticed above, even though each one of them was sought to be repudiated on behalf of the CBI. I am of the considered view, that the very filing of the instant Review Petition was wholly uncalled for, specially when this Court emphatically pointed out its satisfaction in its earlier order dated 6.1.2012 (which is the subject matter of review) not only in paragraph 11 thereof, but also, for not accepting the prayers made on behalf of the petitioner in the subsequent paragraphs which have been extracted hereinabove. As of now, I would only seriously caution the petitioner from such behaviour in future. After all, frivolous litigation takes up a large chunk of precious court time. While the state of mind of the accused can be understood, I shall conclude by suggesting, that the accused should henceforth abide by the advice tendered to her, by learned counsel representing her. For, any uncalled or frivolous proceedings initiated by the petitioner hereinafter, may evoke exemplary costs.

23. As a matter of caution I direct the Magistrate, not to be influenced by any observations made by the High Court or by this Court, while dealing with the order dated 9.2.2011, specially insofar as the factual parameters are concerned.

24. Dismissed.

K.K.T. Review Petition dismissed.

P. SANJEEVA RAO
v.
THE STATE OF A.P.
(Criminal Appeal Nos. 874-875 of 2012)

JULY 2, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Code of Criminal Procedure, 1973 - ss. 311 and 242 - Extent and scope of the power of the Court to recall witnesses - Prosecution for offences punishable u/ss.7 and 13(1) r/w 13(d) of the Prevention of Corruption Act - Around the time the prosecution concluded its evidence, accused-appellant filed petition u/ss.242 and 311 CrPC for recall of PW 1-complainant and PW2 (an independent witness) for cross-examination - Plea of appellant that cross-examination of PWs 1 and 2 had been deferred till such time the Trap Laying Officer (PW 11) was examined by the prosecution and since the said officer had been examined, PWs 1 and 2 need be recalled for cross-examination by counsel for the appellant - Application dismissed by trial court on grounds that there was nothing to show on the record that the appellant had reserved his right to cross examine the witnesses at a later point of time and that recall of PWs 1 and 2 for cross-examination more than 3½ years after they had been examined in relation to an incident that had taken place 7 years back, was bound to cause prejudice to the prosecution - Order upheld by High Court - On appeal, held: The decision to cross-examine is generally guided by the nature of the depositions and whether it incriminates the accused - In a case like the one at hand where PWs1 and 2 had clearly indicted the appellant and supported the prosecution version not only regarding demand of the bribe but also its receipt by the appellant there was no question of the defence not cross-examining them - One is inclined to believe that the two PWs were not cross-examined

by the counsel for the appellant because he had indeed intended to cross-examine them after the Trap Laying Officer had been examined - The fact that the appellant did not make a formal application to this effect nor even an oral prayer to the Court to that effect at the time the cross-examination was deferred may be a mistake - But merely because a mistake was committed, should not result in the appellant suffering a penalty totally disproportionate to the gravity of the error committed by his lawyer - A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the appellant to defend himself - Direction given that PWs1 and 2 be recalled by the Trial Court and an opportunity to cross-examine the said witnesses afforded to the appellant.

The appellant was being prosecuted for offences punishable under Sections 7 & 13 (1) read with Section 13(1)(d) of Prevention of Corruption Act, 1988, before the Special Judge for CBI cases. Around the time the prosecution concluded its evidence, the appellant filed Crl. Misc. Petition under Sections 242 and 311 Cr.P.C. for recall of PW 1-complainant and PW2 (an independent witness) for cross-examination. The appellant's case was that cross-examination of PWs 1 and 2 had been deferred till such time the Trap Laying Officer (PW 11) was examined by the prosecution and since the said officer had been examined, PWs 1 and 2 need be recalled for cross-examination by counsel for the accused-appellant. The application was dismissed by the Trial Court on the ground that there was nothing to show on the record that the appellant had reserved his right to cross examine the witnesses at a later point of time. The Trial Court also held that recall of PWs 1 and 2 for cross-examination more than 3½ years after they had been examined in relation to an incident that had taken place 7 years back, was bound to cause prejudice to the prosecution and that the appellant could not ask for the recall of any witness

without cogent reasons. Aggrieved, the appellant filed revision petition before the High Court which held that since this was an old case of the year 2005 and the matter was now coming up for examination of the appellant-accused under Section 313 Cr.P.C., there was no justification for recall of the PWs1 and 2 and accordingly dismissed the revision petition.

In the instant appeals, the appellant raised various contentions: 1) that the Trial Court as also the High Court had taken a hyper technical view of the matter without appreciating that grave prejudice will be caused to the appellant if the prayer for cross-examination of PWs. 1 and 2 was not granted and the recall of the witnesses for that purpose declined; 2) that counsel for the appellant before the Trial Court was under a bona fide belief that the cross-examination of PWs. 1 and 2 could be conducted after PW-11 had been examined; 3) that the lawyer appearing before the Trial Court had also filed a personal affidavit stating that PWs. 1 and 2 had not been cross-examined by him under a bona fide impression that he could do so after the evidence of PW-11 had been recorded; 4) that while the lawyer may have committed a mistake in presuming that PWs 1 and 2 could be recalled for cross-examination at a later stage without the Trial Court granting to the accused the liberty to do so, such a mistake should not vitiate the trial by denying to the appellant a fair opportunity to cross-examine the said witnesses; 5) that no party to a trial can be denied the opportunity to correct errors if any committed by it and 6) that if proper evidence was not adduced or the relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such a mistake to be rectified.

Allowing the appeals, the Court

HELD: 1.1. There is no dispute that no formal application was filed by the appellant nor even an oral prayer made before the Trial Court to the effect that the exercise of the right to cross-examine the two witnesses-PWs 1 and 2 was being reserved till such time the Trap Laying Officer (PW11) was examined. This is precisely where counsel for the appellant has stepped in and filed a personal affidavit in which he has stated that even though there is no formal prayer made to that effect he intended to cross-examine the two witnesses only after the deposition of the Trap Laying Officer was recorded. In the peculiar circumstances of the case, the version given by the counsel may indeed be the true reason why the two witnesses were not cross-examined on the conclusion of their examination-in-chief, primarily because no lawyer worth his salt especially one who had sufficient experience at the Bar like the one appearing for the appellant would have let the opportunity to cross-examine go unavailed in a case where the witnesses had supported the prosecution version not only in regard to the demand of bribe but also its payment and the success of the trap laid for that purpose. There is no gainsaying that every prosecution witness need not be cross-examined by the defence. It all depends upon the nature of the deposition and whether the defence disputes the fact sought to be established thereby. Formal witnesses are not at times cross-examined if the defence does not dispute what is sought to be established by reference to his/her deposition. The decision to cross-examine is generally guided by the nature of the depositions and whether it incriminates the accused. In a case like the one at hand where the complainant examined as PW1 and the shadow witness examined as PW2 had clearly indicted the appellant and supported the prosecution version not only regarding demand of the bribe but also its receipt by the appellant there was no question of the defence not

cross-examining them. The two witnesses doubtless provided the very basis of the case against the appellant and should their testimony have remained unchallenged, there was nothing much for the appellant to argue at the hearing. The depositions would then be taken to have been accepted as true hence relied upon. [Para 10] [797-E-H; 798-A-F]

1.2. This Court is inclined to believe that the two prosecution witnesses were not cross-examined by the counsel for the appellant not because there was nothing incriminating in their testimony against the appellant but because counsel for the appellant had indeed intended to cross-examine them after the Trap Laying Officer had been examined. The fact that the appellant did not make a formal application to this effect nor even an oral prayer to the Court to that effect at the time the cross-examination was deferred may be a mistake which could be avoided and which may have saved the appellant a lot of trouble in getting the witnesses recalled. But merely because a mistake was committed, should not result in the accused suffering a penalty totally disproportionate to the gravity of the error committed by his lawyer. Denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses. It is trite that the credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross-examination. Denial of an opportunity to do so will result in a serious miscarriage of justice in the present case keeping in view the serious consequences that will follow any such denial. [Para 11] [798-H] [799-A-D]

1.3. Power is vested in the Courts under Section 311 Cr.P.C. to recall witnesses. The object underlying Section 311 is to prevent failure of justice on account of a mistake

of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial. Discovery of the truth is the essential purpose of any trial or enquiry. [Paras 12, 13 and 15] [799-E-F; 800-G-H; 801-F]

1.4. This Court is conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by the Additional Solicitor General that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, this Court is of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, one would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself. [Para 16] [802-B-D]

1.5. It is directed that PWs1 and 2 be recalled by the Trial Court and an opportunity to cross-examine the said witnesses afforded to the appellant. The Trial Court shall endeavour to conclude the examination of the two witnesses expeditiously and without unnecessary delay. [Para 17] [802-F-G]

Rajendra Prasad v. Narcotic Cell **1999 SCC (Crl) 1062;**

SarwanSingh v. State of Punjab **(2003) 1 SCC 240: 2002 (3) Suppl. SCR 128;** *Hanuman Ram v. The State of Rajasthan & Ors.* **(2008) 15 SCC 652: 2008 (14) SCR 348;** *Hoffman Andreas v. Inspector of Customs, Amritsar* **(2000) 10 SCC 430;** *Mohanlal Shamji Soni v. Union of India & Anr.* **1991 Supp (1) 271: 1991 (1) SCR 712 and** *Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria through LRs.* **2012 (3) SCALE 550 - relied on.**

Case Law Reference:

1999 SCC (Crl) 1062	**relied on**	**Para 7**
2002 (3) Suppl. SCR 128	**relied on**	**Para 10**
2008 (14) SCR 348	**relied on**	**Para 12**
(2000) 10 SCC 430	**relied on**	**Para 13**
1991 (1) SCR 712	**relied on**	**Para 14**
2012 (3) SCALE 550	**relied on**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 874-875 of 2012.

From the Judgment & Order dated 29.03.2011 of the High Court of Judicature Andhra Pradesh at Hyderabad in Criminal Revision Case Nos. 534 & 710 of 2011.

ATM Ranga Ramanujan, Gouri Karuna Das Mohanti, Deepak Agnihotri, Prakhar Sharma, Sanjeev Kumar Sharma, Anu Gupta for the Appellant.

Harin P. Rawal, ASG, D. Mahesh Babu, Mayur R. Shah, Amit K Nain, Suchitra Hrangkhwat, Anando Mukherjee, PK Dey, Rajiv Nanda, Arvind Kumar Sharma for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. These appeals arise out of an order dated 29th March, 2011, passed by the High Court of Judicature for Andhra

Pradesh whereby Criminal Revision Petitions No.534 and 710 of 2011 filed by the appellant have been dismissed and order dated 22nd January, 2011 passed by the Special Judge for CBI cases at Hyderabad in Crl. M.P. Nos.18 and 19 of 2011 upheld.

3. The appellant is being prosecuted for offences punishable under Sections 7 & 13 (1) read with Section 13(1)(D) of Prevention of Corruption Act, 1988, before the Special Judge for CBI cases at Hyderabad. Around the time the prosecution concluded its evidence, the appellant filed Crl. Misc. Petitions No.18 and 19 of 2011 under Sections 242 and 311 Cr.P.C. for recall of prosecution witnesses No.1 and 2 for cross-examination. The appellant's case in the said Criminal Misc. Petition No.18 of 2011 was that cross-examination of PWs 1 and 2 had been deferred till such time the Trap Laying Officer (PW 11) was examined by the prosecution and since the said officer had been examined, PWs 1 and 2 need be recalled for cross-examination by counsel for the accused-appellant. In Crl. Misc. Petition No.19 of 2011 the petitioner made a prayer for deferring the cross-examination of Investigating Officer (PW12) in the case till such time PWs 1 and 2 were cross-examined.

4. Both the applications mentioned above were opposed by the prosecution resulting in the dismissal of the said applications by the Trial Court in terms of its order dated 22nd January, 2011. The Trial Court observed:

> "For what ever be the reasons the cross-examination of PWs 1 and 2 has been recorded as "nil". There is nothing to show on the record that the petitioner had reserved his right to cross examine the witnesses at a later point of time. The dockets of the Court do not reflect any such intention of the petitioner."

5. The Trial Court also held that recall of PWs 1 and 2 for cross-examination more than 3 and ½ years after they had been examined in relation to an incident that had taken place 7 years back, was bound to cause prejudice to the prosecution.

The Trial Court was of the view that the appellant had adopted a casual and easy approach towards the trial procedure and that he could not ask for the recall of any witness without cogent reasons.

6. Aggrieved by the order passed by the Trial Court the appellant filed two revision petitions before the High Court which, as noticed earlier, have been dismissed by the High Court in terms of the order impugned in these appeals. The High Court took the view that PWs 1 and 2 had been examined on 13th June, 2008 and 31st July, 2008 respectively followed by examination of nearly one dozen prosecution witnesses. The High Court held that since this was an old case of the year 2005 and the matter was now coming up for examination of the appellant-accused under Section 313 Cr.P.C., there was no justification for recall of the prosecution witnesses No.1 and 2. The revision petitions were accordingly dismissed.

7. Appearing for the appellant Mr. A.T.M Ranga Ramanujan, learned senior counsel, contended that the Trial Court as also the High Court had taken a hyper technical view of the matter without appreciating that grave prejudice will be caused to the appellant if the prayer for cross-examination of PWs. 1 and 2 was not granted and the recall of the witnesses for that purpose declined. He submitted that counsel for the appellant before the Trial Court was under a bona fide belief that the cross-examination of the prosecution witnesses PWs. 1 and 2, who happened to be the star witnesses, one of them being the complainant and the other a witness who allegedly heard the conversation and observed the passing of the bribe to the accused could be conducted after PW-11 had been examined. It was contended that the lawyer appearing before the Trial Court had also filed a personal affidavit stating that PWs. 1 and 2 had not been cross-examined by him under a bona fide impression that he could do so after the evidence of the Trap Laying Officer (PW-11) had been recorded. Mr. Ramanujan urged that while the lawyer may have committed a mistake in presuming that the prosecution witnesses No. 1 and

2 could be recalled for cross-examination at a later stage without the Trial Court granting to the accused the liberty to do so, such a mistake should not vitiate the trial by denying to the appellant a fair opportunity to cross-examine the said witnesses. Heavy reliance was placed by learned counsel on the decision of this Court in *Rajendra Prasad Vs. Narcotic Cell* [1999 SCC (Cri) 1062], in support of his submission that no party to a trial can be denied the opportunity to correct errors if any committed by it. If proper evidence was not adduced or the relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such a mistake to be rectified.

8. Appearing for the respondent Mr. H.P. Rawal, learned Additional Solicitor General, contended that while cross-examination of PWs. 1 and 2 could be deferred at the option of the accused to a later stage, the Court record does not show any such request having been made or any liberty being reserved to the accused. It was, according to Mr. Rawal, a case where an opportunity to cross-examine had been given to the accused and his counsel but they had chosen not to avail of the same, in which case a belated request for recall of the witnesses to exercise the right to cross-examine could and has been rightly rejected by the Trial Court and that rejection affirmed by the High Court. It was also submitted that the recall of the prosecution witnesses, who have gone without cross-examination at an earlier stage, is likely to prejudice the prosecution inasmuch as the incident in question is as old as of the year 2005, while the request for recall was made only in the year 2011, nearly four years after the framing of the charges against the appellant.

9. The appellant who was working as Sub Divisional Officer in the B.S.N.L., Karimnagar, is accused of having demanded and received a bribe of Rs.3,000/- from the complainant who was examined as PW1 at the trial. The trap led by the CBI in which PW2 was associated as an independent witness is said to have succeeded in catching the

petitioner red-handed with the bribe money eventually leading to the filing of a charge-sheet against him before the Court of Special Judge for CBI cases at Hyderabad in March, 2005. Charges were framed against the petitioner on 7th December, 2006. While PW1, the complainant in the case, was examined on two different dates i.e. 3rd March, 2008 and 13th June, 2008, prosecution witness No.2 was similarly examined on 18th July, 2008 and 31st July, 2008. It is common ground that both the witnesses have stood by the prosecution case for they have not been declared hostile by the prosecution. This implies that the depositions of the two witnesses are incriminating against the appellant and in the absence of any cross-examination their version may be taken to have remained unchallenged. It is also common ground that PWs. 3 to 11 were examined during the period 31st July, 2008 and 28th December, 2011. The Trap Laying Officer (PW 11) was examined on 18th February, 2010 and on 1st April, 2010. The two applications referred to earlier were filed before the Trial Court at that stage, one asking for recall of PWs. 1 & 2 for cross-examination and the other asking for a deferring that the cross-examination of PW 12 till PWs. 1 and 2 are recalled and cross-examined.

10. The only question that arises in the above backdrop is whether the decision not to cross-examine PWs 1 and 2 was for the reasons stated by the petitioner or for any other reason. There is no dispute that no formal application was filed by the petitioner nor even an oral prayer made before the Trial Court to the effect that the exercise of the right to cross-examine the two witnesses was being reserved till such time the Trap Laying Officer was examined. This is precisely where counsel for the appellant has stepped in and filed a personal affidavit in which he has stated that even though there is no formal prayer made to that effect he intended to cross-examine the two witnesses only after the deposition of the Trap Laying Officer was recorded. In the peculiar circumstances of the case, we feel that the version given by the counsel may indeed be the true reason why two witnesses were not cross-examined on the conclusion

of their examination-in-chief. We say so primarily because no lawyer worth his salt especially one who had sufficient experience at the Bar like the one appearing for the appellant would have let the opportunity to cross-examine go unavailed in a case where the witnesses had supported the prosecution version not only in regard to the demand of bribe but also its payment and the success of the trap laid for that purpose. There is no gainsaying that every prosecution witness need not be cross-examined by the defence. It all depends upon the nature of the deposition and whether the defence disputes the fact sought to be established thereby. Formal witnesses are not at times cross-examined if the defence does not dispute what is sought to be established by reference to his/her deposition. The decision to cross-examine is generally guided by the nature of the depositions and whether it incriminates the accused. In a case like the one at hand where the complainant examined as PW1 and the shadow witness examined as PW2 had clearly indicted the appellant and supported the prosecution version not only regarding demand of the bribe but also its receipt by the appellant there was no question of the defence not cross-examining them. The two witnesses doubtless provided the very basis of the case against the appellant and should their testimony have remained unchallenged, there was nothing much for the appellant to argue at the hearing. The depositions would then be taken to have been accepted as true hence relied upon. We may, in this connection, refer to the following passage from the decision of this Court in *Sarwan Singh v. State of Punjab* (2003) 1 SCC 240:

> "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted.

11. We are, therefore, inclined to believe that the two prosecution witnesses were not cross-examined by the counsel for the appellant not because there was nothing incriminating

in their testimony against the appellant but because counsel for the appellant had indeed intended to cross-examine them after the Trap Laying Officer had been examined. The fact that the appellant did not make a formal application to this effect nor even an oral prayer to the Court to that effect at the time the cross-examination was deferred may be a mistake which could be avoided and which may have saved the appellant a lot of trouble in getting the witnesses recalled. But merely because a mistake was committed, should not result in the accused suffering a penalty totally disproportionate to the gravity of the error committed by his lawyer. Denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses. It is trite that the credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross-examination. Denial of an opportunity to do so will result in a serious miscarriage of justice in the present case keeping in view the serious consequences that will follow any such denial.

12. The nature and extent of the power vested in the Courts under Section 311 Cr.P.C. to recall witnesses was examined by this Court in *Hanuman Ram v. The State of Rajasthan & Ors.* (2008) 15 SCC 652. This Court held that the object underlying Section 311 was to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. This Court observed:

> "This is a supplementary provision enabling, and in certain circumstances imposing on the Court, the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a

> Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.
>
> *The object underlying Section 311 of the Code 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 section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. *In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code".* It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."
>
> (emphasis supplied)

13. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in *Hoffman Andreas v. Inspector of Customs, Amritsar* (2000) 10 SCC 430. The following passage is in this regard apposite:

> "In such circumstances, if the new Counsel thought to have

the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

(emphasis supplied)

14. The extent and the scope of the power of the Court to recall witnesses was examined by this Court in *Mohanlal Shamji Soni v. Union of India & Anr.* 1991 Supp (1) 271, where this Court observed:

"The principle of law that emerges from the views expressed by this Court in the above decisions is that the *criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command and examination of any person which would depend on the facts and circumstances of each case."*

(emphasis supplied)

15. Discovery of the truth is the essential purpose of any trial or enquiry, observed a three-Judge Bench of this Court in *Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria through LRs.* 2012 (3) SCALE 550. A timely reminder of that solemn duty was given, in the following words:

"What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the

main purposes underlying the existence of the courts of justice."

16. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.

17. In the result, we allow these appeals, set aside the orders passed by the Trial Court as also the High Court and direct that the prosecution witnesses No.1 and 2 shall be recalled by the Trial Court and an opportunity to cross-examine the said witnesses afforded to the appellant. In fairness to the counsel for the appellant, we must record that he assured us that given an opportunity to examine the witnesses the needful shall be done on two dates of hearing, one each for each witness without causing any un-necessary delay or procrastination. The Trial Court shall endeavour to conclude the examination of the two witnesses expeditiously and without unnecessary delay. The parties shall appear before the Trial Court on 6th August, 2012.

B.B.B. Appeals allowed.

BRIJESH MAVI
v.
STATE OF NCT OF DELHI
(Criminal Appeal Nos. 824-825 of 2011)

JULY 3, 2012

[SWATANTER KUMAR AND RANJAN GOGOI, JJ.]

Penal Code, 1860/Arms Act, 1959 - ss. 302 and 460 r/w s. 34 / s. 25 - Prosecution under - Sole eye-witness - He named one accused who in turn disclosed involvement of appellant and one other accused - After arrest of appellant-accused, recovery of weapon at his instance - Proceedings abated against the named accused due to his death - Conviction of appellant and the other accused by trial court - High Court affirming the conviction of appellant-accused but acquitting the other accused - On appeal by appellant-accused, held: Conviction u/s. 25 Arms Act was justified as the recovery of the weapon at the instance of the appellant was proved - However, conviction u/s. 302 and 460 r/w. s. 34 IPC not correct - No direct evidence to connect the appellant with the offences under IPC - Appellant was not identified by the sole eye-witness - The case built up by prosecution on the basis of circumstantial evidence did not prove involvement of the appellant beyond all reasonable doubt - Other serious lapses on the part of the prosecution not explained - Since proceedings against the named accused had abated and one other accused was acquitted, culpability of the appellant should not have been determined with the aid of s. 34 IPC but on the basis of individual overt acts - There was no evidence as regards individual acts of the appellant-accused.

Appellant-accused was prosecuted u/ss. 302 and 460 r/w s. 34 IPC and u/s. 25 of the Arms Act. The

prosecution case was that in a firing incident one person died. The eye-witness to the incident (PW-1) named one accused. On the basis of the statement of PW1, FIR case No. 438/2001 was registered. The Investigating Officer (PW 24) arrested the named accused, who disclosed about involvement of appellant and one other accused. The other accused was arrested thereafter. He and the named accused were sent for trial.

During the pendency of the trial, appellant-accused was arrested in connection with some other case. On interrogation, the appellant-accused admitted his involvement in the present case. On the basis of his statement, a .380? caliber revolver was recovered from a house along with three live .380? cartridges. Apart from the FIR 438/2001 u/ss. 302 and 460 r/w s. 34 IPC, another FIR No. 456/2003 was registered against the appellant. The ballistic expert stated that .380? revolver was in working condition and the crime fired bullets had been fired through the said revolver.

During trial, the named accused died and hence the proceedings stood abated against him. The trial court convicted the appellant as well as the other accused u/ss. 302 and 460 r/w s. 34 IPC and in addition convicted the appellant-accused u/s. 25 of Arms Act. In appeal, High Court affirmed the conviction of the appellant-accused but acquitted other accused.

In appeal to this court, appellant-accused contended that he was not identified by the sole eye-witness; that the recovery of his revolver was not proved by independent witness; that the bullets extracted from the body of the deceased since not sent for examination to ballistic expert, it was not proved that the bullets were fired from the revolver recovered at the instance of the appellant; that the bullets proved to have been fired from the revolver, recovered at the instance of the appellant,

were not sent for serological examination to prove the presence of human blood so as to establish that the bullets had entered and exited the body of the deceased and thus the conviction was not justified.

Partly allowing the appeal, the Court

HELD: 1. While the conviction of accused-appellant u/s. 25 of th e Arms Act and the sentence imposed is justified, the accused-appellant is entitled to the benefit of doubt with regard to the offences under Section 302 and Section 460 read with Section 34 IPC. [Para 21] [822-B-C]

2. The accused-appellant, after being arrested in connection with another case admitted his involvement in the present case. On the basis of statement made by him before SI (PW1); ASI (PW 2) and Constable (PW 3) a .380" Calibre revolver was recovered. The evidence of PWs 1, 2 and 3 examined in connection with FIR Case No. 456/03 as well as the evidence of PW19 in the FIR Case No. 438/01 (who was PW3 in FIR case No. 456/03) indicates without doubt or ambiguity the detailed facts in which the recovery was effected. The cross-examination of the three witnesses has not revealed any fact which would go in favour of the accused. The defence witnesses, DW 1 and DW 2 have not succeeded in demolishing the prosecution version inasmuch as DW 1 - admittedly was being interrogated in the police station on the date when the recovery was made. On the other hand, DW 2 - has failed to prove that he was a tenant under DW 1, in respect of the Apartment in question from where recovery was made, at the relevant time. In such circumstances, the court will have to proceed on the basis that the recovery, as claimed by the prosecution, has been proved by the evidence on record. The above finding would render the conviction of the accused-appellant under Section 25 of the Arms Act wholly

justified. [Paras 17 and 18] [818-G-H; 819-A-E]

3. The facts of the case demonstrate that there is no direct evidence to connect the accused-appellant with the firing incident involving the deceased. The only eye-witness examined by the prosecution, namely, PW-1 has categorically deposed that the accused-appellant was not present at the place of the crime on the date of occurrence and, in fact, he had seen the accused-appellant for the first time in court. The second person accompanying the named accused to the place of occurrence along with the firearm therefore remained unidentified. The prosecution, in the absence of any direct evidence, has sought to build up its case on the basis of circumstantial evidence. The prosecution must not only prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime. [Paras 14 and 15] [817-G-H; 818-A-D]

Sharad Birdhichand Sarda vs. State of Maharashtra **(1984) 4 SCC 116: 1985 (1) SCR 88;** *Tanviben Pankajkumar Divetia vs. State of Gujarat* **(1997) 7 SCC 156: 1997 (1) Suppl. SCR 96;** *Vikram Singhvs. State of Punjab* **(2010) 3 SCC 56: 2010 (2) SCR 22;** *Aftab Ahmad Anasari vs. State of Uttaranchal* **(2010) 2 SCC 583: 2010 (1) SCR 1027;** *Sanatan Naskar and anr. vs. State of West Bengal* **(2010) 8 SCC 249;** *Mohd. Arif alias Ashfaq vs. State (NCT of Delhi)* **(2011) 13 SCC 621: 2011 (10) SCR 56 - relied on.**

4. The recovery of the .380? cablibre firearm was effected after more than two years from the date of the occurrence. The prosecution has not proved that during the intervening period, the weapon had not changed hands and the same was consistently possessed by the

accused-appellant. The report regarding the live and fired cartridges alongwith the bullets recovered from the place of occurrence and also the bullets recovered from the dead body in the course of post mortem, has been exhibited as Ex.PW-21/A. The said report is of the date before the recovery of the .380? calibre revolver. After the recovery of the said weapon was made, the weapon itself along with the cartridges (live and empty) as well as the four bullets recovered from the place of occurrence was sent to the CFSL Chandigarh and is covered by the report of PW 20 (Ex.PW-20/B). However, the bullets recovered from the dead body at the time of post mortem were not sent to the CFSL, Chandigarh. This is evident from the evidence of PW 25. No explanation for such a serious lapse on the part of the prosecution is forthcoming. That apart, in Ex.PW-20/B it is recorded that three out of the four bullets (recovered from the place of occurrence) were fired from the recovered weapon. The said bullets were not sent for serological examination to establish that the three bullets fired from the recovered weapon had entered and exited from the body of the deceased. In such a situation a lingering doubt remains as to whether the prosecution in the present case has succeeded in proving the charge against the accused-appellant beyond all reasonable doubt. Furthermore, from Ex.PW-20/B it is evident that one bullet (marked as B.2 by the Expert) was not fired from the .380? calibre firearm recovered at the instance of the appellant. The first report of the FSL, EX.PW21/A also indicates that one bullet of .380? calibre did not have any striations of riffling marks. The prosecution has remained silent on the aforesaid aspect of the matter, though, from the two reports, the possibility of use of another fire arm of .380? calibres cannot be ruled out. [Para 18] [819-F-H; 820-A-F]

Abdulwahab Abdulmajid Baloch vs. State of Gujarat **(2009) 11 SCC625: 2009 (4) SCR 956 - relied on.**

Musheer Khan Alias Badshah Khan and Anr. vs. State of MadhyaPradesh **(2010) 2 SCC 748: 2010 (2) SCR119 - referred to.**

5. It would not be wholly safe to hold that the only conclusion that can follow from the proved circumstances of the case, is that the appellant-accused is responsible for the death of the deceased. The High Court has convicted the accused-appellant u/s. 302 as well as Section 460 IPC with the aid of Section 34. In a situation where one co-accused had died during the trial and the other co-accused had been acquitted by the High Court, the culpability of the present accused-appellant with the aid of Section 34 will be open to serious doubt. Such culpability will have to be determined on the basis of individual overt acts on the part of the accused appellant for which there is no cogent and reliable material on record. [Para 20] [821-F-H; 822-A]

Case Law Reference:

2010 (2) SCR 119	**Referred to**	**Para 12**
1985 (1) SCR 88	**Relied on**	**Para 15**
1997 (1) Suppl. SCR 96	**Relied on**	**Para 15**
2010 (2) SCR 22	**Relied on**	**Para 15**
2010 (1) SCR 1027	**Relied on**	**Para 15**
(2010) 8 SCC 249	**Relied on**	**Para 15**
2011 (10) SCR 56	**Relied on**	**Para 15**
2009 (4) SCR 956	**Relied on**	**Para 19**

CRIMINAL APPELATE JURISDICTION : Criminal Appeal Nos. 824-825 of 2011.

From the Judgment & Order dated 10.08.2009 of the High Court of Delhi at New Delhi in Crl. Appeal Nos. 662 and 646 of 2008.

A. Sharan, S. Chandra Shekhar, Neeraj Walia, Sanchit Guru, Manoj Kumar, Suraj Rathi for the Appellant.

J.S. Attri, N.K. Srivastava, Priyanka Bharihoke, K.K. Tyagi, Anil Katiyar, B.V. Balram Das for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. These appeals are directed against the common judgment and order dated 10.08.2009 passed by the High Court of Delhi whereby the conviction of the appellant under Sections 302 and 460 read with Section 34 of the IPC as well as under Section 25 of the Arms Act has been affirmed. The appellant has been sentenced to undergo rigorous imprisonment for life for the offence under Section 302 read with Section 34 IPC whereas for the offence under Section 460 read with Section 34 IPC sentence of seven years rigorous imprisonment has been imposed. Insofar as the offence under the Arms Act is concerned, the accused-appellant has been sentenced to undergo rigorous imprisonment for one year. All the sentences have been directed to run concurrently.

2. The short case of the prosecution is that on 06.06.2001, H.C. Brij Pal (PW 11), who was posted in the PCR, received an information at about 10.35 PM that firing is taking place at Savitri Nagar near a sweet shop. Accordingly, PW 11 alongwith other police personnel reached the said place and saw that a crowd had gathered near a STD booth where blood was splattered and some articles were lying scattered in broken condition. The STD booth belonged to one Omiyo Das Of Malik Communications, who having been injured in the firing had already been removed to the hospital.

The said information was passed on to the local police station which was duly recorded in the Daily Diary of the Police Station and marked to SI - Sudhir Sharma, PW 24, who along with Constable- Bajrang Bahadur reached the place of occurrence. On reaching the said place the police party could

come to know that the injured Omiyo Das had already been declared brought dead to the hospital.

Further more, according to the prosecution, one Vicky Malik (PW 1) was an eye witness to the occurrence. Accordingly, his statement (Ex.PW-1/A) was recorded where he had stated that on 06.06.2001 at about 10.20 P.M. when he was sitting outside his STD booth and sweet shop at J-196, Savitri Nagar, he had noticed a white Maruti Car stopping on the other side of the road. In the statement recorded by the police, PW 1 has stated that two men alighted from the vehicle and entered the STD booth whereafter they started firing at his maternal uncle, Omiyo Das. According to PW 1 he tried to intervene and in fact had brought a palta from his nearby sweet shop but his uncle told him to run away from the place and save his life. PW 1 had further stated that blood was oozing out from the injuries suffered by his uncle and he ran towards his house No.86B shouting for help. According to PW 1, thereafter, the assailants fled away and he had along with his younger brother -Raj Kumar Malik -PW 3 and another maternal uncle - Ravi Kumar Dass - PW 4 had removed the injured to the hospital. In his statement, PW 1 had categorically stated that one Satish Kumar who had killed his father and who had been acquitted about a month ago in the case arising from the said incident was one of the assailants whereas the other/second assailant was about 25-26 years of age and was a well built person. On the basis of the aforesaid statement made by PW 1 - Vicky Malik, the FIR -Ex.PW-6/A was lodged and FIR Case No. 438/2006, Police Station Malviya Nagar (hereinafter referred to as the present case) was registered. Three live cartridges cage of 0.380 bore; one empty cartridge of 0.380 bore and four lead pieces of fired bullets were seized from the place of occurrence by PW 24 - Sudhir Sharma. The blood stained baniyan of PW 3; blood stained earth etc. were also seized from the place of occurrence by the Investigating Team.

3. The further case of the prosecution is that on the next

day, i.e. on 07.06.2001, PW 9 -Dr. T.Milo had conducted the post mortem on the body of the deceased in the course of which nine ante-mortem bullet injuries were noted and four bullets had been extracted from the body which along with one cotton underwear; one cotton baniyan, one long pant was handed over to the Investigating Officer, PW 24- SI- Sudhir Sharma. The cause of death was stated to be coma due to head injuries caused by a firearm.

4. According to the prosecution on 16.11.2001, the IO- PW 24- SI -Sudhir Sharma arrested accused Satish Kumar who was already arrested by the Faridabad police in connection with FIR No.339/2004 of Police Station GRP, Faridabad under Section 25 of the Arms Act. The prosecution has alleged that Satish Kumar made a disclosure statement (Ex.PW-24/D) in the instant case and had also disclosed about the involvement of two other persons in the offence, i.e. one Med Singh and the present appellant - Brijesh. On the basis of the said disclosure statement made by accused Satish, a .30" pistol along with 3(three) .30" calibre live cartridges was recovered. Thereafter, on 09.01.2002, PW 25 - SI - Sanjeev Sharma arrested Med Singh who was already arrested on 05.01.2002 in a separate case under the Arms Act. Three sealed parcels containing the .30" calibre pistol with three 7.62mm/.30" live cartridges recovered at the instance of accused Satish, the three .380" live cartridges; one .380" cartridge cage, two bullets and two defused bullets recovered from the place of occurrence and the four bullets recovered from the dead body in the course of post-mortem examination were all sent to the Forensic Science Laboratory, Rohini, Delhi on 03.12.2001. Thereafter, the report of one Shri KC Varshney, Senior Scientific Officer, FSL, Rohini, Delhi (Ex.PW-21/A) was received which was to the effect that the bullets marked as EB-1, EB-3 to EB-8 (seven in number) had been discharged through a standard .380" calibre firearm. On these facts, the two apprehended accused Satish and Med Singh were sent for trial. As the two accused persons denied

the charges levelled against them the trial proceeded. The third accused was neither identified nor traced out at that stage.

5. While the trial of the case was in progress the present appellant, Brijesh, was arrested on 11.8.2003 in connection with another case, i.e., FIR No.575/2003 Police Station, Malviya Nagar. According to the prosecution, on interrogation, the accused appellant disclosed/admitted his involvement in the present case and made a statement on the basis of which a .380" calibre revolver was recovered from the second floor of an Apartment bearing No.F-4/64, Sector 16, Rohini, Delhi alongwith 3 live .380" calibre cartridges. In respect of the said incident a separate FIR No.456 of 2003 under Section 25 of the Arms Act of Prashant Vihar Police Station was registered. It may be noticed, at this stage, that the aforesaid recovery of the weapon was in the presence of SI- Satish Kumar, ASI - Ravinder and Head Constable - Rajiv Mohan who had been examined as PWs. 1, 2 and 3 in the case arising out of FIR No. 456/2003. It may also be noticed that Head Constable - Rajiv who was examined as PW 3 in connection with FIR No.456/2003 was again examined in the present case as PW 19. Both the cases, i.e. the present as well FIR No. 456/2003 were clubbed together by order of the learned Additional District and Sessions Judge dated 10.03.2005 and charges under Sections 302 and 460 of the IPC read with Section 34 were framed against the accused-appellant in the present case. A separate charge under Section 25 of the Arms Act was also framed against the appellant in FIR Case No. 456/2003.

PW 1 - Vicky Malik who was already examined was recalled for further examination after charges were framed against the present appellant. While the trial of the two cases was in progress, accused Satish died and the proceedings stood abated against him. As many as 25 witnesses were examined by the prosecution in the present case and a large number of documents were also exhibited. Two witnesses were examined by the defence. DW-1 -Vijay Gupta claimed to be

owner of the Apartment No.F-4/64, Sector 16, Rohini. This witness has stated that while he had occupied the ground floor of the apartment the first floor was vacant for repairs. The second floor was under the occupation of a tenant, one Rajiv Chauhan. According to DW-1, no recovery was made as claimed by the police on 12.08.2003. DW-2- Rajiv Chauhan, the tenant, had fully corroborated the above version of DW 1. Both the accused persons - Med Singh and appellant Brijesh were examined under Section 313 Cr.P.C. At the conclusion of the trial both Med Singh and the present appellant Brijesh were convicted for the offences for which they were charged. Separate appeals were filed by both the accused before the High Court. By the impugned judgment dated 10.08.2009 while the accused Med Singh was acquitted, the present appellant has been convicted of the charges framed in both the cases and sentenced as aforesaid giving rise to the present appeal.

6. Before proceeding to notice and examine the arguments advanced on behalf of the appellant, the bare facts proved and established by the evidence on record which would be required to be considered may be set out hereinbelow.

7. In the initial deposition tendered in court by PW 1 - Vicky Malik, the witness had categorically stated that the second assailant who was accompanying accused Satish was not known to him. After the arrest of the present accused-appellant on 11.08.2003 PW 1 was recalled and examined once again on 21.10.2005. On this occasion PW 1 had clearly denied that in his statement to the police that he had named the accused-appellant-Brijesh or that he had identified the present accused-appellant before the police. In fact, in his further examination PW 1 had categorically stated that "the accused-appellant Brijesh Mavi present in court was not there on the date of incident" and further that "accused present in the court Brijesh Mavi is not the person who had killed my uncle. I have seen Brijesh Mavi first time". PW 1 was not declared hostile.

8. PW 24 - Sudhir Kumar, the IO of the case, in his deposition, as already noted, had deposed about the recovery of three live cartridges, one empty cartridge and 4 bullets (all of 0.380 calibre) from the place of occurrence. He has also deposed about the receipt of four bullets which were extracted from the body of the deceased at the time of post-mortem. According to PW 24 the cartridges and bullets recovered from the spot were sealed with the initial SK whereas the bullets recovered from the dead body were sealed with the seal of Forensic Medicine AIIMS Hospital. PW 24 has also deposed with regard to the arrest of accused Satish; the disclosure statement made by him and the recovery of one pistol of .30" calibre alongwith three live cartridges. In his cross-examination, he has stated that in the course of interrogation it was revealed that the .380 calibre revolver was with the accused Satish and the .30" calibre pistol was with accused Brijesh.

9. From the evidence of PW 21 - Shri KC Varshney, Sr. Scientific Officer and his report Ex.PW-21/A it is evident that along with the .30" calibre pistol and the three .30" calibre live cartridges, the .380 cartridges(3 in No.), one .380 cartidge cage and the four bullets recovered from the spot along with the four bullets recovered from the body of the deceased were sent for the examination and the report thereof is that 7 bullets marked as EB-1, EB-3 to EB-8 had been fired from a .380 calibre fire arm.

10. From the evidence of PW 25, SI-Sanjiv Sharma, it also appears that after the recovery of the .380 calibre revolver from Apartment No. F-4/64, Sector 16, Rohini, Delhi, the said revolver and the empty and live .380 calibre cartridges and the four bullets recovered from the place of occurrence were sent to the CFSL, Chandigarh for examination and "matching" report, namely, whether the cartridges and bullets bore any relation to the fire arm recovered . The report of examination (Ex. PW -20/B) submitted by Dr. P. Siddambary Junior Scientific Officer (Ballastics), CFSL, Chandigarh (PW 20) is to

the effect that the .380 revolver (bearing No. 25502) was in working condition and the crime fired bullets marked B/1, B/3 and B/4 had been fired through the said .38" revolver bearing No.25502 and further that the said bullets could not have been fired through any other firearm. Insofar as the live cartridges are concerned, the report of PW 20 is silent where as in regard to the cartridge cage marked as EC.1 by the Ballistic Expert the opinion was inconclusive. From the above, it will be clear that the four bullets sent to the CFSL, Chanidgarh and examined by PW 20 were the bullets recovered from the place of occurrence. The bullets recovered from the dead body though sent to the FSL, Rohini and were examined by PW 21 were however not sent by the prosecution to the CFSL, Chandigarh and are not a part of the report submitted by PW 20 in his report (Ex. PW-20/B)

11. Another significant fact that has to be noticed is that in the report of CFSL, Chandigarh Ex. PW- 20/B it is not mentioned that one of the bullets recovered from the place of occurrence and marked as B.2 by the Ballistic Expert had been fired from the revolver bearing No.25502 though according to both the reports, i.e. Ex.PW-21/A and Ex.PW-20/B the said bullet is also a .380 calibre bullet.

12. Shri A. Sharan, learned senior counsel for the appellant, has argued that from the evidence of the sole eye witness, PW 1 Vicky Malik, it is clear and evident that he had not identified the accused-appellant Brijesh to be the person accompanying the accused Satish to the STD booth where the firing took place. In fact, according to the learned counsel, PW 1 has categorically stated in Court that the accused-appellant Brijesh was not present at the place of occurrence and that he had seen the accused appellant for the first time in court. Learned counsel therefore has contended that there is no direct evidence to link the accused-appellant with the offence for which he has been charged. In the absence of identification of the accused-appellant, the conviction, it is contended, is wholly without any basis. Shri Sharan has further contended that the

recovery of the revolver from Apartment No.F-4/64, Sector 16, Rohini, Delhi, as claimed by the prosecution, has not been proved in any manner inasmuch as no independent witness has been examined to prove the same. Furthermore, DW 1 and DW 2 had clearly deposed that no police party has come to the apartment on 12.08.2003 and no recovery had taken place on the said date. Shri Sharan has also contended that the scrutiny of the evidence tendered by the defence witnesses would go to show that there is no basis for not accepting the same.

Continuing, Shri Sharan has argued that the bullets extracted from the body of the deceased, admittedly, had not been sent for examination to the ballastic expert to prove that the same were fired from revolver No. 25502 allegedly recovered from Apartment No.F-4/64, Sector 16, Rohini, Delhi. Therefore, according to learned counsel, even if the recovery of the revolver is to be assumed there is no proof that the same was fired to cause the injuries resulting in the death of the deceased. In sofar as the three bullets proved by Ex.PW -20/B to have been fired from the recovered weapon is concerned, Shri Sharan has argued that the same had not been sent for serological examination to prove the presence of human blood so as to establish that the said bullets had entered and exited the body of the deceased. It is also argued that the report of the CFSL Chandigarh (Ex.PW-20/B) read with the report of the FSL, Rohini (Ex.PW-21/A) would go to show that the bullet marked as Ex.B2 in the report of CFSL, Chandigarh (Ex.PW-20/B) was not fired from the recovered weapon. Yet, according to the prosecution, the same was a .380 calibre bullet recovered from the place of occurrence which facts open up the possibility of the use of another .380 revolver in the incident. No Evidence to the aforesaid effect is forthcoming. In these circumstances Shri Sharan has argued that the conviction of the accused -appellant cannot be approved. In support, reliance has been placed on the judgment of this court in *Abdulwahab Abdulmajid Baloch vs. State of Gujarat*[1]. Placing the said

1. (2009) 11 SCC 625.

judgment before the court Shri Sharan has contended that in the present case even if it is assumed that recovery of the offending weapon has been proved by the prosecution the said fact is only one adverse circumstance against the appellant. The same by itself, would not give rise to a complete chain of events and circumstances from which the only inference that can be drawn is one of culpability of the accused. Shri Sharan has also sought to draw the attention of the court to a recent judgment in *Musheer Khan Alias Badshah Khan and anr. Versus State of Madhya Pradesh*[2] to contend that the recovery of the alleged weapon, even if assumed, cannot reasonably lead to a conclusion which would justify the conviction of the accused-appellant.

13. In reply Shri J.S. Attri, learned senior counsel for the State has contended that the failure of PW 1 to identify the accused-appellant as being present at the place of occurrence would not be fatal to the prosecution case, inasmuch as in the present case the prosecution has succeeded in proving, beyond all reasonable doubt, that the weapon recovered at the instance of the accused-appellant from Apartment No. F-4/64, Sector 16, Rohini, Delhi was used to fire upon the deceased. It is contended that the three bullets recovered from the spot have been fired from the said weapon (Ex. PW 20/B). The said circumstance, according to the learned State counsel, clinches the issue beyond all reasonable doubt. It is argued that a firm conclusion with regard to the culpability of the accused can be reasonably drawn from the aforesaid circumstance proved in the present case.

14. The brief conspectus of facts set out above demonstrates that there is no direct evidence to connect the accused-appellant with the firing incident involving the deceased. The only eye-witness examined by the prosecution, namely, PW 1 has categorically deposed that the accused-appellant Brijesh was not present at the place of the crime on

2. (2010) 2 SCC 748.

the date of occurrence and, in fact, he had seen the accused-appellant for the first time in court. The second person accompanying the deceased accused Satish to the STD booth along with the firearm therefore remained unidentified. The prosecution, in the absence of any direct evidence, has sought to build up its case on the basis of circumstantial evidence.

15. The principles of law governing proof of a criminal charge by circumstantial evidence need hardly any reiteration. From the several decisions of this court available on the issue the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime. The above principle is deducible from the five propositions laid down by this Court in *Sharad Birdhichand Sarda vs. State of Maharashtra*[3] which principles have been consistenly followed in *Tanviben Pankajkumar Divetia vs. State of Gujarat*[4], *Vikram Singh vs. State of Punjab*[5], *Aftab Ahmad Anasari vs. State of Uttaranchal*[6], *Sanatan Naskar and anr. vs. State of West Bengal*[7] and *Mohd. Arif alias ASshfaq vs. State (NCT of Delhi)*[8].

16. The next question that has to engage the attention of the court is what are the circumstances that the prosecution has succeeded in proving in the present case and if so proved what is the conclusion that can be reached on the proved circumstances in the light of the principles of law indicated above.

3. (1984) 4 SCC 116 (para 153).
4. (1997) 7 SCC 156.
5. (2010) 3 SCC 56.
6. (2010) 2 SCC 583.
7. (2010) 8 SCC 249.
8. (2011) 13 SCC 621.

17. The prosecution has asserted that on 11.08.2003 the accused-appellant, after being arrested in connection with another case admitted his involvement in the present case. On the basis of statement made by him before SI - Satish Kumar (PW 1); ASI - Ravinder (PW 2) and Constable - Rajiv (PW 3) a .380 Calibre revolver was recovered from the second floor of Apartment No. F-4/64, Rohini,Delhi. The evidence of PWs 1, 2 and 3 examined in connection with FIR Case No. 456/03 as well as the evidence of Head Constable Rajiv (PW 3) in FIR Case No.456 who was examined as PW 19 in the present case indicates without doubt or ambiguity the detailed facts in which the recovery was effected. The cross-examination of three witnesses has not revealed any fact which would go in favour of the accused. The defence witnesses, DW 1 and DW 2, examined, in our considered view, have not succeeded in demolishing the prosecution version inasmuch as DW 1 - Vijay Gupta admittedly was being interrogated in the police station on the date when the recovery was made. On the other hand, DW 2 -Rajiv Chauhan has failed to prove that he was a tenant under DW 1, in respect of the second floor of the Apartment in question at the relevant time. In such circumstances the court will have to proceed on the basis that the recovery, as claimed by the prosecution, has been proved by the evidence on record.

18. Our above finding would render the conviction of the accused-appellant under Section 25 of the Arms Act wholly justified. However, insofar as the charges under Section 302 and Section 460 read with Section 34 of the IPC is concerned, there are certain other connected facts and circumstances proved by the evidence on record which will have to be weighed by us in order to determine the consequence(s) that can be attributed to the accused from the recovery of the weapon in question. The recovery was affected after more than two years. The incident had occurred on 06.06.2001 and the recovery was made on 12.08.2003. The prosecution has not proved that during the intervening period the weapon had not changed hands and the same was consistently possessed by the

accused appellant Brijesh. The live and fired cartridges alongwith the bullets recovered from the place of occurrence and also the bullets recovered from the dead body in the course of post mortem were sent to the FSL Rohini. The report has been exhibited as Ex.PW-21/A. The said report is dated 28.02.2002, i.e. before the recovery of the .380 calibre revolver. After the recovery of the weapon said was made, the weapon itself along with the cartridges (live and empty) as well as the four bullets recovered from the place of occurrence was sent to the CFSL Chandigarh and is covered by the report of PW 20 dated 28.11.2003 (Ex.PW-20/B). However, surprisingly, the bullets recovered from the dead body at the time of post mortem were not sent to the CFSL, Chandigarh. This is evident from the evidence of PW 25 - SI- Sanjiv Sharma. No explanation for what appears to us to be a serious lapse on the part of the prosecution is forthcoming. That apart, in Ex.PW-20/B it is recorded that three out of the four bullets (recovered from the place of occurrence) were fired from the recovered weapon. The said bullets were not sent for serological examination to establish that the three bullets fired from the recovered weapon had entered and exited from the body of the deceased. In such a situation a lingering doubt remains as to whether the prosecution in the present case has succeeded in proving the charge against the accused-appellant beyond all reasonable doubt. Furthermore, from Ex.PW-20/B it is evident that one bullet (marked as B.2 by the Expert) was not fired from the .380 calibre firearm recovered at the instance of the appellant. The first report of the FSL, Rohini, Delhi - EX.PW21/A also indicates that one bullet of .380 calibre did not have any striations of riffling marks. The prosecution has remained silent on the aforesaid aspect of the matter, though, from the two reports, the possibility of use of another fire arm of .380 calibres cannot be ruled out.

19. In the above context the decision of this court in *Abdulwahab Abdulmajid Baloch vs. State of Gujarat* (supra) would be a particular significance. Though the observations

contained in Paragraphs 37 and 38 of the judgment have to be understood to have been rendered in the context of the facts of the case we find that the said observations would squarely apply to the present case. Consequently the aforesaid two paragraphs may be usefully extracted hereinbelow :

> "37. Be that as it may, we feel that only because the recovery of a weapon was made and the expert opined that the bullet found in the body of the deceased was fired from one of the weapons seized, by itself cannot be the sole premise on which a judgment of conviction under Section 302 could be recorded. There was no direct evidence. The accused, as noticed hereinbefore, was charged not only under Section 302 read with Section 34 of the Penal Code but also under Section 302 read with Section 120-B thereof. The murder of the deceased was said to have been committed by all the accused persons upon hatching a conspiracy. This charge has not been proved.
>
> 38. The learned trial Judge himself opined that the recovery having been made after nine months, the weapon might have changed in many hands. In absence of any other evidence, connecting the accused with commission of crime of murder of the deceased, in our opinion, it is not possible to hold that the appellant on the basis of such slander evidence could have been found guilty for commission of offence punishable under Section 302 of the Penal Code."

20. Though the above discussions would lead us to the conclusion that the prosecution, in the present case, has succeeded in proving a highly incriminating circumstance against the accused -appellant, yet, we do not consider that it would be wholly safe to hold that the only conclusion that can follow from the aforesaid proved circumstance is that the accused Brijesh is responsible for the death of the deceased

that had occurred on 06.06.2001. We have also noticed that the High Court has convicted the accused-appellant under Section 302 as well as Section 460 IPC with the aid of Section 34. In a situation where co-accused Satish had died during the trial and the other co-accused Med Singh had been acquitted by the High Court, the culpability of the present accused-appellant with the aid of Section 34 will be open to serious doubt. Such culpability will have to be determined on the basis of individual overt acts on the part of the accused appellant for which we do not find any cogent and reliable material on record.

21. Consequently, we hold that while the conviction of accused-appellant under Section 25 of the Arms Act and the sentence imposed is justified, the accused-appellant is entitled to the benefit of our doubts with regard to the offences under Section 302 and Section 460 read with Section 34 of the IPC. We, therefore, set aside the judgment of the High Court insofar as the offence under Section 302 and Section 460 read with Section 34 of the IPC is concerned. The conviction of the accused-appellant under Section 25 of the Arms Act and the sentence imposed is upheld. If the appellant is presently in custody and he has undergone the sentence imposed under Section 25 of the Arms Act he be released forthwith unless wanted in any other case.

The appeals are disposed of in the aforesaid terms.

K.K.T. Appeals partly allowed.

UNION OF INDIA
v.
MOHANLAL & ANR.
(Criminal Appeal No. 652 of 2012)

JULY 3, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 - ss. 8/18(b) r/w s. 29 and 52A - Charge u/ss. 8/18(b) r/w s. 29 - Impugned order acquitting the accused on the ground that failure to produce the contraband before court, in absence of proof that the same was destroyed as per prevalent procedure, implies failure to prove its seizure - In appeal, brought to the notice of the Supreme Court that States not following the procedure prescribed for destruction of the seized contraband resulting in accumulation of the seized contrabands increasing chances of its pilferage and re-circulation - Held: Destruction of seized contraband is not only the statutory duty but a constitutional mandate - India being the signatory to United Nations Convention against Illicit Traffic and Narcotic Drugs and Psychotropic Substances, is required to reduce the vulnerability of the contrabands to substitution or theft during its storage - In view of SAARC Convention for Narcotic Drugs and Psychotropic Substances, 1990, authorities concerned required to take follow up action to eliminate drug abuse - Directions issued for collection of information, as regards Seizure, Storage, Disposal/Destruction and Judiclal Supervision, from the police heads of each State through the Secretary concerned relating to the nature and extent of the problem and the available measures - Queries enumerated - Direction to Chief Secretaries of the States to serve a questionnaire on the above lines to the Director General of Police of the State for a report - Registrar General of the High Court in each State to be Nodal Officer and to ensure

collections of the reports from the Chief Secretary of the State concerned and submit the report to the Supreme Court, containing a summary of the information - Answer to the queries specified under the head 'Judicial Supervision' to be collected by the Registrar Generals of the High Court independently from the District and Sessions Judges concerned - Direction also to Chief of the agencies viz. Narcotics Control Bureau, Central Bureau of Narcotics, Directorate General of Revenue Intelligence and Commissionerates of Customs and Central Excise including Indian Coast Guard, to issue similar questionnaire to the officers concerned and submit a report before Supreme Court - Standing Order No. 1/89 and Circular dated 22nd February, 2011 issued by Ministry of Finance, Department of Revenue, Government of India - Constitution of India, 1950 - Article 47 - Code of Criminal Procedure, 1973 - s. 451 - United Nations Convention Against Illicit Traffic and Narcotic Drugs and Psychotropic Substances - SAARC Convention for Narcotic Drugs and Psychotropic Substances, 1990.

*Sunderbhai Ambalal Desai v. State of Gujara*t **(2002) 10 SCC 283: 2002 (3) Suppl. SCR 39 - referred to.**

Case Law Reference:

2002 (3) Suppl. SCR 39	**Referred to**	**Para 5**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 652 of 2012.

From the Judgment & Order dated 05.01.2010 of the High Court of Madhya Pradesh bench at Indore in Criminal Appeal No. 193 of 2008.

Ajit Kumar Sinha, R.P. Bhat, Sushma Manchanda, Shreekant N. Terdal for the Appellant.

Sunil Verma, Pradeep Kumar Kaushik, Sanjay Sharawat for the Respondents.

The order of the Court was delivered by

T.S. THAKUR, J. 1. This appeal has been filed by the Union of India against the judgment and order of the High Court of Madhya Pradesh at Indore in Criminal Appeal No.193 of 2008 whereby the High Court has acquitted the respondents of the charges framed against them under Section 8/18(b) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, primarily for the reason that no evidence regarding the destruction of the 3.36 Kgs. of opium allegedly seized from the respondents had been provided by the prosecution. In the absence of any evidence to show that the seized contraband was destroyed as per the prevalent procedure, the contraband should have been, according to the High Court, produced before the Trial Court. The failure of the prosecution to do so, therefore, implies a failure to prove the seizure of the contraband from the possession of the respondents.

2. When this appeal came up for hearing before us on 11th April, 2012, Mr. Anoop G. Chaudhary, learned senior counsel, appearing for the appellant, argued that the High Court was in error in holding that the procedure prescribed for destruction of the contraband had not been followed and the destruction of the seized quantity had not been proved. In support of his submission he placed reliance upon Standing Order No.1/89 and Circular dated 22nd February, 2011 issued by the Ministry of Finance, Department of Revenue, Government of India, impressing upon the Chief Secretaries of the States and the Union Territories as also Heads of Police of the States to comply with the instructions and the procedure prescribed by the Standing Order. We had, upon consideration of the submission made by Mr. Choudhary, passed an order on 11th April, 2012 in which we said:

> "We have been taken through the contents of the Standing Order also which prescribes the procedure for search, disposal and destruction of the seized contraband.

> We are not, however, very sure whether the said procedure is being followed as it ought to be. The pilferage of the contraband and its return to the market place for circulation is, in our opinion, a major hazard against which the system must guard at all cost if necessary by making suitable changes wherever the same are called for. Before any exercise to that end is undertaken it is necessary to examine whether the procedure is being followed in letter and spirit. For that purpose in view we request Mr. Ajit Kumar Sinha, learned senior counsel to assist this Court as Amicus Curiae and identify if possible, by reference to the standing order and the available material, the weak links in the chain of the procedure of search, disposal or destruction of the narcotics and the remedial steps, if any, needed to plug the holes. To that extent we are inclined to enlarge the scope of this appeal for we are of the view that the hazardous nature of the substance seized in large quantities all over the country must not be let loose on the society because of human failure or failure of the system that is purported to have been put in place."

3. Pursuant to the above we have heard Mr. Ajit Kumar Sinha, learned senior counsel, who argued that the procedure prescribed for destruction of the contraband seized in different States has not been followed resulting in a very peculiar situation arising on account of such failure and accumulation of the seized drugs and narcotics in large quantities thereby increasing manifold the chances of pilferage for re-circulation in the market from the stores where such drugs are kept. In support of that submission Mr. Sinha placed reliance upon a press report published in the timesofindia.indiatimes.com dated 12th July, 2011, under the heading "Bathinda's police stores bursting at seams with seized narcotics". From a reading of the said report it appears that the inventory of the drugs seized by the police over the past many decades include drug seized as far as back as in the early eighties. Large quantities of seized drugs are said to have lost their original colour and

texture, making even the task of preparing the inventories difficult.

4. It was further stated that, not only traditional drugs like, opium, poppy husk, charas etc. but other drugs and modern narcotic substances are also awaiting disposal which includes 39 lakh sedatives and narcotic tablets, 1.10 lakh capsules, over 21,000 drug syrups and 1828 sedative injections apart from 8 kgs. of smack and 84 kgs. of ganja.

5. The position is, according to Mr. Sinha, no better in some other States like Gujarat, Rajasthan and Bihar whose boundaries touch international borders. He submitted that in the absence of proper data from the concerned authorities it will not be possible to take stock of the magnitude of the problem no matter challenges posed by rampant drug abuse have attained formidable proportions affecting especially the youth and driving them towards crime and anti-social activities. Our attention was drawn by Mr. Sinha, to the judgment of this Court in *Sunderbhai Ambalal Desai v. State of Gujarat* (2002) 10 SCC 283 where this Court has emphasized the need for a proper and prompt exercise of the power to destroy the seized contrabands and recommended supervision by the registry of the High Court concerned to see that the rules in this regard are implemented properly. He also drew our attention to an order dated 3rd December, 2010 passed by the High Court of Judicature at Patna in which the High Court had recommended overhaul of the existing system so far as the procedure of seizure, sampling and sending of the seized articles to the FSL is concerned. The Court in that case noticed that 57% of the samples sent for testing were pending examination for four years causing delay in the trial of NDPS cases which was unfortunate to say the least. The Court also noticed steps to be taken in checking the despatch of reports from the FSL and recommended a revamp of the system. A similar order was passed by the Punjab and Haryana High Court in CWP No.1868 of 2011 where the High Court was informed by the

State of Punjab and Haryana that incinerators for the destruction of such contrabands and drugs shall be provided by March 2012.

6. Mr. Sinha supplemented his submissions by filing written submissions relying upon Article 47 of the Constitution of India and Section 52A of the NDPS Act, 1985 besides Section 451 of the Cr.P.C. to argue that destruction of seized narcotic drugs is not only a statutory duty but a constitutional mandate. He also relied upon United Nations Convention against Illicit Traffic and Narcotic Drugs and Psychotropic Substances and urged that India being a signatory to the Convention had no doubt promptly added Section 52A to the NDPS Act but much more was required to be done to reduce the vulnerability of such contrabands to substitution or theft while in storage in poorly secured and ramshackle storage facilities. Referring to SAARC Convention for Narcotic Drugs and Psychotropic Substances, 1990, it was urged by Mr. Sinha that while most of the countries were committed to elimination of drug abuse from their society, the ground reality is that there was no will to take follow up action by the concerned authorities. He, therefore, prayed for issue of appropriate directions to the States to furnish information relating to the nature and the extent of the problem faced by them so that this Court could, upon consideration of the matter, direct systemic changes having regard to the procedure followed and the experience of other countries in the world faced with similar problems.

7. We find considerable merit in the submissions made by Mr. Sinha. The problem is both wide-spread and formidable. There is hardly any State in the country today which is not affected by the production, transportation, marketing and abuse of drugs in large quantities. There is in that scenario no gainsaying that the complacency of the Government or the officers dealing with the problem and its magnitude is wholly misplaced. While fight against production, sale and transportation of the NDPS is an ongoing process, it is equally

important to ensure that the quantities that are seized by the police and other agencies do not go back in circulation on account of neglect or apathy on the part of those handling the process of seizure, storage and destruction of such contrabands. There cannot be anything worse than the society suffering on account of the greed or negligence of those who are entrusted with the duty of protecting it against the menace that is capable of eating into its vitals. Studies show that a large section of the youth are already victims of drug abuse and are suffering its pernicious effects. Immediate steps are, therefore, necessary to prevent the situation from going out of hand. We, therefore, consider it necessary to direct collection of the information from the police heads of each one of the States through the Chief Secretary concerned on the following aspects:

Seizure

1. What narcotic drugs and psychotropic substances (natural and synthetic) have been seized in the last 10 years and in what quantity? Provide year-wise and district-wise details of the seizure made by the relevant authority.

2. What are the steps, if any, taken by the seizing authorities to prevent damage, loss and pilferage of the narcotic drugs and psychotropic substances (natural and synthetic) during seizure/transit?

3. What are the circulars /notifications /directions / guidelines, if any, issued to competent officers to follow any specific procedure in regard to seizure of contrabands, their storage and destruction? Copies of the same be attached to the report.

Storage

1. Is there any specified/notified store for storage of the seized contraband in a State, if so, is the storage space available in each district or taluka?

2. If a store/storage space is not available in each district or taluka, where is the contraband sent for storage purposes? Under what conditions is withdrawal of the contraband permissible and whether a Court order is obtained for such withdrawal?

3. What are the steps taken at the time of storage to determine the nature and quantity of the substance being stored and what are the measures taken to prevent substitution and pilferage from the stores?

4. Is there any check stock-register maintained at the site of storage and if so, by whom? Is there any periodical check of such register? If so, by whom? Is any record regarding such periodic inspection maintained and in what form?

5. What is the condition of the storage facilities at present? Is there any shortage of space or any other infrastructure lacking? What steps have been taken or are being taken to remove the deficiencies, if any?

6. Have any circulars/notifications/directions/guidelines been issued to competent officers for care and caution to be exercised during storage? If so, a copy of the same be produced.

Disposal/ Destruction

1. What narcotic drugs and psychotropic substances (natural and synthetic) have been destroyed in the last 10 years and in what quantity? Provide year-wise and district-wise details of the destruction made by the relevant authority. If no destruction has taken place, the reason therefor.

2. Who is authorised to apply for permission of the Court to destroy the seized contraband? Has there been any failure or dereliction in making such applications? Whether any person

having technical knowledge of narcotic drugs and psychotropic substances (natural and synthetic) is associated with the actual process of destruction of the contraband?

3. Was any action taken against the person who should have applied for permission to destroy the drugs or should have destroyed and did not do so?

4. What are the steps taken at the time of destruction to determine the nature and quantity of the substance being destroyed?

5. What are the steps taken by competent authorities to prevent damage, loss, pilferage and tampering/substitution of the narcotic drugs and psychotropic substances (natural and synthetic) during transit from point of storage to point of destruction?

6. Is there any specified facility for destruction of contraband in the State? If so, a list of such facilities along with location and details of maintenance, conditions and supervisory bodies be provided.

7. If a facility is not available, where is the contraband sent for destruction purposes? Under whose supervision and what is the entire procedure thereof?

8. Is any record, electronic or otherwise prepared at the site of destruction of the contraband and by whom? Is there any periodical check of such record? What are the ranks/ designation of the supervising officers charged with keeping a check on the same?

Judicial Supervision

1. Is any inspection done by the District and Sessions Judge of the store where the seized drugs are kept? If drugs are lying in the store, has the Sessions Judge taken steps to have them destroyed?

2. Is any report of the inspection conducted, submitted to the Administrative Judge of the High Court or the Registry of the High Court? If so, has any action on the subject being taken for timely inspection and destruction of the drugs?

3. Are there any pending applications for destruction of drugs in the district concerned, if so, what is the reason for the delay in the disposal of such application?

4. What level officers including the judicial officers are associated with the process of destruction?

5. At what stages are the magistrates/ judicial officers/ any other officer of the Court associated with seizure/storage/ destruction of drugs?

6. Are there any rules framed by the Court regarding its supervisory role in enforcement of the NDPS Act as regards seizure/storage/destruction of drugs?

7. What is the average time for completion of trial of NDPS matters?

8. The Chief Secretaries of the States shall ensure that a questionnaire on the above lines is served upon the Director General of Police of the State for a report and on receipt of the report forward the same to the Registrar General of the State High Court.

9. The Registrar General of the High Court in each State shall be the Nodal Officer and shall ensure collection of the reports from the Chief Secretary of the State concerned, scrutinise the same, get clarifications and further information wherever necessary and submit the report to this Court containing a summary of the information so collected, as early as possible but not later than three months from the date of a copy of this order being received by him.

10. The Registrar Generals shall independently secure

from the concerned District and Sessions Judges, in their respective States, answer to the queries specified under the head "Judicial Supervision" within the same period.

11. Chiefs of Central Government agencies viz. Narcotics Control Bureau, Central Bureau of Narcotics, Directorate General of Revenue Intelligence and Commissionerates of Customs & Central Excise including the Indian Coast Guard shall issue similar questionnaire to the concerned officers and submit a report detailing the information required in terms of this order within three months from today.

12. Post the matter after the reports in terms of the above are received from all concerned.

K.K.T. Matter pending.

NEW INDIA ASSURANCE CO. LTD.
v.
GOPALI & ORS.
(Civil Appeal No. 5179 of 2012)

JULY 05, 2012

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

MOTOR VEHICLES ACT, 1988:

s.166 - Motor accident - Death of victim - Claim for compensation - Computation of income of deceased - Consideration of increase in income - Held: High Court was justified in determining the amount of compensation by granting 100% increase in the income of the deceased - In the normal course, the deceased would have served for 22 years and during that period his salary would have certainly doubled because the employer was paying 20% of his salary as bonus per year - Insurer's challenge to the impugned order is meritless.

Motor accident - Death of victim - Compensation - Deduction towards personal expenses - Held: Single Judge of the High Court did not commit any error by not following the rule of 1/3rd deduction towards the personal expenses of the deceased - In the instant case, the deceased had 8 dependents including four sons and one daughter - Where the family of the deceased comprised of 5 persons or more having an income of Rs.3,000/- to Rs.5,000/-, it is virtually impossible for him to spend more than 1/10th of the total income upon himself.

Motor accident - Compensation - Multiplier - Deceased aged about 36 years - Held: Tribunal and High Court were not right in applying the multiplier of 10 - They should have

adopted the multiplier of 15 for the purpose of determining the amount of compensation - This is a fit case in which the Court should exercise power under Art. 142 of the Constitution and enhance the compensation determined by High Court, by applying appropriate multiplier - With a view to do complete justice to the claimants, the amount of compensation is redetermined by applying the multiplier of 15 and accordingly, the claimants are entitled to a total amount of Rs.10,63,040/-, as detailed in the judgment - The claimants shall also get interest on the enhanced compensation at the rate of 12% per annum from the date of filing the claim petition - Interest - Constitution of India, 1950 - Article 142.

COSTS:

Payment of compensation delayed - Compensation awarded by Tribunal enhanced by single Judge of High Court, confirmed by Division Bench of High Court - Held: Since the insurer had enjoyed the ex-parte interim order passed by Supreme Court for a period of five years, it is directed to pay cost of Rs.5 lakhs to the claimants.

ADMINISTRATION OF JUSTICE:

Appeal by insurer challenging the compensation awarded by Tribunal, enhanced by single Judge of High Court and confirmed by Division Bench of High Court - Ex-parte interim order - Court expressed its concern with regard to the ex-parte interim order continuing to operate for years together without the matter being listed for effective hearing - Interim order - Ex-parte interim order - Practice and procedure.

Santosh Devi v. National Insurance Company Ltd. and others **2012(3) SCR 1178 - relied on**

General Manager, Kerala State Road Transport Corporation v. Susamma Thomas **(1994) 2 SCC 176;** *Sarla Verma v. Delhi Transport Corporation* **2009 (5) SCR 1098 =**

(2009) 6 SCC 121; *U.P.SRTC v. Trilok Chandra* **(1996) 4 SCC 362 and** *Fakeerappa v. Karnataka Cement Pipe Factory* **2004 (2) SCR 369 = (2004) 2 SCC 473 - referred to.**

Case Law Reference:

(1994) 2 SCC 176	**referred to**	**para 7**
2009 (5) SCR 1098	**referred to**	**para 14**
(1996) 4 SCC 362	**referred to**	**para 15**
2004 (2) SCR 369	**referred to**	**para 15**
2012(3) SCR 1178	**relied on**	**para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5179 of 2012.

From the Judgment & Order dated 22.03.2007 of the High Court of Judicature at Rajasthan at Jaipur Bench, Jaipur in D.B. Special Appeal No. 49 of 2005.

Nikunj Dayal, Pramod Dayal for the Appellant.

The Order of the Court was delivered

O R D E R

1. Leave granted.

2. India is acclaimed for achieving a flourishing constitutional order, an inventive and activist judiciary, aided by a proficient bar and supported by the State. However, the Courts and Tribunals, which the citizens are expected to approach for redressal of their grievance and protection of their fundamental, constitutional and legal rights, are beset with the problems of delays and costs. In a country where 36 per cent of the population live below the poverty line, these deficiencies in the justice delivery system prevent a large segment of the population from availing legal remedies. The disadvantaged

and poor are deprived of access to justice because of the costs of litigation, both in terms of actual expenses and lost opportunities, and the laudable goal of securing justice - social, economic and political enshrined in the Preamble to the Constitution of India remains an illusion for them. The infrastructure of Courts and the processes which govern them are simply inaccessible to the poor. The State, which has been mandated by Article 39A of the Constitution to ensure that the operation of the legal system promotes justice by providing free legal aid and that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, has not been able to create an effective mechanism for making justice accessible to the poor, downtrodden and disadvantaged. In last two and a half decades the institution of the legal services authorities has rendered yeoman's service in the field of providing legal aid to the poor but a lot is required to be done for ensuring justice to economically deprived section of the society and those who suffer from other disabilities like illiteracy and ignorance.

3. We have prefaced the disposal of this petition, filed against order dated 22.3.2007 passed by the Division Bench of the Rajasthan High Court whereby the special appeal filed by the appellant against the judgment of the learned Single Judge was dismissed as not maintainable, by making the aforementioned observations because in last almost 20 years the claimants - the aged parents, wife and five children of Nanag Ram, who became a victim of road accident in 1992, must have exhausted all their resources in prosecuting and contesting the litigation till the stage of High Court and they must not have been left with money sufficient for engaging an advocate in this Court and also because in last almost five years, during which the special leave petition remained pending in this Court, they must have lost all hopes to get justice. The learned Single Judge of the High Court had allowed the appeal filed by the dependants of Nanag Ram under Section 173 of the Motor Vehicles Act, 1988 (for short, 'the Act') and enhanced the

compensation awarded by Motor Accident Claims Tribunal, Jaipur (for short, 'the Tribunal') by an amount of Rs.4,85,000/- and directed the appellant to pay the enhanced compensation with interest at the rate of 12 per cent per annum from the date of filing the claim petition till 31.12.2000 and at the rate of 9 per cent from 1.1.2001 till the payment thereof, but on account of ex-parte interim order passed by this Court on 23.7.2007, the claimants could get a paltry sum of Rs. 2 lakhs and they perhaps thought that it will not be worthwhile to spend money for contesting the special leave petition filed by the appellant. This is perhaps the thinking of many thousands of poor litigants, who succeed in the Courts below and the High Courts but cannot afford the cost and expenses of contesting litigation in the highest Court of the country and suffer silently in the name of the Almighty God by treating it as their destiny.

4. Nanag Ram died in a road accident which occurred on 9.3.1992 when his motorcycle was struck by a truck owned by respondent No.10-Ram Chandra Paliwal and driven by Raghu Nath, whose name was deleted from the array of parties vide order dated 2.4.2009. At the time of accident, Nanag Ram's age was about 36 years and he was employed as a Machine Operator in National Engineering Company Ltd., Jaipur for a salary of Rs.4,000/- per month.

5. The dependants of Nanag Ram filed a petition under Section 166 of the Act for award of compensation to the tune of Rs.24 lakhs by alleging that their bread winner had died due to rash and negligent driving of the truck by Shri Raghu Nath. While the owner of the truck and its driver did not file a reply to contest the claim petition, the appellant raised all possible objections. In the reply filed on behalf of the appellant it was prayed that the claimants be directed to prove whether the driver of the offending vehicle was in the employment of the owner and had a valid and effective driving licence. The appellant also sought a direction to the owner for production of the original insurance policy and, as is usually done in such

cases, it claimed that the accident was not caused due to rash and negligent driving of the truck. An alternative plea taken by the appellant was that if an award is passed, the contributory negligence of both the drivers be determined.

6. After considering the pleadings and evidence of the parties, the Tribunal held that the accident was caused due to rash and negligent driving of the truck. The Tribunal also accepted the claimants' assertion that the deceased was employed as a Machine Operator in National Engineering Company, Jaipur. The Tribunal then referred to the evidence produced by the claimants on the issue of monthly income of the deceased and held that it could be taken as Rs.3,000/- per month. After deducting 1/3rd towards personal expenses and applying the multiplier of 10, the Tribunal concluded that the claimants are entitled to total compensation of Rs.2,55,000/- with interest at the rate of 12 per cent per annum w.e.f. 5.9.1992.

7. The learned Single Judge of the High Court took cognizance of the fact that the employer was annually paying bonus to the deceased at the rate of 20 per cent of his salary, referred to the judgment of this Court in *General Manager, Kerala State Road Transport Corporation v. Susamma Thomas* (1994) 2 SCC 176 and held that the claimants are entitled to total compensation of Rs.6,45,300/-. The learned Single Judge made additions of small amounts towards pains and sufferings, loss of love and affection, consortium, security and protection and directed the appellant to pay an additional amount of Rs.4,85,000/- with interest at the rate of 12 per cent per annum.

8. The special appeal filed by the appellant was dismissed by the Division Bench of the High Court by relying upon Section 100A of the Code of Civil Procedure.

9. On 23.7.2007, this Court ordered notice on the special leave petition and indirectly stayed the judgment of the learned

Single Judge of the High Court. For the sake of reference that order is extracted below:

"Issue notice.

Without prejudice to the claims involved, let the petitioner deposit a sum of Rupees three lakhs with the concerned MACT within four weeks from today. A sum of Rupees two lakhs shall be permitted to be withdrawn by the claimant without furnishing security."

10. As is the fate of large number of other special leave petitions, this petition was not listed before the Court for next five years for effective hearing and the appellant continued to enjoy the benefit of ex-parte interim order. For the first time, the case was listed before the Registrar on 15.10.2008 i.e. after almost one year and three months of the issue of notice. The Registrar noted that notice has not been served upon respondent Nos. 1 to 8 and 10 and an application has been filed for deleting respondent No. 9 from the array of parties. On 2.4.2009, the application was allowed by the Chamber Judge. For next two years and five months, the file of the case did not see the light of the day. On 14.9.2011, the case was listed before the Registrar, who recorded the statement of the appellant's counsel that he does not want to bring on record the legal representatives of respondent Nos. 1 and 3. On 12.10.2011, the matter was again listed before the Registrar, who directed that the matter be placed before the Chamber Judge. When the matter was listed before the Chamber Judge, he noted that the legal representatives of respondent Nos. 1 and 3 are already on record. It should be a matter of concern for those who are associated with this institution as to why an ex-parte interim order passed by the Court should continue to operate for years together without the matter being listed for effective hearing. If the claimants had been members of economically affluent sections of the society, they would have engaged an eminent advocate and taken steps for hearing of the matter at an early date but, as noted earlier, they do not

have the financial capacity and resources to engage any advocate for contesting the special leave petition.

11. We have heard learned counsel for the appellant and carefully perused the record.

12. In our view, the appellant's challenge to the impugned order is meritless and the appeal is liable to be dismissed. We are also convinced that this is a fit case in which the Court should exercise power under Article 142 of the Constitution and enhance the compensation determined by the High Court by applying appropriate multiplier.

13. We shall first consider whether the High Court was justified in not applying the rule of 1/3rd deduction towards personal expenses of the deceased.

14. In *Sarla Verma v. Delhi Transport Corporation* (2009) 6 SCC 121, the two Judge Bench made an endeavor to standardise the parameters for determination of the compensation payable by the insurer and / or the owner of the offending vehicle. While dealing with the issue of deduction towards personal expenses, the Court made the following observations:

> "We have already noticed that the personal and living expenses of the deceased should be deducted from the income, to arrive at the contribution to the dependants. No evidence need be led to show the actual expenses of the deceased. In fact, any evidence in that behalf will be wholly unverifiable and likely to be unreliable. The claimants will obviously tend to claim that the deceased was very frugal and did not have any expensive habits and was spending virtually the entire income on the family. In some cases, it may be so. No claimant would admit that the deceased was a spendthrift, even if he was one.
>
> It is also very difficult for the respondents in a claim petition to produce evidence to show that the deceased was

> spending a considerable part of the income on himself or that he was contributing only a small part of the income on his family. Therefore, it became necessary to standardise the deductions to be made under the head of personal and living expenses of the deceased. This lead to the practice of deducting towards personal and living expenses of the deceased, one-third of the income if the deceased was married, and one-half (50%) of the income if the deceased was a bachelor. This practice was evolved out of experience, logic and convenience. In fact one-third deduction got statutory recognition under the Second Schedule to the Act, in respect of claims under Section 163-A of the Motor Vehicles Act,1988 ("the MV Act", for short). But, such percentage of deduction is not an inflexible rule and offers merely a guideline."

15. The Bench then referred to the judgments in *Kerala State Road Transport Corporation v. Susamma Thomas* (1994) 2 SCC 176, *U.P.SRTC v. Trilok Chandra* (1996) 4 SCC 362 and *Fakeerappa v. Karnataka Cement Pipe Factory* (2004) 2 SCC 473 and held:

> "Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six."

16. The issue was recently considered in *Santosh Devi v. National Insurance Company Ltd. and others* (Civil Appeal No.3723 of 2012 decided on 23.3.2012) and it was observed:

"It is also not possible to approve the view taken by the Tribunal which has been reiterated by the High Court albeit without assigning reasons that the deceased would have spent 1/3rd of his total earning, i.e., Rs. 500/-, towards personal expenses. It seems that the Presiding Officer of the Tribunal and the learned Single Judge of the High Court were totally oblivious of the hard realities of the life. It will be impossible for a person whose monthly income is Rs.1,500/- to spend 1/3rd on himself leaving 2/3rd for the family consisting of five persons. Ordinarily, such a person would, at best, spend 1/10th of his income on himself or use that amount as personal expenses and leave the rest for his family."

17. National Sample Survey Report No. 527 on Household Consumer Expenditure in India 2006-07, which has been prepared after conducting thorough research on the subject contains the figures of monthly per capita expenditure (MPCE) for various classes. These are extracted below:

18. Here, we are dealing with a case in which the deceased had 8 dependents including four sons and one daughter. The question which arises for our consideration is whether in 1992 a person having an income of less than Rs.3,000/- and a family of 9 could think of spending 1/3rd of his income on himself. On a conservative estimate, it is possible to say, he would have spent at least 50% of the income on the purchase of foodgrains, milk, etc., and for payment of water, electricity and other bills. 25% of the income would have been spent on the education of children which would have included school/college fee, cost of books, etc. 15% of the income would have been used for meeting other family necessities, like, clothes, medical expenses, etc. He would have then been left with 10% of his income, a portion of which could be used to meet unforeseen contingencies and on the occasion of festivals. In this scenario, any deduction towards personal expenses would be unrealistic. In any case, where the family of the deceased comprised of 5 persons or more having an income of Rs.3,000/- to Rs.5,000/-, it is virtually impossible for him to spend more than 1/10th of the total income upon himself.

19. What we have observed hereinabove may not apply to rich people living in urban areas who can afford to spend a substantial amount of their income in clubs, hotels and on drinks parties. In those cases, there may be a semblance of justification in applying the rule of 1/3rd deduction but it would be wholly unrealistic to universally apply that rule in all cases.

20. On the basis of the above discussion, we hold that the learned Single Judge of the High Court did not commit any error by not following the rule of 1/3rd deduction towards the personal expenses of the deceased.

21. We are also of the view that the High Court was justified in determining the amount of compensation by granting 100% increase in the income of the deceased. In the normal course, the deceased would have served for 22 years and during that period his salary would have certainly doubled because the

employer was paying 20% of his salary as bonus per year.

22. The issue which remains to be considered is whether the Tribunal and the High Court committed an error by applying the multiplier of 10.

23. In *Sarla Verma v. Delhi Transport Corporation* (supra), this Court considered the question relating to selection of multiplier, referred to the judgments in *Kerala State Road Transport Corporation v. Susamma Thomas* (supra), *U.P.SRTC v. Trilok Chandra* (supra) and the Second Schedule appended to the Act and held :

> "We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

24. It is not in dispute that at the time of accident, the age of the deceased was 36 years. Therefore, the Tribunal and the High Court were not right in applying the multiplier of 10. They should have adopted the multiplier of 15 for the purpose of determining the amount of compensation.

25. In the result, the appeal is dismissed. However, with a view to do complete justice to the claimants, we suo motu re-determine the amount of compensation in the following terms by applying the multiplier of 15 and hold that the claimants are entitled to a total amount of Rs.10,63,040/-:

Amount of compensation with 12 months salary and 15 as multiplier : Rs. 5378 x 12 x 15 = Rs.9,68,040 [Rs.2,689 pm x 2= Rs. 5,378/- pm]

Compensation to Family members for loss of love & affection, deprivation of protection, social security, etc. : Rs.70,000/-

Compensation to the widow of the deceased for loss of love & affection, pains and sufferings, loss of consortium, deprivation of protection, social security, etc. : Rs.25,000/

Total Compensation : Rs.10,63,040

[Rs.9,68,040 + Rs. 70,000 + Rs. 25,000]

26. The claimants shall also get interest on the enhanced compensation at the rate of 12% per annum from the date of filing the claim petition.

27. The appellant is directed to pay the enhanced / additional compensation and interest to the claimants within a period of six weeks by getting a demand draft prepared in the name of respondent No.2, that is, the widow of the deceased. The latter shall invest 50% of the amount in a fixed deposit of three years term in a nationalized bank.

28. Since the appellant had enjoyed the ex-parte interim order passed by this Court for a period of five years, it is directed to pay cost of Rs.5 lakhs to the claimants.

29. The appellant shall submit compliance report in the Registry of the Rajasthan High Court, Jaipur Bench. The Registry shall list the matter before an appropriate Bench for perusal of the report. If the Bench finds that the appellant has failed to comply with the directions contained in this order, it shall initiate proceedings against the officers of the appellant under the Contempt of Courts Act, 1971 and also order recovery of the amount as arrears of land revenue.

R.P. Appeal dismissed.

PONNALA LAKSHMALAH
v.
KOMMURI PRATAP REDDY & ORS.
(Civil Appeal No. 4993 of 2012)

JULY 6, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Representation of the People Act, 1951 - s. 83 and proviso to s. 83(1) - Election petition - Returned candidate seeking its dismissal in limine on the ground that it did not disclose cause of action - High Court refusing to dismiss the petition in limine - On appeal, new plea that the petition was liable to be dismissed as it was not supported by affidavit in terms of proviso to s. 83(1) - Held: High Court was right in refusing to dismiss the petition in limine - The petition discloses a cause of action and gives rise to triable issues - The petition also contained statement of material facts as required u/s. 83 - The plea of absence of affidavit in terms of proviso to s. 83(1) cannot be permitted to be raised before Supreme Court for the first time - Also, the absence of affidavit in a given format by itself does not cause any prejudice to the returned candidate and the defect is curable - Breach of proviso to s. 83(1) is not a valid ground for dismissal of an election petition at the threshold - The requirement of filing an affidavit in given format should not be exalted to the status of a statutory mandate, by a judicial interpretation - Format of affidavit is not a matter of substance - In view of the fact that electoral process is vulnerable to misuse, the courts should not adopt a technical approach towards resolution of electoral disputes - Code of Civil Procedure, 1908 - Or. VII r. 11 - Conduct of Election Rules, 1961 - r. 94 (1) r/w. Form 25 - Plea - New plea - Interpretation of Statute.

Election petition was filed against the returned

candidate on the ground that there was variance between total number of votes polled and votes counted. The petition was contested. High Court refused to dismiss the petition in limine holding that the petition disclosed a cause of action and gave rise to triable issues.

In appeal to this court the appellant (returned candidate) contended that the petition was liable to be dismissed on the grounds that it was deficient as it did not disclose material facts and particulars; and that the petition was not accompanied by an affidavit in Form 25 terms of proviso to Section 83(1) of the Act, as the same was mandatory.

Dismissing the appeal, the Court

HELD: 1.1 There is no error in the order passed by the High Court refusing to dismiss the petition in limine on the ground that the same discloses no cause of action. The averments made in the election petition if taken to be factually correct, as they ought to for purposes of determining whether a case for exercise of powers under Order VII Rule 11 CPC has been made out, disclose a cause of action. The High Court did not, therefore, commit any error much less an error resulting in miscarriage of justice, to warrant interference by this Court in exercise of its extra-ordinary powers under Article 136 of the Constitution. [Para 8] [865-E-G]

1.2 Courts are competent to dismiss petitions not only on the ground that the same do not comply with the provisions of Sections 81, 82 & 117 of the Representation of the People Act, 1951 but also on the ground that the same do not disclose any cause of action. The expression "cause of action" has not been defined either in the Civil Procedure Code or elsewhere and is more easily understood than precisely defined. While examining whether a plaint or an election petition

discloses a cause of action, the Court has a full and comprehensive view of the pleading. Averments made in the plaint or petition cannot be read out of context or in isolation. They must be taken in totality for a true and proper understanding of the case set up by the plaintiff. [Paras 3 and 4] [862-E-G; 863-C-D]

Shri Udhav Singh v. Madhav Rao Scindia **(1977) 1 SCC 511:1976 (2) SCR 246;** *Church of North India v. Lavajibhai Ratanjibhai and Ors.* **(2005) 10 SCC 760: 2005 (3) SCR 1037;***Liverpool and London S.P. and I. Asson. Ltd. v. M. V. SeaSuccess I. and Anr.* **(2004) 9 SCC 512: 2003 (5) Suppl. SCR 851 - relied on.**

Om Prakash Srivastava v. Union of India and Anr. **(2006) 6 SCC207: 2006 (3) Suppl. SCR 80;** *H.D. Revanna v. G. Puttaswamyand Ors.* **(1999) 2 SCC 217: 1999 (1) SCR 198 - referred to.**

1.3 The successful candidates charged with commission of corrupt practices or other illegalities and irregularities that constitute grounds for setting aside their elections seek dismissal of the petitions in limine on grounds that are more often than not specious, in an attempt to achieve a two fold objective. First, it takes a chance of getting the election petition dismissed on the ground of it being deficient, whether the deficiency be in terms of non-compliance with the provisions of Sections 81, 82 & 117 of the Act or on the ground that it does not disclose a cause of action. The second and the more predominant objective is that the trial of the election gets delayed which in itself sub-serve the interests of the successful candidate. Dilatory tactics are adopted with a view to prevent or at least delay a trial of the petition within a reasonable time frame. While a successful candidate is entitled to defend his election and seek dismissal of the petition on ground legally available to him, the prolongation of proceedings by prevarication is

not conducive to ends of justice that can be served only by an early and speedy disposal of the proceedings. The Courts have, therefore, to guard against such attempts made by parties who often succeed in dragging the proceedings beyond the term for which they have been elected. The Courts need to be cautious in dealing with requests for dismissal of the petitions at the threshold and exercise their powers of dismissal only in cases where even on a plain reading of the petition no cause of action is disclosed. [Para 12] [867-G-H; 868-A-E]

2.1 The High Court has, in the present case, held that the material facts constituting the foundation of the case set up by the election petition have been stated in the election petition. That being so, the requirement of Section 83 of the Act viz. that "the petition shall contain a concise statement of material facts" has been satisfied. The question of dismissing the petition on that ground also therefore did not arise. The High Court committed no wrong in coming to that conclusion. [Para 12] [867-C-D]

Raj Narain v. Indira Nehru Gandhi and Anr. **(1972) 3 SCC 850:1972 (3) SCR 841;** *H.D. Revanna v. G. Puttaswamy and Ors.***(1999) 2 SCC 217: 1999 (1) SCR 198;** *V.S. Achuthanandan v.P.J. Francis and Anr.* **(1999) 3 SCC 737: 1999 (2) SCR 99;** *Mahendra Pal v. Ram Dass Malanger and Ors.* **(2000) 1 SCC261 1999 (4) Suppl. SCR 170;** *Sardar Harcharan Singh Brar v. Sukh Darshan Singh and Ors.* **(2004) 11 SCC 196: 2004 (5)Suppl. SCR 682;** *Harkirat Singh v. Amrinder Singh* **(2005) 13 SCC 511: 2005 (5) Suppl. SCR 817;** *Umesh Challiyil v. K.P.Rajendran* **(2008) 11 SCC 740: 2008(3) SCR 457;** *Virender Nath Gautam v. Satpal Singh and Ors.* **(2007) 3 SCC 617:2006 (10) Suppl. SCR 413 - relied on.**

2.2 The burden which lies on an election petitioner to prove the allegations made by him in the election petition whether the same relate to commission of any

corrupt practice or proof of any other ground urged in support of the petition has to be discharged by him at the trial. There is no dilution of that obligation when the court refuses to dismiss a petition at the threshold. All that the refusal to dismiss the petition implies is that the appellant has made out a case for the matter to be put to trial. Whether or not the petitioner will succeed at the trial remains to be seen till the trial, is concluded. [Para 12] [867-E-F]

3.1 The plea relating to defective verification of the petition is not allowed to be taken by this Court for the first time in appeal. The ground that the petition was liable to be dismissed in absence of affidavit in terms of proviso to Section 83(1) of the Act, was not raised in the application filed by the appellant before the High Court nor was it argued at the bar. The High Court had in that view no occasion to deal with the contention that is sought to be advanced before this Court for the first time. There is no reason why the appellant should not have urged the point before the High Court, if he was serious about its implications. [Paras 14 and 15] [869-C-D; 870-A-B]

Balwan Singh v. Prakash Chand and Ors. **(1976) 2 SCC 440: 1976 (3) SCR 335 - relied on.**

3.2 The absence of an affidavit or an affidavit in a form other than the one stipulated by the Rules does not by itself cause any prejudice to the successful candidate so long as the deficiency is cured by the election petitioner by filing a proper affidavit when directed to do so. In the absence of any provision making breach of the proviso to Section 83(1), a valid ground of dismissal of an election petition at the threshold, the requirement of filing an affidavit in a given format should not be exalted by a judicial interpretation to the status of a statutory mandate. A petition that raises triable issues need not, therefore, be dismissed simply because the affidavit filed

by the petitioner is not in a given format no matter the deficiency in the format has not caused any prejudice to the successful candidate and can be cured by the election petitioner by filing a proper affidavit. [Paras 21 and 23] [874-D-E; 875-F-H]

Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore and Ors. **AIR 1964 SC 1545: 1964 SCR 573 - followed.**

Sardar Harcharan Singh Brar v. Sukh Darshan Singh and Ors. **(2004) 11 SCC 196: 2004 (5) Suppl. SCR 682;** *G. Mallikarjunappa and Anr. v. Shamanur Shiv Ashankappa and Ors.* **(2001) 4 SCC 428;** *F.A. Sapa and Ors. v. Singora and Ors.* **(1991) 3 SCC 375: 1991 (2) SCR 752;** *Dr. Vijay Laxmi Sadho v. Jagdish* **(2001) 2 SCC 247: 2001 (1) SCR 95;** *T. Phungzathang v. Hangkhanlian and Ors.* **(2001) 8 SCC 358: 2001 (2) Suppl. SCR 256;** *Manohar Joshi v. Nitin Bhaurao Patil* **(1996) 1 SCC 169: 1995 (6) Suppl. SCR 421;** *H.D. Revanna v. G. Puttaswamy Gowda and Ors.* **(1999) 2 SCC 217: 1999 (1) SCR 198 - relied on.**

M. Kamalam v. Dr. V.A. Syed Mohammed **(1978) 2 SCC 659: 1978 (3) SCR 446;** *R.P. Moidutty v. P.T. Kunju Mohammad* **(2000) 1 SCC 481;** *V. Narayanswamy v. C.P. Thirunavukkarasu* **(2000) 2 SCC 294: 2000 (1) SCR 292;** *Kamalnath v. Sudesh Verma* **(2002) 2 SCC 410: 2002 (1) SCR 63;** *Mithilesh Kumar Pandey v. Baidyanath Yadav and Ors.* **(1984) 2 SCC 1: 1984 (2) SCR 278;** *Ravinder Singh v. Janmeja Singh* **(2000) 8 SCC 191: 2000 (3) Suppl. SCR 331;** *Ram Sukh v. Dinesh Aggarwal* **(2009) 10 SCC 541: 2009 (14) SCR 836 - referred to.**

3.3 The format of the affidavit is at any rate not a matter of substance. What is important and at the heart of the requirement is whether the election petitioner has made averments which are testified by him on oath, no matter in a form other than the one that is stipulated in the Rules. [Para 22] [874-C, D]

4. The election of a successful candidate is not lightly interfered with by the Courts. The Courts generally lean in favour of the returned candidates and place the onus of proof on the person challenging the end result of an electoral contest. That approach is more in the nature of a rule of practice than a rule of law and should not be unduly stretched beyond a limit. While it is important to respect a popular verdict and the courts ought to be slow in upsetting the same, it is equally important to maintain the purity of the election process. An election which is vitiated by reason of corrupt practices, illegalities and irregularities enumerated in Sections 100 & 123 of the Act cannot obviously be recognised and respected as the decision of the majority of the electorate. The Courts are, therefore, duty bound to examine the allegations whenever the same are raised within the framework of the statute without being unduly hyper-technical in its approach & without being oblivious of the ground realities. Experience has shown that the electoral process is, despite several safeguards taken by the Statutory Authorities concerned, often vitiated by use of means, factors and considerations that are specifically forbidden by the statute. The electoral process is vulnerable to misuse, in several ways, in the process distorting the picture in which the obvious may be completely different from the real. Electoral reforms is, therefore, a crying need of our times but has remained a far cry. If the Courts also adopt a technical approach towards the resolution of electoral disputes, the confidence of the people not only in the democratic process but in the efficacy of the judicial determination of electoral disputes will be seriously undermined. [Para 22] [874-F-H; 875-A-D]

T.A. Ahammed Kabeer v. A.A. Azeez and Ors. **(2003) 5 SCC 650:2003 (3) SCR 511;** *P. Malaichami v. M. Andi Ambalam and Ors.* **(1973) 2 SCC 170: 1973 (3) SCR 1016 - referred to.**

Case Law Reference:

2006 (3) Suppl. SCR 80	Referred to	Para 3
1976 (2) SCR 246	Relied on	Para 4
2005 (3) SCR 1037	Relied on	Para 5
2003 (5) Suppl. SCR 851	Relied on	Para 6
1999 (1) SCR 198	Referred to	Para 7
	Relied on.	Para 10
1972 (3) SCR 841	Relied on	Para 8
1999 (2) SCR 99	Relied on	Para 10
1999 (4) Suppl. SCR 170	Relied on	Paras 10 and 16
2004 (5) Suppl. SCR 682	Relied on	Para 10
2005 (5) Suppl. SCR 817	Relied on	Para 11
2008 (3) SCR 457	Relied on	Para 11
2006 (10) Suppl. SCR 413	Relied on	Para 11
1978 (3) SCR 446	Referred to	Para 13
(2000) 1 SCC 481	Referred to	Para 13
2000 (1) SCR 292	Referred to	Para 13
2002 (1) SCR 63	Referred to	Para 13
1984 (2) SCR 278	Referred to	Para 13
2000 (3) Suppl. SCR 331	Referred to	Para 13
2009 (14) SCR 836	Referred to	Para 13
1976 (3) SCR 335	Relied on	Para 14
(2001) 4 SCC 428	Relied on	Para 18

1991 (2) SCR 752	**Relied on**	**Para 19**
2001 (1) SCR 95	**Relied on**	**Para 19**
1964 SCR 573	**Followed**	**Para 20**
2001 (2) Suppl. SCR 256	**Relied on**	**Para 20**
1995 (6) Suppl. SCR 421	**Relied on**	**Para 20**
1999 (1) SCR 198	**Relied on**	**Para 20**
2003 (3) SCR 511	**Referred to**	**Para 22**
1973 (3) SCR 1016	**Referred to**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4993 of 2012.

From the Judgment & Order dated 22.04.2010 of the High Court of Andhra Pradesh at Hyderabad in E.A. No. 873 of 2009 in E.P. No. 13 of 2009.

P.P. Rao, Y. Raja Gopala Rao, Y. Vismai Rao, Apeksha Sharan, Manoj Jain, Hitendra Nath Rath, Utsav sidhu, Abhimanyu Tewari for the Appellant.

Ranjit Kumar, Jaideep Gupta, A.D.N. Rao, Annam Venkatesh, Keerthi Kiran Kota, Neelam Jain, D. Mahesh Babu, Amit K. Nain, Anu Gupta, Chandra Mohan Anisetty, T. Anamika, G.N. Reddy for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. The short question that falls for determination in this appeal by special leave is whether the High Court of Andhra Pradesh was right in holding that the election petition filed by respondent No.1 against the appellant who happens to be the successful candidate in the election to the 98-Jangaon Assembly Constituency in the State of Andhra Pradesh,

disclosed a cause of action and could not therefore be dismissed at the threshold. The factual matrix in which the election petition came to be filed by the respondent has been set out at length by the High Court, hence need not be recounted except to the extent the same is essential for the disposal of the appeal. The High Court has, while holding that the averments made in the election petition raised triable issues and disclosed a cause of action, observed:

> "23. As seen from the statement showing voter turn out report in connection with General Elections, 2009 to 98-Jangaon Legislative Assembly Constituency on 16.04.2009, the total votes polled, as reported by the Returning Officer, is shown as 1,50,678 from 251 polling stations. Whereas the final result sheet in Form no.20, total valid votes is shown as 1,51,411. So, from this document, it is clear that prima facie a proper counting had not taken place. Therefore, prima facie it can be said to be an irregularity on the part of the Returning Officer involved in dereliction of the duty. Similarly, there is a specific allegation that out of 653 postal ballots, the election petitioner would have secured more than 300 votes, if properly counted, and out of the said votes, 142 votes which were validly polled in favour of the election petitioner, were illegally declared as invalid and another 52 votes polled in favour of the election petitioner were counted in favour of the first respondent, and 45 invalid votes were illegally counted in favour of the first respondent. Since the margin between the elected candidate and the nearest rival is only 236 votes, had postal ballots been counted properly, then there would be a possibility of materially affecting the result of the election in so far as the returned candidate. So, under no stretch of imagination, it can be said that the allegations in the Election Petition are vague.
>
> 24. No doubt, it is true that in view of the decision of the Apex Court, recounting of the votes cannot be resorted to

as a matter of course and every endeavour should be made to protect the secrecy of the ballots. But, at the same time suspicion of the correctness of the figures mentioned in the crucial documents of the statement showing voters' turn out report and Form-20-final result sheet, where there is a variance between total number of votes polled and votes counted. The two basic requirements laid down by the Apex Court, to order recounting, are: (a) the election petition seeking recount of the ballot papers must contain an adequate statement of the material facts on which the allegations of irregularity or illegality in counting are founded; and (b) on the basis of evidence adduced in support of the allegations, the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary.

Therefore, the questions-whether counting of votes by the officials is in accordance with the rules and regulations and also whether the votes polled in favour of the election petitioner were rejected as invalid or there was improper counting of votes polled in favour of the returned candidate, are required to be decided after adducing evidence only. The allegation that because of the improper counting of postal ballots polled in favour of the election petitioner, the election petitioner could not secure 300 votes, if accepted as true at this stage, it would materially affect the election result because the margin of votes polled between returned candidate and his nearest rival is very narrow. In the Election Petition, the allegation with regard to irregularity or illegality in counting of votes, which affects election of the returned candidate materially, has been clearly stated in the Election Petition. It is not a vague or general allegation that some irregularities or illegalities have been committed in counting. Similarly, there is allegation that in the first instance, after totalling of all votes, the election petitioner secured a majority of 44 votes and the same was

informed to the electronic media, and some TV channels telecasted the same immediately. A Compact Disc (CD) is also field along with the Election Petition, in support of the said allegation. It is also alleged that none of the contested candidates filed any petition for recounting of votes within maximum period of five minutes after the election petitioner was declared to have secured a majority of 44 votes. Therefore, there is prima facie material to show that there was irregularity or illegality in counting of votes which resulted in affecting materially the election of the returned candidate, so as to proceed further with the Election Petition. As, at this stage, prima facie case for recounting, as seen from the allegations in the Election Petition, is made out, the pleadings cannot be struck off as unnecessary. Therefore, rejecting the Election Petition at this stage does not arise."

3. Having carefully gone through the averments made in the election petition, we are of the opinion that the election petition sets out the requisite material facts that disclose a cause of action and gives rise to triable issues, which can not be given a short shrift by taking an unduly technical view as to the nature of the pleadings. There is no denying the fact that Courts are competent to dismiss petitions not only on the ground that the same do not comply with the provisions of Sections 81, 82 & 117 of the Representation of the People Act, 1951 but also on the ground that the same do not disclose any cause of action. The expression "cause of action" has not been defined either in the Civil Procedure Code or elsewhere and is more easily understood than precisely defined. This Court has in *Om Prakash Srivastava v. Union of India & Anr.* (2006) 6 SCC 207 attempted an explanation of the expression in the following words:

"The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense "cause of action" means the circumstances forming the infraction of the right or the immediate occasion for the reaction. In the wider

sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but also the infraction coupled with the right itself. Compendiously, as noted above the expression means every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary, to prove each fact. comprises in "cause of action"."

4. It is equally well settled that while examining whether a plaint or an election petition discloses a cause of action, the Court has a full and comprehensive view of the pleading. Averments made in the plaint or petition cannot be read out of context or in isolation. They must be taken in totality for a true and proper understanding of the case set up by the plaintiff. This Court has in *Shri Udhav Singh v. Madhav Rao Scindia* (1977) 1 SCC 511 given a timely reminder of the principle in the following words:

"We are afraid, this ingenious method of construction after compartmentalisation, dissection, segregation and inversion of the language of the paragraph, suggested by Counsel, runs counter to the cardinal canon of interpretation, according to which, a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context, in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention of the party concerned is to be gathered, primarily, from the tenor and terms of his pleading taken as a whole."

5. Reference may also be made to the decision of this Court in *Church of North India v. Lavajibhai Ratanjibhai and*

Ors. (2005) 10 SCC 760, wherein this Court reiterated that for purposes of determining whether the plaint discloses a cause of action, the Court must take into consideration the plaint as a whole. It is only if even after the plaint is read as a whole, that no cause of action is found discernible that the Court can exercise its power under Order VII Rule 11 of the CPC.

6. To the same effect is the decision of this Court in *Liverpool & London S.P. and I. Asson. Ltd. v. M. V. Sea Success I. & Anr.* (2004) 9 SCC 512; where this Court held that the disclosure of a cause of action in the plaint is a question of fact and the answer to that question must be found only from the reading of the plaint itself. The Court trying a suit or an election petition, as the position is in the present case, shall while examining whether the plaint or the petition discloses a cause of action, to assume that the averments made in the plaint or the petition are factually correct. It is only if despite the averments being taken as factually correct, the Court finds no cause of action emerging from the averments that it may be justified in rejecting the plaint. The following paragraph from the decision is apposite in this regard:

"Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in its entirety, a decree would be passed."

7. We may also gainfully refer to the decision of this Court in *H.D. Revanna v. G. Puttaswamy & Ors.* (1999) 2 SCC 217, where this Court held that an election petition can be dismissed for non-compliance of Sections 81, 82 and 117 of the Representation of the People Act, 1951 but it may also be dismissed if the matter falls within the scope of Order VI Rule 16 or Order VII Rule 11 of the CPC. A defect in the verification of the election petition or the affidavit accompanying the

election petition was held to be curable, hence, not sufficient to justify dismissal of the election petition under Order VII Rule 11 or Order VI Rule 16 of CPC. The following passage in this regard is instructive:

> ".....the relevant provisions in the Act are very specific. Section 86 provides for dismissal of an election petition in limine for non-compliance with Sections 81, 82 and 117. Section 81 relates to the presentation of an election petition. It is not the case of the appellant before us that the requirements of Section 81 were not complied with..... Sections 82 and 117 are not relevant in this case. Significantly, Section 86 does not refer to Section 83 and non-compliance with Section 83 does not lead to dismissal under Section 86. This Court has laid down that non-compliance with Section 83 may lead to dismissal of the petition if the matter falls within the scope of Order 6 Rule 16 or Order 7 Rule 11 CPC. Defect in verification of the election petition or the affidavit accompanying the election petition has been held to be curable and not fatal."

8. Applying the above principles to the case at hand, we do not see any error in the order passed by the High Court refusing to dismiss the petition in limine on the ground that the same discloses no cause of action. The averments made in the election petition if taken to be factually correct, as they ought to for purposes of determining whether a case for exercise of powers under Order VII Rule 11 has been made out, do in our opinion, disclose a cause of action. The High Court did not, therefore, commit any error much less an error resulting in miscarriage of justice, to warrant interference by this Court in exercise of its extra-ordinary powers under Article 136 of the Constitution.

9. There was some debate at the bar as to whether the petition discloses material facts and particulars and if it does not whether it could be dismissed on the ground of the petition being deficient, hence no petition in the eyes of Law. That

argument, need not detain us for long, as the legal position on the subject is well-settled by a long line of decisions rendered by this Court. In *Raj Narain v. Indira Nehru Gandhi & Anr.* (1972) 3 SCC 850, this Court held that if allegations regarding a corrupt practice do not disclose the constituent parts of the corrupt practice alleged, the same will not be allowed to be proved and those allegations cannot be amended after the period of limitation for filing an election petition but the Court may allow particulars of any corrupt practice alleged in the petition to be amended or amplified. Dealing with the rules of pleadings, this Court observed:

> "Rules of pleadings are intended as aids for a fair trial and for reaching a just decision. An action at law should not be equated to a game of chess. Provisions of law are not mere formulae to be observed as rituals. Beneath the words of a provision of law, generally speaking, there lies a juristic principle. It is the duty of the court to ascertain that principle and implement it."

10. The Court further held that just because a corrupt practice has to be strictly proved does not mean that a pleading in an election petition must be strictly construed. Even in a criminal trial, a defective charge did not necessarily result in the acquittal of the accused unless it was shown that any such defect had prejudiced him. The Court held that it cannot refuse to enquire into allegations made by the election petitioner merely because the election petitioner or someone who prepared his brief did not know the language of the law. The principle was reiterated by this Court in *H.D. Revanna v. G. Puttaswamy & Ors.* (1999) 2 SCC 217, *V.S. Achuthanandan v. P.J. Francis & Anr.* (1999) 3 SCC 737, *Mahendra Pal v. Ram Dass Malanger & Ors.* (2000) 1 SCC 261, *Sardar Harcharan Singh Brar v. Sukh Darshan Singh & Ors.* (2004) 11 SCC 196.

11. In *Harkirat Singh v. Amrinder Singh* (2005) 13 SCC 511, this Court once again stated the distinction between

material facts and particulars and declared that material facts are primary and basic facts which must be pleaded by the plaintiff while particulars are details in support of those facts meant to amplify, refine and embellish the material facts by giving distinct touch to the basic contours of a picture already drawn so as to make it more clear and informative. To the same effect are the decisions of this court in *Umesh Challiyil v. K.P. Rajendran* (2008) 11 SCC 740, *Virender Nath Gautam v. Satpal Singh & Ors.* (2007) 3 SCC 617.

12. The High Court has, in the present case, held that the material facts constituting the foundation of the case set up by the election petition have been stated in the election petition. That being so, the requirement of Section 83 of the Act viz. that "the petition shall contain a concise statement of material facts" has been satisfied. The question of dismissing the petition on that ground also therefore did not arise. The High Court in our opinion committed no wrong in coming to that conclusion. We need only emphasise that the burden which lies on an election petitioner to prove the allegations made by him in the election petition whether the same relate to commission of any corrupt practice or proof of any other ground urged in support of the petition has to be discharged by him at the trial. There is no dilution of that obligation when the court refuses to dismiss a petition at the threshold. All that the refusal to dismiss the petition implies is that the appellant has made out a case for the matter to be put to trial. Whether or not the petitioner will succeed at the trial remains to be seen till the trial is concluded. Even so on a somewhat erroneous understanding of the law settled by this Court, the successful candidates charged with commission of corrupt practices or other illegalities and irregularities that constitute grounds for setting aside their elections seek dismissal of the petitions in limine on grounds that are more often than not specious, in an attempt to achieve a two fold objective. First, it takes a chance of getting the election petition dismissed on the ground of it being deficient, whether the deficiency be in terms of non-compliance with the

provisions of Sections 81, 82 & 117 of the Act or on the ground that it does not disclose a cause of action. The second and the more predominant objective is that the trial of the election gets delayed which in itself sub-serve the interests of the successful candidate. Dilatory tactics including long drawn arguments on whether the petition discloses a cause of action or/and whether other formalities in the filing of the petition have been complied with are adopted with a view to prevent or at least delay a trial of the petition within a reasonable time frame. While a successful candidate is entitled to defend his election and seek dismissal of the petition on ground legally available to him, the prolongation of proceedings by prevarication is not conducive to ends of justice that can be served only by an early and speedy disposal of the proceedings. The Courts have, therefore, to guard against such attempts made by parties who often succeed in dragging the proceedings beyond the term for which they have been elected. The Courts need to be cautious in dealing with requests for dismissal of the petitions at the threshold and exercise their powers of dismissal only in cases where even on a plain reading of the petition no cause of action is disclosed. Beyond that note of caution, we do not wish to say anything at this stage for it is neither necessary nor proper for us to do so.

13. Mr. Rao next argued that the election petition was liable to be dismissed also on the ground that the same was not accompanied by an affidavit which the election petitioner was obliged to file in terms of proviso to Section 83 (1) of the Act. He urged that the use of the word 'shall' in the proviso made it mandatory for the petitioner to support the averments in the election petition with an affidavit in Form 25 prescribed under Rule 94 (A) of the Conduct of Election Rules, 1961. Inasmuch as an affidavit had not been filed in the prescribed format, the election petition, argued Mr. Rao, was no election petition in the eye of law and was, therefore, liable to be dismissed in limine. Reliance in support of his submissions was placed by Mr. Rao upon the decisions of this Court in *M. Kamalam v. Dr.*

V.A. Syed Mohammed (1978) 2 SCC 659, *R.P. Moidutty v. P.T. Kunju Mohammad* (2000) 1 SCC 481, *V. Narayanswamy v. C.P. Thirunavukkarasu* (2000) 2 SCC 294, *Kamalnath v. Sudesh Verma* (2002) 2 SCC 410, *Mithilesh Kumar Pandey v. Baidyanath Yadav & Ors.* (1984) 2 SCC 1, *Ravinder Singh v. Janmeja Singh* (2000) 8 SCC 191, *Ram Sukh v. Dinesh Aggarwal* (2009) 10 SCC 541.

14. On behalf of the respondent, it was argued by Mr. Ranjit Kumar that the non-filing of an affidavit in terms of proviso to Section 83(1) of the Act was never taken as a ground before the High Court in the application which the High court has decided in terms of the impugned order nor was the point ever argued at the bar. The appellant cannot, therefore, urge that point before this Court for the first time. Relying upon the decision of this Court in Balwan Singh v. Prakash Chand & Ors. (1976) 2 SCC 440, Mr. Kumar argued that a plea relating to defective verification of the petition was not allowed to be taken by this Court for the first time in appeal. It was further submitted by Mr. Kumar that an affidavit in support of the election petition had indeed been filed by the respondent-petitioner in which the averments and the grounds alleged by the respondent were set out and reiterated on oath. An affidavit filed under Order VI Rule 15(4) of the CPC supporting the averments made in the election petition has also been filed including averments made in para 12 to 15 of the election petition. It was urged that two affidavits mentioned above sufficiently complied with the requirements of Section 83 of the Act and Rule 94(A) of The Conduct of Election Rules 1961. He submitted that even assuming that there was any deficiency in the affidavit sworn by the respondent, not being in the format in which the same was required to be filed, yet the same was not fatal to the election petition inasmuch as the Court trying the petition can at any stage of the proceedings direct the election petitioner to file a proper affidavit if it finds that the one already filed is deficient in any way.

15. There is considerable merit in the submission made by Mr. Kumar. The ground urged by Mr. Rao was not admittedly

raised in the application filed by the appellant before the High Court nor was it argued at the bar. The High Court had in that view no occasion to deal with the contention that is sought to be advanced before us for the first time. There is no reason why the appellant should not have urged the point before the High Court, if he was serious about its implications.

16. Even otherwise the question whether non-compliance of the proviso to Section 83 (1) of the Act is fatal to the election petition is no longer res-integra in the light of a three-Judge Bench decision of this Court in *Sardar Harcharan Singh Brar v. Sukh Darshan Singh & Ors.* (2004) 11 SCC 196. In that case a plea based on a defective affidavit was raised before the High Court resulting in the dismissal of the election petition. In appeal against the said order, this Court held that non-compliance with the proviso to Section 83 of the Act did not attract an order of dismissal of an election petition in terms of Section 86 thereof. Section 86 of the Act does not provide for dismissal of an election petition on the ground that the same does not comply with the provisions of Section 83 of the Act. It sanctions dismissal of an election petition for non-compliance of Sections 81, 82 and 117 of the Act only. Such being the position, the defect if any in the verification of the affidavit filed in support of the petition was not fatal, no matter the proviso to Section 83(1) was couched in a mandatory form. This Court observed:

> "14. So is the case with the defect pointed out by the High Court in the affidavit filed in support of the election petition alleging corrupt practice by the winning candidate. The proviso enacted to Sub-section (1) of Section 83 of the Act is couched in a mandatory form inasmuch as it provides that a petition alleging corrupt practice shall be accompanied by an affidavit in the prescribed form in support of the allegations of such corrupt practice and the particulars thereof. The form is prescribed by Rule 94-A. But at the same time, it cannot be lost sight of that failure to comply with the requirement as to filing of an affidavit

cannot be a ground for dismissal of an election petition in limine under Sub-section (1) of Section 86 of the Act. The point is no more res integra and is covered by several decisions of this Court. Suffice it to refer to two recent decisions namely G. Mallikarjunappa and Anr. v. Shamanur Shivashankarappa and Ors. and Dr. Vijay Laxmi Sadho v. Jagdish, both three-Judges Bench decisions, wherein the learned Chief Justice has spoken for the Benches. It has been held that an election petition is liable to be dismissed in limine under Section 86(1) of the Act if the election petition does not comply with either the provisions of "Section 81 or Section 82 or Section 117 of the RP Act". The requirement of filing an affidavit along with an election petition, in the prescribed form, in support of allegations of corrupt practice is contained in Section 83(1) of the Act. Non-compliance with the provisions of Section 83 of the Act, however, does not attract the consequences envisaged by Section 86(1) of the Act. Therefore, an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with provisions of Section 83(1) or (2) of the Act or of its proviso. The defect in the verification and the affidavit is a curable defect. What other consequences, if any, may follow from an allegedly "defective" affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case.

17. More importantly the Court held that if the High Court had found the affidavit to be defective for any reason it should have allowed an opportunity to the election petitioner to remove the same by filing a proper affidavit. This Court observed:

"15. Having formed an opinion that there was any defect in the affidavit, the election petitioner should have been allowed an opportunity of removing the defect by filing a proper affidavit. Else the effect of such failure should have been left to be determined and adjudicated upon at the

trial, as held in *G. Mallikarjunappa and Anr.'s* case (supra)."

18. To the same effect is the decision of a three-Judge bench of this Court in *G. Mallikarjunappa and Anr. v. Shamanur Shiv Ashankappa and Ors.* (2001) 4 SCC 428. The High Court had in that case also dismissed the election petitions taking the view that there had been non-compliance with Rule 94-A of the Conduct of Elections Rules, 1961 inasmuch as the affidavit filed in support of the allegations of corrupt practices with the election petitions did not comply with the requirements of the format as prescribed in Form 25. Allowing the appeal this Court observed:

"An election petition is liable to be dismissed in limine under Section 86(1) of the Act if the election petition does not comply with either the provisions of "Section 81 or Section 82 or Section 117 of the RP Act". The requirement of filing an affidavit along with an election petition, in the prescribed form, in support of allegations of corrupt practice is contained in Section 83(1) of the Act. Non-compliance with the provisions of Section 83 of the Act, however, does not attract the consequences envisaged by Section 86(1) of the Act. Therefore, an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with provisions of Section 83(1) or (2) of the Act or of its proviso. The defect in the verification and the affidavit is a curable defect. What other consequences, if any, may follow from an allegedly "defective" affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case."

19. A similar view was taken by a three-Judge Bench of this Court in *F.A. Sapa and Ors. v. Singora and Ors.* (1991) 3 SCC 375 and in *Dr. Vijay Laxmi Sadho v. Jagdish* (2001) 2 SCC 247.

20. We may also refer to a Constitution Bench decision of this Court in *Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore & Ors.* (AIR 1964 SC 1545) where this Court held that a defective affidavit is not a sufficient ground for summary dismissal of an election petition as the provision of Section 83 of the Act are not mandatorily to be complied with nor did the same make a petition invalid as an affidavit can be allowed to be filed at a later stage or so. Relying upon the decision of a three-Judge Bench of this Court in *T. Phungzathang v. Hangkhanlian and Ors.* (2001) 8 SCC 358 this Court held that non-compliance with Section 83 is not a ground for dismissal of an election petition under Section 86 and the defect, if any, is curable as has been held by a three-Judge Bench of this Court in *Manohar Joshi v. Nitin Bhaurao Patil* (1996) 1 SCC 169 and *H.D. Revanna v. G. Puttaswamy Gowda & Ors.* (1999) 2 SCC 217. This Court observed:

> ".…….If the view of the High Court in the order impugned before us is to be upheld, an election petitioner having filed an affidavit fully satisfying the requirement of Section 83(1) proviso and Rule 94-A in all respects but having made an omission in the copy of the affidavit delivered to the respondent would be placed in a position worse than an election petitioner whose original affidavit filed with the election petition itself did not satisfy the requirement of Section 83(1) proviso read with Rule 94-A. This could not have been the intendment of law. Such an interpretation would, to say the least, make a mockery of justice. That non-compliance with Section 83 cannot be a ground for dismissal of the election petition under Section 86 and the defect, if any, is curable, has been the view taken by a three-Judge Bench in Manohar Joshi v. Nitin Bhaurao Patil and also in *H.D. Revanna v. G. Puttaswamy Gowda* wherein all the decisions available till then have been considered. In *Kamal Narain Sarma v. Dwarka Prasad Mishra* affidavit was sworn in before the Clerk of Court attached with the Office of the District Judge empowered by the District Judge under Section 139(c) of the Code of Civil Procedure for the purpose of administration of oaths on affidavits made under the Code of Civil Procedure. The Election Tribunal allowed a fresh affidavit to be filed in place of such affidavit, treating it to be defective. On the matter reaching this Court, a Constitution Bench held that an extreme and technical view was not justified. The affidavit was held to be proper and the second affidavit was held to be not necessary."

21. The decisions relied upon by Mr. Rao do not in terms deal with a comparable situation to the one this Court was dealing with in *Sardar Harcharan Singh Brar's* case (supra). The format of the affidavit is at any rate not a matter of substance. What is important and at the heart of the requirement is whether the election petitioner has made averments which are testified by him on oath, no matter in a form other than the one that is stipulated in the Rules. The absence of an affidavit or an affidavit in a form other than the one stipulated by the Rules does not by itself cause any prejudice to the successful candidate so long as the deficiency is cured by the election petitioner by filing a proper affidavit when directed to do so.

22. There is no denying the fact that the election of a successful candidate is not lightly interfered with by the Courts. The Courts generally lean in favour of the returned candidates and place the onus of proof on the person challenging the end result of an electoral contest. That approach is more in the nature of a rule of practice than a rule of law and should not be unduly stretched beyond a limit. We say so because while it is important to respect a popular verdict and the courts ought to be slow in upsetting the same, it is equally important to maintain the purity of the election process. An election which is vitiated by reason of corrupt practices, illegalities and irregularities enumerated in Sections 100 & 123 of the Act cannot obviously be recognised and respected as the decision of the majority of the electorate. The Courts are, therefore, duty bound to

examine the allegations whenever the same are raised within the framework of the statute without being unduly hyper-technical in its approach & without being oblivious of the ground realities. Experience has shown that the electoral process is, despite several safeguards taken by the Statutory Authorities concerned, often vitiated by use of means, factors and considerations that are specifically forbidden by the statute. The electoral process is vulnerable to misuse, in several ways, in the process distorting the picture in which the obvious may be completely different from the real. Electoral reforms is, therefore, a crying need of our times but has remained a far cry. If the Courts also adopt a technical approach towards the resolution of electoral disputes, the confidence of the people not only in the democratic process but in the efficacy of the judicial determination of electoral disputes will be seriously undermined. This Court has in several pronouncements while emphasising the need to leave the elections untouched, reiterated, the need to maintain the purity of elections and thereby strengthening democratic values in this country. The decisions of this Court in *T.A. Ahammed Kabeer v. A.A. Azeez & Ors.* (2003) 5 SCC 650 and *P. Malaichami v. M. Andi Ambalam and Ors.* (1973) 2 SCC 170 express a similar sentiment.

23. Suffice it to say, that in the absence of any provision making breach of the proviso to Section 83(1), a valid ground of dismissal of an election petition at the threshold, we see no reason why the requirement of filing an affidavit in a given format should be exalted by a judicial interpretation to the status of a statutory mandate. A petition that raises triable issues need not, therefore, be dismissed simply because the affidavit filed by the petitioner is not in a given format no matter the deficiency in the format has not caused any prejudice to the successful candidate and can be cured by the election petitioner by filing a proper affidavit. In the result, this appeal fails and is dismissed with costs assessed at Rs.25000/-.

K.K.T. Appeal dismissed.

ASHA

v.

PT. B.D. SHARMA UNIVERSITY OF HEALTH SCIENCES & ORS.

(Civil Appeal No. 5055 of 2012)

JULY 10, 2012

[SWATANTER KUMAR AND RANJAN GOGOI, JJ.]

EDUCATION:

Medical admissions - MBBS course - Candidate securing more marks and placed higher in merit list, ignored on the ground of absence in counseling during relevant time - Held: The rule of merit for preference of courses and colleges admits no exception - It is an absolute rule and all stakeholders and authorities concerned are required to follow this rule strictly and without demur - Record indicates that the candidate was present in the counseling at the time of attendance and even subsequent thereto - Directions issued for her admission to MBBS course.

Medical admissions - Cut-off-date - Exception - Held: 30th September is undoubtedly the last date by which the admitted students should report to their respective colleges without fail - Thereafter, only in very rare and exceptional cases, admission may be permissible but such power may preferably be exercised by the courts only if the conditions stated by Supreme Court in the case of Priya Gupta and the instant judgment are found to be unexceptionally satisfied - Adherence to the schedule is the obligation of the authorities and the students both - Constitution of India, 1950 - Art. 141.

Medical admissions -Refusal of admission if found arbitrary, violative of Rules and Regulations or contrary to judgments of Supreme Court - Remedy - Explained - Further

directions given in order to avoid ambiguity and to ensure that authorities act in accordance with law.

Medical admissions - Interim orders - Held: As has been held in Priya Gupta's case, courts should avoid giving interim orders where admissions are the matter of dispute - The students who pursue the courses under the courts' orders would not be entitled to claim any equity at the final decision of the case nor should it weigh with the courts - Equity.

PLEADINGS:

Denial of an averment - Held: An averment made by the appellant is expected to be specifically denied by the replying party - If there is no specific denial, then such averment is deemed to have been admitted by the respondent.

The appellant, a candidate belonging to Backward Class B (BCB) and Ex-Serviceman (ESM) category, secured 832 marks in the entrance examination for MBBS, BDS and BAMS and was put at serial no. 13 of the ESM category. In the first counselling held on 14-15th July, 2011, being lower in merit, she could not get admission in MBBS course and, therefore, she took admission in the BDS course. She participated in the second counselling held on 20.9.2011, but her name was not declared for the admission, and respondent no. 3, who had secured less marks (821) than her and was placed at sl. No. 14 in ESM category, was given admission in the MBBS course. She filed a writ petition before the High Court. The single Judge allowed her claim. The said order having been set aside by the Division Bench of the High Court, the writ petitioner filed the appeal

Disposing of the appeal, the Court

HELD: 1.1 The rule of merit for preference of courses

and colleges admits no exception. It is an absolute rule and all stakeholders and authorities concerned are required to follow this rule strictly and without demur. It will be travesty of the scheme formulated by this Court and duly notified by the States, if the rule of merit is defeated by inefficiency, inaccuracy or improper methods of admission. There cannot be any circumstance where the rule of merit can be compromised. Circumvention of merit is not only impermissible, but is also abuse of the process of law. Relaxation of the rule of merit for reason of non-appearance is not permissible. [para 22, 30 and 36(a)] [893-B; 896-C, D; 900-G]

Priya Gupta Vs. State of Chhatisgarh & Anr. **2012 (7) SCC 433;** *Harshali v. State of Maharashtra and Others* **(2005) 13 SCC 464;** *Pradeep Jain v. UOI* **1984 (3) SCR 942 = 1984 (3) SCC 654;** *Sharwan Kumar and Others v. Director of Health Services and Another* **1993 Supp (1) SCC 632;** *Preeti Srivastava v. State of MP* **1999 (1) Suppl. SCR 249 = (1999) 7 SCC 120;** *Guru Nanak Dev University v. Saumil Garg and Others* **2005 (13) SCC 749; and** *AIIMS Students' Union v. AIIMS and Others* **2001 (2) Suppl. SCR 79 = (2002) 1 SCC 428 - relied on.**

1.2 The judgments of this Court constitute the law of the land in terms of Art. 141 of the Constitution and the regulations framed by the Medical Council of India are statutorily having the force of law and are binding on all the parties concerned. Various aspects of the admission process as of now are covered either by the respective notifications issued by the State Governments, prospectus issued by the colleges and, in any case, by the regulations framed by the Medical Council of India. [para 27] [895-C-E]

State of M.P. v. Gopal D. Tirthani and Others **2003 (1) Suppl. SCR 797 = (2003) 7 SCC 83;** *State of Punjab v. Dayanand Medical College & Hospital and Ors.* **2001 (4)**

Suppl. SCR 72 =AIR 2001 SC 3006; *Bharati Vidyapeeth v. State of Maharashtra and Another* **2004 (2) SCR 775 = (2004) 11 SCC 755;** *Chowdhury Navin Hemabhai and Others v. State of Gujarat and Others* **2011 (2) SCR 1071 = (2011) 3 SCC 617;** *Harish Verma and Others v. Ajay Srivastava and Another* **2003 (3) Suppl. SCR 833 = (2003) 8 SCC 69 - relied on**

Medical Council of India v. Madhu Singh and Others **2002 (2) Suppl. SCR 228 = (2002) 7 SCC 258;** *Ms. Neelu Arora and Another v. Union of India and Others* **2003 (1) SCR 562 = (2003) 3 SCC 366;** *Aman Deep Jaswal v. State of Punjab and Others* **2005 (1) SCR 380 = (2006) 9 SCC 597;** *Medical Council of India v. Naina Verma and Others* **(2005) 12 SCC 626;** *Mridul Dhar and Another v Union of India and Others* **2005 (1) SCR 380 = (2005) 2 SCC 65- cited.**

1.3 There is no dispute to the fact that the appellant had appeared before the authorities and marked her attendance in the attendance sheet on 20.9.2011. When the list of successful candidates revealed that candidates of merit lower to her had been admitted to the MBBS course, she instantly raised her claim and even submitted a representation to the respondents, but to no avail. In the reply filed on merits by the respondents, this aspect was dealt with in a most casual manner and no specific denial was made. It is a settled principle of law of pleadings that an averment made by the appellant is expected to be specifically denied by the replying party. If there is no specific denial, then such averment is deemed to have been admitted by the respondent. Therefore, this Court is of the considered view that the appellant has been able to make out a case for interference. [para 14, 16,17 and 18] [888-E-F; 889-F; 890-F-G;] [891-E-G]

2.1 30th September is undoubtedly the last date by which the admitted students should report to their

respective colleges without fail. In the normal course, the admissions must close by holding of second counseling by 15th September of the relevant academic year in terms of the decision of this Court in Priya Gupta. Thereafter, only in very rare and exceptional cases of unequivocal discrimination or arbitrariness or pressing emergency, admission may be permissible but such power may preferably be exercised by the courts, only if the conditions stated in Priya Gupta's case and this judgment are found to be unexceptionally satisfied and the reasons therefor are recorded by the court of competent jurisdiction. Adherence to the schedule is the obligation of the authorities and the students, both. The courts have consistently taken the view that the schedule is sacrosanct like the rule of merit. The prescribed schedule is to be maintained stricto sensu by all the stakeholders. The authorities should follow the procedure prescribed under the Rules and maintain due records thereof. [para 24, 26, 27 and 36(b)] [894-A; 894-G-H; 895-D-E; 900-H; 901-A-D]

State of Bihar v. Sanjay Kumar Sinha & Ors. **1989 (2) Suppl. SCR 168 = (1990) 4 SCC 624;** *Medical Council of India v. Madhu Singh & Ors.* **2002 (2) Suppl. SCR 228 = (2002) 7 SCC 258;** *GSF Medical and Paramedical Association v. Association of Management of Self Financing Technical Institutes and Anr.* **2003 (12) SCC 414;** *Christian Medical College v. State of Punjab and Others* **(2010) 12 SCC 167 - relied on.**

2.2. In the instant case, since the appellant is not at fault and she pursued her rights and remedies as expeditiously as possible, this Court is of the considered view that the cut-off date cannot be used as a technical instrument or tool to deny admission to a meritorious student. The rule of merit stands completely defeated in the instant case. [para 31] [897-C-D]

Arti Sapru and Others v. State of J & K and Others **1981 (3) SCR 34 = (1981) 2 SCC 484;** *Chavi Mehrotra v. Director General Health Services* **(1994) 2 SCC 370; and** *Aravind Kumar Kankane v. State of UP and Others* **2001 (1) Suppl. SCR 262 = (2001) 8 SCC 355 - relied on.**

3.1. Wherever the court finds that the action of the authorities has been arbitrary, contrary to the judgments of this Court and violative of the Rules, regulations and conditions of the prospectus, causing prejudice to the rights of the students, the court shall award compensation to such students as well as direct initiation of disciplinary action against the erring officers/ officials. The court shall also ensure that the proceedings under the Contempt of Courts Act, 1971 are initiated against the erring authorities irrespective of their stature and empowerment. Where the admissions given by the authorities concerned are found by the courts to be legally unsustainable and where there is no reason to permit the students to continue with the course, the mere fact that such students have put in a year or so into the academic course is not by itself a ground to permit them to continue with the course. [para 36(c) and (d)] [901-E-H; 902-A]

3.2. In fact, normally, keeping in view the factual matrix of the case, this Court would have directed the admission of the appellant to the MBBS course in the academic year 2011-2012 and would further have directed the respondents to pay compensation to her. But the records show that the appellant has attended only 28 to 42 per cent lectures instead of the required 75 per cent and has not even pursued her BDS course properly and, thus, she has not fulfilled even the pre-requisites for MBBS course, assuming that the BDS and MBBS courses are similar for the first six months. In these circumstances, the respondents are directed to give the appellant admission to the MBBS course in the current

academic year i.e. 2012-2013, subject to the condition that she will pursue her MBBS course right from the beginning without any advantage of her course in the BDS. While giving her admission to the MBBS course, the respondents shall follow the procedure as explained in the judgment. [para 33-35] [898-D; 899-D; 900-B-C]

4. As has been held in Priya Gupta's case, it is reiterated that the courts should avoid giving interim orders where admissions are the matter of dispute. Even in cases where the candidates are permitted to continue with the courses, they should normally be not permitted to take further examinations of the professional courses. The students who pursue the courses under the orders of court would not be entitled to claim any equity at the final decision of the case nor should it weigh with the courts of competent jurisdiction. In order to put the matter to rest beyond ambiguity and to ensure that the authorities act in accordance with law, this Court issues further directions, as detailed in the judgment. [para 37 and 38] [902-B-D]

Case Law Reference:

2012 (7) SCC 433	**relied on**	**para 22**
(2005) 13 SCC 464	**relied on**	**para 22**
1984 (3) SCR 942	**relied on**	**para 22**
1993 Supp (1) SCC 632	**relied on**	**para 22**
1999 (1) Suppl. SCR 249	**relied on**	**para 22**
2005 (13) SCC 749	**relied on**	**para 22**
2001 (2) Suppl. SCR 79	**relied on**	**para 22**
1989 (2) Suppl. SCR 168	**relied on**	**para 26**
2002 (2) Suppl. SCR 228	**relied on**	**para 26**

2003 (12) SCC 414	**relied on**	**para 26**
(2010) 12 SCC 167	**relied on**	**para 26**
2003 (1) Suppl. SCR 797	**relied on**	**para 28**
2001 (4) Suppl. SCR 72	**relied on**	**para 28**
2004 (2) SCR 775	**relied on**	**para 28**
2011 (2) SCR 1071	**relied on**	**para 28**
2003 (3) Suppl. SCR 833	**relied on**	**para 28**
2002 (2) Suppl. SCR 228	**cited**	**para 30**
2003 (1) SCR 562	**cited**	**para 30**
2006 (9) SCC 597	**cited**	**para 30**
2005 (12) SCC 626	**cited**	**para 30**
2005 (1) SCR 380	**cited**	**para 30**
1981 (3) SCR 34	**relied on**	**para 31a**
1994 (2) SCC 370	**relied on**	**para 31**
2001 (1) Suppl. SCR 262	**relied on**	**para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5055 of 2012.

From the Judgment & Order dated 27.01.2012 of the High Court of Punjab & Haryana at Chandigarh in LPA No. 2129 of 2011.

Himanshu Gupta, Anil Kumar Tandale for the Appellant.

S.B. Upadhyay, Vikrant Yadav, M.C. Dhingra, Dr. Kailash Chand, Rajat Rathee for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. Admission to the medical courses (MBBS and BDS) has been consistently a subject of judicial scrutiny and review for more than three decades. While this Court has enunciated the law and put to rest the controversy arising in relation to one facet of the admission and selection process to the medical courses, because of ingenuity of the authorities involved in this process, even more complex and sophisticated set of questions have come up for consideration of the Court with the passage of time. One can hardly find any infirmities, inaccuracies or impracticalities in the prescribed scheme and notifications in regard to the process of selection and grant of admission. It is the arbitrary and colourable use of power and manipulation in implementation of the schedule as well as the apparently perverse handling of the process by the concerned persons or the authorities involved, in collusion with the students or otherwise, that have rendered the entire admission process faulty and questionable before the courts. It is the admissions granted arbitrarily, discriminately or in a manner repugnant to the regulations dealing with the subject that have invited judicial catechism. With the passage of time, the quantum of this litigation has increased manifold.

3. Thus, it is both the need of the hour and the demand of justice that this Court clarifies its decision and states the principles with greater precision so as to ensure elimination of colourable abuse and arbitrary exercise of power in the process of selection and admission to these professional courses by all concerned.

4. Therefore, in our view, though the present appeal arises from very simple facts, yet it raises questions of considerable importance and application. These questions are bound to arise repeatedly not only before this Court, but even before the High Courts. Therefore, it is imperative for us to formulate the questions and answer them in accordance with law.

5. The questions are :-

a) Is there any exception to the principle of strict adherence to the Rule of Merit for preference of courses and colleges regarding admission to such courses?

b) Whether the cut-off date of 30th September of the relevant academic year is a date which admits any exception?

c) What relief the courts can grant and to what extent they can mould it while ensuring adherence to the rule of merit, fairness and transparency in admission in terms of rules and regulations?

d) What issues need to be dealt with and finding returned by the court before passing orders which may be more equitable, but still in strict compliance with the framework of regulations and judgments of this court governing the subject?

6. The appellant cleared her Secondary examination (medical stream) with 75% marks and was eligible for taking medical entrance examination as she fulfilled the requisite criteria to take that exam. Pt. B.D. Sharma University (for short 'the University') issued a notification/advertisement for the entrance examination for MBBS, BDS and BAMS to be held in the first week of May, 2011. The appellant applied for the same in the Backward Class 'B' (for short 'BCB') and dependent of Ex-Serviceman (ESM) category. Her application was accepted and roll number was issued to her. The date of the examination was fixed for 12th June, 2011 by the University. The appellant was declared successful in the entrance examination having secured 832 marks. The appellant was at serial number 13 of the ESM category. All concerned were informed that the first counseling for allotment of seats was to be held on 14th -15th July, 2011. In this counseling, the appellant was not admitted to MBBS Course as she was lower

in merit. Consequently, she took admission in the BDS Course on that very day. Thereafter, a declaration was made by the respondents that the second counseling for allotment of seats in the MBBS course would be held on 20th September, 2011. The appellant again participated in the counseling but her name and roll number was not declared by the respondents for the said admissions. However, when the list of allocation of seats was displayed, it came to light that though the appellant had not been admitted to the MBBS Course, candidates who ranked below her in the merit list, including the respondent no.3, Vineeta Yadav, who had obtained 821 marks and was at serial number 14 of the ESM Category, had been given admission to the MBBS Course.

7. On the above facts, the learned Single Judge of the High Court of Punjab and Haryana at Chandigarh, observed that according to the respondents, the 'appellant left the counseling place' without appearing before the Counseling Board. Resultantly, her candidature was not considered for admission to the MBBS course under the ESM category and the candidate next in merit was given the admission. It was the opinion of the Court that it would be too far fetched to accept that the appellant, though was physically present at the time of taking of attendance, thumb impressions and photography, did not respond to the call for counseling at the relevant time. Further, the Court observed that no reason whatsoever could be seen for absence of the appellant at the relevant moment from the record before the Court. In view of the fact that the appellant had filed the writ petition within a week of the second counseling, the Court accepted the facts averred in the writ petition and directed the respondents to admit the appellant to the MBBS course while further directing that it would be open for the respondents to see that admission of other students lower in merit is not cancelled, if so permissible and possible under the relevant Rules.

8. Upon appeal, the Division Bench of that Court upset the

judgment of the learned Single Judge and held as under:-

> "We find that such directions could not have been issued on the basis of possibilities. In view the process of counseling, we find that the writ petitioner herself has failed to appear before the counseling board at the relevant time. It is not that she has not got admission. She is pursuing BDS course at Rohtak whereas, the other two candidates are pursuing their courses at PGI Rohtak and Medical College Agroha. At this stage, to disturb the entire admission process would not in the interest of academics when there is no substantive allegation in respect of admission process."

9. The Division Bench also noticed the contention of the respondents that the appellant was a student of the same college and other candidates were even outstation, thus it was possible that the appellant was not present when the call for her name was made, may be due to her negligence or carelessness.

10. The Court also observed that since there was no allegation of mala fides against any member of the Counseling Board and there also being no allegations of misconduct and favouritism, the conclusion arrived at by the learned Single Judge was not sustainable in law.

11. The moot question which falls for consideration of this Court in view of the divergent views taken by the Single Judge and the Division Bench of the High Court is whether the decision of the learned Single Judge is based on inferences or assumptions or whether it was a reasonable conclusion which the Court could arrive at in view of the pleadings of the parties and the relevant rules in force.

12. Notification for the second counseling was issued on 26th August, 2011. The second counseling was to be held for admission to MBBS and BDS courses in Government Aided

Medical Dental Colleges in the State of Haryana on 20th September, 2011 in the Office of the Director, Pandit B.D. Sharma University of Health Sciences, PGI, Rohtak, as per the schedule given therein.

13. The notification inter alia also stated:-

Date	Reporting Time	Category	Rank
20.09.2011	8.00 A.M.	General (Common Merit List)	01 to 704
		SC	01 to 65
		BCA	01 to 144
		BCB	01 to 150
		PH	01
		ESM	01 to 30
		FF	01

14. In furtherance to this notification, there is no dispute to the fact that the appellant, who was at Sr. No. 13 of ESM category, had appeared before the authorities and marked her attendance in the attendance sheet on 20th September, 2011. It is interesting to note that the same sheet had been signed by the candidates to mark their presence even on 15th July, 2011, when the first counseling was held. The appellant had also signed on 15th July, 2011 and, as already noticed, was given admission to the BDS course.

15. Another important aspect which needs to be noticed at this stage is the original merit list which has been produced before us. This merit list relates to the date of first counseling, i.e., 15th July, 2011. According to the respondents, the appellant had been given admission to the BDS course but in

this merit list the column for signature in front of her name is empty. This document does not have any of the members of the Board or any candidate specifying the date of this counseling. Therefore, we would take it that this document is dated and relates to the proceedings of 15th July, 2011. If that be so, it is difficult to understand as to how the appellant was given admission to the BDS course on 15th July, 2011 when nothing is noted in front of her name. It does not even say, whether she was given admission to MBBS or BDS course. Interestingly, in the remark column, the members of the Board have noted the candidates who have already been given admission to a college or who were not interested in BDS course or who had vacated the seat of BDS. The merit list for admission dated 20th September, 2011 has not been placed on record. There is no explanation available from the records produced before us, as to why this has not been done. It has also not been clarified in the affidavit filed on behalf of respondent Nos. 1 and 2.

16. We may notice that in the writ petition before the High Court the appellant had specifically averred that she was present in the second counseling at the time of attendance and even subsequent thereto. However, despite such presence, her name and roll number were not declared by the respondents for the purpose of admission to the MBBS course. However, the list of successful candidates revealed that candidates of merit lower to her had been admitted to the MBBS course. According to her, she instantly raised her claim and even submitted a representation upon the respondents but to no avail. Paragraphs 7 to 9 of the writ petition read as follows :

"7. That the respondents have decided to take second counseling and the date for second counseling was fixed for 20.09.2011. The petitioner again participated in the second counseling but her name and roll number was again not declared by the respondents for the said admission in the MBBS course.

8. That after the date of second counseling, the petitioner was shocked to know that one Vinita Yadav daughter of Sh. Arvind Kumar Yadav Roll No. 126038 having the same category i.e. BCB-ESM and having 821 marks which is lower then the marks secured by the petitioner got admission in MBBS Course conducted by the respondents. The petitioner has visited the office of the respondent just after getting the information that a candidate who is lower in merit/marks got admission in MBBS Course and requested the respondents that this is totally illegal and discriminatory on the part of them that they are giving admission to a candidate who is having lesser marks than the petitioner but the respondents have not considered her genuine claim and legal rights and willfully ignored the request of the petitioner.

9. That the petitioner has not continuously visited the office of the respondents and raised her voice for her genuine claim for the admission in MBBS Course and she has specifically mentioned that a candidate having lesser marks as compared to the petitioner has got admission in MBBS course but in vain. The petitioner submitted a representation before the respondents mentioning everything about the incident but the respondents have not considered her request. A true typed copy of the representation is attached herewith as ANNEXURE P-3."

17. In the reply filed on merits by the respondents, these paragraphs were dealt with in a most casual manner and no specific denial was made. Paragraphs 7 to 9 of the reply read as under:-

"7. That in reply to Para No. 7 of the petition averments made in Para No. 3 and 4 of the preliminary submissions are reiterated here.

8. That in reply to Para No. 8 of the petition it is submitted that since the Petitioner left the counseling place without

appearing before the counseling board her candidature was not considered for admission to MBBS course under ESM category and the Respondent No. 3 who was next in merit than the Petitioner got the admission in MBBS course under ESM category. Averments made in Para No. 3 and 4 of the preliminary submissions are also reiterated here.

9. That Para No. 9 of the writ petition is wrong and denied. The Petitioner has never approached to the answering Respondents with regard to her admission in MBBS course after 2nd counseling as claimed in this para. However, in any case she is not entitled for admission to MBBS Course under ESM category in present circumstances in view of facts mentioned in Para No. 2, 3 & 4 of the preliminary submissions."

18. From a bare reading of the reply filed by the respondents, it is clear that there is no specific denial of the above-noted averments made by the appellant. It is a settled principle of the law of pleadings that an averment made by the appellant is expected to be specifically denied by the replying party. If there is no specific denial, then such averment is deemed to have been admitted by the respondent. In the present case, it is evident that the above-noted averments in the writ petition were relevant and material to the case. In fact, the entire case of the appellant hinged on these three paragraphs of the writ petition. It was thus, expected of the respondents to reply these averments specifically, in fact to make a proper reference to the records relevant to these paragraphs. In view of the omission on part of the respondents to refer to any relevant records and failure to specifically deny the averments made by the appellant, we are of the considered view that the appellant has been able to make out a case for interference.

19. Not only this, if the averments made in paragraph 9 are correct and the appellant had instantaneously raised her

claim before the respondents, followed by making of the representation, we see no reason why the claim of the appellant could not be settled at that time or in any case in the subsequent counseling held on 30th September, 2011, where the appellant was admittedly present. The attendance sheet produced before us shows that the appellant was present on all the three days. Even the records produced by the respondents before the Court support the case of the appellant.

20. The appellant filed the writ petition before the High Court without any undue delay and on 4th November, 2011, the judgment by the court was passed in her favour. The cumulative effect of the above factual matrix, the pleadings of the parties and the expeditious manner in which the appellant had taken action before the authorities and then before the court and pursued her remedies, persuade the Court to believe that the case of the appellant is truthful. The cases of the present kind are not required to be tested by us on the touchstone of stringent principles of burden of proof applicable to criminal jurisprudence. As already mentioned, it was the obligation of the respondents to specifically deny the averments made by the appellant and to produce the relevant records to show that the stand taken by them is worthy of credence. Having failed to do so, they cannot shift the burden upon the appellant and expect this Court to believe that a student of the same college, would disappear at the relevant time of counseling after having marked her presence at the counseling.

21. It is not necessary for the appellant to plead and prove mala fides, misconduct or favouritism and nepotism on the part of the parties concerned. Failure to do the same could be an error, intentional or otherwise, but in either event, we see no reason why the appellant should be made to suffer despite being a candidate of higher merit.

22. At this stage, we may refer to certain judgments of the Court where it has clearly spelt out that the criteria for selection has to be merit alone. In fact, merit, fairness and transparency

are the ethos of the process for admission to such courses. It will be travesty of the scheme formulated by this Court and duly notified by the states, if the Rule of Merit is defeated by inefficiency, inaccuracy or improper methods of admission. There cannot be any circumstance where the Rule of merit can be compromised. From the facts of the present case, it is evident that merit has been a casuality. It will be useful to refer to the view consistently taken by this Court that merit alone is the criteria for such admissions and circumvention of merit is not only impermissible but is also abuse of the process of law. Ref. *Priya Gupta Vs. State of Chhatisgarh & Anr.* [CA @ SLP(C) No. 27089 of 2011, decided on 8th May, 2012], *Harshali v. State of Maharashtra and Others* [(2005) 13 SCC 464], *Pradeep Jain v. UOI* [1984 (3) SCC 654], *Sharwan Kumar and Others v. Director of Health Services and Another* [1993 Supp (1) SCC 632], *Preeti Srivastava v. State of MP* [(1999) 7 SCC 120], *Guru Nanak Dev University v. Saumil Garg and Others* [2005 (13) SCC 749], *AIIMS Students' Union v. AIIMS and Others* [(2002) 1 SCC 428].

23. It is true that the notification dated 26th August, 2011 had clearly stated that the candidate should appear before the second Counseling Board well in time along with all the original documents and that the photograph and thumb impression of the candidate would be taken at the time of the counseling. The notification stated the reporting time as 8.00 a.m. The exact time when the candidates of each category i.e. General, SC, PH (MS), EMS and FF were to be present was nowhere stated. In other words all candidates were required to be present at 8.00 a.m.. It cannot be disputed that the appellant was present at that time and undisputedly she had marked her presence in the attendance register. She admittedly participated in the photography and taking of thumb impressions held by the concerned authority. However, her absence at the crucial time of counseling is the essence of dispute in the present case.

24. Adherence to the schedule is the obligation of the authorities and the students both. The prescribed schedule is to be maintained stricto sensu by all the stakeholders because if one party adheres to the schedule and others do not or there is some kind of lack of communication or omission to make proper announcements and maintain proper records for such counseling, disastrous results can follow, of which the present case is an apt example.

25. The Court cannot ignore the fact that these admissions relate to professional courses and the entire life of a student depends upon his admission to a particular course. Every candidate of higher merit would always aspire admission to the course which is more promising. Undoubtedly, any candidate would prefer course of MBBS over BDS given the high-competitiveness in the present times, where on a fraction of a mark, the admission to course could vary. Higher the competition, greater is the duty on the part of the concerned authorities to act with utmost caution to ensure transparency and fairness. It is one of their primary obligations to see that a candidate of higher merit is not denied seat to the appropriate course and college, as per his preference. We are not oblivious of the fact that the process of admissions is a cumbersome task for the authorities but that per se cannot be a ground for compromising merit. The concerned authorities are expected to perform certain functions, which must be performed in a fair and proper manner i.e. strictly in consonance with the relevant rules and regulations.

26. Strict adherence to the time schedule has again been a matter of controversy before the courts. The courts have consistently taken the view that the schedule is sacrosanct like the rule of merit and all the stakeholders including the concerned authorities should adhere to it and should in no circumstances permit its violation. This, in our opinion, gives rise to dual problem. Firstly, it jeopardizes the interest and future of the students. Secondly, which is more serious, is that such

action would be ex- facie in violation of the orders of the court, and therefore, would invite wrath of the courts under the provisions of the Contempt of Courts Act, 1971. In this regard, we may appropriately refer to the judgments of this Court in the cases of *Priya Gupta* (supra), *State of Bihar v. Sanjay Kumar Sinha & Ors.* [(1990) 4 SCC 624], *Medical Council of India v. Madhu Singh & Ors.* [(2002) 7 SCC 258], *GSF Medical and Paramedical Association v. Association of Management of Self Financing Technical Institutes and Anr.* [2003 (12) SCC 414], *Christian Medical College v. State of Punjab and Others* [(2010) 12 SCC 167].

27. The judgments of this Court constitute the law of the land in terms of Article 141 of the Constitution and the regulations framed by the Medical Council of India are statutorily having the force of law and are binding on all the concerned parties. Various aspects of the admission process as of now are covered either by the respective notifications issued by the State Governments, prospectus issued by the colleges and, in any case, by the regulations framed by the Medical Council of India. There is no reason why every act of the authorities be not done as per the procedure prescribed under the Rules and why due records thereof be not maintained.

28. This proposition of law or this issue is no more res integra and has been firmly stated by this Court in its various judgments which may usefully be referred at this stage. Ref. *State of M.P. v. Gopal D. Tirthani and Others* [(2003) 7 SCC 83], *State of Punjab v. Dayanand Medical College & Hospital and Ors.* [AIR 2001 SC 3006], *Bharati Vidyapeeth v. State of Maharashtra and Another* [(2004) 11 SCC 755], *Chowdhury Navin Hemabhai and Others v. State of Gujarat and Others* [(2011) 3 SCC 617], *Harish Verma and Others v. Ajay Srivastava and Another* [(2003) 8 SCC 69].

29. In the prospectus issued by the respondents, Chapter 9 dealt with the method of selection and admission. Clause 3.1 stated that it was mandatory for the qualified candidates to

appear before the Counseling Board in person. No relaxation was to be given to the candidates who were unable to appear before the Counseling Board on the fixed dates. Further, it was stated in the prospectus that at the time of the counseling, the candidates would be required to exercise their choice for the institution and the course. The allotment of the seats would be made according to the merit and preference exercised by the candidates at the time of counseling. During the subsequent counseling the Course/Institution would be allotted as per the merit of the candidates depending on the availability of seats.

30. All these clauses are in accordance with the regulations framed by the Medical Council of India or the notifications issued by the concerned State Government. Relaxation of the Rule of Merit for reason of non-appearance is not permissible. In the present case, there is no dispute that the appellant was present at the place and on the date of the second counseling but the dispute relates to her absence at the particular time when her name was called out for the purpose of counseling. As far as this issue is concerned, we have already expressed the opinion that there is no substance in the defence taken by the respondents and the appellant should be entitled to the relief prayed for. However, the question that immediately follows is whether any mid-term admission can be granted after 30th September of the concerned academic year, that being the last date for admissions. The respondents before us have argued with some vehemence that it will amount to a mid-term admission which is impermissible, will result in indiscipline and will cause prejudice to other candidates. Reliance has been placed upon the judgments of this Court in *Medical Council of India v. Madhu Singh and Others* [(2002) 7 SCC 258], *Ms. Neelu Arora and Another v. Union of India and Others* [(2003) 3 SCC 366], *Aman Deep Jaswal v. State of Punjab and Others* [(2006) 9 SCC 597], *Medical Council of India v. Naina Verma and Others* [(2005) 12 SCC 626], *Mridul Dhar and Another v Union of India and Others* [(2005) 2 SCC 65], *Medical Council of India v Madhu Singh and Others* [(2002)

7 SCC 258].

31. There is no doubt that 30th September is the cut-off date. The authorities cannot grant admission beyond the cut-off date which is specifically postulated. But where no fault is attributable to a candidate and she is denied admission for arbitrary reasons, should the cut-off date be permitted to operate as a bar to admission to such students particularly when it would result in complete ruining of the professional career of a meritorious candidate, is the question we have to answer. Having recorded that the appellant is not at fault and she pursued her rights and remedies as expeditiously as possible, we are of the considered view that the cut-off date cannot be used as a technical instrument or tool to deny admission to a meritorious students. The rule of merit stands completely defeated in the facts of the present case. The appellant was a candidate placed higher in the merit list. It cannot be disputed that candidates having merit much lower to her have already been given admission in the MBBS course. The appellant had attained 832 marks while the students who had attained 821, 792, 752, 740 and 731 marks have already been given admission in the ESM category in the MBBS course. It is not only unfortunate but apparently unfair that the appellant be denied admission. Though there can be rarest of rare cases or exceptional circumstances where the courts may have to mould the relief and make exception to the cut-off date of 30th September, but in those cases, the Court must first return a finding that no fault is attributable to the candidate, the candidate has pursued her rights and legal remedies expeditiously without any delay and that there is fault on the part of the authorities and apparent breach of some rules, regulations and principles in the process of selection and grant of admission. Where denial of admission violates the right to equality and equal treatment of the candidate, it would be completely unjust and unfair to deny such exceptional relief to the candidate. [Refer *Arti Sapru and Others v. State of J & K and Others* [(1981) 2 SCC 484]; *Chavi Mehrotra v. Director*

General Health Services [(1994) 2 SCC 370]; and *Aravind Kumar Kankane v. State of UP and Others* [(2001) 8 SCC 355].

32. We must hasten to add at this stage that even if these conditions are satisfied, still, the court would be called upon to decide whether the relief should or should not be granted and, if granted, should it be with or without compensation.

33. This brings us to the last phase of this case as to what relief, if any, the appellant is entitled to. Having returned a finding on merits in favour of the appellant, the Court has to grant relief to the appellant even, if necessary, by moulding the relief appropriately and in accordance with law. This Court must do complete justice between the parties, particularly, where the legitimate right of the appellant stands frustrated because of inaction or inappropriate action on the part of the concerned respondents. In fact, normally keeping in view the factual matrix of this case, we would have directed the admission of the appellant to the MBBS course in the academic year 2011-2012 and would further have directed the respondents to pay compensation to the appellant towards the mental agony and expense of litigation and the valuable period of her life that stands wasted for failure on the part of the respondents to adhere to the proper procedure of selection and admission process. May be the Court would have granted this relief subject to some further conditions. However, we are unable to grant this relief to the appellant in its totality for reason of her own doing. She has completely faulted in pursuing her academic course in accordance with the Rules and like a diligent student should do. In the reply filed on behalf of respondent Nos.1 and 2, it has been stated that as per the Dental Council of India Norms, minimum required attendance is 75 per cent in Theory as well as in Practical of each subject individually for issuance of roll numbers in the BDS course. Undoubtedly, the appellant was admitted to the BDS course and she was expected to complete her academic course in

terms of the Norms of Dental Council of India. It is also not disputed before us and, in fact, was confirmed to us on behalf of the Medical Council of India and the respondent University that the course for the first year of both, BDS and MBBS, is more or less the same. Except one paper of Anatomy, rest of the subjects and papers are more or less similar particularly for the first six months. If the appellant had pursued the BDS course to which she was admitted diligently and had attended all the lectures, she might have been eligible to pursue her MBBS course in continuation thereto. We are not recording any finding in this behalf as, in our opinion, the appellant is not entitled to this particular relief, as already indicated, and for the same she has to blame none else but herself.

34. In the reply, the respondents have specifically explained by the figures on record that the appellant had attended only 28 per cent to 42 per cent lectures (minimum being 28% and maximum 42%) instead of the required 75 per cent and as such she has not even pursued her BDS course properly. The table given in the reply reads as under :

S.No.	Name of Deptt.	Practical			Theory		
		Lect. Deliv.	Lec. Attnd.	%age	Lec Deliv.	Lec. Attnd.	%age
1.	Prosthodontics	95	22	23%	Nil	Nil	Nil
2.	Dental Anatomy	93	31	33%	95	28	29%
3.	Dental Material	Nil	Nil	Nil	35	13	37%
4.	Anatomy	125	39	31%	86	25	29%
5.	Physiology	30	09	30%	94	27	28%
6.	Biochemistry	32	12	37%	59	25	42%

35. From the above data, it is clear that the appellant has miserably failed to pursue her BDS course in accordance with

Rules and, thus, she has not fulfilled even the pre-requisites for MBBS course, assuming that the BDS and MBBS courses are similar for the first six months. In these circumstances and finding that the appellant is at fault to this limited extent, we are of the considered view that the only relief the appellant can be granted in the present appeal is a direction to the respondents to give the appellant admission to the MBBS course not in the academic year 2011-12 but in the current academic year i.e. 2012-2013, that too, subject to the condition that she will pursue her MBBS course right from the beginning without any advantage of her course in the BDS. If any examinations have been held in the meanwhile, it shall be deemed that she had not appeared in those examinations and be treated as such for all intent and purpose. While giving her admission to the MBBS course, preferably and if it is permissible, admission of none of the other candidates to the MBBS course may be disturbed. If for whatever reasons, it is not possible to do so, in that event, the candidate last in the merit who has been granted admission to the MBBS course shall be transferred to the BDS course and appellant shall be admitted to the MBBS course. We also direct that such candidate would not be required to commence her/his BDS course from the beginning provided the candidate has satisfied the attendance requirements of the Dental Council of India.

36. Now, we shall proceed to answer the questions posed by us in the opening part of this judgment.

ANSWERS

a) The rule of merit for preference of courses and colleges admits no exception. It is an absolute rule and all stakeholders and concerned authorities are required to follow this rule strictly and without demur.

b) 30th September is undoubtedly the last date by which the admitted students should report to their respective colleges without fail. In the normal

course, the admissions must close by holding of second counseling by 15th September of the relevant academic year [in terms of the decision of this Court in *Priya Gupta* (supra)]. Thereafter, only in very rare and exceptional cases of unequivocal discrimination or arbitrariness or pressing emergency, admission may be permissible but such power may preferably be exercised by the courts. Further, it will be in the rarest of rare cases and where the ends of justice would be subverted or the process of law would stand frustrated that the courts would exercise their extra-ordinary jurisdiction of admitting candidates to the courses after the deadline of 30th September of the current academic year. This, however, can only be done if the conditions stated by this Court in the case of *Priya Gupta* (supra) and this judgment are found to be unexceptionally satisfied and the reasons therefor are recorded by the court of competent jurisdiction.

c) & d) Wherever the court finds that action of the authorities has been arbitrary, contrary to the judgments of this Court and violative of the Rules, regulations and conditions of the prospectus, causing prejudice to the rights of the students, the Court shall award compensation to such students as well as direct initiation of disciplinary action against the erring officers/officials. The court shall also ensure that the proceedings under the Contempt of Courts Act, 1971 are initiated against the erring authorities irrespective of their stature and empowerment.

Where the admissions given by the concerned authorities are found by the courts to be legally unsustainable and where there is no reason to

permit the students to continue with the course, the mere fact that such students have put in a year or so into the academic course is not by itself a ground to permit them to continue with the course.

37. With all humility, we reiterate the request that we have made to all the High Courts in Priya Gupta's case (supra) that the courts should avoid giving interim orders where admissions are the matter of dispute before the Court. Even in case where the candidates are permitted to continue with the courses, they should normally be not permitted to take further examinations of the professional courses. The students who pursue the courses under the orders of the Court would not be entitled to claim any equity at the final decision of the case nor should it weigh with the courts of competent jurisdiction.

38. Besides providing the above answers to the questions, we also issue the following directions to put the matters to rest beyond ambiguity and to ensure that the authorities act in accordance with law :

(a) From the records of this case, it is clear that two different records are being maintained at the time of counseling. Firstly, the attendance register and thereafter photography and thumb impressions are taken and, secondly, the Committee maintains a record of the counseling where the students are actually given a specific college/course of his/her preference. We direct that the second set of records shall be maintained more accurately. It shall not only contain the signatures of the candidate and the Committee members but also the date and time when the candidate is given a seat and it shall also be signed by the candidate with the course clearly written by the Committee and signed by the candidate in the remarks column.

(b) The essence of all the judgments dealing with this

issue is to nurture discipline, fairness and transparency in the selection and admission process and avoid prejudice to any of the stake-holders. Thus, while we expect the authorities to be perfect, fair and transparent in the discharge of their duties, we make it clear that the students who adopt malpractices in collusion with the authorities or otherwise for seeking admissions and if their admissions are found to be irregular or faulty in law by the courts, they shall normally be held responsible for paying compensation to such other candidates who have been denied admission as a result of admission of the wrong candidates.

(c) The law requires adherence to a settled protocol in the process of selection and grant of admission. None should be able to circumvene or trounce this process, with or without an ulterior motive. The courts are duty bound to ensure that litigation relating to academic courses, particularly, professional courses should not be generated for want of will on the part of the stake holders to follow the process of selection and admission fairly, transparently and without exploitation.

(d) Keeping in mind the hard reality that there are number of petitions filed in each High Court of the country, on the one hand challenging the admissions on varied grounds while, on the other, praying for grant of admission on merit to the respective professional courses of MBBS/BDS, the Court cannot lose sight of the fact that the career of the meritorious youth is at stake. These are matters relating to adherence to the rule of merit and when its breach is complained of, the judiciary may be expected to deal with the said grievances preferentially and effectively. The diversity of our

country and the fact that the larger population lives in rural areas and there being demand for consistent increase in the strength of qualified medical practitioners, we are of the considered view that such cases, at least as of now and particularly for a specific period of the year require higher priority in the heavy business of court cases. We are not oblivious of the fact that the Hon'ble Judges of the High Court are working under great pressure and with some limitations. However, we would still make a request to the Hon'ble Chief Justices of the respective High Courts to direct listing of all medical admission cases before one Bench of the Court as far as possible and in accordance with the Rules of that Court. It would further be highly appreciable if the said Bench is requested to deal with such cases within a definite period, particularly during the period from July to October of a particular year. We express a pious hope that our request would weigh with the Hon'ble Chief Justices of the respective High Courts as it would greatly help in serving the ends of justice as well as the national interest.

39. For the reasons afore-recorded and with the directions as mentioned above, we direct the respondents to grant admission to the appellant to the MBBS course in the current academic year subject to the condition that she will pursue her MBBS course right from its beginning and to the conditions afore-noticed. However, in the facts and circumstances of the case, we award no costs.

Appeal is disposed of accordingly.

R.P. Appeal disposed of.