HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Criminal Appeal No. 244/2022

Kamlesh S/o Shankar Lal, Aged About 25 Years, R/o Balmukundpura Alias Basda, Police Station Kothkawada, Jaipur (South)

----Appellant

Versus

State Of Rajasthan, Through P.p.

----Respondent

For Appellant(s)	:	Ms. Anubha Singh
For Respondent(s)	:	Mr. Rajendra Yadav, AAG with Mr. Sher Singh Mahla, PP Mr. Vijay Singh Shekhawat

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HON'BLE MR. JUSTICE FARJAND ALI

Judgment

RESERVED ON ::: 11.01.2023

PRONOUNCED ON ::: 27.02.2023

Reportable

BY THE COURT:-

1. The instant appeal has been filed under Section 374(2) of Cr.P.C. against the judgment of conviction and order of sentence dated 05.10.2021 passed by learned Special Judge, Protection of Children from Sexual Offences Act, 2012, No. 03, Jaipur Metropolitan-I in Sessions Case No. 28/2021 whereby the appellant was held guilty for commission of offence under Sections 5(m)/6 of Protection of Children from Sexual Offences Act, 2012 and he was sentenced to suffer 20 years rigorous imprisonment and a fine of Rs. 2,00,000/-; in default of payment of fine, he was to further undergo two months additional simple imprisonment.

2. Succinctly stated, the facts of the case as per the FIR are that a girl aged of nine years left her house to get a *beedi* for her grandfather from a shop in the village at around 5 p.m. on 26.09.2021. When the girl was returning with the *beedi* and sweets, the accused-appellant lured her, took her to a discreet place and committed the offence of rape upon her. He had tied her hands and her mouth and he had even tried to strangle her. After thinking that she had died, the accused-appellant left from the scene. The villagers started looking for her when the girl did not return for a long period of time and found her lying unconscious. She was in a disconcerted state and she was bleeding from her private parts. She was taken to hospital immediately where she told the whole story to her father. Thereafter, her father lodged a report with the police. Upon filing of the FIR, investigation commenced.

3. As part of their usual investigation, the police recorded the statements of witnesses, inspected the crime scene, prepared the site plan, procured the documents pertaining to the age of the victim, recorded the statement of the victim under Section 161 CrPC and got her medically examined. The statement of the victim was recorded under Section 164 CrPC, the accused-appellant was detained and interrogated. An interrogation note was prepared and post-interrogation, the offences under Section 376 AB of IPC and Section 5/6 of POCSO Act, 2012 were found proved against the appellant and he was arrested. The arrestee was also subjected to medical examination and as per the disclosure made by him under Section 27 of Indian Evidence Act, the attested map

of the crime scene was prepared. After conducting complete investigation and looking at the facts and circumstances as available on record, the police filed charge-sheet against the petitioner for the offences under Section 376 AB of IPC and Section 5/6 of POCSO Act, 2012 on 27.09.2021.

4. Thereafter, vide the order dated 28.09.2021, cognizance was taken by the trial court and charges were framed against the accused-appellant for the offences under Sections 5(m)/6 of the POCSO Act and in alternate Section 376AB of IPC.

5. As many as 16 witnesses were examined by the prosecution and 33 documents were tendered into evidence. Thereafter, when the accused-appellant was examined under Section 313 of CrPC, he refuted the testimonies of all the prosecution witnesses and claimed them to be untrue except the part of testimony of PW-14 the prosecutrix wherein he accepted the fact that he was intoxicated. Four documents were adduced in favour of the accused in his defence.

6. Subsequently, after hearing learned counsel for the accused and the public prosecutor and examining the evidence produced before the court, the learned trial court convicted the accused-respondent under Section 5(m)/6 of the POCSO Act and sentenced him to suffer a sentence of twenty years rigorous imprisonment along with fine of Rs. 2,00,000/-. Aggrieved by the said judgment of conviction and order of sentence, the instant appeal has been preferred by the accused-appellant.

7. Learned counsel for the appellant submitted that the impugned order passed by the court below needs to be set aside as the correct factual and legal aspects of the case have not been dealt with. The accused is a victim of hasty investigation. The agency completed investigation and filed the charge sheet in this case within 24 hours of filing of the FIR. The right of the accused to get a fair trial was hampered as free legal aid was not provided to him when he was first presented before the Magistrate. Reliance was placed by the counsel on the judgment passed by Hon'ble the Supreme Court in ***Khatri and Ors. Vs. State of Bihar and Ors.***[1].

8. It was further submitted that the whole trial was concluded within six days and injustice was caused to the accused because of the hastiness of the investigating agency and the trial court. The counsel appointed by order of the District Legal Service Authority on 28.09.2021 was called to court on the same day, supplied with the charge sheet and had to argue on the point of framing of charge without any time for preparation. The said counsel was not given time to file reply to the application of the prosecution requesting day-to-day hearing of the matter which leads to the inference that the trial court was partial to the prosecution and did not abide by the natural principles of justice.

9. She further submitted that there are discrepancies in the statement of the prosecutrix and the prosecution witnesses. The original documents pertaining to the samples of the accused sent to FSL were not presented and this creates suspicion over the

1 AIR 1981 SC 928.

whole process of sending the samples and procuring the results. Though it is alleged by the prosecution that the accused was intoxicated and the same is also transpiring from the statement of the accused recorded during the trial, yet, no test was conducted by the agency to confirm this fact. The whole process of investigation, filing of charge-sheet, conduct of trial and rendering of final opinion upon the guilt of the accused is not in accordance with law and thus, the impugned judgment passed by the trial court needs to be set aside.

10. Looking to the serious nature of allegations, this Court deemed it appropriate to call the learned Additional Advocate General to represent the case of prosecution as well as to save the interest of the victim. Thereupon, he appeared and submitted that the matter was sensitive and it was decided quickly for the sole reason that justice be delivered to the victim without any undue delay. The trial court applied its mind, evaluated the material available on record and then passed the judgment in accordance with law, thus, there is no room for interference in the present matter.

11. Learned AAG along with public prosecutor opposed the prayer made by counsel for the appellant and submitted that the haste exercised by the learned trial court did not affect the rights of the accused as the evidence available on record was substantial enough to book him for the alleged offences and put him behind the bars.

12. Per contra, learned counsel for the complainant submitted that the learned trial judge had passed the judgment after due deliberation of the facts and the same is in accordance with law. The accused committed a heinous crime against the prosecutrix and the evidence available on record proved the case of the prosecution beyond any reasonable doubt, thus, he prayed that the appeal be rejected and the order of the trial court be upheld.

13. He further submitted that it was a serious case of commission of rape upon a minor and the judgment passed by the Court below is a reasoned judgment, therefore, no interference is called for by this Court.

14. Heard counsel for the parties. After examining the impugned judgment carefully and wading through the material available on record and before beginning its observations about the process and manner in which the trial was conducted in this particular matter, this Court would like to discuss the general principles and guidelines governing the case of present nature.

15. Cases involving rape of a girl child need to be dealt with carefully and with a certain degree of sensitivity. Delhi High Court has consolidated certain parameters in ***Mohd. Alam Vs. The State (NCT of Delhi)***[2] that need to be kept in mind in cases pertaining to rape of a girl child and they are as follows:

> "42. From a perusal of these decisions rendered by the Supreme Court, the following parameters and factors that need to be kept in mind, clearly emerge in cases of a rape of a girl child:
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> Such cases need to be dealt with sensitively and

2 Crl. A. 601/2009, decided on 30.09.2010.

> not like cases involving other penal offences. In other words, the whole approach of the Courts must be quite different.
>
> The traditional non-permissive bounds of Indian society must be kept in mind while examining the evidence in cases involving sexual offences. Social factors play an important role in the nature and quality of available evidence."

16. In the present case, the learned trial judge has not hearkened to the above-mentioned caution as the victim was made to tell and retell the horrific incident that happened with her at least four times within a span of few days; firstly, to her father/ family upon coming home; secondly, to the police officer who took her statement under Section 161 CrPC; thirdly, to the magistrate who recorded her statement under Section 164 CrPC and lastly, to the court while making her on-oath statement. She is a tweenager who was badly injured and found herself in a befuddled and semi-conscious state. There was no such haste for which she was made to relive the entire incident multiple times in front of authorities and unknown individuals and made to depose when she was in a traumatized state of mind and was facing an utterly unpleasant upheaval.

17. In a non-permissive society like India where a girl feels bound by the societal norms and traditions, it is natural for her to hesitate before sharing the details of such an untoward incident with her family for the fear of getting ostracized or looked down upon by the society.[3]

18. If the victim is given a reasonable time period to cool down from the shock and trauma, she will be in a better frame of mind

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3 Lexis Nexis, R.A. Nelson's Indian penal Code, 12th Edition, Volume III, p. 3206.

to give her statement and will be able to remember and re-tell the incident that happened with her more accurately. It is a natural phenomenon that when our mind and body have just been through a major mishap, we require time to step out of the discombobulation caused by the unfortunate episode, understand and process the incident that occurred and come to terms with the new reality that starts to exist after the episode. In the matter at hand, the victim is a young girl who cannot be expected to possess the physical, mental and emotional depth to be able to cope with the whole ordeal at such a freakishly quick pace and give her statements repeatedly in an uncomfortable and unfamiliar environment.

19. After the Criminal Law (Amendment) Act, 2018 came into force, the punishment prescribed for commission of rape of a girl aged below twelve years cannot be less than twenty years and it may extend to imprisonment for life with fine or death as per Section 376AB of IPC. The punishment of imprisonment for life prescribed in this provision is further detailed and it is specified that it shall mean imprisonment for the remainder of the natural life of the person upon whom the punishment is being imposed. The spectrum of sentence prescribed for the offence allegedly committed by the accused is very wide and a Sessions Judge adjudicating upon such a matter needs to be vigilant of the fact that the rights of the accused are not endangered while the matter is disposed of in a timely manner. On one side, the Trial Judge needs to do justice with the rights of the young victim and ensure that the trial is conducted in a timely manner and as expeditiously

as possible and on the other side, the Trial Judge needs to rationalise in such a manner that the rights of the accused do not get imperiled. The distance between the two sides is equivalent to a hairbreadth but it needs to be maintained and both the lines of rights need to run parallel to each other without over-lapping or intertwining in order to avoid infraction of justice and to ensure administration of justice. The fundamental principles of administration of justice provide that the authorities need to behave in a manner which is lawful, reasonable and procedurally fair. If the present factual matrix is considered, the conduct of the presiding officer, though it may not have been intended, but it was unreasonable, procedurally unfair and not in accordance with law.

20. In the willingness to dispose off the case quickly, the presiding officer conducted the trial in such a hurried manner that several deficiencies were overlooked or neglected or missed. There are several defects and contrarieties that have been noticed by this Court while going through the material available on record. For instance, it is revealed in the FIR that the villagers found the victim lying in an unconscious, befuddled and injured state whereas it is stated in the final report submitted by the police that the victim walked back to her house on her own and she was bleeding from her private parts. There are other discrepancies but this Court does not wish to appreciate evidence or give any finding on the credibility of the testimonies of the witnesses and the facts available on record, however, above observation has been made in order to express the concern of this Court that no endeavour has been made to wipe out the anomaly rather the thrust of the

learned trial judge had been to conclude the trial as expeditiously as he could no matter the cost.

21. It is emanating from the record that neither the court asked the accused as to whether he has engaged any counsel to represent him or he is an indigent person so that legal assistance may be provided to him through legal service authority nor was he afforded enough time to engage a counsel of his own choice. In fact, there is no application on behalf of the accused to the Legal Service Authority seeking legal aid. It seems that a panel lawyer of DLSA has been foisted upon him to defend his cause.

22. No time was granted to the accused to meet with his counsel, to sit with him or strategize so that he may apprise the counsel of the facts and circumstances relevant to the case. No effort has been made to get him examined by any psychologist or civil surgeon. No representation from the department of social justice has been obtained regarding his socio-economic condition as well as family/dependents.

23. There was no need to record the statement of the victim in such haste when she was severely frightened by the incident and as per the report, she underwent a surgery on the very same day and was in an intensive care unit of the hospital so in the view of this Court, she was in trauma and the presence of police officer, employees of the court, judicial officer, medical officer etc. who were making her reply to the questionnaire was no less traumatic than what she had already endured.

24. The order appointing a lawyer to the accused in pursuance of providing legal aid to the accused was passed on 28.09.2021 and after a lawyer from the District Legal Aid Authority was appointed to the accused, a copy of the charge-sheet was given to him and cognizance of the offence was taken and arguments on framing of charge were heard and the charges were framed against the accused under Section 376AB of IPC and Sections 5/6 of Protection of Children from Sexual Offences, 2012 on the very same day as well. Even the challan was filed at home with no paper at 07.30 p.m. on 27.09.2021; cognizance was taken by the learned judge on 28.09.2021 and statements of eight witnesses were recorded on 30.09.2021.

25. At more than one instance, this Court was forced to ponder upon the unwarranted haste and urgency that was shown at various steps of investigation as well as at effective stages of trial. There was no need for recording of the statement of the prosecutix in the hospital when she was about to get discharged at 02:00 p.m. on the very same day.

26. A small cooling period should have been given to the prosecutrix as breathing time to understand what had happened with her and process the whole incident better so that she could share the details of the incident as well as the details of the person responsible for the crime in a more accurate manner. She must have been in a fuzzy state of mind while giving her statements given to the huge mishap that she had just suffered a short while ago and her age.

27. Trial in Rape Cases should be conducted *de die in diem:*

Trial in a matter pending before Sessions Court must proceed in a continuous fashion and must be conducted on a day-to-day basis. The Court is au courant with the settled legal position that once the stage of examination of witnesses begins, all the witnesses in attendance have to be examined *de die in diem*, however, the same has come to pass by way of passing of a slew of judicial pronouncements by Hon'ble the Supreme Court and nowhere it is stated therein that the rights of either of the parties to a fair and reasonable trial shall get hampered in the process of securing a faster conviction/acquittal rather it is promulgated that the trial should proceed from day to day in the interest of both the prosecution as well as the defence.

28. On one hand, the courts think that a rape victim needs time to come out of the trauma of the incident that took place with her and on the other hand, she is made to record her statement and depose in front of the court within a span of five days of happening of the incident.

29. Judgment of conviction and order of sentence passed on the same day:

In ***Bhagwani Vs. The State of Madhya Pradesh***[4], Hon'ble the Supreme Court has recently held that there should be a separate hearing on the point of sentence so that the accused gets sufficient time and fair opportunity to represent himself adequately while making a note of the hasty manner in which trial courts conduct trials in murder and rape cases. Though the facts

4 AIR 2022 SC 527.

of this case are different and thus, the punishment is graver than the one imposed on the present appellant, but the opinion on the subject of separate hearing for sentence is pertinent to the case at hand and the relevant paragraph of the above cited judgment reads as follows:

> "13. It is travesty of justice as the Appellant was not given a fair opportunity to defend himself. This is a classic case indicating the disturbing tendency of Trial Courts adjudicating criminal cases involving rape and murder in haste. It is trite law that an Accused is entitled for a fair trial which is guaranteed Under Article 21 of the Constitution of India. In respect of the order of conviction and sentence being passed on the same day, the object and purpose of Section 235(2) Code of Criminal Procedure is that the Accused must be given an opportunity to make a representation against the sentence to be imposed on him. A bifurcated hearing for convicting and sentencing is necessary to provide an effective opportunity to the Accused. Adequate opportunity to produce relevant material on the question of death sentence shall be provided to the Accused by the Trial Court."

30. Hon'ble the Supreme Court conducted a hearing in a ***Suo Moto Writ Petition (Crl.) No. 1 of 2022***[5] for the purpose of consolidating the precedents and find a definite and uniform answer to the question that whether, after recording conviction for a capital offence, under law, it is the obligation of the court to conduct a hearing separately on the point of sentence. The matter was referred to a larger bench seeking a uniform approach but it was observed that one thing that was common in all the precedents was that a *'meaningful, real and effective'* hearing must be held and the opportunity should be given to the accused

5 In Re: Framing Guidelines regarding Potential Mitigating Circumstances to be Considered while imposing Death Sentences, Suo Moto Writ Petition (Crl.) 01 of 2022, decided on 19.09.2022.

to produce any material relevant for the adjudication of sentence and defend himself. The relevant paragraphs of the afore-said judgment are reproduced below:

> "22. After hearing the parties on the question of conviction in Manoj and Ors. v. State of Madhya Pradesh, this Court had adjourned the matter for submissions on sentencing, with directions23 eliciting reports from the probation officer, jail authorities, a trained psychiatrist and psychologist, etc., to assist the Accused in presenting mitigating circumstances. Noticing the lack of a uniform framework in this regard, the present Suo Motu W.P. (Crl.) No. 1/2022 was initiated wherein this Court has indicated by its orders the necessity of working out the modalities of psychological evaluation, the stage of adducing evidence in order to highlight mitigating circumstances, and the need to build institutional capacity in this regard. The apprehensions relating to the absence of such a framework was also recorded in the final judgment of Manoj and Ors. v. State of Madhya Pradesh, wherein the importance of a separate hearing and the necessity of background analysis of the Accused, was highlighted. It was suggested that the social milieu, the age, educational levels, whether the convict had faced trauma earlier in life, family circumstances, psychological evaluation of a convict and post-conviction conduct, were relevant factors at the time of considering whether the death penalty ought to be imposed upon the Accused.
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> 23. In light of the above, there exists a clear conflict of opinions by two sets of three judge bench decisions on the subject. As noticed before, this Court in Bachan Singh had taken into consideration the fairness afforded to a convict by a separate hearing, as an important safeguard to uphold imposition of death sentence in the rarest of rare cases, by relying upon the recommendations of the 48th Law Commission Report. It is also a fact that in all cases where imposition of capital punishment is a choice of sentence, aggravating circumstances would always be on record, and would be part of the prosecution's evidence, leading to conviction, whereas the Accused can scarcely be expected to place mitigating circumstances on the record, for the reason that the stage for doing so is after

> conviction. This places the convict at a hopeless disadvantage, tilting the scales heavily against him. This Court is of the opinion that it is necessary to have clarity in the matter to ensure a uniform approach on the question of granting real and meaningful opportunity, as opposed to a formal hearing, to the Accused/convict, on the issue of sentence."

31. The aggravating circumstances need to be listed, then the mitigating circumstances need to be listed and thereafter, both are to be taken on record, weighed and measured as against each other and then a conclusion regarding the same is to be arrived at. Both mitigating and aggravating circumstances need to be listed down and weighed against each other for the purpose of determining the quantum of sentence. The mitigating circumstances that the accused would want to put on record for the purpose of defending himself during the hearing on point of sentence can only be stated after the finding of guilt is reached and the accused has been convicted, thus, a separate hearing is required on the point of sentence. Section 235 of CrPC reads as follows:

> **235. Judgment of acquittal or conviction.**
> (1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.
> (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

32. Sub-clause (2) of Section 235 clearly states that once the accused has been convicted, he shall be heard on the question of the sentence and thereafter, sentence shall be passed. Arguendo, if Section 235 is interpreted in a way that it is not mandatory that

the judgment of conviction and order of sentence cannot be passed on the same day, then too, the requirement of hearing the accused after passing the judgment of conviction and before passing the order of sentence is explicit in the statute and cannot be waived off. Hearing the accused has to be an effective hearing as the process of sentencing cannot be considered to be a stage which is subservient to the stage of deciding the guilt of the accused.

33. In the considered view of this Court, a reasonable amount of time is needed to be taken after passing of judgment of conviction and the reasons for the same are two-fold:

i) There are multiple factors to be taken into account before passing an order of sentence like nature of the offence, the extenuating/mitigating and aggravating circumstances, previous criminal antecedents, age of the person who committed the offence, educational background of the accused, information pertaining to employment of the accused, mental & emotional state of the offender, life of the offender at home & family, "society and social adjustment, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence."[6] For any counsel to prepare for the hearing on point of sentence and for any judge to consider the

6 *Santa Singh Vs. State of Punjab*, (1976) 4 SCC 190.

submissions regarding these factors and pass an order of sentence, a reasonable amount of time has to be employed towards this aspect. In the present factual matrix, the counsel of the accused-appellant did not even get time to furnish or obtain the information on the above-enumerated factors, let alone being prepared to answer or present on the same. In such circumstances, it will be unsafe to infer that a reasonable opportunity was indeed afforded to the offender of the present case to make submissions on the point of sentence and thus, the mandate contained under Section 235 of CrPC stands vitiated particularly when the sentence of death or life imprisonment till remainder of entire natural life is prescribed.

ii) Even if it is considered that sufficient time is provided in cases of same-day sentencing, the notion that the sentence was passed on the very same day as the passing of judgment of conviction raises serious doubts as to whether the factors discussed above were deliberated upon or not.

34. Haste in conducting trial:

The then Lord Chief Justice of England, Lord Hewart had laid down the famous dictum in Rex Vs. Sussex Justices; Ex parti McCarthy reported in [1924] 1 KB 256 that 'justice must be seen to be done'. 'Justice should not only be done, but should manifestly and undoubtedly be seen to be done.' This oft-quoted, historic phrase has been in vogue since almost a hundred years now. This was an interesting case where the clerk to the justices was a partner in the firm that was representing one of the parties and the opposite party had opposed the fact that the said clerk

retired with the justices. Later, it was clarified and stated as a matter of fact that the clerk did not partake in any discussion regarding the case, however, Lord Hewart quashed the conviction passed in the matter stating that what was actually done is not important but what might appear to have been done is important and held as follows:

> "Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

35. One of the other judges that formed the coram in this case concurred with Justice Hewart and he observed that even though anything irregular or wrong was not intended by the trial judges but they put themselves in a no-win situation by allowing the clerk to retire with the justices without his presence being waived by the solicitor. Similarly, in the case at hand, this Court does not feel that the learned trial judge has acted in haste with any other ulterior object in mind nevertheless it is discernible from the record that the task of final disposal was done by him just with a view to dispose of the case as expeditiously as possible so that the victim of a gruesome incident may get justice. Here, the intention of the learned trial judge may not have been to do something irregular or wrong, however, he put himself in an impossible situation wherein if the timeline and manner in which the trial was conducted are scrutinised as against the procedural provisions of Code of Criminal Procedure, principles of natural justice and the right to a fair trial falling under the creatively interpreted shade of the parasol of Article 21 of Constitution of India, then it can safely

be inferred that what has actually been done will lose its significance, irrespective of the fact whether the same was right or wrong, and what appears to have been done will assume importance.

36. The use of this well-established principle in setting aside orders of courts/tribunals/quasi-judicial authorities wherein something irregular or out of order/place appears to have been done by the Indian courts has stood the test of time and being oblivious to the same can shake people's faith in the impartiality of the judiciary.

37. The various stages and steps of the trial have been tabulated below:

S. No.	**Date**	**Particulars**
1.	26.09.2021	when the incident took place
2.	27.09.2021	FIR lodged. Accused arrested. All investigation was done and accused was produced by the police, along with the charge sheet, before presiding officer after court hours at his residence at 07:00 p.m.
3.	28.09.2021	order sheet regarding submission of charge sheet was drawn.
		counsel appointed through DLSA to provide legal assistance to the accused.
		counsel submitted a copy of the order No. 171 dated 28.09.2021 by which he was appointed by the DLSA.
		copy of the charge sheet supplied to the accused.
		arguments on point of cognizance and for consideration on the question of charge were heard and accordingly, cognizance was taken and charges were framed. trial commenced on the very same day.
		prosecution witnesses PW- 1, 3, 5, 6 & 7 summoned for recording of their on-oath statement on 29.09.2021. prosecution witnesses PW- 2, 4, 9, 10 & 11 summoned for recording of their on-oath statement on 30.09.2021.

		prosecution witnesses PW- 8, 12, 13, 14 & 15 summoned for recording of their on-oath statement on 01.10.2021. prosecution witnesses PW- 16, 17 & 18 summoned for recording of their on-oath statement on 04.10.2021.
4.	29.09.2021	statements of PW- 1, 2, 3 & 4 recorded. Special P.P. deleted names of witness no. 3 & 5 from the list.
5.	30.09.2021	three applications filed by the prosecution dealt with.
		Dr. Aman Choudhary added to the list of prosecution witnesses as witness no.19.
		on-oath statements of PW- 5, 6, 7, 8, 9, 10, 11 & 12 recorded.
		SHO, Kotkhera directed to remain present at hospital on 01.10.2021.
6.	01.10.2021	statement of PW- 13 recorded.
		statement of PW- 14 (the victim) recorded through video conferencing in the presence of Dr. Arpana, Secretary, DLSA and the mother of the victim at hospital.
		envelope containing the statement of the victim sent by Secretary, DLSA to the court.
		victim was discharged from the hospital.
	02.10.2021	Holiday
	03.10.2021	Holiday
7.	04.10.2021	statements of PW- 15 & 16 recorded.
		explanation sought from accused under Section 313 CrPC
		matter listed for final arguments on 05.10.2021.
8.	05.10.2021	final arguments heard.
		judgment of conviction and order of sentence written and pronounced in open court.

38. It is apparent from the chart that the investigation was concluded and charge sheet was filed in less than a day. After taking of cognizance and framing of charge on 28.09.2021, the trial began. The statements of all the witnesses were recorded and evidence was taken on record in a total of four days and final arguments were heard on the fifth day. On the fifth day itself, the

judgment of conviction was written and pronounced in open court. The order of sentence was also passed on the fifth day of the trial post framing of charge. Effectively, the trial was concluded within a span of just five days post framing of charge excluding the two days of holidays, i.e. 02.10.2021 and 03.10.2021.

39. It is further reflected from the chart that the date of incident was 26.09.2021; investigation was completed within a day and charge sheet was filed on 27.09.2021 and the accused was thereafter sent to judicial custody. He did not get any time to seek legal help or for that matter, any help, as he was taken to court from the judicial lock-up on 28.09.2021 itself. He did not even get an opportunity to talk to his family or any other person or seek counsel from a lawyer of his choice and in this disturbing situation, he was made to stand trial without proper defence. It is unascertainable whether the court afforded him an opportunity to talk with his counsel for a certain period or whether the counsel was allowed in jail to meet him or whether any room was allotted to him to converse with the lawyer or not.

40. The orders/judgments passed by the courts must be in sync with the principles of natural justice, one of which is '*audi alteram partem*'. It simply means 'hear the other side'. The principle dictates that both the sides should be heard before passing of any order/judgment and no individual should be condemned unheard. The opportunity of hearing has to be genuine and it cannot be a mere formality or given just for the sake of it. The very purpose of principles of natural justice is to protect the rights of the parties to

a fair hearing and it is the rule acting against bias and imposing a general duty upon the judges to act in a fair, reasonable and equitable manner. The precipitate maxim of this principle is *'qui aliquid statuerit parte inaudita altera, aequum licet dixerit, haud aequum fecerit'* which translates into the meaning that 'He who decides anything without having heard the other side, though he may decide rightly, by no means has acted justly.'[7]. Even in the ancient era, the rule of law operated side-by-side with the concept of social justice/natural justice. Justice is the concept of fairness and social justice is fairness as it is present/demonstrated in the society, therefore, the principles of natural justice are nothing but those which naturally differentiate between what is fair or unfair; right or wrong. A man cannot be exploited by another one in a society where social justice is enforced. Social justice is one of the basic features of the Constitution of India.[8] In a welfare sovereign like ours, the doctrine of social justice would mean that the problem of socio-economic inequalities and misbalance in the society will be faced with the help of laws made by the legislature and the rule of law in order to achieve economic equality. In order to achieve this goal of economic justice, neither can the liberties of an individual be stifled by over-regulation and over-legislation and nor can the individual be allowed to act without any reasonable regulation or to the impairment of liberties of other individuals. Therefore, it is the right of the accused by virtue of being party to the criminal proceedings that he be heard in an

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7 Ballentine, James A., 1871-1949, *Ballentine's Law Dictionary, with Pronunciations.* Rochester, N.Y.: Lawyers' Co-operative Pub. Co., 1969.

8 *S.R. Bommai Vs. Union of India*, AIR 1994 SC 1918.

impartial manner by the trial judge and his trial be conducted while granting him a reasonable opportunity at every required stage to defend his rights and liberties.

41. In the considered view of this Court, an opportunity of hearing shall be considered to have been given when both the parties have had sufficient time to comply with the procedural steps of a criminal proceeding and formulate their arguments and defences at whichever stage of the trial it is so necessitated and mandated by the Code of Criminal Procedure. As the custodian of fundamental rights of the citizens of the country, it is the duty of the courts to be vigilant of trampling the rights of the accused as it is very easy to crossover the thin line drawn between disposal of a trial without unnecessary delay in accordance with the mandate of law and over-zealousness in dispensation of justice and final adjudication of a criminal proceeding. When all is said and done, criminal proceedings are matters concerning curtailment of civil liberties/personal liberties of an individual which are of utmost importance in any civilisation, thus, it is essential for trial courts to conduct the trial in an unbiased and fair manner and being mindful of the rights of both the parties.

42. When the means to an end are not justifiable, then the end can not be said to be justifiable. The means and mode were not justifiable so the conclusion cannot be said to be a fair and reasonable conclusion. A conclusion of trial may be a just conclusion but if it has been achieved through a process and manner which is not justifiable and in accordance with the spirit of

law & justice and fair procedure then the outcome cannot be said to be a good outcome. It is not to be misunderstood that this Court is commenting on the correctness of the finding reached by the court below or overturning the conviction on merits of the case rather the concern of this Court is that the mode and manner in which the trial is pursued shall not breed injustice. If the methods used to reach the result of judicial diagnosis are not in accordance with the principles of law and justice, then the result itself cannot be said to be justified. An individual is a unit of a family; a family is a unit of the society and law has been made for the society and it revolves around social good, thus, if the charge is grave in nature, then ample opportunity should be granted to the accused to defend his stance or rights. Such an opportunity should be a real one and not just an attempt which is regarded for its visual attempt.

43. There is no rat race or competition between the trial judges to see who finishes first or who concluded a trial first. Justice should not be approached from that kind of ambitious perspective. While protecting the right of complainant to fair trial, courts have to be conscious of the right of the accused to be safeguarded from a trial born out of *mala fide* or a trial conduced unfairly. A path in the middle needs to be carved out to conduct the trial in a regular, systematic manner while finding balance between undue haste and undue delay.

44. Section 309 of the Code of Criminal Procedure contains the power to postpone or adjourn proceedings. The first sub-clause of the provision is as follows:

> **309. Power to postpone or adjourn proceedings.** - (1) In every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:
>
> Provided that when the inquiry or trial relates to an offence under section 376, section 376A, section 376AB, , section 376B, section 376C, section 376D, section 376DA or section DB of the Indian Penal Code (45 of 1860), the inquiry or trial shall be completed within a period of two months from the date of filing of the charge sheet.

45. A simple construal of the above provision leads to the understanding that the proceedings shall be pursued on a day-to-day basis and continued till the end of witness list is reached and each of the witnesses have been examined, however, it is nowhere stated that the same shall be done in a manner that is unfair and unreasonable. The rider contained in Section 309 further specifies that a trial relating to offence under Sections 376AB of IPC has to be completed within the time span of two months from the date of filing of the charge sheet. It means that the statute contemplates speedy trial but not at the expense of exposing the accused to a hastened quest for disposal of the trial so as to impart justice as quickly as possible.

46. The extent of urgency was not such that the police conducted and completed the investigation in one day as the FIR got lodged on 27.09.2021 and on the very same day, police

presented the challan at the residence of the presiding officer as it was neither the case that the time period of ninety days as prescribed under Section 167 of CrPC was nearing its end nor was it the case that there was going to be a significant change or for that matter, any change in the circumstances of the case had the police waited and presented the challan before the presiding officer in court hours/ reasonable working hours on the next day.

47. Quick justice becomes weak justice if not accomplished with compliance of statutory procedure and established conventions. If the accused is guilty of committing an offence then the trial must be concluded in an expeditious manner so that the memory of the witnesses does not fade away but in the present case, the statements and testimonies were recorded too expeditiously which led to re-traumatising of the victim as well as stymying of the right of accused to a trial that is marked by justice, fairness and freedom from bias.

48. A high-speed trial and free legal aid are two pre-requisites of a fair trial sans any injustice, prejudice, unreasonableness or arbitrariness. The requisite of high-speed trial has already been discussed sufficiently in the prevenient paragraphs, hence, this Court will now move on to the requisite of free legal aid. The right to free legal aid of the accused is enshrined in the Constitution of India. Article 21 provides that no one shall be deprived of his life or personal liberty except according to procedure established by law and Article 22 provides that no person shall be denied the right to consult and be defended by a legal practitioner of his

choice. Additionally, Article 39A talks about equal justice and free legal aid and is reproduced below for easy reference:

> **39A. Equal justice and free legal aid.**—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

49. Article 39A mentions the opportunities for securing justice that should not be denied to any citizen and non-provision of proper legal aid or provision of legal aid just for the sake of complying with the norms amounts to denial of such an opportunity. In the present matter, the accused has not been given due opportunity to choose his counsel and even if it is considered that the legal aid provided by the authority was adequate and well-equipped to defend the accused, the same was, in fact, not done by the counsel. The accused did not get an opportunity to seek real counsel. True and necessary counsel for the accused would have ideally included breaking up of the case of the prosecution, making up a good case for accused and building a valid defence, none of which was done by the counsel for the accused. The assistance of counsel rendered as per the statutory requirement cannot be deemed to be adequate if such assistance was not competent enough or not present/rendered satisfactorily to the accused at every effectual juncture of the trial.

50. In addition to Article 39A, Section 41D of CrPC also confers a right upon the accused to meet a counsel of his choice during interrogation stage, though not the entire time of investigation.

The accused in the present matter has not been able to exercise the right conferred upon him under Section 41D of CrPC. Section 41D of CrPC reads as under:

> **41D. Right of arrested person to meet an advocate of his choice during interrogation.-** When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.

51. It is deemed appropriate to discuss Sections 303 and 304 of CrPC before starting the discussion on right to cross-examine. The provisions under Sections 303 and 304 of CrPC are replicated below:

> **303. Right of person against whom proceedings are instituted to be defended. -** Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice.
>
> **304. Legal aid to accused at State expense in certain cases.**
>
> (1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.
>
> (2) The High Court may, with the previous approval of the State Government, make rules providing for -
>
> > (a) the mode of selecting pleaders for defence under sub-section (1);
> > (b) the facilities to be allowed to such pleaders by the Courts;
> > (c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).
>
> (3) The State Government may, by notification, direct that, as from such date as may be specified

> in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session.

52. When the legislative intent is incorporated in the Code in the form of any specific provision, then it cannot be interpreted in a manner that makes the provision redundant and the object of the provision is not fulfilled. The word ‘defended’ in the provision includes effective defence with proper and reasonable opportunity. The provision of right to defence of the accused should not be a mere paper formality. The above-cited provisions talk about the right of the accused to choose a lawyer of his choice if he is facing accusations for commission of any offence before a criminal court or facing any proceeding initiated under the Code of Criminal Procedure. The right to free legal aid is guaranteed not just by the Constitution of India but it is also explicit in the statute prescribing criminal procedural law.

53. Moving on, the right to cross-examine needs to be discussed. The right of defence to cross-examine the witnesses in a trial is equivalent to what a lumbar spine is to the body of an individual. It is very important to support the body of defence and protect the right of the accused to defend himself and establish a case for his vindication. Section 137 of the Evidence Act defines 'examination-in-chief', 'cross-examination' and 're-examination' and Section 138 describes the order of examinations. It is churned out from a reading of both these sections together that no examination can be deemed to be completed without cross-examination except when the adverse party itself does not desire to cross-examine a

witness or witnesses and that the cross-examination is an independent right of the accused. Sections 137 and 138 of the Evidence Act are reproduced herein below for easy reference:

> **137. Examination-in-chief.** - The examination of witness by the party who calls him shall be called his examination-in-chief.
>
> **Cross-examination.** - The examination of a witness by the adverse party shall be called his cross-examination.
>
> **Re-examination.** - The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.
>
> **138. Order of examinations.** - Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.
>
> The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.
>
> **Direction of re-examination.**- The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

54. It is also prescribed in Section 138 that both examination and cross-examination must appertain to relevant facts, however, cross-examination is not limited to the facts to which the witness testified during his examination-in-chief. In the present case, there was no sufficient time available with the counsel and the accused to communicate with each other and develop a strategy of defence or share details regarding the matter and circumstances prevalent in the case as the charge sheet was presented before the presiding officer after court hours, at his

residence at around 7.00 p.m. presumably in the evening, on 27.09.2021 and the counsel from DLSA was appointed vide order No. 171 dated 28.09.2021 and thus, a copy of the challan papers was supplied to him on 28.09.2021 itself. On the very same day, pleadings on the point of cognizance as well as on the point of charge were heard from both the parties, cognizance was taken by the presiding officer against the appellant and charges were framed too. Expectantly, the counsel could not have had time to acquaint himself with the charge sheet properly, let alone his client, i.e. the accused-appellant. Within a matter of four days of trial post framing of charge on 28.09.2021, the case was finally decided on 05.10.2021 in favour of the complainant. The counsel did not get a chance good enough to know about the incident from the accused or hear his side of the story owing to the undue haste in conducting the trial and the ability to cross-examine the witnesses could not have escaped the adverse impact of this haste. There is hardly any possibility that the counsel was aware of such facts which the witnesses could not have testified to during their examinations so as to cross-examine beyond that limit as prescribed under Section 138 of CrPC.

55. Seemingly, the accused did not get an opportunity to discuss facts and circumstances of the case from the perspective of the accused and share any information that the accused would have wanted his lawyer to be aware of, thus, it is hard to digest that the aid that was provided to the accused by the District Legal Service Authority was equipped with sufficient ammo to cross-examine the

witnesses or even if he was conversant enough with the case in order to perform effective cross-examination of witnesses.

56. This Court would like to borrow the words of Delhi High Court from the recent verdict passed in a case titled **Sunil Vs. State**[9] which go as follows:

> "There is no doubt that right of cross-examination to any accused in a criminal case to discredit the witnesses and to test veracity of the statement is the most vital part of a criminal trial."

57. If the counsel knows the facts that are not on the charge sheet then only he can cross-examine the witnesses in a manner that could shake their credibility or if the witnesses are tutored, they could answer with the first thing that comes to their mind rather than the answers that they were prepared for. The learned trial judge should have realised the importance of free legal aid and performed his duty towards the accused by ensuring that the appellant received effective legal aid at all stages of the trial.

58. The right to free legal aid as stipulated in Article 39-A of Constitution of India is considered necessary for making the procedure of trial fair, just and reasonable and thus, the same forms part of the interpretative ambit of Article 21 of Constitution of India which is a fundamental right guaranteed to every individual. Justice Bhagwati, one of the crusaders of fundamental rights in Indian judiciary, especially the right to life and personal liberty, had opined in the oft-cited judgment of ***Hussainara***

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9 Criminal Appeal 273/2009; 2023/DHC/000036.

Khatoon and Ors. Vs. Home Secretary, State of Bihar, Patna[10] as follows:

> "7. We may also refer to Article 39-A the fundamental constitutional directive which reads as follows:
>
> 39-A. Equal justice and free legal aid: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.
>
> This Article also emphasizes that free legal service is an unalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice.
>
> The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer. ..."

59. Even before ***Hussainara Khatoon*** (supra), it was observed in ***Madhav Hayawadanrao Hoskot Vs. State of Maharashtra***[11] that the phrase 'procedure established by law' contained in Article 21 of the Constitution of India does not mean a mere formal procedure but it means a procedure that is fair, just and reasonable. It was also observed therein that there are two components of fair procedure, one being natural justice and the

10 (1980) 1 SCC 98.
11 AIR 1978 SC 1548.

other component of fair procedure for a prisoner being the services of a lawyer which are required in order to manoeuvre through the stages of a criminal trial. The relevant paragraphs of the afore-cited judgment are as follows:

> "11. One of us in his separate opinion there observed Per Krishna Iyer, J. at 337, 338:
>
> "Procedure established by law", with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not ex necessitate import into those weighty words an adjectival rule of law, civilised in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation, with 'do or die' patriotism, was launched be sapped by formalistic and pharisaic prescriptions, regardless of essential standards? An enacted apparition is a constitutional illusion. Processual justice is writ patently on Article 21.
>
> **Procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself.** Thus understood, 'procedure' must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised process.... What is fundamental is life and liberty. What is procedural is the manner of its exercise. This quality of fairness in the process is emphasised by the strong word 'established' which means 'settled firmly' not wantonly or whimsically. If it is rooted in the legal consciousness of the community it becomes 'established' procedure. And 'law' leaves little doubt that it is normae regarded as just since law is the means and justice is the end.
>
> **Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human-right ring.** In India, because of poverty and illiteracy, the people are unable to protect and defend their rights; observance of

> fundamental rights is not regarded as good politics and their transgression as bad politics.
>
> To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece."
>
> 12. ...
>
> 13. ...
>
> 14. ...
>
> 15. **The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side.** Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said,
>
> What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is ? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?"
>
> (Emphasis supplied)

60. Next, this Court moves on to the verdict passed in ***Anokhilal Vs. State of Madhya Pradesh***[12] which is very imperative and apt to consider in the factual matrix of the present case. In ***Anokhilal*** (supra), an appeal was filed against the sentence of death penalty passed in a case of rape and murder of a minor. The nine years old victim in this case had gone to a shop to get a *beedi* for her neighbour and she did not return. Later, she

12 AIR 2020 SC 232.

was found dead in an open field. It was observed that the Amicus Curiae in this matter neither had sufficient time to go through the fundamental papers nor did he have the advantage of any communication with the accused as the Amicus Curiae was appointed on the same day when the charges were being framed. He did not have any time to think over the matter. The trial concluded within the next fourteen days and the assistance provided in the form of amicus curiae was not considered to be real and meaningful by the Hon'ble Apex Court. There were other glaring defects that were noticed too, one of them being that 13 witnesses were examined within a span of seven days, the statement of the accused under section 313 of CrPC was recorded before complete evidence was led by the prosecution. The prevalent law and the precedents on the aspect of provision of free legal aid being essential component of a fair trial were discussed in ***Anokhilal*** (supra) and Hon'ble the Supreme Court had enlisted the following principles that emerged from the judicial pronouncements referred by them:

> "13. The following principles, therefore, emerge from the decisions referred to hereinabove:
>
> a) Article 39-A inserted by the 42nd amendment to the Constitution, effected in the year 1977, provides for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The statutory regime put in place including the enactment of the Legal Services Authorities Act, 1987 is designed to achieve the mandate of Article 39-A.
>
> b) It has been well accepted that Right to Free Legal Services is an essential ingredient of 'reasonable, fair and just' procedure for a person Accused of an offence and it must be held implicit

> in the right guaranteed by Article 21. The extract from the decision of this Court in Best Bakery case[13] (as quoted in the decision in Mohd. Hussain[14]) emphasizes that the object of criminal trial is to search for the truth and the trial is not a bout over technicalities and must be conducted in such manner as will protect the innocent and punish the guilty.
>
> c) Even before insertion of Article 39-A in the Constitution, the decision of this Court in Bashira[15] put the matter beyond any doubt and held that the time granted to the Amicus Curiae in that matter to prepare for the defense was completely insufficient and that the award of sentence of death resulted in deprivation of the life of the Accused and was in breach of the procedure established by law.
>
> d) The portion quoted in Bashira[16] from the judgment of the Madras High Court authored by Subba Rao, J., the then Chief Justice of the High Court, stated with clarity that mere formal compliance of the Rule under which sufficient time had to be given to the counsel to prepare for the defense would not carry out the object underlying the rule. It was further stated that the opportunity must be real where the counsel is given sufficient and adequate time to prepare.
>
> e) In Bashira[17] as well as in Ambadas[18], making substantial progress in the matter on the very day after a counsel was engaged as Amicus Curiae, was not accepted by this Court as compliance of 'sufficient opportunity' to the counsel."

61. It was further observed in ***Anokhilal*** (supra) that the whole trial was concluded in less than a month's time but the hasty disposal caused a lot of deficiencies. The Bench observed as under:

> "17. In V.K. Sasikala v. State Represented by Superintendent of Police: (2012) 9 SCC 771 a caution was expressed by this Court as under:

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13 *Zahira Habibullah Sheikh and Ors. Vs. State of Gujarat and Ors*., (2006) 3 SCC 374.
14 (2012) 9 SCC 408.
15 AIR 1968 SC 1313.
16 AIR 1968 SC 1313.
17 AIR 1968 SC 1313.
18 *Ambadas Laxman Shinde and Others Vs. State of Maharashtra*, (2018) 18 SCC 788.

> 23.4 While the anxiety to bring the trial to its earliest conclusion has to be shared it is fundamental that in the process none of the well-entrenched principles of law that have been laboriously built by illuminating judicial precedents are sacrificed or compromised. In no circumstance, can the cause of justice be made to suffer, though, undoubtedly, it is highly desirable that the finality of any trial is achieved in the quickest possible time.
>
> 18. Expeditious disposal is undoubtedly required in criminal matters and that would naturally be part of guarantee of fair trial. However, the attempts to expedite the process should not be at the expense of the basic elements of fairness and the opportunity to the Accused, on which postulates, the entire criminal administration of justice is founded. In the pursuit for expeditious disposal, the cause of justice must never be allowed to suffer or be sacrificed. **What is paramount is the cause of justice and keeping the basic ingredients which secure that as a core idea and ideal, the process may be expedited, but fast tracking of process must never ever result in burying the cause of justice.**"
>
> (Emphasis supplied)

62. Ultimately, the judgment of conviction and the order of sentence were set aside and it was directed that trial be conducted with *de novo* consideration. Hon'ble the Supreme Court laid down certain norms in ***Anokhilal*** (supra) so that the glitches and shortcomings that occurred in that case do not get repeated again. The norms are:

> "22. Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:
>
> i) In all cases where there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum of 10 years practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an Accused.

> ii) In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.
>
> iii) Whenever any learned Counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard and fast Rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.
>
> iv) Any learned Counsel, who is appointed as Amicus Curiae on behalf of the Accused must normally be granted to have meetings and discussion with the concerned Accused. Such interactions may prove to be helpful as was noticed in Imtiyaz Ramzan Khan[19]."

63. If the manner in which the trial proceeded in the case at hand is studied, then it becomes crystal clear that the counsel for the accused did not get sufficient and reasonable time as mentioned in point (iii) stated above rather the counsel appointed by the DLSA was given the challan papers on the very same day that he was appointed by the DLSA and in fact, the charges came to be framed on that very day. This Court is of the view that a lawyer-client relationship, in its true sense, could not be established and developed between the accused and his counsel.

64. The accused should be questioned whether he is desirous to engage a counsel of his choice or if he requires assistance of Legal Services Authority as has also been held by the Hon'ble Apex Court in ***Anokhilal*** (supra), however, the same was not practiced in the case at hand. A senior advocate/leading advocate should be provided to accused persons in matters involving commission of serious offences and the judgment passed by Hon’ble the

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19 (2018) 9 SCC 160.

Supreme Court in this regard needs to be followed in letter and in spirit and not just like a mere formality. The object for passing of the said judgment is not to comply with a formality only but to actually provide him legal assistance so that his fundamental right can be protected adequately and suitably.

65. Another statutory non-compliance and anomaly in the procedural advancement of the trial was that the charges framed in the present case are not in consonance with the stipulations contained in Sections 227 and 228 of the CrPC that talk about discharge and framing of charge. Section 228 clearly states that the submissions of the accused as well as the prosecution have to be heard along with the consideration of the record of the case and the documents submitted therewith before framing of charge in any case. In the instant case, a copy of the challan was provided to the counsel for the accused on the same day that he was appointed as a counsel for the accused-appellant by the DLSA, i.e. on 28.09.2021. It is manifested from order-sheet of the trial court dated 28.09.2021 that the pleadings on point of cognizance as well as on point of framing of charge were framed on 28.09.2021 as well. It is incomprehensible as to how a counsel who received his appointment letter by the DLSA on 28.09.2021 itself could possibly be able to make submissions regarding framing of charge satisfactorily having filed the *vakalatnama* and been provided a copy of the challan paper on the very same day.

66. In the landmark judgment passed by Hon'ble the Supreme Court in ***Union of India (UOI) Vs. Prafulla Kumar Samal and***

Ors.[20], the principles on the subject of charge have been propounded and the relevant paragraph of the said judgment is as follows:

> "10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:
> (1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:
> (2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.
> (3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and largo however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.
> (4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

67. A detailed judgment titled ***H.G. Grover Vs. State of Rajasthan***[21] was passed by this court vide order dated 08.12.2022 wherein the process of framing of charge has been

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20 (1979) 3 SCC 4.
21 S.B. Criminal Revision Petition No. 1356/2022, decided on 08.12.2022.

elaborately discussed and all the aspects that need to be considered and kept in mind before framing of charge have also been dealt with thoroughly and extensively. The relevant paragraphs of the above-mentioned judgment are reproduced as under:

> "16. Framing of charge is a determinative action taken by the judge as subject to the decision of framing of the charge against an accused or discharging an accused of the charges leveled against him, two outcomes are generated; either the prosecution (State or complainant) gets a point to moot, i.e. to challenge the order of discharge or the accused is made to face the trial. If the charges are framed without there being even a scruple of the ingredients or circumstances required to constitute an offence under the Sections alleged against the accused, then the accused is made to face the rigour of the trial which may prove to be deleterious to him as he may finally be acquitted of the charges so framed against him. The word 'presuming' must be read *ejusdem generis* to the opinion of a judge that there is a ground; the ground to form the opinion on the basis of the record of the case and the documents submitted therewith that an individual has committed an offence and thus, he shall be accused with the charge under that offence. To a slight extent, if a plea of defence is raised that the criminal proceedings are barred by any other statutory provision, then it needs to be considered and a provisional opinion needs to formed. Thus, it can safely be inferred that the process of framing of charge is an exercise that requires solemn consideration on the point of forming a tentative opinion whether there are ingredients and facts which are enough to constitute the offence for which charge is being framed against the accused or not."

68. As the charge in the current matter pertains to an offence of grave nature, reasonable and sufficient time needs to be provided to the accused as well as the counsel for the accused to prepare

his defence after receiving the challan papers/final report/charge-sheet and other requisite documents at that stage, if any.

69. The intention of the legislature and the scheme of the Code indicate that post framing of charge, a date is to be fixed by the trial judge for examination of witnesses. Sections 230 and 231 of CrPC have been reproduced below for ease of reference:

> **230. Date for prosecution evidence.** - If the accused refuses to plead, or does not plead, or claims to be tried or is not convicted under section 229, the Judge shall fix a date for the examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing.
>
> **231. Evidence for prosecution.**- (1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.
> (2) The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.

70. From a simple reading of the above provisions, it can be elicited that after the charges have been framed in the proceedings of a trial, and the accused has not pleaded guilty and thereupon convicted under Section 229 of CrPC, then a date is to be fixed for the examination of witnesses. This reflects that a breather/pause is given before beginning with the examination of witnesses to the accused for preparation and presentation as well as to the prosecution to re-align their case with the charges framed and get rid of any bias but the same has not been observed in the instant case. Fixing a date for examination of witness doesn’t mean that charges are framed in the evening and

the date of examination of three-four witnesses is fixed for the next morning giving no opportunity to the accused to converse with his counsel during the intervening night. The intent for employing the use of the phrase 'fix a date' in the provision cannot be construed in such a manner otherwise what was stopping the learned Sessions Judge and the prosecutor from recording testimonies of witnesses on the same date.

71. The inability to ensure that the right of the accused to legal aid was exercised in the true sense or that the accused was granted a fair opportunity to defend is noxious to the constitution-guaranteed liberties. The right to legal representation is vital and is guaranteed by Code of Criminal Procedure as well as the Constitution of India and even other legal aid schemes and protected by a series of pronouncements of Hon'ble the Supreme Court. There have been many occasions when absence of legal service of a lawyer has been the cause for ordering of re-trial[22] or the judgment of conviction passed below has been set aside and it has been ordered that no fresh trial should be held against the accused[23]; The right to fair trial of an accused is different from the right to speedy trial because the right to fair trial, if hampered, affects the ability of the accused to defend himself whereas the same cannot be said to be true for the right to speedy trial.

72. In the ***Best Bakery Case***[24], it was held that a trial is not just a whirlwind affair but it is a process wherein issues are

22 *Tyron Nazareth Vs. State of Goa*, 1994 Supp. (3) SCC 321.
23 Suk Das Vs. Union Territory of Arunachal Pradesh, (1986) 2 SCC 401.
24 *Zahira Habibullah Sheikh and Ors. Vs. State of Gujarat and Ors*., (2006) 3 SCC 374.

examined by a judge to answer the question regarding the guilt or innocence of the accused and the same can be done fairly in a criminal case only when the principles of law are followed and miscarriage of justice is thwarted rather than when just a formal observance of the said principles is done during the trial. The relevant paragraphs of the ***Best Bakery Case*** (supra) read as follows:

> "35. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.
>
> 36. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.
>
> 37. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

73. Lack of Proper/Adequate Legal Assistance:

It is manifesting from the perusal of the original file of the learned trial court that the counsel provided to the accused did not move any application for obtaining copies of statements of witnesses recorded during trial and the other court proceedings. In such a situation, this Court is baffled with a question that has come to the fore that what was the basis of the case prepared by the counsel and how was he able to prepare the final arguments. It leads this Court to believe that the mentioning by the learned Judge that he had heard the final arguments submitted on behalf of the accused in the judgment was certainly an empty formality. It is not comprehensible for this Court as to how the lawyer for the accused may have canvassed his arguments in the court without having any paper pertaining to testimonies of the prosecution witnesses. In common parlance, in a case in which quantum of sentence may extend to death or Life Imprisonment, an advocate appearing for the accused obtains copies of the statements of the witnesses recorded in the trial as well as of the other order-sheets and documents tendered into evidence. Thereafter, he goes through the statements previously recorded which were provided to him along with the charge sheet and develops a startegy based on his legal acumen and knowledge and then canvasses arguments on the basis of the same. It is a mockery of legal practice if a lawyer completes his arguments without having/scanning/perusing/studying a single paper of evidence recorded during the trial.

74. This Court is not hesitant to say that though the trial court noted in the judgment that the arguments of the counsel for the accused had been heard but in light of the circumstances emerging upon a perusal of the record, the same seems to be nothing but a mere fake display of compliance and a farce. There is provision in the criminal rules that if the accused is in judicial custody, then the copies of court proceedings shall be provided to him free of cost, however, there is not even a whisper in the entire file that any copy was ever provided to the accused. Though a copy of the challan papers was provided to the counsel for the accused, however, it is not graspable that the counsel for the accused received a copy of the challan papers on 28.09.2021, went through the entire challan papers during court hours and was able enough to argue on the point of cognizance as well as on the point of charge. Cross-examination is a skill and can only be done by an advocate having good experience and dexterity in the task and the counsel appointed for the accused had to perform the tedious task of cross-examination of four witnesses on the very next date of being appointed without being given time to meet with his client.

75. Even where a valid defence would have been available to the accused, he may have not been able to use such defence as it is appearing from the record that the legal assistance provided to the accused was for namesake. Though there were discrepancies in the evidence available on record, the same were not brought forth in a manner so as to strengthen the defence of the accused.

Similarly, there was no explanation of the fact that how two injuries were found on the body of the accused.

76. Attorney-Client Privilege:

Law provides protection to the communication exchanged between a lawyer and his/her/their client. Section 126 of the Indian Evidence Act provides that any professional communication exchanged between the client and the counsel, including any advice that the counsel shared with the client, any information disclosed to the counsel by the client or contents or condition of any document that the counsel became aware of during the course and for the purpose of his employment, cannot be disclosed except with the explicit consent of the client. Section 126 has been reproduced herein under for handy reference:

> **126. Professional communications**.- No barrister, attorney, pleader or *vakil* shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or *vakil*, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment:
> Provided that nothing in this section shall protect from disclosure -
> (1) any such communication made in furtherance of any illegal purpose;
> (2) any fact observed by any barrister, pleader, attorney or *vakil*, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.
> It is immaterial whether the attention of such barrister, pleader, attorney or *vakil* was or was not directed to such fact by or on behalf of his client.

> *Explanation.* The obligation stated in this section continues after the employment has ceased.

77. The purpose of referring to the above-reproduced provision of the Evidence Act is to cull out from the prevalent criminal statute of Indian Evidence Law that a communication that entails exchange of important information as well as advice between a counsel employed by a client is statutorily envisaged and thus, more emphasis is supplied to the aspect that the accused in the present case should have been given ample time to converse and consult with his counsel in order to be able to defend his rights in an adequate manner.

78. A talk between the lawyer and the litigant is a must as there is no presumption in any law at the pre-trial stage that the story narrated in the charge sheet is true and there is nothing underneath the surface. and to know this the talk between the lawyer and the litigant is a must. There is a custom/convention/culture from times immemorial that there shall be some communication between a lawyer and a litigant and thus, the privilege of non-disclosure of a lawyer is prescribed in the criminal statute.

79. Lastly, another aspect that has struck this Court is that normally, a trial judge presiding over a court relating to POCSO Act cases in a metropolitan city would not have just a single case listed in his daily cause-list and the cases so listed would be at different stages of trial. For instance, cases may pertain to stages varying from taking cognizance, framing of charge, calling for examination of witnesses, recording the statements of witnesses

and other evidence, seeking of explanation from the accused under Section 313 of CrPC, recording/adducing of defence evidence to the stages of hearing of final arguments, passing judgment of conviction and order of sentence. In addition to cases proceeding at the various stages as mentioned above, there are bail applications as well as other miscellaneous and piecemeal applications to be dealt with. It has been apprised to this Court that there are 10-15 daily cases listed on an average before the presiding officer of court of Special Judge, Protection of Children from Sexual Offences Act, 2012, No. 03, Jaipur Metropolitan-I and there is a pendency of more than 500 cases in this particular court. In such circumstances, this Court fails to comprehend that how and why was this particular, instant matter proceeded with and adjudged in such a hasty fashion and in a manner as if only and only the case of the present accused-appellant was listed on board for that week.

80. Though the trial judge may not have acted with mala fide or with an ulterior motive, however, this Court feels compelled to express caution as the presiding officer of the instant matter may act in a similar manner in other cases in future and may lose sight of interest of justice in wake of the praise and attention that he may receive from the media and the public.

81. Justice is not intended to be imparted to one party of the lis only. Justice will be considered to be done when it will be imparted to all the parties affected as well as when done in larger societal interest. Complete justice is accomplished when it has reached to all the parties to the lis including the society.

82. The purpose and intended impact of the observations made herein above is not that the trial judge should take longer in disposal of the case but he/she/they shall be careful while conducting the trial expeditiously so as not to affect the rights of the parties. Promptness alone does not form a necessary part of the virtue of prudence.

83. As an upshot of the discussion made herein above, there is no cause for allowing the conviction to stand as passed by the court below. This court does not concur with the finding reached by the learned District & Sessions Judge and the manner in which the trial was culminated and therefore, rejects the same. The appeal deserves to be allowed in accordance with the terms and conditions as discussed in the preceding paragraphs.

84. Circling back to the exordium of this judgment, this Court deems it fit to order for a *de novo* trial to be conducted by the learned trial judge from before the point of framing of charge.

85. The learned trial judge has to conduct the trial with *de novo* consideration while adhering to the following conditions:

i) the trial judge shall comply with the provisions contained under Sections 226-228 of CrPC.

ii) that the trial judge shall issue fresh summons to the witnesses.

iii) the victim shall be called to court for recording of her statement in a child friendly environment which is conducive enough for her to fearlessly and freely depose before the court.

iv) a person who is trusted by the victim shall be allowed to accompany her during the course of trial to make her feel comfortable.

v) if it is felt by the learned judge that the child is not comfortable enough and the assistance of a child counsellor is required, then a counsellor may be called from child care home, other institutions that specialise in child care, government agency or government NGO to maintain the confidence of the child during the trial.

vi) the victim shall not be directly exposed to the accused. The accused shall be veiled and made to stand in a separate section.

vii) as far as and if possible, the accused must not be exposed to the victim physically. He can be shown to the victim for the purpose of formal identification using video conferencing or digital photograph that can be displayed on the screen of the court, however, if the accused has to be exposed to the victim physically, then the same shall be done at the end of the examination-in-chief.

viii) the rules and procedure/guidelines prescribed for POCSO Act cases shall be followed.

ix) the witnesses cannot be harassed by asking unnecessary questions.

x) the victim cannot be asked any questions that are in themselves or when asked in a certain manner become vexatious, scandalous and irrelevant.

xi) no party shall be allowed to take unnecessary adjournments.

xii) the trial judge may decide the case on merits and if conclusion of guilt is reached and the accused is convicted, then the hearing of sentence must be done within the bounds of the law as discussed in the preceding paragraphs of the judgment.

xiii) the trial judge shall not be influenced by any observation made herein in this judgment in any manner whatsoever.

86. Accordingly, the appeal is allowed. The impugned judgment of conviction and order of sentence dated 05.10.2021 passed by learned Special Judge, Protection of Children from Sexual Offences Act, 2012, No. 03, Jaipur Metropolitan-I in Sessions Case No. 28/2021 is set aside and the matter is remanded back to the learned trial court for conducting trial afresh as discussed in the preceding paragraphs.

87. Needless to say, none of the observations made herein above shall influence the trial judge in any manner whatsoever so as to adversely affect the rights of either of the parties. This Court has refrained itself from dealing with the merits of the case and the learned trial judge is directed to conduct the trial afresh from the stage of framing of charges while keeping in mind the guidelines listed in paragraph no. 85 of this judgment.

88. Before parting, this Court appreciates the efforts of Advocate Anubha Singh in assisting this Court throughout the hearing of appeal. Her dedication is duly lauded.

(FARJAND ALI),J