Reserved

AFR

Court No. - 45

Case :- CAPITAL CASES No. - 11 of 2021

Appellant :- Najeeruddin
Respondent :- State of U.P.
Counsel for Appellant :- From Jail, Nazrul Islam Jafri (Senior Adv.), A C.
Counsel for Respondent :- G.A., Ashutosh Gupta, Gyan Prakash Verma

With

REFERENCE No. 08 of 2021

Hon'ble Manoj Misra,J.
Hon'ble Sameer Jain,J.

(Delivered by Manoj Misra, J.)

1. Najeeruddin (the appellant) has been convicted under Sections 302, 307, 376, 376-A, 376-AB, 377, 201 I.P.C. and Sections 5/6 of Protection of Children from Sexual Offences Act (for short Pocso Act), vide judgment and order dated 26th March, 2021 passed by Special Judge (Pocso Act), Azamgarh in Special Sessions Trial No.229 of 2019, and has been awarded following punishment:

(i) Under Section 302 I.P.C., death penalty with fine of Rs. 2 lacs;

(ii) Under Section 307 I.P.C., ten years R.I. with fine of Rs. 1 lac and a default sentence of additional six months R.I.;

(iii) Under Section 376 I.P.C., imprisonment for life with fine of Rs. 1 lac and a default sentence of additional six months;

(iv) Under Section 376-A I.P.C., imprisonment for life

with fine of Rs. 1 lac and a default sentence of additional six months R.I.;

(v) Under Section 376-AB I.P.C., imprisonment for life with fine of Rs. 2 lacs and a default sentence of additional six months R.I.;

(vi) Under Section 377 I.P.C., ten years R.I. with fine of Rs. 1 lac and a default sentence of additional six months R.I.; and

(vii) Under Section 201 I.P.C., seven years R.I. with fine of Rs. 1 lac and a default sentence of additional three months R.I.

All sentences to run concurrently.

2. As for offence punishable under Section 302 I.P.C., capital sentence has been awarded, the court below has sent a reference for confirmation of death penalty.

3. The appellant has submitted his appeal from jail against the aforesaid judgment and order of conviction and sentence. The said appeal has been forwarded by the Superintendent (Jail), Azamgarh, vide letter dated July 5, 2021, which has been registered as Capital Cases No. 11 of 2021. The appellant has prayed that the judgment and order of conviction and sentence recorded by the trial court be set aside and that he be acquitted of the charges.

4. To represent the appellant, who could not engage a private counsel, by order dated 27.07.2021, Sri N.I. Jafri, learned senior counsel, was appointed as Amicus Curiae.

INTRODUCTORY FACTS IN A CHRONOLOGICAL ORDER

5. To have a clear understanding of the case, it would

be useful to have a chronological narration of the facts giving rise to this appeal.

(i) On 25.11.2019 at 10:14 hours, the police station concerned receives an information that some untoward incident has occurred in the house of Deceased No. 1 (for short D-1) (identity of various victims including deceased is not being disclosed because they are victim of sexual crime). The police team visits the spot and discovers D-1, his wife (Deceased No.2 - for short D-2) and infant son (Deceased No.3 - for short D-3), aged about 4 months, lying dead; and D-1's daughter (victim no.1- for short V-1 - PW2), aged about 8 years, and D-1's minor son (victim no.2 - for short V-2), aged about 6 years, lying injured. On the same day, Inquest in respect of D-1 is completed by 11:45 hours and inquest report (Exb. Ka-10), witnessed by five persons including the informant (PW-1), is prepared. Likewise, inquest in respect of D-2 and D-3 is also completed on the same day and inquest reports (Exb. Ka-15 and Exb. Ka-20, respectively) are prepared. PW-1 is one of the five witnesses to all the three inquest proceedings.

(ii) In the meantime, V-1 is taken to Primary Health Centre, Azamgarh where she is medically examined at 12:15 PM by PW-6, who prepares an injury report (Exb. Ka-4) noticing following external injuries:

(a) Lacerated wound 4 cm x 0.4 cm x bone deep on left side of head, 6 cm above left eyebrow;

(b) Lacerated wound 3 cm x 0.3 cm x bone deep on left side of forehead, 3 cm above lateral end of left eyebrow;

(c) Lacerated wound 2 cm x 0.3 cm x

muscle deep, just below left eyebrow; and

(d) Lacerated wound 1 cm x 0.2 cm x muscle deep which is below left eye.

All injuries fresh in duration, caused by hard and blunt object and kept under observation. Patient was referred to District Hospital, Azamgarh for X-ray and expert opinion /management and needful.

(iii) V-2 was also examined by PW-6 on 25.11.2019 at 11:40 am of which injury report (Exb. Ka-3) is prepared noticing following injuries:

(a) Lacerated wound 5 cm x 1.2 cm x bone deep on the median plain and left side of (sic) of left forehead and left side of head, 3 cm above left eyebrow;

(b) Lacerated wound 1.5 cm x 0.3 cm x bone deep on right side of head, 5 cm above top of right pinna;

(c) Lacerated wound 1 cm x 0.2 cm x bone deep on right side of forehead, 1 cm above lateral end of right eyebrow; and

(d) Lacerated wound 1.5 cm x 0.2 cm x cartilage deep on left side of nose.

All injuries fresh in duration, caused by hard and blunt object and kept under observation. Patient was referred to District Hospital, Azamgarh for X-ray and expert opinion/needful treatment and management.

(iv) A Field Unit Team, at the request of Station House Officer (SHO), Mubarakpur and on the order of Superintendent of Police, Azamgarh, headed by Vijay Kumar

(not examined), visited the spot, collected articles and prepared an inspection report, dated 25.11.2019 i.e. Paper No. 10 Ka (at page 39 of the paper book - not exhibited) and collected from the spot following articles:-

(a) Blood swab from the body of D-2;

(b) Blood swab from the body of D-1;

(c) Blood soaked piece of *Pual* (a mat made from grass straw) from front of the house;

(d) Blood soaked bra found on the spot;

(e) Blood soaked piece of blanket found on the spot;

(f) Blood stained vest (*Baniyan*) with seam found on the spot;

(g) Delux Nirodh (Condom wrapper) and scissor found on the spot;

(h) Finger prints lifted from the bed found on the spot; and

(i) Hair found in the hand of D-2.

(v) At 17:33 hours, on 25.11.2019, PW-1 submitted a written report (Exb. Ka-1) at PS Mubarakpur, District Azamgarh, which was registered as first information report (FIR) No. 0267 of 2019 under Section 302/307 I.P.C. In the FIR, it is alleged: that on 25.11.2019 at 9:30 am, the informant received an information that some incident has occurred at the house of his brother (D-1); that on getting the information, the informant went to the house of D-1, found the door of the house open, D-1, his wife (D-2) and D-1's infant son (D-3) lying dead and D-1's daughter (V-1) and D-1's elder son (V-2) seriously injured; that immediately he took the victims to the Government

Hospital, Mubarakpur from where they were referred to Sadar Hospital, Azamgarh and from Sadar Hospital they were referred to Life Line Hospital, Azamgarh where both victims are under treatment. The FIR alleges that V-1 told the informant that Imtiyaz Nut, a resident of the village, has committed the crime.

(vi) In the evening of 25.11.2019, autopsy of the three bodies is carried out by PW-8.

(vi a) Autopsy report of D-3 (Exb. Ka-9), which was completed at about 9.00 pm, reveals a solitary ante-mortem injury of the following description:-

> "Contusion 15 cm x 8 cm over right side of scalp, 5 cm posterior to right ear with underlying right parietal bone fracture."

Rigor Mortis was present in lower extremities.

Stomach content found empty; small intestine filled with gases; large intestine had faecal matter.

According to the opinion of the Doctor, death was caused about a day before due to coma as a result of ante-mortem head injury.

(vi b) Autopsy report of D-2 (Exb. Ka-8), which was completed by 8.20 pm, reveals following ante-mortem injuries:

(a) Lacerated wound 17 cm x 1 cm x bone deep over left side of scalp, 5 cm posterior to left ear pinna;

(b) Lacerated wound 1 cm x 0.5 cm x bone deep over right eyebrow on lateral aspect 7 cm interior to left tragus;

Underlying fracture of left temporal bone.

Rigor Mortis Present Both Extremities.

Stomach content found empty; small intestine filled with gases; large intestine had faecal matter.

Genital Organs: NAD; Vaginal wash for spermatozoa test in 50 ml vial and blood sample sealed.

According to the opinion of the doctor, death was caused about a day before due to coma as a result of ante-mortem head injury.

(vi c) Autopsy of D-1 (Exb. Ka-7), which was completed by 7.40 pm, reveals following ante-mortem injuries:

(a) Multiple lacerated wound over right side scalp in area 18 cm x 10 cm of lacerated wound are bone deep with underlying bone fracture, 5 cm posterior to left ear pinna, five in number;

(b) Multiple lacerated wound over left side of face in area of 16 cm x 14 cm with depressed bone fracture;

The skull disclosed left parietal bone fracture and fracture of left maxillary bone fracture.

Stomach had 100 gm semi-digested food; small intestine filled with gases; large intestine had faecal matter.

According to the opinion of the doctor, death could have occurred about a day before due to coma as a result of ante-mortem head injury.

(vii) On 26.11.2019, vide CD Parcha No. 2, the statement of suspect Imtiyaz Nut is recorded, who states that on the date and time of the incident he was in his own house

with his family and that he knows nothing about the incident. The police in CD Parcha No.2, dated 26.11.2019, makes an entry that upon enquiry it was found that Imtiyaz Nut was in his house on the date and time of the incident. On this day i.e.26.11.2019, the police also prepares site plan (Exb. Ka-32) of the place of incident.

(viii) On 29.11.2019, vide CD Parcha No. 5, information is received by the police from an informer with regard to involvement of a person who weeps at the grave of all the three deceased (D-1, D-2 and D-3) in the night at Ibrahimpur road Kabristan and does not come out during day time.

(ix) On 30.11.2019, vide CD Parcha No. 6, the name of that person, who weeps at the grave of all the three deceased, is noted and put on record as that of Najeeruddin son Abdul Aziz Ansari (the appellant herein).

(x) On 01.12.2019, vide CD Parcha No. 7, the statement of V-1 is recorded under Section 161 Cr.P.C. She stated therein that in the night of 24.11.2019 when, after dinner, she and her family had slept. On hearing noise, she woke up and, in the light of a bulb lit in the room, she saw a bearded man, a resident of her village, whose name is Najeeruddin, who is also known as 'AOU PAU". She stated that that person killed her father with a brick and also killed her mother with the same brick and that after removing the clothes of his mother, raped her and when V-1 shouted and protested, he also hit her with brick and also hit her brother with brick and then he raped V-1. After doing that, he lifted V-1's mother's body and put her naked on the floor and again raped her. Thereafter, he started searching the Almirah where he found a photograph. Upon noticing the photograph, he asked V-1 to identify one of the

persons in the photograph and when V-1 stated that the person in the photograph is her maternal uncle then he put a cloth on V-1's mother's body and scolded V-1 not to shout otherwise she would also be killed. After that V-1 sat there.

(xi) On 01.12.2019, statement of Salauddin (PW-5) was recorded under Section 161 Cr.P.C. He informed the police that on 01.12.2019, he was informed by Rehana (PW-3) and her son Hanzala (PW-4) that they were shown a video clip by Najeeruddin in which bodies of D-1 and D-2 were visible and their children were shown in an injured condition and someone was moving his hand over the breast of D-2.

(xii) On 01.12.2019, another statement of one Abu Sad (not examined) was recorded, who also confirmed what was stated by Rehana and her son to Salauddin (PW-5). On the basis of the aforesaid statement, on 01.12.2019, vide CD Parcha No. 7, the nomination of Imtiyaz Nut in the FIR was found incorrect and sections 376, 376-A I.P.C. and section 5/6 of Pocso Act were added; and Najeeruddin's name was recorded as a suspect.

(xiii) On 02.12.2019, vide CD Parcha No. 8, the police arrested Najeeruddin and on the basis of his confessional statement, recovery of blood stained shirt, lungi, vest, wrapped in a polythene was made of which site plan (Exb. Ka-31) was prepared; and a blood stained brick, salwar, duppatta, chemise and a cut piece of frock is recovered from another place of which site plan (Ex. Ka-30) is prepared and a common recovery memo of both the recoveries (Exb. Ka-25) is prepared by Investigating Officer (I.O.) Akhilesh Kumar Mishra (PW-11), which is witnessed by PW-5 amongst others. This recovery memorandum (Ex. Ka-25) also records the confessional statement of the appellant to the effect that in the

night of the incident, the appellant had urge to have sex. He purchased a potency (sex drive) enhancement pill and condom from a shop keeper (PW-9). Thereafter he forcibly gained entry into the house of the deceased and committed various crime. He confessed to have video-graphed the incident but stated that he had thrown the mobile in the river.

(xiv) On 02.12.2019 and 03.12.2019, search for the mobile was made but the same could not be found. Memorandums in respect of search made on 02.12.2019 and 03.12.2019 were prepared and produced as Exb. Ka-27 and Exb. Ka-28, respectively, and a site plan (Ex. Ka-29) where search was made was also prepared.

(xv) On 02.12.2019, internal medical examination of V-1 is carried out. Her hymen is found fresh torn with redness and tenderness. Redness and swelling was also noticed in the anus. For determination of age she is referred to CMO, Azamgarh. The internal examination report (Exb. Ka-5) was prepared by doctor Rashmi Sinha (PW-7).

(xvi) On 03.12.2019, statement of V-1 is recorded under Section 164 Cr.P.C. where she repeats what she stated under section 161 CrPC.

(xvii) On 03.12.2019, by radiological procedure, the age of V-1 is determined as 8 years old of which report (Ex Ka-35) is prepared on 5.12.2019.

(xviii) On 04.12.2019, PW-7 prepares supplementary report (Ex. Ka 6) that no spermatozoa is noticed in the vaginal smear obtained from V-1.

(xix) On 09.12.2019, vide CD Parcha No. 14, charge sheet is submitted against the appellant with a note that DNA and other forensic reports are awaited.

(xx) On 10.12.2019, the Court of Additional District and Sessions Judge/Special Judge (Pocso), Azamgarh takes cognisance on the charge-sheet dated 09.12.2019 for offences punishable under Sections 302, 307, 376, 376-A, 376-AB, 377, 201 I.P.C. and section 5/6 Pocso Act.

(xxi) On 11.12.2019, following order is passed by the Special Judge:

''दिनाँकः 11.12.2019

पुकार पर अभियुक्त नजीरूद्दीन जेल से उपस्थित। उसके विद्वान अधिवक्ता उपस्थित। सहायक जिला शासकीय अधिवक्ता फौजदारी व अभियुक्त के विद्वान अधिवक्ता को सुना।

सहायक जिला शासकीय अधिवक्ता फौजदारी द्वारा न्यायालय के समक्ष आरोप के समर्थन में प्रस्तुत किये जाने वाले साक्ष्यों का विवरण प्रस्तुत किया गया।

उभय पक्ष को सुनने तथा पत्रावली पर उपलब्ध प्रपत्रों के अवलोकन से अभियुक्त के विरूद्ध प्रथम दृष्टया धारा– 302, 307, 376, 376ए, 376 ए बी, 377, 201 भा0दं0सं0 एवं धारा– 5/6 पाक्सो अधिनियम का आरोप बनता है।

अतः अभियुक्त के विरूद्ध उक्त धाराओं के अन्तर्गत आरोप विरचित किया गया। अभियुक्त को आरोप पढ़ कर सुनाया व समझाया गया। अभियुक्त ने आरोप से इनकार किया एवं विचारण की याचना की। पत्रावली वास्ते साक्ष्य लंच बाद पेश हो।

दिनाँकः 11.12.2019

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(पारूल अत्री)

विशेष न्यायाधीश (पाक्सो एक्ट)/

अपर सत्र न्यायाधीश, कोर्ट नं0–5,

आजमगढ़।''

(xxii) On the basis of the above order, against the

appellant charges are framed as follows: under Section 302 I.P.C. for the murder of D-1, D-2 and D-3; under Section 307 for attempt of murder of V-1 and V-2; under Section 376 I.P.C. for committing rape of D-2; under Section 376-AB I.P.C. for committing rape of V-1; under Section 376-A I.P.C. for committing rape and murder of D-2, under Section 377 for committing unnatural offence on V-1, under Section 201 I.P.C. for destroying the evidence available in the mobile of the entire incident; and under Section 5/6 Pocso Act for penetrative sexual assault on V-1. The appellant denied the charges and claimed for trial.

(xxiii) On 12.12.2019, statement of five witnesses, namely, PW-1, V-1 (PW-2), Rehana (PW-3), Hanzala Tauhir (PW-4), and Sallauddin (PW-5), were recorded. Thereafter, on 13.12.2019, the cross-examination of PW-5 was concluded and statement of doctor Abdul Aziz Ansari (PW-6), doctor Rashmi Sinha (PW-7), doctor Santosh Kumar (PW-8), Ramji (PW-9), Devendra Kumar Singh (PW-10); and Akhilesh Kumar Mishra (PW-11) were recorded. On 16.12.2019, the cross-examination of PW-11 was concluded and statement of doctor Manish Kumar Shah (the radiologist who conducted radiological tests to determine the age of V-1) was recorded. On 16.12.2019 itself, the statement of the appellant under Section 313 Cr.P.C. was recorded.

(xxiv) On 19.12.2019, the appellant filed an application 37 Kha for recall of witnesses PW-1 to PW-7 for fresh cross-examination. In this application 37 Kha, it was stated by the appellant that on the date when statement of PW-1 to PW-7 was being recorded, he had not engaged any counsel to represent him; that the police had obtained his signature on blank paper and vakalatnama and under fear of

the police he signed as desired by the police and that he was not even aware that any advocate was representing. In the application, it was also stated that on 13.12.2019, he had engaged two advocates, namely, Haribansh Yadav and Sri Sarvajeet Yadav, to put forth his defence and that earlier the police got all the witnesses examined as per their own sweet will therefore, for proper cross-examination of those witnesses by the counsels engaged by him, those witnesses be recalled. On application 37 Kha, written objection was filed by the informant. In the written objection (paper no. 38 Kha), it was stated that the defence had engaged Sri Rabindra Nath Tiwari and Deepak Gupta, Advocates, who extensively cross-examined the witnesses and, thereafter, the statement of the accused, under Section 313 Cr.P.C., was also recorded therefore, the defence stand that no advocate was appointed is incorrect and baseless and that the application for recall of the witnesses is mala fide.

(xxv) On 04.01.2020, the trial court rejected the application 37 Kha and fixed a date for the defence evidence, if any. While rejecting the application 37 Kha, the trial court observed that there existed a vakalatnama, dated 11.12.2019, in favour of Rabindra Nath Tiwari and Deepak Gupta to represent the accused - appellant and that though the accused had submitted a fresh vakalatnama in favour of Haribansh Yadav and Sarvajeet Yadav but he had not withdrawn the earlier vakalatnama in favour of Rabindra Nath Tiwari and Deepak Gupta. The court also observed that the statement of PW-1 to PW-7 were recorded in the presence of the accused and the order-sheet also bears the signature of the accused; and further, the statement of PW-8, 9, 10, 11 and 12 were recorded in the presence of Haribansh Yadav, Sarvajeet

Yadav, Rabindra Nath Tiwari and Deepak Gupta, Advocates and the accused Najeeruddin, then, had raised no objection in respect of their appearance therefore, the application 37 Kha is liable to be rejected.

(xxvi) On 07.01.2020, the court gave last opportunity to the accused to lead defence evidence and fixed 16.01.2020. In between, on 10.01.2020, finger print expert report, as entered in the CD, was received, which was taken on record. On 16.01.2020, the matter was adjourned and, thereafter, it was adjourned for one reason or the other including COVID-19 pandemic.

(xxvi) The order sheet of the court below reflects that on 21.10.2020, an order was passed by the trial court. In that order it is mentioned that though the accused is present through video conferencing but no person in his defence is present and since report from the forensic laboratory has not yet been received, next date i.e. 02.11.2020 is being fixed. On 02.11.2020, the matter was again adjourned to 09.11.2020. On 09.11.2020, forensic report (Paper No.48 Ka) was obtained from U.P. Forensic Laboratory, Lucknow. The court gave last opportunity to the accused to lead defence evidence. While giving last opportunity, vide order dated 09.11.2020, the court fixed 10.11.2020 as the next date. Thereafter, the matter was adjourned from one date to the other for various reasons including absence of the Presiding Officer. Finally, on 12.03.2020, arguments on behalf of the prosecution were heard and 17.03.2021 was fixed for remaining arguments. On 17.03.2021, the arguments on behalf of prosecution were completed. On behalf of the accused adjournment was sought. Consequently, on 17.03.2021, 18.03.2021 was fixed for arguments on behalf of the accused. On 18.03.2021, the following order was passed:

''18.3.21

पत्रावली पेश हुई। अभियुक्त जेल से उपस्थित। पत्रावली वास्ते बहस नियत चली आ रही है। अभियुक्त की ओर से कोई स्थगन प्रा0पत्र भी नही। अभियोजन पक्ष द्वारा अपनी बहस की जा चुकी है। ऐसी स्थिति मे पत्रावली निर्णय हेतु नियत किया जाना उचित होगा।

आदेश

पत्रावली वास्ते निर्णय दिनांक 24.3.21 को नियत की जाती है। अभियुक्त की ओर से निर्णय के एक दिन पूर्व तक किसी भी कार्य दिवस मे अपनी लिखित अथवा मौखिक बहस प्रस्तुत करने के अवसर प्रदान किया जाता है।

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18.3.21''

(xxvii) On 23.03.2021, counsel for the defence appeared and argued in part. For the remaining arguments, 25.03.201 was fixed. On 25.03.2021, the remaining arguments on behalf of defence were advanced and 26.03.2021 was fixed for orders. On 26.03.2021, the impugned judgment was delivered.

6. We have heard Sri N.I. Jafri, learned senior counsel, as an Amicus Curiae, assisted by Ms. Nasira Adil and Mohd. Zubair, Advocates, for the appellant; Sri J.K. Upadhyay, learned A.G.A., for the State; and Sri Ashutosh Gupta and Sri Gyan Prakash Verma, for the informant.

PROSECUTION EVIDENCE

7. Before we proceed to appreciate the rival submissions, we must have a glimpse of the prosecution evidence. The prosecution evidence can be divided into following parts:-

(a) **Eye-witnesses account** rendered by V-1 (PW-2);

(b) **Recovery of incriminating material**, which can be classified into two categories:

(i) Recovery at the instance of the accused of which seizure memorandum Ex. Ka-25 was prepared by PW11. This related to:- (i) recovery of blood stained clothes, etc of the accused wrapped in a polythene made from near a Neem tree near the place of residence of the accused; and (ii) recovery of brick (used for assault) and frock, etc of the deceased made from bushes in an Eucalyptus grove of some third party.

(ii) Recovery from the scene of crime, which again can be divided into two categories. One made by the I.O. and the other by the Field Unit Team. The I.O. recovered blood stained and plain earth from the scene of the crime of which recovery memo was prepared and exhibited as Exb. Ka-26. Whereas, the Field Unit Team collected blood swab from D-2's body, blood swab from D-1's body, blood soaked Pual (mat) from front of the deceaseds' house; blood soaked bra, cutting of blood soaked blanket, blood soaked vest, wrapper of condom and a scissor as also lifted finger prints from the bed and hair from the hand of D-2.

The recovery memo prepared by Field Unit Team dated 25.11.2019 has neither been proved nor has been exhibited.

(c) **Forensic evidence.** This can be divided into three categories: (i) Medical reports; (ii) Chemical analysis

reports; and (iii) Finger print expert report

(i) Medical reports include autopsy reports of the three deceased which was marked as exhibits Ka-7, Ka-8 and Ka-9, proved by PW-8; External injury report of V-2 and V-1 marked as exhibits Ka-3 and Ka-4, respectively, proved by PW-6; Internal medical examination report of V-1, which was marked as Exb. Ka-5, proved by PW-7; Supplementary report in respect of non presence of spermatozoa in the vaginal smear of V-1, which was marked as Exb. Ka-6, proved by PW-7; and Age report of V-1, marked as Exb. Ka-35, submitted by the Chief Medical Officer, Azamgarh, which has been proved by PW-12;

(ii) Chemical Analysis Report dated 07.11.2020 (Paper No.48 Ka) submitted by Scientific Officer, Forensic Science Laboratory, Lucknow in respect of DNA matching of the blood found on various articles recovered either by the I.O. or by the Field Unit Team as aforesaid. But this forensic report dated 07.11.2020 was obtained after recording of the statement of the accused under Section 313 Cr.P.C. and was not put to the accused for seeking his explanation under Section 313 Cr.P.C.

(iii) Finger print expert report of the Director, Finger Print Bureau, U.P., Lucknow, dated 03.01.2020, Paper No.40 Ka/6 to 40 Ka/ 13. But this finger print report was obtained after recording the statement of the accused under Section 313 CrPC and was not put to the accused for seeking his explanation under section 313 CrPC.

(d) **Evidence of conduct of the accused**- The evidence relating to the conduct of the accused post commission of crime can broadly be classified into two categories: (a) pre-crime and (b) post crime. Pre-crime conduct of the accused with regard to purchase of sex drive enhancement pill and condom is sought to be proved by PW-9. Post crime conduct is in respect of: (i) showing video-clip of the incident to PW-3 and PW-4 and telling them that he knows the truth about the incident and that the police has yet not been able to know about the real criminal and that PW-3 and PW-4 should not behave like cowards; (ii) hiding during day-time and crying at the grave of the three deceased during night hours; and (iii) leading to recovery of incriminating articles mentioned above.

(e) **Formal Evidence -** Such as lodging of FIR; proof of various stages of investigation, etc.

SUBMISSIONS ON BEHALF OF THE APPELLANT

8. (A) Learned counsel for the appellant, at the outset, submitted that this is a case where a re-trial would be required for the following reasons:-

(i) The appellant got no time to engage and consult his lawyers to enable an effective cross-examination of the prosecution witnesses as also for recording of his statement under section 313 CrPC, which has vitiated the trial. In support whereof, he highlighted the following circumstances:

(a) On 13.12.2019, the appellant engaged lawyers of his choice, whereas before that, on 11.12.2019,

charges were framed and, on 12.12.2019, five witnesses were examined. Thereafter, on 13.12.2019, Haribansh Yadav and Sarvajeet Yadav appeared for the appellant. On the same day i.e. 13.12.2019 cross-examination of PW-5 is undertaken and, thereafter, on the same day i.e. 13.12.2019, statement of six other prosecution witnesses, namely, PW-6, PW-7, PW-8, PW-9, PW-10 and PW-11 is recorded. Thereafter, on 16.12.2019 cross-examination of PW-11 is completed and statement of PW-12 is recorded. Such speed with which the trial proceeded gave no opportunity to the appellant to effectively consult his lawyer and brief them for an effective cross-examination.

(b) Similarly, on 16.12.2019 itself, when recording of statement of prosecution witnesses got over, no date was fixed to enable the appellant to effectively consult his lawyer and prepare for his examination under Section 313 Cr.P.C. and straight away the court proceeded to record statement under section 313 CrPC.

(c) On 19.12.2019, highlighting the above, the appellant submitted application 37 Kha for recall of witnesses PW-1 to PW-7, which was rejected by overlooking the following circumstances:-

(c 1) That vakalatnama dated 11.12.2019 allegedly executed by the appellant in favour of advocates Rabindra Nath Tripathi and Deepak Gupta was not accepted by Rabindra Nath Tripathi whereas the vakalatnama in favour of advocates Haribansh Yadav and Sarvajeet Yadav bears signature of both the said advocates as a token of acceptance of the power.

(c 2) There appears over writing on the date of acceptance of the Vakalatnama dated 11.12.2019 executed in favour of Rabindra Nath Tripathi and Deepak Gupta Advocate.

(c 3) No objection to the application 37 Kha was taken by the State against whom allegations were made whereas objection was taken only by the informant.

(c-4) When Rabindra Nath Tripathi had not accepted the vakalatnama then, in what capacity he represented the appellant is a serious issue.

(c-5) It is quite strange that statement of so many witnesses could be recorded at one go, on a single day, and the counsel made no request for a date to prepare for cross-examination because, ordinarily, a counsel needs to consult his client to prepare for cross-examination. Here, the allegations were so serious that if charges were proved, death penalty was one of the alternative punishments, hence, normal prudence would suggest that the counsel would like to consult his client to effectively cross-examine the witness and for such purpose seek a date. Such tearing hurry in getting the examination of witnesses over; and, thereafter, examination, under section 313 CrPC, undertaken on the day when testimony of last two witnesses is recorded; and the counsel for defence not seeking a date for preparation, would suggest that there was something wrong and, therefore, the application 37 Kha required deeper scrutiny.

(ii) The prosecution produced no material object recovered either from the scene of the crime or at the instance of the applicant before the court and no link evidence was led to demonstrate that it was the seized object that was sent for forensic examination for obtaining reports in respect of finger prints or DNA profiling. Hence, the forensic reports (i.e. relating to finger prints and DNA matching) though, later, brought on record were not admissible and, otherwise also, those forensic reports were not put to the accused under section 313 CrPC hence would have to be eschewed from consideration. Yet, the trial court in its judgment placed reliance on those forensic reports as would be clear from paragraph 61 of its judgment, which vitiates the trial as well as the judgment. On this count also, a retrial would be necessary.

(B) On merits of the prosecution case, the learned counsel for the appellant submitted as follows:-

(i) The eye-witness account rendered by V-1 (PW-2) is not reliable. Sri Jafri urged that PW-2 is a child, who could easily be tutored, and, therefore, it would not be safe to base conviction on her testimony alone. More so, when the FIR lodged by PW-1, on the basis of information received from PW-2, was against one Imtiyaz Nut, who is an existing person, and it appears that the police tried to save him. Further, from the statement of PW-2 it appears that she recognised the perpetrator of the crime on the basis of his beard (**दाढ़ी**) and by referring him as "दाढ़ी वाले अंकल" though, during cross-examination, she, stated "दाढ़ी वाले अंकल में जिनका नाम बाद मे पता चला कि उनका नाम नजीरूद्दीन है," which means that she was not aware of appellant's name. But, if that was so, how could it be possible that she could disclose the name of the appellant in her statement

recorded under Section 161 Cr.P.C. when, by that time, the appellant was not even arrested. This suggests that even before the appellant was arrested and identified by PW-2, or anything incriminating recovered from him, appellant's name was disclosed to the victim-PW-2. Thus, her testimony could be considered tutored. Further, PW-2 does not speak of preparing a video-clip. Hence, the testimony of PW-3 and PW-4 that they were shown video-clip falls to the ground.

(ii) In respect of recovery and the forensic evidence, it was submitted that the material object recovered has not been produced in court and there exists no link evidence to demonstrate as to which article was submitted for forensic examination hence the forensic reports are a waste paper. Moreover, the collection of incriminating material from the spot has not been proved by any member of the field unit team and even the I.O. has not proved as to what was recovered by the field unit team and, in any case, the material object recovered has not been produced during trial. Hence, the recovery is inconsequential. Further, those reports cannot be relied upon as they have not been put to the accused under section 313 CrPC.

(iii) In respect of testimony of PW-3 and PW-4, the learned counsel for the appellant submitted that, admittedly, the video clip was not recovered and, most importantly, the investigating officer, during the course of cross-examination, stated that he did not try to ascertain the mobile number, which suggests, that no effort was made by the investigating agency to ascertain whether the appellant had a mobile and if he held a mobile, whether its CDR details,

disclosed its location at the scene of crime. All of this, coupled with the fact that initially the accused was one Imtiyaz Nut, would suggest that the investigation is hiding true facts.

(iv) In respect of the evidence of PW-5 in respect of the accused hiding during day time and crying at the grave in the night hours, it has been submitted that nothing has been disclosed as to when PW-5 saw the appellant doing this. Moreover, this is an imaginary story set up by the I.O. on the basis of some information from an informer. This being pure hearsay evidence therefore, not admissible. Likewise, evidence of PW-9 regarding purchase of condom and sex drive enhancement pill is, firstly, false because PW-9 held no licence and, secondly, is inconsequential as there is no recovery of the bill or wrapper of that drug. In so far as recovery of wrapper of condom from the scene of crime is concerned that is inconsequential because that can be used by D-1 himself to ensure family planning.

(v) Lastly, Sri Jafri submitted that the ocular evidence of PW-2 regarding rape of D-2 is not supported by medical evidence, as no spermatozoa was discovered in the vaginal wash of D-2 and no injury on the genital area was noticed. It was also submitted that there is nothing to indicate anal intercourse with V-1 therefore, conviction under section 377 IPC is not at all justified.

Summarising his submissions, she Jafri submitted that this is a case where there is no worthwhile reliable evidence and the forensic reports in respect of DNA matching are not admissible in absence of proof of recovery and the link evidence, thus the appellant deserves to be acquitted.

SUBMISSIONS ON BEHALF OF THE STATE

9. Sri J.K. Upadhyay, learned A.G.A., submitted that the trial court gave adequate opportunity to the appellant to cross-examine the prosecution witnesses; that the appellant had engaged a private counsel on 11.12.2019 at the time when the charges were framed; that the private counsel represented the appellant when the statement of PW-1 to PW-5 were recorded and the counsel also cross-examined those witnesses as would be clear from the record therefore, the contention that the witnesses PW-1 to PW-7 be recalled because their examination occurred when there was no counsel representing the appellant is not sustainable. He further submitted that the testimony of PW-2 alone is sufficient to record conviction as she not only saw D-1 and D-2 being killed by the appellant but she also saw her mother being raped in front of her own eye and thereafter she was also raped by the appellant. Hence, she had every opportunity to recognise her offender. Even though PW-2 may be a child witness, the image of her offender would get imprinted in her memory and she can never forget. Moreover, she has identified the appellant at the dock during the course of her testimony and no questions could discredit her testimony and therefore, her statement alone is sufficient to uphold the conviction of the appellant.

10. Sri Upadhyay also submitted that the police witnesses and PW-5 have clearly proved the recovery of incriminating material and the forensic report can be taken into consideration by virtue of the provisions of section 293 Cr.P.C. and therefore, merely because the forensic reports were received after recording of the statement of the appellant under Section 313 Cr.P.C., the judgment and order of the trial court cannot be set aside only on that ground.

11. In respect of non-recovery of mobile phone, Sri Upadhyay submitted that even if the mobile phone was not recovered, it will not wash away the testimony of PW-3 and PW-4 because the appellant, in his statement recorded under Section 313 Cr.P.C., did not categorically deny showing the video clip to PW-3 and PW-4. Rather, in his answer to question No.4, he stated that he had shown the video clip to Rehana of the day incident, which was prepared on Monday. Even the purchase of medicine from PW-9 is not denied, though the appellant in his answer to question No.10, recorded under Section 313 Cr.P.C., stated that he purchased some medicine for his back ache from PW-9.

12. Sri Upadhyay submitted that absence of injury to D-2 on her genital area will not rule out rape because being a married lady and mother of three children, she might not suffer injury on account of penetration. Similarly, absence of spermatozoa in the vaginal wash is of no consequence because, according to the prosecution story, a condom was used, which is corroborated by recovery of a condom wrapper from the spot.

13. Learned A.G.A. further submitted that in so far as naming of Imtiyaz Nut in the FIR is concerned that would not be of much significance because the informant (PW-1) in his statement had clarified that the victim had not named Imtiyaz Nut but had disclosed to him that it was a person who looked like Imtiyaz Nut, hence, this would not be fatal to the prosecution case.

14. Learned A.G.A. also submitted that since this is a case of gruesome rape and multiple murders as well as rape of a minor girl, an exhibition of extreme depravity by the offender, therefore, conviction must entail in death penalty. Hence, not

only the appeal be dismissed but the reference for confirmation of the death penalty be accepted and the awarded punishment be confirmed.

ANALYSIS

15. Having noticed the rival submissions and having perused the record, before we proceed to analyse the merit of the prosecution evidence, we must first consider whether on the facts of the case a retrial would be required, if so, from what stage. Because, if a retrial is required, it would, then, be not appropriate for us to express an opinion with regard to the merit of the prosecution evidence as it may influence the trial court and thereby cause prejudice to both sides.

16. In the instant case, we find from paragraph 61 of the trial court judgment that the trial court had placed reliance on forensic report in respect of the DNA match between the incriminating articles (i.e. hair, blood-stained frock, clothes, etc) recovered from the scene of crime as well as at the instance of the appellant and the blood sample of the appellant. Importantly, the said forensic report has not been put to the appellant under section 313 CrPC inasmuch as it was obtained after the statement under section 313 CrPC was recorded.

17. It is well settled that all incriminating circumstances appearing in the prosecution evidence must be put to the accused while recording his statement under section 313 CrPC. According to section 313 (1) (b) CrPC, the stage of examination of the accused under section 313 (1) (b) comes when the witnesses of the prosecution have been examined and before the accused is called on for his defence. This implies that after the incriminating material is put to the accused, he gets a right

to lead evidence in defence. No doubt, under section 293 CrPC, a forensic report from a Government scientific expert can be accepted in evidence without the requirement of formal proof, but, the accused, if he so choses, has a right to challenge the report and lead evidence in rebuttal. The accused may also challenge the very foundation of the report by questioning the collection or recovery or seizure of the material in respect of which the report is obtained. To ensure that the accused gets opportunity to avail that right, section 313 (1) (b) CrPC exists in the Code.

18. In ***Nar Singh v. State of Haryana (2015) 1 SCC 496,*** the Supreme Court, on the issue as to what are the various courses available to the appellate court where incriminating material appearing in the prosecution evidence has not been put to the accused, after considering various earlier decisions, in paragraph 30 of the judgment, summarised the law as under:-

> *"30.1.Whenever a plea of non-compliance with Section 313 Cr.P.C. is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer.*
>
> *30.2. In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.*
>
> ***30.3. If the appellate court is of the***

> ***opinion that non-compliance with the provisions of Section 313 Cr.P.C. has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh.***
>
> *30.4. The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused."*
>
> *(Emphasis Supplied)*

19. In the instant case, not putting the forensic report to the appellant for sure has caused prejudice to the appellant as he could neither tender his explanation to it nor could get opportunity to lead evidence in rebuttal. Hence, paragraph 30.3 of the judgment in ***Nar Singh's case (supra)*** gets attracted. Therefore, on this ground alone, the matter would have to be remitted back.

20. Not only that, there appears another important lapse on the part of the prosecution, which is, that the seized/ recovered material in respect of which report has been obtained have not been produced before the court and got marked as material exhibit. No doubt, paragraph 61 of the impugned

judgment refers to the articles recovered as material source for the forensic report but, upon scanning the entire prosecution evidence with the help of learned AGA, we could not find that any such articles were produced before the court and identified by any of the prosecution witnesses as the articles recovered or seized from the scene of crime by the field unit team or by the police i.e. investigating officer at the instance of the accused of which seizure memorandum (Ex. Ka-25) was prepared. Importantly, the collection report prepared by the field unit team is not even exhibited.

21. At this stage, we may notice the decision of the Supreme Court in ***Jitendra and Another Versus State of M.P., (2004) 10 SCC 562*****,** wherein the prosecution placed reliance on a Chemical Examiner report to show that the articles seized were Charas and Ganja i.e. narcotics. Although the High Court noticed that the Charas and Ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, but it brushed aside the lapse by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be Charas and Ganja. The High Court relied on section 465 CrPC to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused. Negativing the view taken by the High Court, the Supreme Court, in paragraph 6 of the judgment, held as follows:

> *"In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged*

> *quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offences punishable with a stringent sentence…."*

The above view has been consistently followed by the Supreme Court in ***Ashok @ Dangra Jaiswal v. State of Madhya Pradesh, (2011) 5 SCC 123; Gorakh Nath Prasad V. State of Bihar, (2018) 2 SCC 305; Vijay Jain V. State of Madhya Pradesh, (2013) 14 SCC 527***. Though, later, in State of ***Rajasthan V. Sahi Ram, (2019) 10 SCC 649***, the Supreme Court, paragraph 18 of its judgment, held that *"if the seizure of the material is otherwise proved on record and is not even doubted or disputed, the entire contraband material need not be placed before the court. If the seizure is otherwise not in doubt, there is no requirement that the entire material ought to be produced before the court. At times the material could be so bulky…. that it may not be possible and feasible to produce the entire bulk before the court. If the seizure is otherwise proved, what is required to be proved is the fact that the samples taken from and out of the contraband material were kept intact, that when samples were submitted for forensic examination the seals were intact,…."*

22. In the instant case, we notice from the statement of

the appellant recorded under section 313 CrPC that though the recovery/ seizure memorandums were put to him by way of question no.12 but the appellant denied the same. The articles recovered or any portion of it entered in the seizure memo (Ex. Ka-25) were not produced and marked material exhibits. In so far as the recovery memorandum alleged to have been prepared by the field unit team in respect of material recovered from the scene of crime is concerned that has not been exhibited and, on the record, despite assistance of the learned AGA, we could find no statement of any of the prosecution witnesses or of any member of the field unit team that lifted articles from the scene of crime. In fact, Sri Vijay Kumar, a member of the field unit team, who prepared the report has not been examined. Accordingly, once neither the seized/ recovered article, nor a portion of it, was produced in court, and the seizure having not been admitted, the forensic report in respect thereto, remained a waste paper. This is a very serious lapse on the part of prosecution and calls for disciplinary action against the person responsible. Unfortunately, even the court below overlooked the mistake. Similarly, though there appears a finger print expert report on record in respect of finger prints lifted from the bed by the field unit team but, neither the lifting of finger prints have been proved nor the finger print expert report has been put to the accused.

23. Now, the question that arises is should the prosecution get an opportunity to prove all those efforts, particularly, when the matter is in respect of extremely grave offence. In ***Zahira Habibulla H. Sheikh V. State of Gujarat, (2004) 4 SCC 158***, the Supreme Court observed:

> *"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 discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty….

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

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."

24. In ***Anokhilal v. State of Madhya Pradesh, (2019) 20 SCC 196*****,** the apex court had occasion to examine a somewhat similar matter as the present case. There also a minor girl child was kidnapped, raped and murdered. In that case, accused was represented by an Amicus Curiae. The Amicus Curiae was appointed on the same day when the charges were framed and, within next seven days, after charges were framed, all the thirteen prosecution witnesses were examined and before the DNA report could be available, the final arguments were heard and the matter was adjourned for placing on record the DNA report and for remaining final arguments. Upon conviction by the trial court and dismissal of appeal by the High Court, when the matter came before the Supreme Court, upon a conspectus of various authorities on the issue of fair and expeditious trial, in paragraph 20 of its judgment, the Apex Court summarised the legal principles on the issue as follows:

> *"20. The following principles, therefore, emerge from the decisions referred to hereinbove:-*
>
> *20.1. Article 39A 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.*
>
> *20.2. 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 (as quoted in the decision in Mohd. Hussain) emphasises 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.

20.3. Even before insertion of Article 39-A in the Constitution, the decision of this Court in Bashira 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.

20.4. The portion quoted in Bashira 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.

20.5. In Bashira as well as in Ambadas, 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."

In ***Anokhilal's case (supra)***, the relevant facts of that case are noticed in paragraphs 21 to 24 of the judgment, which are extracted below:-

"21. In the present case, the Amicus Curiae, was appointed on 19.02.2013, and on the same date, the counsel was called upon to defend the accused at the stage of framing of charges. One can say with certainty that the Amicus Curiae did not have sufficient time to go through even the basic documents, nor the advantage of any discussion or interaction with the accused, and time to reflect over the matter. Thus, even before the Amicus Curiae could come to grips of the matter, the charges were framed.

22. The provisions concerned viz. Sections 227 and 228 of the Code contemplate framing of charge upon consideration of the record of the case and the documents submitted therewith, and after 'hearing the submissions of the accused and the prosecution in that behalf'. If the hearing for the purposes of these provisions is to be meaningful, and not just a routine affair, the right under the said provisions stood denied to the appellant.

23. In our considered view, the Trial Court on its own, ought to have adjourned the matter for some time so that the Amicus Curiae could have had the advantage of sufficient time to prepare the matter. The approach adopted by the Trial Court, in our view, may have expedited the conduct of trial, but did not further the cause of justice. Not only were the charges framed the same day as stated above, but the trial itself was concluded within a fortnight thereafter. In the process, the assistance that the appellant was entitled to in the form of legal aid, could not be real and meaningful.

24. There are other issues which also arise in the matter namely that the examination of 13 witnesses within seven days, the examination of the accused under the provisions of the Section 313 of the Code even before the complete evidence was led by the prosecution, and not waiting for the FSL and DNA reports in the present case. DNA report definitely formed the foundation of discussion by the High Court. However, the record shows that the DNA report was received almost at the fag end of the matter, and after such receipt, though technically an opportunity was given to the accused, the issue on the point was concluded the very same day. The concluding paragraphs of the judgment of the Trial Court show that the entire trial was completed in less than one month with the assistance of the prosecution as

well as the defense, but, such expeditious disposal definitely left glaring gaps."

In the contextual background of the facts noticed above, the Apex Court, in paragraphs 26 to 29 of its judgment, held as follows:-

"*26. 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.*

27. In the circumstances, going by the principles laid down in Bashira, we accept the submission made by Mr. Luthra, the learned Amicus Curiae and hold that the learned counsel appointed through Legal Services to represent the appellant in the present case ought to have been afforded sufficient opportunity to study the matter and the infraction in that behalf resulted in miscarriage of justice. In light of the conclusion that we have

arrived at, there is no necessity to consider other submissions advanced by Mr. Luthra, the learned Amicus Curiae.

28. All that we can say by way of caution is that in matters where death sentence could be one of the alternative punishments, the courts must be completely vigilant and see that full opportunity at every stage is afforded to the accused.

29. We, therefore, have no hesitation in setting aside the judgments of conviction and orders of sentence passed by the Trial Court and the High Court against the appellant and directing de novo consideration. It shall be open to the learned counsel representing the appellant in the Trial Court to make any submissions touching upon the issues (i) whether the charges framed by the Trial Court are required to be amended or not; (ii) whether any of the prosecution witnesses need to be recalled for further cross-examination; and (iii) whether any expert evidence is required to be led in response to the FSL report and DNA report. The matter shall, thereafter, be considered on the basis of available material on record in accordance with law."

(Emphasis Supplied)

After holding as above, before parting with the case, the Apex Court, in paragraph 31, also laid down certain guidelines with regard to appointment of Amicus Curiae for representing

the accused in serious matters. The relevant guidelines as contained in paragraph 31 of the judgment are extracted below:-

> *"31. Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:-*
>
> *31.1 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.*
>
> *31.2 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.*
>
> *31.3 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.*
>
> *31.4 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."

25. From the decisions noticed above, what is clear is, that both prosecution as well as defence must have fair opportunity in the trial. The objective of the trial is to come to the truth. Neither an innocent be punished nor guilty to go scot-free. Sufficient time is to be given to both sides to have their say and technicalities must not come in the way. In the light of above, we are of the view that the prosecution as well as the defence should get an even chance to lead evidence to ensure that complete justice is done and truth prevails more so, when not much time has elapsed since the commission of the crime. This we say so also for the reason that in the instant case, statement of as many as twelve witnesses were recorded in three days i.e. 12.12.2019, 13.12.2019 and 16.12.2019, spread over five days. Importantly, the statement under Section 313 Cr.P.C. was also recorded on 16.12.2019, that is the date when the statement of last two witnesses, namely, PW-11 and PW-12 was recorded. Most importantly, by that time, the DNA report was not even available and, interestingly, the Court was made aware that the DNA report was not available though has been sought for. Likewise, finger print report was also not available when the statement under Section 313 Cr.P.C. was recorded. Noticeably, all these reports were received later, but were not put to the accused to seek his explanation under Section 313 Cr.P.C. Yet, the trial court placed reliance on the forensic reports as would be clear from paragraph 61 of its judgment. Above all, while doing so, the trial court did not even take into consideration as to whether the collection of the incriminating material by the Field Unit Team was proved

and whether the seized material was produced as a material object and made material exhibit, if not, then what would be its consequence. Noticeably, the Field Unit Team report dated 25.11.2019 regarding collection of various material from the scene of crime is not exhibited. In fact, the person, namely, Vijay Kumar, who prepared the report was not examined as a prosecution witness. Yet, the DNA matching report has been taken into consideration as a corroboratory material to record conviction. In our view, all of this has resulted in serious miscarriage of justice and, therefore, the matter requires a re-trial.

26. In addition to above, we notice from the record that while rejecting application 37 Kha i.e. the application, dated 19.12.2019, moved on behalf of the appellant to recall PW-1 to PW-7, the trial court over looked that the earlier Vakalatnama dated 11.12.2019 though was in favour of two counsels, namely, Ravindra Nath Tripathi and Deepak Gupta, but it was accepted by D.K. Gupta alone. Further, there appeared overwriting in the date of acceptance of the Vakalatnama by D.K. Gupta. May be this was a clerical mistake, but since a very serious charge was levelled by the accused-appellant in his application 37 Kha that he had not engaged any counsel and that all those witnesses were examined when he was unrepresented, the court ought to have enquired from those counsels in the presence of the accused whether they were engaged by the accused and whether they had sufficient opportunity to consult the accused to effectively prepare for cross-examination. Notably, as many as five witnesses were examined on 12.12.2019; and six witnesses were examined on 13.12.2019. Though, we do not wish to express our opinion as to whether those witnesses are to be recalled but, as we have

already taken a view that the matter would have to be remitted for a re-trial, we consider it appropriate to leave it open to the accused-appellant to apply for recall of witnesses, which, if made, shall be considered on its own merit and in accordance with law, without being prejudiced by earlier rejection of application 37 Kha. Similarly, we leave it open to the prosecution either to recall and re-examine its witnesses, or to produce fresh witness, to prove collection/seizure of incriminating articles as well as produce the same as material objects.

27. For all the reasons recorded above, we reject the reference for confirmation of death penalty and set aside the judgment and order of conviction and punishment /sentence passed by the court below with direction to the trial court for a de novo consideration from the stage of examination of the appellant under Section 313 Cr.P.C in the light of the observations made above. This shall be without prejudice to the right of the prosecution to call/recall a witness or witnesses to prove the recovery made from the scene of the crime by the Field Unit Team as also to produce the items recovered by Field Unit Team as well as the Investigating Officer so as to connect/ link the forensic reports with the items seized / recovered. Likewise, it shall also be open for the appellant to apply for recall of any of the prosecution witness or witnesses or to produce expert report in rebuttal, if so advised. If any such recall application is filed the same shall be considered on merit without being prejudiced by earlier rejection of application 37 Kha. The matter shall, thereafter, be decided on the basis of available material on record, in accordance with law. It is expected that the trial shall be completed expeditiously and that all parties shall cooperate in that effort.

28. As we have directed for a re-trial, we do not deem it appropriate to express our opinion on the merit of the prosecution case. Rather, we make it clear that we have not expressed any opinion on the merit of the prosecution case as also whether on the evidence already on record, conviction of the appellant could be sustained or not.

29. The appeal stands **allowed** to the extent indicated above.

30. It may be clarified that as we are directing for a re-trial, our order, by itself, should not be interpreted as a ground to release the appellant on bail and, therefore, we clarify that the appellant shall be treated as an under-trial prisoner till his release, either on bail or otherwise.

31. Let this order be certified and communicated to the court below and the lower court record be also sent to the trial court for compliance.

Order Date:- 21.1.2022

Sunil Kr Tiwari