

Anand Singh vs.state

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SooperKanoon Citation : sooperkanoon.com/1203933

Court : Delhi

Decided On : Oct-25-2016

Appellant : Anand Singh

Respondent : State

Advocate for Def. : Ms. Aashaa Tiwari

Advocate for Pet/Ap. : Mr. M.L. Yadav, Mr. Lokesh Chandra

Judgement :

\$~ *IN THE HIGH COURT OF DELHI AT NEW DELHI + % ANAND SINGH
STATE CRL.A. No.839/2016 Date of decision :

25. h October, 2016 Through: Mr. M.L. Yadav and Appellant Mr. Lokesh Chandra, Advs. versus Respondent Through: Ms. Aashaa Tiwari, APP for the State with Insp. Satyavir Singh from PS Bindapur CORAM: HON'BLE MS. JUSTICE GITA MITTAL HON'BLE MR. JUSTICE P.S.TEJI JUDGMENT (ORAL) GITA MITTAL, J.

1. The appellant assails the judgment dated 24th May, 2016 passed in Sessions Case No.

by the learned Additional Sessions Judge convicting him for commission of offence under Section 302 of the IPC as well as the consequential order of sentence dated 26th May, 2016 awarding life imprisonment as well as fine of `20,000/-, in default simple imprisonment for six months.

2. On 19th September, 2013 at 04.45 hours, information was received by Police Station Bindapur from Ct. Mukesh, who was Crl. App.No.839/2016 Page 1 of 30 posted at DDU Hospital that one Soni, wife of Anand Singh (appellant) had been brought dead to hospital. This information was logged as DD No.11-B (Exh.PW9/A) and was marked to SI Raj Kumar (PW17).

3. SI Raj Kumar proceeded to the hospital where he met Varun Singh (PW14), father of the deceased and recorded his statement. It was disclosed by Varun Singh (PW14) that his daughter Soni was married to Anand Singh in the year 2014 according to Hindu rites and ceremonies; that they lived as husband and wife for merely 1 year whereafter she was left at her native village by Anand Singh who came back to Delhi. About one year thereafter, his daughter Soni had given birth to a male child who was named Ankit.

4. Varun Singh (PW14) informed that he had filed a case regarding abandonment of his daughter by the accused whereafter, in the year 2013, Anand apologised for his actions before the panchayat and promised to take Soni with him as well as to look after her properly. Soni was brought to Delhi by the appellant. However, barely 15 days thereafter, Varun Singh (PW14) received information regarding the death of his daughter from Anand Singh. As he did not believe the accused, he got it confirmed from his grandson Ankit whereupon he rushed to Delhi.

5. Varun Singh (PW14) had expressed suspicion about the conduct of his son-in-law regarding the incident in which his daughter was killed. This statement (Exh.PW14/C) was attested by SI Raj Kumar (PW17). On this statement, SI Jatinder Kumar Crl. App.No.839/2016 Page 2 of 30 (PW19) who was also posted at Police Station Bindapur on that day, prepared the tehrir for registration of the case (Exh.PW19/A) and sent the same to HC Vijay Pal (PW12). As a result, HC Vijay Pal (PW12) registered a computer typed FIR No.6 Exh.PW12/A on 30th December, 2013 which fact was logged as DD No.38A at 16:10.

6. The appellant was absconding. It was only on 9th April, 2014 that he surrendered before the concerned Metropolitan Magistrate in the District Courts at Dwarka when he was arrested vide memo Exh.PW5/A.

7. After his arrest, the appellant is stated to have made a disclosure statement (Exh.PW15/A). It is an admitted position that no recovery was effected pursuant to this disclosure statement and the same having been made when the appellant was arrested, is inadmissible in evidence in view of the prohibition contained under Section 24 of the Evidence Act.

8. On completion of investigation, a final charge sheet was filed by the police under Section 173 of the Cr PC before the court of the Metropolitan Magistrate. The matter was committed to the court of Sessions in accordance with law.

9. After consideration of the material, by an order dated 11th August, 2014, the trial court framed the charge against the appellant for commission of an offence under Section 302 IPC to the effect that on the intervening night of 18/19th September, 2013, the appellant had committed murder of his wife, the deceased Soni. The appellant pleaded not guilty and claimed trial. CrI. App.No.839/2016 Page 3 of 30 10. During trial, the prosecution examined a total of 22 witnesses. The incriminating circumstances in the evidence were put to the appellant under Section 313 of the Cr PC. The appellant opted to lead defence and examined three witnesses in support of his case.

11. So far as the offence with which the appellant was charged, the only evidence led by the prosecution was the evidence of the son from the wedlock of the deceased Soni and the appellant, namely Master Ankit who was examined as PW16.

12. Mr. M.L. Yadav, learned counsel for the appellant has carefully taken us through the evidence of this witness. It appears that the learned trial court first put questions to test the competency of the child who was 5 years of age as on 2nd December, 2014 when his evidence was recorded. After recording satisfaction that the child witness was of sufficient maturity and understanding, the trial court noted that the child did not understand the meaning of the oath and consequently, while declaring him a competent witness, recorded his statement without oath.

13. The testimony of the child runs into only four sentences. The trial court has recorded a bald statement as having been made by this witness to the effect that

his mother was killed by his father (the present appellant), chacha (father's younger brother) and chachi (father's brother's wife). In the second, third and fourth sentence, the trial court has noted his statement to the effect that he could identify his father, chacha Vinay Singh and chachi. There is not a word about the incident or the commission of the offence in CrI. App.No.839/2016 Page 4 of 30 which the mother of the child was killed.

14. Further, while under cross examination, the child witness stated that the incident took place during the night and thereafter his mother was carried on a cart (thela) to the Mahajan hospital by his father. The child has further stated in his cross examination that he was given food by his chacha Vinay Singh. He went to sleep and thereafter woke up only in the morning. He further stated that he used to sleep in the same room as his mother and father and that his father used to come back in the night.

15. It is also in the cross examination of the child (PW-16) that his father, the appellant, used to provide food as well as clothes to his mother and that his parents were residing comfortably without any problem.

16. The child has also referred to a quarrel in which he alleged that his father gave beatings to his mother and that Vinay Singh had also come when the quarrel was going on. But the exact date and time of such quarrel is not discernible from the statement.

17. A reading of the testimony in its entirety also exhibits that the attribution of the quarrel and the allegations made by him were not clearly tutored and were voluntarily made by the child. We find that the last sentence in the cross examination actually tells the complete tale where the child has stated that his parents i.e. the appellant and his mother Soni used to love each other and that they also loved him. Therefore, other than the bald statement by the child in his examination in chief attributing the murder to the appellant, his brother and his brother's wife, there is not an iota of CrI. App.No.839/2016 Page 5 of 30 evidence to bring home the charge against the appellant.

18. The prosecution has also examined the appellants landlady Smt. Gulia Devi (PW20). This witness has also not given any evidence to support the prosecution version that the appellant was guilty of having killed his wife.

19. The record shows that on the request of the police, a post mortem was conducted on the body of the deceased Soni on 24th September, 2013 by Dr. Komal Singh (PW1), HOD Forensic Examination who has proved her report as Exh.PW1/A. We find from the post mortem report, the doctor's noting to the effect that the deceased was found in unconscious state in the bathroom at her house. So far as the injuries on the body of the deceased are concerned, the following external injuries have been noted by the doctor in Exh.PW1/A : EXTERNAL EXAMINATION: External Injuries 1. Bruise present over left arm of size 20cm x 9cm. reddish blue in colour.

2. Abrasion of size 8cm x 3cm present over left scapula with reddish brown in colour.

3. Abrasion of size 6cm x 3cm present over left lumbar region (posterior), reddish brown in colour.

4. Bruise of size 8cm x 6cm present over left iliac crest (Posterior), reddish brown in colour.

5. Bruise of size 22cm x 10cm present over left thigh (laterally), bluish colour.

6. Bruise of size 3cm x 3cm present over left knee joint.
 7. Abrasion present over outer surface of left forearm of size 2cm x 2cm, reddish brown in colour.

8. Bruise of size 8cm x 4cm present over ext. Surface of left forearm, reddish brown in colour.

9. Abrasion of size 3cm x 1cm present over right forearm ext. Surface, reddish brown in colour.

10. Bruise present over posterior aspect of right leg of size 8cm x 4cm, bluish in colour.

11. Bruise of size 10cm x 5cm present over right arm, reddish brown in colour. 20. Upon internal examination, the doctor has noted that the frothy secretion present in the tracheal lumen; left lung adherent to chest wall and about one litre of clotted and liquid blood was present in the peritoneal cavity. The doctor has also noted that spleen was ruptured and clotted blood present in and around it. The deceased had clearly suffered extensive injuries prior to her death.

21. The injuries were opined to be ante-mortem. So far as the cause of death is concerned, the doctor has noted that the same is due to blunt trauma inflicted over the abdomen by the second party.

22. The appellant disputed culpability for commission of the offence in his statement under Section 313 of the Cr PC and alleged that he had been falsely implicated.

23. In answer to question no.11, the appellant stated that he CrI. App.No.839/2016 Page 7 of 30 returned home at 11 p.m. after selling fruits and vegetables in the market when he learnt that his wife Soni had injured herself in the bathroom and thereafter he took her to the Mahajan Hospital alongwith neighbours.

24. In support of his defence, the appellant has examined a neighbour Smt. Usha (DW-1) who supported the PW16s statement and deposed that she had never seen the accused having fought with the deceased. She made a positive statement that on 17th November, 2014, when the appellant was away plying his trade of selling vegetables, at about 11 p.m., his wife Soni had fallen in the bathroom and that she along with her neighbours had brought her out from the bathroom. In the meantime, the appellant had returned from work and he alongwith others had taken Soni to the Mahajan Hospital near Mangal Bazar, Uttam Nagar. Her remaining testimony is hearsay in as much as she refers to having heard that from this Hospital, Soni was referred to DDU Hospital where she had died. DW1 has also stated that Ankit (PW16) was sleeping in the room at that time.

25. Shri Hargobind (DW2), a tailor by profession, and another neighbour of the appellant, was also examined who stated that he used to go to the appellants

house to collect money for tailoring work undertaken by him. He has stated that on 19th September, 2013 at about 11 p.m. when he had gone to the appellants house to collect his dues, he had seen that the deceased Soni was lying on the open bathroom floor. Thereafter, he had accompanied others to Crl. App.No.839/2016 Page 8 of 30 the Mahajan Hospital where Soni was taken in conscious condition. At this hospital, after giving first aid, Mahajan Hospital had suggested that she be removed to another Hospital and consequently, she was removed to the DDU Hospital. The appellant also examined the rickshaw pullar Sh. Om Prakash as DW-3 who has stated that in the month of September, 2013 while he was plying his rickshaw, he received a phone call from the appellant requesting him to come to his house with the rickshaw as his wife was not well. DW-3 has categorically stated that he had taken the appellant and his wife Soni to the Mahajan Hospital on his rickshaw and that 3-4 persons had accompanied them in another rickshaw. The prosecution could not shake the testimony of the defence witnesses in the cross examination. The witnesses have denied the general suggestions put to them by the prosecutor. The above narration would show that the prosecution miserably failed in proving the allegations with which the appellant was charged. The appellant was successful in the defence set up by him to the extent that his wife Soni had fallen in the bathroom when he was not in the house and was away plying his trade.

26. The above narration would show that there is not a whit of evidence on the record to show as to how the deceased suffered all these injuries. Other than a bald statement in the testimony of the six year old child (PW16), this is yet another case where the investigating agency has miserably failed to investigate a homicidal death.

27. Other than the suspicion expressed by Sh. Varun Singh, Crl. App.No.839/2016 Page 9 of 30 father of the deceased, the police had no material at all to register the case against the appellant. For this reason, no case was registered for a period of almost four months after the death of the deceased. There is not a whit of an explanation as to why despite the serious injuries pointed out in the post mortem report, no investigation seems to have been undertaken and why the case was registered after a period of four months. The record shows that the appellant

and his family consisted of the deceased and the child who were living in a room in the premises. It is trite that witnesses produced by the defence have to be given the same importance as the evidence led by the prosecution. There is no explanation given in the impugned judgment as to why the defence witnesses deserve to be disbelieved. We find that the witnesses have corroborated each other and supported the defence of the appellant. Testimonies of these witnesses remained unshaken despite an incisive cross examination by the prosecutor and there is no reason to disbelieve their testimonies. The examination in chief of the child is best illustrated by his complete statement which we extract hereunder: My mother was killed by my father (accused), Chachi and Vinay. I can identify my Chachi. I do not know her name. Vinay is my Chacha. I identify my father (accused) present in the court today. Crl. App.No.839/2016 Page 10 of 30 The incident took place during the night. Thereafter, my mother was carried on cart (Thela) to Ganga Ji by my father. xxxx by Sh.P.D.P. Deo and Sh. V.S. Gandhi, Ld. Defence I alongwith my mother and father used to reside in a room. I do not remember when I went to sleep on the day of incident. I slept alone and I got up at about 1.00 AM. I washed my face and had food. The food was given by Vinay Singh. I did not have any talk with Vinay Singh. After taking food I went to sleep. It is correct that thereafter I wake up in the morning. After waking up in the morning, I had a talk with my maternal grandfather by the mobile phone of my father. I did not know the telephone number of my maternal grandfather (nanaji). My father (papa) was talking to my maternal grandfather from his mobile phone. My maternal grandfather (nanaji) asked my father to give phone to me. My maternal grandfather (nanaji) asked me about my mother and I told him that she had died and thereafter the phone was disconnected. I do not remember the contents of conversation between my father and maternal grandfather (nanaji). No other talks took place except the above said conversation. 28. The child has further stated : I used to sleep with my mother and my father used to sleep in the same. room. I do not know the occupation of my father. My father used to come back in the night, I was not having any problem while sleeping with my parents. My parents used to provide food and clothes to me as well as my mother. My parents used to reside comfortably and there was no problem. Vol. There was quarrel when my father Crl. App.No.839/2016 Page 11 of 30 gave beatings to my mother. I do not know the

cause of quarrel. My father and mother were at a distance of about 2-3 ft. when the quarrel was going on between them. Vinay Singh also came when the quarrel was going on. I do not remember what happened after the quarrel. Vinay Singh was abusing my mother. I do not know what happened thereafter. It is incorrect that my mother was suffering from some diseases. It is correct that I had not seen anything except the quarrel. xxx xxx xxx I am telling on my own. It is correct that my mother and father used to love each other and they also used to love me."

(Emphasis supplied) 29. The prosecutor made no effort to question the child about what had happened or to explain his statements.

30. The court also was adequately empowered to put questions to the child under Section 165 of the Evidence Act to ascertain the truth. However, the learned trial judge opted to be a silent spectator.

31. There can be no better exposition of the role of the court than in the words of the Supreme Court in the pronouncement reported at AIR 2004 SC346: (2004) 4 SCC158Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors. when it stated as follows :-

"43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and CrI. App.No.839/2016 Page 12 of 30 wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing

indifference or adopting an attitude of total aloofness. (Emphasis supplied) 32. The observations of the Supreme Court setting out the parameters of the duty and jurisdiction of the court while recording evidence also deserve to be extracted and read thus : 55. The courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. CrI. App.No.839/2016 Page 13 of 30 It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading mock fight and making a mockery of the criminal justice administration itself. (Emphasis supplied) 33. On a consideration of the matter, we are also extremely pained to note the manner in which the trial court has proceeded in the case.

34. The post-mortem report shows several external injuries. The internal examination shows extensive bleeding, an indication of internal injuries of a large and serious magnitude which caused Sonis death. Yet despite evidence of the presence of the child (PW-16) in the room where, as per the prosecution suggestion, the murder took place, there is not one word about how the deceased suffered injuries. A quarrel is not necessarily physical or violent - it could be verbal. Therefore, the reference to the quarrel in the child's cross-examination is not supportive of a finding of culpability for murder.

35. A duty lay on the prosecution as well as the court to ascertain the truth from the child who had been produced for examination before the court. Admittedly, the child was residing in the same room as his parents. Apart from recording his four sentence deposition as noted by us above, no effort was made by the trial court to exercise its jurisdiction under Section 311 of the CrI. App.No.839/2016 Page 14 of 30 Code of Criminal Procedure and Section 165 of the Evidence Act to ascertain the circumstances in which the death of the deceased had occurred. No evidence is there on record to establish the manner in which the deceased suffered injuries

leading to her death. As a result, the prosecution has failed to establish the basic ingredients of commission of the offence under Section 300 of IPC and the charge against the appellant.

36. The present case thus manifests not only a complete failure of the investigating agency and the prosecution to discharge its solemn duty but also failure on the part of the court to ensure that complete justice resulted in the case.

37. One of us (Gita Mittal, J.) has had occasion to deal with a similar issue regarding recording of a child's evidence in the judgment dated 29th September, 2009 in CrI. Appeal No.121/2008 Virender v. State of NCT of Delhi 2009 SCC Online Del 3083 wherein we had observed thus :

"59. So far as power of a judge to put questions to a witness is concerned, the same is statutorily founded in section 165 of the Indian Evidence Act, 1872 which enables the judge to do so 'in order to discover or to obtain proper or relevant facts'. The statutory provision reads thus:-

""165. Judge's power to put questions or order production - The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or CrI. App.No.839/2016 Page 15 of 30 of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question: Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved: Provided also that this section shall not authorise any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer, or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except the cases hereinbefore excepted."

in 60. The Delhi High Court Rules in Part E prescribe the "Practice in the Trial of Criminal Cases" and lay down therein the manner in which the record of evidence in criminal cases shall be made. Rule 1 mandates that only relevant evidence should be recorded. Rule 2 sets out the duty of the court in the following terms :-

"Crl. App.No.839/2016 Page 16 of 30

"2. Duty of Court to elucidate facts - Magistrates should endeavour to elucidate the facts and record the evidence in a clear and intelligible manner. As pointed out in 23 P.R. 1917 a Judge in a criminal trial is not merely a disinterested auditor of the contest between the prosecution and the defence, but it is his duty to elucidate points left in obscurity by either side, intentionally or unintentionally, to come to a clear understanding of the actual events that occurred and to remove obscurities as far as possible. The wide powers given to the Court by Section 165 of the Indian Evidence Act and Section 540 of the Code of Criminal Procedure be judiciously utilised for this purpose when necessary."

should (Emphasis supplied) These rules bind the conduct of trials by the courts in Delhi.

61. Certain provisions of the Code of Criminal Procedure which deal with the recording of evidence in inquiries and trials require to be considered. Section 273 to 277 in this behalf are noteworthy. Section 280 of the Code enables a court to record remarks regarding the demeanour of the witness. Crl. App.No.839/2016 Page 17 of 30 62. From the above, it is evident that there is statutory recognition of the necessity for a judge to ask certain questions to discover or obtain proper proof of the relevant facts. This assumes significance in the context of examination of a child witness where the court is first required to satisfy itself about the competency of the child to testify and thereafter to ensure that the complete testimony is brought out on record.

63. The Supreme Court has criticised the silence of the trial judges who have permitted trials to develop into a contest between the prosecution and the defence resulting in contradictions entered into the trial. In this behalf, the observations of Chinnappa Reddy, J in the case : MANU/SC/0206/1981 Ram Chander vs. State of

Haryana reads thus :-

"reported CriLJ1981609 at "The adversary system of trial being what is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable from combative elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a trial by evincing participant intelligent active interest by putting distortions and competitive flowing the in Crl. App.No.839/2016 Page 18 of 30 questions to witnesses in order to ascertain the truth."

(Emphasis supplied) 64. The Apex Court has emphasised the wide powers of the trial court under section 165 of the Evidence Act in the case reported at AIR 1997 SC1023: (1997) 6 SCC162State of Rajasthan vs. Ani alias Hanif & Ors. which observations read thus :-

""11. We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial Court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on to use the power whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the Court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question. trial Court the Crl. App.No.839/2016 Page 19 of 30 taciturn Judge may be 12. Reticence may be good in many circumstances, but a judge remaining mute during trial is not an ideal situation. A the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be about or combat between two rival sides with the judge performing the role

only of a spectator or even an umpire to pronounce finally who won the race. A judge is expected to actively participate in the trial, elicit necessary materials from witnesses at the appropriate context which he feels necessary correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross- examination or even during re-examination to elicit truth. The corollary of it is that if a judge felt that a witness has committed an error or a slip it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence collecting process. It is a useful exercise for trial judge to remain active and alert so that errors can be minimised."

for reaching the Crl. App.No.839/2016 Page 20 of 30 (Underlining supplied) It is noteworthy that in this case the court had put questions to PW3 with regard to certain cross his examination. This was objected to by learned counsel for the respondent/accused. contradictions in 65. The role of the court is best described in the words of the Supreme Court in the pronouncement reported at AIR 2004 SC346: (2004) 4 SCC158 Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors. and there can be no better exposition of the principles than in the words of the Apex Court when it stated as follows :-

"to

"43. The Courts have take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to in to monitor elicit all necessary materials by playing an the evidence collecting active role process. They have the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the Crl. App.No.839/2016 Page 21 of 30 requisite manner. The Court cannot afford to be wishfully or pretend

to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In *Mohan Lal v. Union of India* (1991 Supp (1) SCC271 this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, "any Court" "at any stage", or "any enquiry or trial or other proceedings" "any person" and "any such person" clearly spells out that the Section has expressed in *Crl. App.No.839/2016* Page 22 of 30 to be obtained the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to upheld the truth. fresh evidence failed xxx xxx 46. Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the *Crl. App.No.839/2016* Page 23 of 30 truth and subserve the ends of justice. Section

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

(Emphasis supplied) In view of the above, the courts are bound to act in exercise of powers under section 165 of the Evidence Act and undertake a participatory role in a trial. They are expected to act fairly especially in a trial involving possibility of a witness being bashful or embarrassed with regard to the occurrence about which she or he is required to depose, and it is the duty of the court to ensure that the complete truth is brought out is even more stringent. Crl. App.No.839/2016 Page 24 of 30 66. In *Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors.* the purpose of a trial has been stated by the court in paras 38, 39 and 40 thus :-

"trial is a

"38. A criminal judicial examination of the issues in the case and its purpose is to arrive at judgment on an issue as 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.

39. 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 CrI. App.No.839/2016 Page 25 of 30 be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.

40. 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."

67. So far as witnesses are concerned, in para 41 of the judgment, the Apex Court has quoted Bentham who described witnesses as the eyes and ears of justice. The Apex Court observed the importance and primacy of the quality of the trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their bench men and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smother and trifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not CrI. App.No.839/2016 Page 26 of 30 injustice resulting suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression, and in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to mockery. The State has definite role to play in protecting

the witnesses to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the "TADA Act") have taken note of the reluctance shown by witnesses to depose against dangerous criminals- terrorists. In a milder form also the reluctance and the hesitation of witnesses depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings CrI. App.No.839/2016 Page 27 of 30 before Courts mere mock trials as are usually seen in movies.

68. Despite the several pronouncements of the Apex Court as well as the High Courts, it is to be noted that the trial courts have failed to comply with the same. The present case throws an imperative issue with regard to the duty of the court so far as recording of the statement of the child witness is concerned. The statement under section 164 of the Cr PC was recorded by a magistrate during the course of investigation. It would appear that individual sensibilities clouded the proceedings resulting in a camouflage of the evidence so much so that complete truth has not been brought out. This in fact defeats the statutory mandate and would be a failure to comply with the binding directions noticed herein. This aspect has a direct and immediate impact on society. For decades, the Apex Court has expressed concerns on the rate at which sexual crime is increasing especially in the context of children. xxx xxx xxx 83. It therefore needs no further elaboration that the care which is required, whether the child is victim of the offence or is one who has witnessed the occurrence would remain the same."

38. The operative part of the above judgment dated 29th September, 2009 in Virender was circulated to all trial courts in Delhi. It was also sent to the Delhi Judicial Academy. It would have been received by the Id. judge who has recorded the evidence of the child witness on 2nd December, 2014 in the present case. Yet

the law laid down by the High Court has been ignored. Crl. App.No.839/2016 Page 28 of 30 39. We find that this is the position regarding the several directions and principles in criminal trials being laid down in judicial pronouncements regarding juvenility determinations, recording of evidence, award of compensation etc. This is an extremely serious matter as justice is the real casualty.

40. In the judicial pronouncement reported in (2012) 8 SCC263Dayal Singh and Others. Vs. State of Uttaranchal, the Supreme Court has directed disciplinary action against investigating officers and doctors for failing to perform their duty.

41. To err bonafide is human. Judges are not infallible. So far as construction on given facts or interpretation of law is concerned, two divergent views could be genuinely held. However, blatant disregard of the basic and first principles of law by a trial court can be disastrous, may be inexplicable as an honest mistake and be intolerable. The impact and consequences of such disregard may require to be examined on the administrative side for appropriate action for such violations of first principles of law as well as of specific judgments of the Supreme Court and this court even in matters of procedure.

42. In view of the above, the judgment dated 24th May, 2016 passed by the trial court returning a finding of guilt against the appellant is not sustainable in law and is hereby set aside and quashed. As a result, the order on sentence dated 26th May, 2016 is also set aside. The bail bonds submitted by the appellant would stand discharged.

43. The Registry is directed to send a copy of the evidence of Crl. App.No.839/2016 Page 29 of 30 PW16, a copy of the impugned judgment of the trial court and this judgment to the Delhi Judicial Academy which shall, after assigning pseudonym to the child, use this testimony in training material for training judges in the matter of recording evidence of child witnesses.

44. A copy of this judgment shall be circulated to all judges in the trial courts through the District Judges concerned. GITA MITTAL, J P.S.TEJI, J OCTOBER25 2016/kr Crl. App.No.839/2016 Page 30 of 30