

Harisha Vs. State Of Karnataka

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Court : Karnataka

Decided On : Jun-22-2021

Judge : B.Veerappa and V Srishananda

Appeal No. : CRL.A 1345/2016

Appellant : Harisha

Respondent : State Of Karnataka

Judgement :

R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE22D DAY OF JUNE, 2021 PRESENT THE HON'BLE MR. JUSTICE B. VEERAPPA AND THE HONBLE MR. JUSTICE V. SRISHANANDA CRIMINAL APPEAL No.1345/2016 BETWEEN: HARISHA, S/O MURTHAPPA, @ NARASIMHAMURTHY, AGED ABOUT27YEARS, TRACTOR DRIVER, R/AT MARASANDRAVILLAGE, CHIKKAJALAHOBOLI, BANGALORE NORTH TALUK, BANGALORE DISTRICT, PIN CODE:-562157. ...APPELLANT (BY SRI M. SHASHIDHARA, ADVOCATE) AND: STATE OF KARNATAKA BY KORATAGERE P.S.REP BY STATE PUBLIC PROSECUTOR, HIGH COURT BUILDING PREMISES, BANGALORE-560 001. ...RESPONDENT (BY SRI VIJAYKUMAR MAJAGE, ADDL. SPP) 2 THIS CRIMINAL APPEAL IS FILED UNDER SECTION3742) OF CODE OF CRIMINAL PROCEDURE, PRAYING TO SET ASIDE THE

JUDGMENT

OF CONVICTION AND

ORDER

OF SENTENCE DATED 17.05.2016 PASSED BY THE IV ADDITIONAL DISTRICT AND SESSIONS JUDGE, MADHUGIRI IN S.C.NO.5010/2015 - CONVICTING THE APPELLANT/ACCUSED NO.1 FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 498 AND 302 OF IPC AND THE SENTENCING HIM TO UNDERGO SIMPLE IMPRISONMENT FOR 2 YEARS AND TO PAY FINE OF RS.5,000/- IN DEFAULT OF PAYMENT OF FINE TO UNDERGO SIMPLE IMPRISONMENT FOR 9 MONTHS FOR THE OFFENCE PUNISHABLE UNDER SECTION 498 OF IPC AND FURTHER SENTENCING HIM TO UNDERGO LIFE IMPRISONMENT AND TO PAY FINE OF RS.10,000/- FOR THE OFFENCE PUNISHABLE UNDER SECTION 302 OF IPC. BOTH THE SENTENCES TO RUN CONCURRENTLY. THIS CRIMINAL APPEAL COMING ON FOR HEARING THIS DAY, B.VEERAPPA J., DELIVERED THE FOLLOWING:

JUDGMENT

Yet another appeal which requires remand for the legal errors committed by the learned Sessions Judge as well as learned Public Prosecutor while conducting the proceedings/trial.

2. Accused No.1, who is the husband of the deceased has filed the present criminal appeal against the impugned judgment of conviction and order of sentence dated 17th May, 2016 made in S.C.No.5010/2015 on the file of the IV Additional District and Sessions Judge, Madhugiri convicting him for the offences 3 punishable under Sections 498A and 302 of the Indian Penal Code (for short, hereinafter referred to as 'the Act') and acquitting accused Nos.2 to 4 for the said offences. I - Facts of the case 3. It is the case of the prosecution that the deceased - Gayathri and accused No.1 were married about three years prior to the incident and the deceased was residing along with accused Nos.1 to 4 in the house of accused No.3 at Yelahanka, Bangalore North Taluk. After the marriage, accused No.1 was suspecting the fidelity of his wife - Gayathri and used to harass her physically and mentally. On 2.9.2014 when deceased-Gayathri, her husband - accused No.1 and others had come to the house of C.W.5 -P.W.5 -

Venkateshappa for Gowri Festival and on that night at 11.45 p.m., accused No.1 suspecting that the deceased was having illicit relationship with somebody, stabbed her on the left side of the chest, stomach and right arm with a knife and killed her. P.W.3 - Susheelamma - mother of the deceased Gayathri lodged a complaint to the jurisdictional police on the basis of which, a case in Crime No.242/2014 came to be registered against accused Nos.1 to 4 for the offences punishable under Sections 498A and 302 r/w 34 of IPC and after investigation, a charge sheet was filed for the said offences against the accused persons.

4. On committal of the case to the Court of Sessions, the learned Sessions Judge framed the charges against the accused persons for the aforesaid offences, read over the same to the accused persons in the language known to them, who pleaded not guilty and claimed to be tried.

5. Prosecution examined in all 12 witnesses as P.Ws.1 to P.W.12 and relied upon the documentary evidence Exs.P.1 to 16 and got marked the material objects M.Os.1 to 8. After completion of the evidence of the prosecution witnesses, the statement of the accused persons as contemplated under the provisions of Section 313 of the Code of Criminal Procedure was recorded. Accused persons denied all the incriminating circumstances appearing against them and did not chose to lead any defense evidence.

6. The learned Sessions Judge considering the aforesaid material on record, formulated following four points for consideration:

5. 1. Whether the prosecution has proved that the deceased Gayatri died of stab injuries?.

2. Whether the prosecution has proved that accused persons were harassing the deceased both mentally and physically suspecting her fidelity?.

3. Whether the prosecution has proved that the accused No.1 stabbed Gayatri with knife?.

4. Whether the prosecution has proved that accused stabbed Gayatri with an intention to kill her?.

5. What order?. II - Findings of the Trial Court 7. Considering both oral and documentary evidence on record, the learned Sessions Judge answered all the points partly in the affirmative holding that the prosecution has proved beyond reasonable doubt that the deceased - Gayathri died due to stab injuries; the accused persons were harassing the deceased both mentally and physically suspecting her fidelity; and accused No.1 6 has stabbed the deceased Gayathri with knife with an intention to kill her. Accordingly, the learned Sessions Judge convicted accused No.1 for the charges leveled against him for the aforesaid offences and sentenced him to undergo simple imprisonment for two years and to pay a fine of Rupees Five Thousand for offence punishable under Section 498A of IPC and life imprisonment with a fine of Rupees Ten Thousand for the offence punishable under Section 302 of IPC. Accused Nos.2 to 4 were acquitted for the charges levelled against them. Hence, the present appeal is filed by accused No.1.

8. It has to be noted that though accused Nos.2 to 4 were acquitted for the charges levelled against them, no appeal is preferred by the State against the impugned judgment of acquittal of the said accused persons.

9. We have heard the learned Counsel for both parties. III - Arguments advanced by the learned Counsel for the appellant 10. Sri M. Shashidhara, learned Counsel for accused No.1 contended with vehemence that the impugned judgment of 7 conviction and order of sentence passed by the learned Sessions Judge is erroneous and contrary to the material on record and cannot be sustained. He would further contend that the prosecution has not established beyond reasonable doubt the homicidal death of the deceased and involvement of accused No.1. Admittedly, C.Ws.43 to 45, the doctors, who conducted postmortem examination on the deceased, P.W.46 - the Tahsildar, who conducted the inquest mahazar, C.W.47, the Scientific Officer of Forensic Science Laboratory, who examined the articles sent and issued the report and C.W.48 - the investigating officer, who investigated the case and filed charge sheet against the accused persons, have not been examined nor the postmortem report or FSL report have been marked. But the learned Sessions Judge proceeded to convict accused No.1 mainly on the basis of the evidence of P.Ws.1 to 3 - parents and aunt of the deceased, who are

highly interested witnesses and when admittedly, P.Ws.4 to 12 and other prosecution witnesses have all turned hostile. As such, in the absence of any material on record about involvement of accused No.1 in the homicidal death of the deceased, his conviction is bad in law. 8

11. The learned Counsel for the accused further contended that non-examination of the Doctors, Tahsildar, Investigating Officer and non-marking of postmortem and FSL reports are nothing but denial of fair trial to the accused and the same is in violation of Articles 21 and 22 of the Constitution of India and the provisions of Sections 303 and 304 of the Code of Criminal Procedure and therefore, sought to allow the criminal appeal. IV - Arguments advanced by the learned Additional State Public Prosecutor 12. Per contra, Sri Vijayakumar Majage, learned Additional State Public Prosecutor while taking us through the impugned judgment and order of conviction, fairly submits that non-examination of material witnesses, doctors, Tahsildar, FSL Officer, Investigating Officer and non-marking of postmortem report and forensic science report are fatal to the case of the prosecution in view of the fact that no fair trial was conducted. Therefore, he sought to dispose of the criminal appeal. The fair submission made by the learned Additional SPP is placed on record. 9 V - Point for determination 13. In view of the rival contentions urged by the learned Counsel for the parties, the only point that arises for our consideration in the present criminal appeal is: Whether the trial Court is justified in convicting accused No.1 for the offences punishable under Sections 302 and 498A of IPC in the absence of the examination of material witnesses C.Ws.43 to 48 - Doctors, Tahsildars, FSL Officers and Investigating Officer and non marking of postmortem and FSL reports in the facts and circumstances of the present case ?.

14. We have given our anxious consideration to the arguments advanced by the learned Counsel for the parties and perused the entire material on record including the original records carefully. VI - Consideration 15. The substance of the case of the prosecution is that accused No.1 and deceased were married prior to three years of the 10 incident and after marriage, the deceased was residing along with accused Nos.1 to 4 in the house of accused No.3 at Yelahanka, Bangalore North Taluk. After the marriage, accused No.1 suspecting the fidelity of his wife -

Gayathri used to harass her physically and mentally. On 2.9.2014 when deceased-Gayathri, her husband - accused No.1 and others had come to the house of C.W.5 -P.W.5 - Venkateshappa for Gowri Festival; on that night at 11.45 p.m., accused No.1 suspecting that the deceased was having illicit relationship with somebody, stabbed her on the left side of the chest, stomach and right arm with a knife and killed her.

16. Admittedly, charge was framed for commission of homicidal death of the deceased against the accused persons for the offence punishable under the provisions of Section 302 of IPC and for subjecting harassment for the offence punishable under Section 498A of IPC., but the learned Sessions Judge has not conducted fair trial as contemplated under the provisions of the Code of Criminal Procedure. Unfortunately, when the matter was posted on 18.2.2016, the learned Public Prosecutor has given up charge sheet witnesses C.Ws.14 to 47 which reads as under:- 11 Accused No.1 produced A2-4 present, CW1 3, 8 present CW8 examined as PW11 and Ex.P.15 marked CW13 examined as PW12 and Ex.P.16 marked application under section 437 Cr.P.C. filed by accused No.1 for objection and to hear by next date. CW14 to 47 given up by PP Issue witness summons to CW48 returnable by 2.3.2016. remand of A1 extended till 2.3.2016.

17. Again, when the matter was posted on 2nd March, 2016, the learned Public Prosecutor had made a submission that the matter may be posted for judgment under Section 232 Cr.P.C. whereby impliedly giving up the examination of C.W.48. The said order reads as under:- A1 produced and A2 to 4 present accused CW48 also present public prosecutor submits that the matter will be posted for judgment under section 232 Cr.P.C. Impliedly giving up CW48 However, there is some incriminating evidence against accused No.1. Hence for 313 statement by 15.3.2016 remand of A1 extended till 15.3.2016. 12 18. The learned Sessions Judge while passing the impugned judgment of conviction and order of sentence at paragraph-29 has observed as under: 29. Though the official witnesses are not examined by the prosecution which the learned public prosecutor was required to do, still the evidence on record and inaction of accused No.1 who claims to have been at the village till the cremation of his wife, to lodge a complaint, if he had not stabbed her, proves beyond reasonable doubt that he did kill his wife brutally

suspecting her fidelity. Thus the allegations against accused No.1 is proved but not against the other accused persons, against whom none of the witnesses have deposed. Hence this court answers these points partly in the affirmative as far as first accused is concerned.

19. On the basis above said finding, the learned Sessions Judge proceeded to convict accused No.1 holding that the prosecution has proved beyond reasonable doubt that accused No.1 was harassing the deceased mentally and physically suspecting her fidelity and with an intention to kill her had stabbed her. 13 Accordingly, though common charge was framed against accused Nos.1 to 4, accused No.1 was convicted for the charges framed against him for the offences punishable under Section 302 and 498A of IPC and accused Nos.2 to 4 were acquitted of the charges leveled against them.

20. It has to be noted that it is the duty of the Court to ensure that prosecution examines the material witnesses, when charge is for a grave offence. Unfortunately, in the case on hand, the learned Sessions Judge has not taken any initiative to conduct the trial responsibly and the learned Public Prosecutor has not discharged his institutional responsibility towards the State and constitutional obligation to protect the interest of parties. Very strangely, he has given up C.Ws.14 to 47 and 48 which clearly indicates that he has not discharged his duty with all devotion. Because of his callous attitude and failing to discharge institutional responsibility, the case has ended in conviction of accused No.1. In the absence of any material documents and medical and scientific evidence, the learned Sessions Judge was not justified in coming to the conclusion that the death of the deceased Gayathri was 14 homicidal based on the oral evidence of P.W.1 to P.W.3 alone and conviction of accused No.1 merely on the ground that accused No.1 had not lodged a complaint though he was very much present in the village till cremation of his wife - deceased Gayathri for the offences punishable under Sections 498A and 302 of IPC. Thus, there is sufficient force in the submission of learned Counsel for appellant/accused that there was no fair trial.

21. It is well settled that while conducting proceedings before the trial Court, proper opportunity ought to be given to both parties for conducting fair trial.

Admittedly, in the present case, non examination of the Doctors, who conducted postmortem examination; Tahsildar, who drew the inquest mahazar; the Investigating Officer, who filed charge sheet; the Scientific Officer of Forensic Science Laboratory, who examined the materials sent for FSL examination as well as non-marking of postmortem and FSL reports is fatal to the case of the prosecution; more so when P.Ws.4 to 12 have turned hostile to the case of prosecution. Learned Sessions Judge proceeded by the submission of learned Public Prosecutor, has not conducted fair trial as contemplated under the 15 provisions of Articles 21 and 22 of the Constitution of India as well as provisions of Sections 303 and 304 of the Code of Criminal Procedure. None of the mandatory provisions of the Constitution of India and Code of Criminal Procedure have been followed while passing the impugned judgment of conviction and order of sentence against accused No.1. In view of the negligence, callous attitude of the learned public prosecutor and anxiousness of the learned Sessions Judge in hurriedly disposing of the matter, accused No.1 has been convicted for the aforesaid offences resulting in justice hurried is justice buried.

22. However, it has to be borne in mind that the provisions of the Code of Criminal Procedure confers a very wide power on the Court on summoning witnesses. The discretion conferred is to be exercised judiciously, as wide the power, the greater is the necessity for application of judicial mind. Unfortunately, when the submission is made by the learned Public Prosecutor on 18.2.2016 and 2.3.2016 for giving up the evidence of C.Ws.14 to 47 and 48, it was the duty on the part of the learned Sessions Judge to summon the material witnesses in order to provide fair opportunity. But the same has been not been done. Regarding providing fair opportunity and role of public prosecutor, the Apex Court in the case of Rajaram Prasad Yadav -vs- State of Bihar and another reported in (2013)14 SCC461at paragraphs-14 and 17 it is held as under: 14. A conspicuous reading of Section 311 Cr PC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression any has been used as a prefix to court, inquiry, trial, other proceeding, person as a witness, person in attendance though not summoned as a witness, and person already examined. By using the said expression any as a prefix to the

various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. 17 The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr PC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr PC. It is, therefore, imperative that the invocation of Section 311 Cr PC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure 18 that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr PC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

17. 1. Whether the court is right in thinking that the new evidence is needed by it?. Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?. 17.2. The exercise of the widest discretionary power under Section 311 Cr PC should ensure that the judgment should not be rendered

on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated. 19

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person. 17.4. The exercise of power under Section 311 Cr PC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case. 17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice. 17.6. The wide discretionary power should be exercised judiciously and not arbitrarily. 17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case. 20

17.8. The object of Section 311 Cr PC simultaneously imposes a duty on the court to determine the truth and to render a just decision. 17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered. 17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. 17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the 21 accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results. 17.12. The additional evidence must not be received as a disguise or to change the

nature of the case against any of the party. 17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party. 17.14. The power under Section 311 Cr PC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. 22 23. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies, but to the accused as well. If an accused is entitled to any legitimate benefit during trial, the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. Admittedly in the present case, the learned Public Prosecutor has given up material witnesses C.Ws.14 to 47 and 48 clearly depicts that he has not discharged his institutional responsibility, constitutional obligation and intention of the 23 Legislature that the learned Public Prosecutor alone has to conduct the proceedings in the prosecution in a Sessions Court, 24. It is also relevant to state, at this stage, the role of the Public prosecutor upholding the law and putting together a sound prosecution; and that the presence of a private lawyer would inexorably undermine the fairness and impartiality which must be hallmark, attribute and distinction of every proper prosecution. In so far as the learned Sessions Judge, who conducted trial is concerned, though comparative latitude was given to him, he must always bear in mind that while the prosecution

must remain being robust and comprehensive and effective, it should not abandon the need to be free, fair and diligent and it is for the Public Prosecutor, who must at all times remain in control of the prosecution and a counsel of a private party can only assist the Public Prosecutor in discharging its responsibility. If the learned Sessions Judge harbours the opinion that the prosecution is likely to fail, prudence would prompt that the complainant or informant or aggrieved party be given an informal hearing and in the absence of not discharging 24 responsibility by the Public Prosecutor, it is the duty of the Court to ensure fair trial is conducted.

25. Even if the prosecution fails to examine any witnesses whether cited or not, whose evidence is essential in unearthing the truth of the matter, the Court enjoys unfettered power under provisions of Section 311 of the Code of Criminal Procedure to summon such witness/witnesses. Admittedly, in the present case C.Ws.43, 44 and 45 - the doctors, who conducted post-mortem examination; C.W.46, Tahsildar, who drew the inquest mahazar; and C.W.47 - Medical Officer of the Forensic Science Laboratory are neither examined nor the reports of post-mortem or FSL are got marked in a serious and heinous offence punishable under the provisions of Section 302 of IPC which has resulted in serious lapse on the part of the prosecution in denying fair opportunity to the accused in putting forth his case and to establish his innocence by cross-examining these witnesses. But very interestingly, non- examination of the Tahsildar - C.W.46, who conducted the inquest panchanama and the Investigating Officer - C.W.48, is one of the serious lapses on the part of the prosecution in the case on hand. 25

26. The Honble Supreme Court while considering the role of the Courts and law enforceable agencies as neutral authorities, under a duty to ensure fairness in the case of *Aparna Bhat -vs- State of Madhya Pradesh* reported in AIR 2021 SC1492at paragraphs-31, 36, 40, 44(e) to (g) has held as under: The role of the courts and law enforcement agencies as neutral authorities, under a duty to ensure fairness 31. The role of all courts is to make sure that the survivor can rely on their impartiality and neutrality, at every stage in a criminal proceeding, where she is the survivor and an aggrieved party. Even an indirect undermining of this responsibility cast upon the court, by permitting discursive formations on behalf of the accused, that seek to diminish his agency, or underplay his role as an active

participant (or perpetrator) of the crime, could in many cases, shake the confidence of the rape survivor (or accuser of the crime) in the impartiality of the court. The current attitude regarding crimes against women typically is that grave offences like rape are not tolerable and offenders must be punished. This, however, only takes into 26 consideration rape and other serious forms of gender-based physical violence. The challenges Indian women face are formidable : they include a misogynistic society with entrenched cultural values and beliefs, bias (often sub-conscious) about the stereotypical role of women, social and political structures that are heavily male-centric, most often legal enforcement structures that either cannot cope with, or are unwilling to take strict and timely measures. Therefore, reinforcement of this stereotype, in court utterances or orders, through considerations which are extraneous to the case, would impact fairness.

36. There have been notable rulings by the CEDAW³³ Committee in this regard. In *V.K. v. Bulgaria*³⁴, the Committee observed that: stereotyping affects women's right to a fair trial and that the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence. 27

40. The Bangalore Principles of Judicial Conduct, 2002, were from a meeting of Chief Justices of Asian and African countries, and endorsed by the UN Commission on Human Rights, the ECOSOC and the Commission on Crime Prevention and Criminal Justice. The Bangalore Principles provide that: 2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue. 5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and 28 economic status and other like causes (irrelevant grounds). 5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds. 44(e) The courts while adjudicating cases involving gender

related crimes, should not suggest or entertain any notions (or encourage any steps) towards compromises between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as it is beyond their powers and jurisdiction; 44(f) Sensitivity should be displayed at all times by judges, who should ensure that there is no traumatization of the prosecutrix, during the proceedings, or anything said during the arguments, and 44(g) Judges especially should not use any words, spoken or written, that would undermine or shake 29 the confidence of the survivor in the fairness or impartiality of the court.

27. At this stage, it is relevant to consider the provisions of Article 21 of the Constitution of India, which reads as under: 21. Protection of life and personal liberty.-No person shall be deprived of his life or personal liberty except according to procedure established by law. By a careful reading of the above provision, makes it clear that no person shall be deprived of his life or personal liberty except in accordance with law and assurance of a fair trial is the first imperative of the dispensation of justice.

28. The Apex Court in the case of Commissioner of Police, Delhi and another -vs- Registrar, Delhi High Court reported in AIR 1997 SC95 at paragraph-15 has held as under: 15. Shri Bhat supported the need for change of venue not only on the apprehensions and threat perception projected by the appellants but also on the ground that the request for 30 change has been made taking into account certain suggestions made by Hon'ble Mr Justice J.S. Verma, sitting Judge of this Court, who sat in Commission to report the security failures relatable to the assassination of late Prime Minister, Shri Rajiv Gandhi. That report, in our view, is entitled to great respect and his Lordship's suggestions are not meant to be merely on paper but must reach out in action. Another former Prime Minister cannot have to be experimentally killed in order to realize the gravity of threat perception more so while undergoing criminal trial/trials. Emphasis need be laid on Article 21 of the Constitution which enshrines and guarantees the precious right of life and liberty to a person, deprivable only on following the procedure established by law in a fair trial, assured of the safety of the accused. Assurance of a fair trial is the first imperative of the dispensation of justice. This is what Justice Krishna Iyer

speaking for the Court in *Maneka Sanjay Gandhi v. Rani Jethmalani* AIR 1979 SC468at

470) had to say: (SCC p. 170, para

5) Likewise, the safety of the person of an accused or complainant is an essential condition for participation in a trial and where that is put in peril by commotion, tumult or threat on account of pathological conditions prevalent in a particular venue, the request for a transfer may not be dismissed summarily. It causes disquiet and concern to a court of justice if a person seeking justice is unable to appear, present one's case, bring one's witnesses or adduce evidence. Indeed, it is the duty of the court to assure propitious conditions which conduce to comparative tranquillity at the trial. Turbulent conditions putting the accused's life in danger or creating chaos inside the court hall may jettison public justice. If this vice is peculiar to a particular place and is persistent the transfer of the case from that place may become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of people in the entire region taking sides and polluting the climate, vitiating the necessary neutrality to hold a detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer. 32 29. The provisions of Article 22(1) of the Constitution of India reads as under: 22. Protection against arrest and detention in certain cases.-(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

30. By a careful reading of the above provisions, makes it clear that no person who is arrested shall be detained in custody without being informed to his nearest relatives and shall have right to engage the counsel of his choice as held by the Honble Supreme Court in the case of *State of M.P -vs- Shobharam and others* reported in AIR 1966 SC1910 wherein at paragraph-23 it is held as under: 23. As I have stated already a person who is arrested gets three rights which are guaranteed. The first is that he must be told why he is arrested. This requirement cannot be dispensed with by taking bail from him. The 33 need to tell him why he is arrested, remains still. The next is that the person arrested must not be detained

in custody more than 24 hours without being produced before a Magistrate. This requirement is dispensed with when the person arrested is admitted to bail. Otherwise it remains. The third is that he gets a right to consult and to be defended by a legal practitioner of his choice. This is, of course, so while the arrest continues but there are no words to show that the right is lost no sooner than he is released on bail. The word defended clearly includes the exercise of the right so long as the effect of the arrest continues. Before his release on bail the person defends himself against his arrest and the charge for which he is arrested and after his release on bail, against the charge he is to answer and, for answering which, the bail requires him to remain present, The narrow meaning of the word defended cannot be accepted.

31. The provisions of Section 303 of the Cr.P.C. gives right to any person accused of an offence before a criminal Court to be defended by a pleader of his choice. The provisions of Section 304 34 of the Code of Criminal Procedure contemplates legal aid to accused facing charge in case triable by Sessions Judge at State expense. On careful reading of the aforesaid provisions of the Constitution of India and the Code of Criminal Procedure, a fair trial is the main object of the criminal procedure and it is the duty of the Court to ensure that such fairness is not hampered or threatened. Further, the right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial.

32. The Honble Supreme Court while considering the powers of the appellate Court for re-trial, particularly on the limited point of re-recording statements of witnesses in the case of P. Ramesh - vs- State represented by Inspector of Police reported in (2019) 20 SCC593 at paragraphs 18 to 23 has held as under: 18. We are mindful of the fact that the decision of the High Court was in an appeal preferred by the accused. In such a situation it is necessary to discuss the scope of the High Court's powers in an appeal filed against conviction. Section 374 Cr PC provides for appeals against convictions and allows any person convicted by a Sessions Judge or an 35 Additional Sessions Judge to appeal before the High Court. Section 386 Cr PC defines the powers of the appellate court while disposing of an appeal against an order of conviction or acquittal. The power under this section is not unlimited. The provision is to be taken as giving the power

to do only that which the lower court could and should have done in a criminal case.

19. A three-Judge Bench decision of this Court in Mohd. Hussain v. State (NCT of Delhi) [(2012) 9 SCC408: (2012) 3 SCC (Cri) 1139]. while dealing with the powers of the appellate court to order a retrial under Section 386(b) Cr PC, held thus: (SCC p. 428, para

41) 41. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be 36 ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appellate court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked. 37 20. A similar position was adopted by this Court in Ajay Kumar Ghoshal v. State of Bihar [(2017) 12 SCC699: (2017) 4 SCC (Cri) 458]. , where it was held thus: (SCC p. 702, para

11) 11. Though the word retrial is used under Section 386(b)(i) Cr PC, the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the

original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the court refused to hear 38 certain witnesses who were supposed to be heard.

21. The power of an appellate court to order a retrial on the limited point of re-recording statements of witnesses was recently discussed in *Atma Ram v. State of Rajasthan* [(2019) 20 SCC481], where the trial court had convicted the accused persons of the offences under Sections 302, 307, 452, 447, 323, 147, 148 and 149 IPC and sentenced them to death. During the trial, the court had recorded the evidence of twelve witnesses in the absence of the accused persons. In an appeal against conviction preferred by the accused persons, the High Court [*State v. Aatma Ram*, 2018 SCC OnLine Raj 2509 : (2019) 1 RLW135] exercised its powers under Section 386(b) Cr PC to quash and set aside the judgment of the trial court and remanded the matter back to trial court to the extent of recording statements of the twelve witnesses afresh after securing presence of the accused in the court. The High Court held [*State v. Aatma Ram*, 2018 SCC OnLine Raj 2509 : (2019) 1 RLW135] in the following terms:

39. 19. In view of the discussion made hereinabove and looking to the glaring facts of the case at hand, we feel that in order to do complete justice to the accused as well as to the victims, the entire case cannot be thrown out by holding the proceedings to be vitiated on account of the mistakes committed by the trial Judge or the prison authorities concerned. A fresh trial/de novo has to be ordered by directing the trial court to lawfully re-record statements of the witnesses indicated above whose evidence was recorded in the first round without ensuring presence of the accused in the court. The accused persons preferred a special leave petition before this Court, challenging the High Court's order of a de novo trial for re-recording of statements of witnesses. Affirming the view taken by the High Court, this Court held thus: (*Atma Ram case* [*Atma Ram v. State of Rajasthan*, (2019) 20 SCC481], SCC pp. 499- 500, para

22) 40 22. Section 386 then enumerates powers of the appellate court which inter alia includes the power to reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent

jurisdiction subordinate to such appellate court or committed for trial. The powers of appellate court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the Code. If the power can go to the extent of ordering a complete retrial, the exercise of power to a lesser extent, namely, ordering de novo examination of twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court. There is, thus, no infraction or jurisdictional error on the part of the High Court.

25. If there was an infraction, which otherwise does not vitiate the trial by itself, the attempt must be to remedy the situation to the 41 extent possible, so that the interests of the accused as well as societal interest are adequately safeguarded. The very same witnesses were directed to be de novo examined which would ensure that the interest of the prosecution is subserved and at the same time the accused will have every right and opportunity to watch the witnesses deposing against them, watch their demeanour and instruct their counsel properly so that said witnesses can be effectively cross-examined. In the process, the interest of the accused would also stand protected. On the other hand, if we were to accept the submission that the proceedings stood vitiated and, therefore, the High Court was powerless to order de novo examination of the witnesses concerned, it would result in great miscarriage of justice. The persons who are accused of committing four murders would not effectively be tried. The evidence against them would not be read for a technical infraction resulting in great miscarriage. Viewed thus, the order and directions passed by the High Court completely ensure that a fair procedure is adopted and the depositions of the witnesses, after due 42 distillation from their cross-examination can be read in evidence.

22. In the present case, the High Court in the considered exercise of its appellate jurisdiction has remanded the proceedings back to the trial court to assess objectively the capacity of the two child witnesses and if the evidence is recorded, to furnish an opportunity to the accused to offer evidence in rebuttal. The accused will also be entitled to cross-examine them. We have taken due note of the submissions which have been made on the part of the appellant in regard to the fact that there has been some lapse of time. As on date, though a little over four

years have elapsed since the exclusion of their evidence by the trial Judge, both the witnesses continue to be minors. Hence, the High Court has issued necessary directions to the learned trial Judge to assess objectively the capacity of the two child witnesses before recording their evidence.

23. Consistent with the law which has been laid down by this Court in *State of Maharashtra v. Bandu* [(2018) 11 SCC163: (2018) 2 SCC43(Cri) 458]. , it would be appropriate for the learned trial Judge to ensure that the evidence of PW3 and PW4 is recorded in a child friendly environment. VII - Conclusion 33. Considering the entire material on record, the conduct of the learned Public Prosecutor and the proceedings conducted by the learned Sessions Judge is deprecated and they should always remember that Courts are meant for the public and justice should prevail, and because of the wrong procedure adopted by the Courts at the instances of the learned Public Prosecutor, injustice should not be caused to any innocent persons.

34. For the reasons stated above and in the light of the principles enunciated in the dictum of the Honble Supreme Court stated supra, the point raised in the present criminal appeal is answered in the negative holding that the learned Sessions Judge was not justified in convicting accused No.1 for the offences punishable under Section 302 and 498A of IPC in the absence of examination of material witnesses C.Ws.43 to 48 - Doctors, 44 Tahsildars, FSL Officers and Investigating Officer and non- marking of postmortem and FSL reports in the facts and circumstances of the present case. VIII - Result 35. In view of the above, we pass the following:

ORDER

i) Criminal Appeal filed by the appellant-accused is allowed; ii) The impugned judgment of conviction and order of sentence dated 17th May, 2016 made in S.C.No.5010/2015 on the file of the IV Additional District and Sessions Judge, Madhugiri only in so far as convicting accused No.1 for the offences punishable under Sections 498A and 302 of the Indian Penal Code is hereby set aside; iii) The matter is remanded back to the Sessions Court for fresh disposal in accordance with law; 45 iv) The learned Public Prosecutor, who was authorized to

conduct session cases on-behalf of the State Government in S.C.No.5010/2015 shall file necessary application before the jurisdictional Court to examine the material witnesses including C.Ws.43 to 48 and to ensure that postmortem and FSL reports are got marked; v) On filing of any such application, the learned Sessions Judge shall allow the said application and ensure that fair trial is conducted and matter is decided strictly on merits and in accordance with law; vi) Accused No.1, who is in custody for more than six years and nine months, is at liberty to file necessary application seeking grant of bail and if any such application is filed, it is for the learned Sessions Judge to consider and decide the same in accordance with law; vii) Since the matter is of the year 2015, the learned Sessions Judge is directed to decide the case on or 46 before 31st December, 2021 and the learned Counsel appearing for accused No.1 and the learned Public Prosecutor for the State shall co-operate with the Court; viii) Parties are directed to appear before the Sessions Court on 12.7.2021 without awaiting for further notice; ix) However, it is made clear that we have not expressed any opinion on merits or demerits of the case; x) It is high time for the Prosecution Department to ensure that the Public Prosecutor who has been entrusted with the serious matter of criminal case should maintain transparency, honesty and integrity while conducting proceedings and should not exhibit callous attitude in casually give up the case of the prosecution before the Sessions Court; xi) The Director of the Prosecution is directed to initiate proceedings against the learned Public Prosecutor, who has given up the material witnesses - C.Ws.14 to 47 on 47 18.2.2016 and C.W.48 on 2nd March, 2016 and proceed in accordance with law; and xii) The registry is directed to send a copy of this judgment to the Law Department, Director of the Prosecution, All the learned District Judges in the State for necessary steps in accordance with law to fulfill the constitutional mandate as well as the intent of the provisions of the Code of Criminal Procedure.

36. In view of disposal off the main appeal itself, all the interim applications which are pending are dismissed as they do not survive for consideration. Sd/- Judge
Sd/- Judge Nsu/-