IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 03RD DAY OF SEPTEMBER, 2021

PRESENT

THE HON'BLE MR. JUSTICE G. NARENDAR

AND

THE HON'BLE MR. JUSTICE M.I.ARUN

CRIMINAL APPEAL NO.227/2020 (C)
C/W
CRIMINAL REFERRED CASE NO.2/2020

IN CRL.A NO.227/2020

BETWEEN:

SRI VENKATESHAPPA
S/O VENKATAPPA @ KRISHNAPPA,
AGED ABOUT 62 YEARS,
R/O BYRANDAHALLI, VEMGAL HOBLI,
TALUK & DIST : KOLAR-563101.

... APPELLANT

(BY SRI VEERANN G.TIGADI, ADVOCATE)

AND:

STATE OF KARNATAKA,
REP. BY SUB-INSPECTOR OF POLICE,
VEMGAL POLICE STATION
REP BY STATE PUBLIC PROSECUTOR,
HIGH COURT OF KARNATAKA,
BENGALURU-560001.

... RESPONDENT

(BY SRI V.M.SHEELAVANT, SPP A/W
SRI VIJAYA KUMAR MAJAGE, ADDL. SPP.)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) CR.PC PRAYING TO SET ASIDE THE IMPUGNED JUDGMENT OF CONVICTION DATED 16.01.2020 AND SENTENCE DATED 17.01.2020 PASSED BY THE II ADDITIONAL DISTRICT AND SESSIONS JUDGE, KOLAR IN S.C.NO.92/2018, CONVICTING THE APPELLANT/ACCUSED FOR THE OFFENCE P/U/S 376 OF IPC AND SECTION 4 AND 6 OF POCSO ACT.

IN CRL.RC NO.2/2020

BETWEEN:

II ADDITIONAL DISTRICT AND
SESSIONS JUDGE,
KOLAR.

...PETITIONER

(BY SRI V.M.SHEELAVANT, SPP A/W
SRI VIJAYA KUMAR MAJAGE, ADDL. SPP.)

AND:

VENKATESHAPPA
S/O VENKATAPPA @ KRISHNAPPA,
R/O. BYRANDAHALLI VILLAGE,
VEMAGAL HOBLI, KOLAR TALUK.

...RESPONDENT

(BY VEERANNA G.TIGADI, ADVOCATE)

THIS CRIMINAL REFERRED CASE IS REGISTERED UNDER SECTION 366(1) OF CR.P.C FOR CONFIRMATION OF DEATH SENTENCE AWARDED TO ACCUSED SRI VENKATESHAPPA, S/O VENKATAPPA @ KRISHNAPPA, AGED ABOUT 60 YEARS, R/AT BYRANDAHALLI, VEMAGAL HOBLI, KOLAR TALUK BY JUDGMENT OF CONVICTION DATED 16.01.2020 AND SENTENCE DATED 17.01.2020 PASSED IN S.C.NO.92/2018 ON THE FILE OF THE II ADDITIONAL DISTRICT AND SESSIONS JUDGE, KOLAR FOR THE OFFENCE P/U/S 376 OF IPC AND SECTION 4 AND 6 OF POCSO ACT.

THIS CRIMINAL APPEAL AND CRIMINAL REFERRED CASE COMING ON FOR HEARING, THIS DAY, G.NARENDAR J., DELIVERED THE FOLLOWING:

JUDGMENT

Heard Sri.Veeranna G. Tigadi, learned counsel for the appellant and Sri.V.M.Sheelavant, learned SPP along with Sri.Vijaykumar Majage, learned Additional SPP for the respondent.

2. It is the case of the complainant that she is residing along with her husband and two children and that eldest child is son named Sunil and aged about 15 years and that the second child is a daughter aged about 12 years and we desire to name the victim and is referred to as Ms.A for the sake of convenience. Ms.A is studying in 6th Std and her husband is working as a Mason and she is working as a Coolie. The accused Venkateshappa, who belongs to Scheduled Caste was residing near their house and developed a close relationship with the complainant and her family. He used to often visit their house to play with their children and that the children used to address him as

grand-father. That on 01.05.2018 when she had gone to do Coolie work and as children were alone at home, she returned home at 1.00 in the noon, she found the door of the house had been locked and when she called out, her son responded from inside the house and he asked her to open the door which was locked from outside and when the door was opened, she enquired where Ms.A was, upon which, her son replied he does not know. Hence, she called out the name of the victim, in response, the victim replied from the bathroom of their house and then she proceeded towards the bathroom and tried to open the bathroom and she found that bathroom was locked from inside and hence, she forcibly pushed against the bathroom door and bathroom door opened to the force and Ms.A came out from the bathroom and when she peeped in, she found accused rearranging his clothes and immediately she proceeded to observe the clothes of the victim and found that the pant and undergarment had been removed and when she questioned the victim, it came to her knowledge that

accused had taken victim into the bathroom and removed the pant and undergarment and had slept on the top of the victim and had done something in the place where she passes urine. By that time, accused had left the bathroom and gone to his house.

3. As her husband had gone out for work, she waited for his return and upon his return she informed him about the occurrence and thereafter, proceeded to the police station and registered the complaint and prayed that action be taken against the accused Venkateshappa son of Venkatappa @ Krishnappa aged 60 years, who belongs to Scheduled Caste.

4. Upon the said allegations, a case came to be registered as Crime No.131/2018, for the offences punishable under Section 376 of Indian Penal Code, 1860 (for short, 'IPC') and Sections 4 and 6 of Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act'). Thereafter, the complaint came to be registered at

about 21.45 hours and accused was arrested on the next day i.e., on 02.05.2018 and he continues to remain in custody from the date of his arrest. The trial Court framed the following charge on 07.01.2019:-

CHARGE

"I, Smt.B.S.Rekha, B.A.(Law), LL.M II-Addl. District and sessions Judge, Kolar, do hereby charge you the accused as follows:-

That on 1.5.2018 at morning hours at Byrandahalli village, within the jurisdiction of Vemgal Police Station, when CW.1 & 4, parents of CW.2 were went to coolie work, you accused came to the house of CW.1 Nagarathnamma and took CW.2/victim girl who is aged about 12 years to the bathroom and committed rape on her and thereby committed an offence punishable U/S 276 of IPC and within my cognizance.

2. On the aforesaid date and time, you accused committed sexual intercourse with CW.2/victim girl who is aged 12 years and thereby committed aggravated penetrative

sexual assault on her, which is an offence punishable under Sec.4 and 6 of POCSO Act and within my cognizance.

And I hereby direct you the accused be tried on the above said charge.

Dated this the 7th day of January 2019."

5. Upon being questioned, the accused stated that he has not committed any crime.

6. The prosecution in order to establish the commission of crime and the guilt of the accused, got examined 19 witnesses as PW-1 to 19 and further got marked Ex.P.1 to P.22 and M.O.1 to M.O.7. After closure of the prosecution evidence, the plea of the accused was recorded under Section 313 of Cr.P.C., wherein the accused has denied all incriminating circumstances alleged against him, but has not examined any witness in defense or offered any explanation. Thereafter, the Court framed points for consideration and by judgment dated 16.01.2020

was pleased to hold the accused guilty for the offences punishable under Section 376 of the IPC and Sections 4 and 6 of POCSO Act and convicted the accused for the same. Thereafter, by sentence dated 17.01.2020, the trial Court was pleased to sentence the accused to undergo death penalty and ordered that he shall be hanged till his death for the offence punishable under Section 376 of IPC and pay a fine of Rs.25,000/- and sentenced to undergo rigorous imprisonment for seven years for the offence punishable under Section 4 of POCSO Act and pay a fine of Rs.10,000/- and in default to undergo simple imprisonment for two months and he was also sentenced to undergo rigorous imprisonment for ten years for the offence punishable under Section 6 of POCSO Act and pay a fine of Rs.10,000/- and in default to undergo simple imprisonment for two months and ordered that the sentences shall run concurrently.

7. With regard to the reasoning adopted by the trial Court to impose death penalty, we would limit our

comments to stating that it shocks our judicial mind and also reflects a lack of judicial temperament in the author of the judgment. We shall be dealing with it in the later part of our judgment.

8. Learned counsel for the appellant submitted that though he intended to canvass the appeal on several grounds, he has limited his arguments to the ground that it is a case for remand. That the judgment of the Trial Court stands vitiated on account of order dated 18.12.2019 whereby, the trial Court has been pleased to reject the applications preferred under Sections 293 and 311 of Cr.P.C., and Section 45 of the Evidence Act. That under the first application, the defense requested for issuance of summons to the author of the Ex.P.12 – DNA report, who is none other than one Sri.L.Purushothama, Assistant Director of State Forensic Science Laboratory. It was canvassed by the defense that contents are false and it has been prepared only with the intention of implicating the accused

for the offence. The application preferred under Section 293 of the Cr.P.C. came to be resisted by the Special Public Prosecutor on various grounds, namely the accused had not questioned the authenticity of the DNA report in his statement recorded under Section 313 of Cr.P.C. That in ***Criminal Appeal No.574/2013*** dated 20.08.2019 rendered by the Co-ordinate Bench of this Court in ***State of Karnataka vs. Wasim Pasha @ Abu,*** it has been held that the sole testimony of the prosecutrix is sufficient to establish the guilt of the accused. That the intention of the accused is to drag on the proceedings. The other application, filed under Section 311 of Cr.P.C. came to be canvassed on the ground that cross-examination of PW-1 to 3 could not be effectively conducted on account of the fact that the accused has not appropriately imparted his instructions to his counsel and what has taken place is only partial examination and the failure of the accused to impart instructions is only on account of inadvertence and lack of knowledge about the legal procedures. The said application

was resisted on the ground that evidence of victim and other witnesses has already been recorded and cross-examination also having been completed, the application was not maintainable and that there is a direction to dispose of the matter at the earliest and the dismissal of the said application was also prayed by the prosecution.

9. Another application under Section 45 of the Evidence Act, 1872 has been preferred wherein the accused has requested the Court that he would give fresh blood samples and semen etc., for DNA examination as he doubts the sanctity of the report at Ex.P.12 and in order to avoid any adverse admissions, the prosecution has deliberately omitted to have the author of Ex.P.12 – DNA report, who is Assistant Director of State Forensic Science Laboratory to be examined before the Court.

10. The said application was resisted by the prosecution on the ground that the matter is an old matter and that witnesses PW-1 to 4 were material witnesses who

have categorically spoken about the incident. The DNA report which is on record and which is relied upon by the prosecution, is marked through the Doctor PW-10 and that the report clearly demonstrates that there are semen stains on the clothing and Doctor has also given final opinion in this matter. The Court below has set out its reasons to reject the application in para 4, which reads as under:-

> *"4. In this case on perusal of the evidence of the prosecution witnesses, it could be ascertained that victim and other witnesses have categorically stated about the incidence and the cross examination is also done in length to PWs 1 to 4 who are material witnesses to the incident. Further in this case the DNA report is on record which is relied upon by the prosecution and it is marked through doctor. This report clearly shows that there are seminal stains on the cloth and the doctor had given final opinion in this regard. In this case already an opportunity was given to the counsel appearing for the accused to cross-examine all the material witnesses. Even it is not the case of defence*

during the course of cross-examination of doctor that accused is incapable to do the sexual intercourse. However the doctor had given clear opinion that there is nothing to suggest that accused is incapable to do the sexual intercourse. In this case already there is evidence of material witnesses and the doctor on record and there is no need to call the DNA expert and also there is no need to once-again send the blood sample for DNA examination. Further it is not the case that blood to be examined, only existence of seminal stains was to be examined by the DNA expert and he did it. Further already the counsel appearing for the accused had cross examined these witnesses in length and that too in POCSO-matters there is no scope for lengthy cross examination of witnesses. Inspite of it this court has given opportunity to cross examine the witnesses. Thus in my opinion there is no need to allow any of these applications as the matter is of 2018 and these matters to be decided within one year. This shows that it is only to drag on the proceedings, hence there is no merit in the

above applications, which deserved to be dismissed.

The applications filed by the learned counsel for accused under section 293 and 311 of Cr.P.C., and section 45 of Evidence Act stands dismissed."

11. The Court below has contended that the presence of the Doctor who has given DNA report i.e., Assistant Director of State Forensic Science Laboratory is not required as the same has been spoken about by PW-10, who is the Doctor. That there is no requirement to summon the expert who has given DNA report. That in respect of trial for the offences under POCSO Act, there is no scope for lengthy cross-examination or witnesses. Despite the same, the Court has granted an opportunity to cross-examine the witnesses and concluded that in its opinion, there was no necessity to allow the applications and as the incident is of the year 2018 and as the case is required to be closed within an year, it concluded that the applications are a

dilatory tactic to prolong to proceedings and proceeded to reject the applications by its order dated 18.12.2019.

12. In the regard, it is relevant to note certain dates. The crime is alleged to have been committed on 01.05.2018 at about 01.00 p.m. and came to be reported to the jurisdictional police at 09.45 p.m. The accused was arrested on 02.05.2018 and charge sheet came to be filed into the Court on 23.06.2018. That recording of evidence commenced on 02.02.2019 and concluded on 12.09.2019 and the applications under Sections 293 and 311 of Cr.P.C. and under Section 45 of the Indian Evidence Act, 1872 are filed on 05.11.2019.

13. From a reading of the reasoning setout by the Trial Court to reject the applications, it can be firmly inferred that the Trial Court has pre-judged the evidence that would have been given by the witness, who was proposed to be summoned i.e., the author of Ex.P12.

14. Per contra, learned SPP would fairly admit that the reasoning of the Trial Court would not stand legal scrutiny by this Court and that the Trial Court ought to have given a full opportunity to the accused and thereby ensured a fair trial. He would also fairly submit that Trial Court could not have pre-judged the evidence that would have been tendered in the examination-in-chief or the evidence that the defence would have elicited in the course of cross-examination more so, in the light of the fact that the prosecution had placed reliance on the said evidence to establish the guilt of the accused.

15. We have perused the judgment. The Trial Court at paragraph Nos.42 and 43 has extensively relied upon the contents of Ex.P10, which is spoken about by PW-10, Medical Doctor, who had medically examined the accused and certified his potency. The Trial Court has also relied upon the deposition of PW-12 another doctor, who examined the victim and who it is stated collected the

clothes said to contain the alleged seminal stains caused by the accused and is said to have forwarded them for DNA test. Paragraph No.43 reads as under:-

> *"43. Now with respect to medical evidence of the victim is concerned, PW-12 who is the doctor Nagaveni, had categorically stated that on 02-05-2018, the victim aged 12 years produced with the history of rape at 10-30 a.m. and on enquiry she told that Venkateshappa, aged 60 years, had taken her to the bathroom and attempted to commit rape and he did that act for 1 hour and she collected the cloths and there was white stains on the Chudidar top and she did not find any external injuries and hymen was intact. She collected those articles and sent it to DNA test. According to her, there was no sexual penetration and there was attempt to commit rape. She has specifically followed the procedure and she had taken the consent of the victim and her mother. Victim was comfortable while she examined. She told that the accused had committed rape by laying bed. She had noted the length of the mark found on the clothes. She herself had sealed the clothes and this particular*

statement of the doctor that there was mark on the cloths and that particular clothe was sent for DNA test. Ex.P.12 is the DNA report, which shows that the victim Jyothi is included from being the contributor of epithelial cells detected on item Nos.4(a) and 4(b). Venkateshappa S/o Late Venkatappa Sample blood sent in item No.8 is included from being the contributor of the seminal stains detected on item Nos.3 and 6. This particular report of the DNA clearly establishes that seminal stains found on the clothes of the victim belongs to the accused. Further, based on that Ex.P.18 doctor had given opinion that there are signs suggestive of the survior seminal fluid contact. Thus, material evidence available on record, which are oral evidence of the victim, her parents and brother about the circumstances and also medical evidence clearly establish that accused had attempted to commit rape on the victim and in that process there was seminal stains found on the victim's clothes. Further, with respect to capacity of the accused to involve in the sexual activity is concerned, the doctor had given opinion in that regard. In this case, the evidence

> *of other witnesses i.e. PW-16 and mahazar witnesses and official witnesses have also supported the case of the prosecution."*

Thus, from a reading of the above, there can be no doubt that the Trial Court has considered Ex.P12 and the deposition of PWs-10 and 12 to arrive and conclude that the accused is guilty of commission of the offence alleged against him. In this background, learned counsel for the appellant has placed reliance on the ruling of the Hon'ble Apex Court rendered in the case of ***Natasha Singh vs. CBI***, reported in ***(2013) 5 SCC 741***. Reliance is placed on the observations in paragraph Nos.8, 15, 16, 21 and 22, which read as under:-

> *"8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just*

decision of the case. Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

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15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to

undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC 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 great caution and circumspection. The very use of words such as "any court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way.

There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same.

[Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar [AIR 1958 SC 376 : 1958 Cri LJ 701] , Zahira Habibulla H. Sheikh v. State of Gujarat (2004) 4 SCC 158, Zahira Habibullah Sheikh (5) v. State of Gujarat (2006) 3 SCC 374, Kalyani Baskar v. M.S. Sampoornam (2007) 2 SCC 258, Vijay Kumar v. State of U.P. (2011) 8 SCC 136 and Sudevanand v. State (2012) 3 SCC 387.

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21. The High Court has simply quoted relevant paragraphs from the judgment of the trial court and has approved the same without giving proper reasons, merely observing that the additional evidence sought to be brought on record was not essential for the purpose of arriving at a just decision. Furthermore, the same is not a case where if the application filed by the appellant had been allowed, the process would have taken much time. In fact, disallowing the said application, has caused delay. No prejudice would have been caused to the prosecution, if the defence had been permitted to examine the said three witnesses.

22. In view of above, the appeal succeeds and is allowed. The judgment and order of the trial court, as well as of the High Court impugned before us, are set aside. The application under Section 311 CrPC filed by the appellant is allowed. The parties are directed to appear before the learned trial court on 17-5-2013, and the learned trial court is requested to fix a date on which the appeliant shall produce the three witnesses, and the same may thereafter be examined expeditiously in accordance with law, and without causing any further delay. Needless to say that the prosecution will be entitled to cross-examine them."

16. Further, reliance is placed on the ruling of the Hon'ble Apex Court rendered in the case of ***Sunil Mehta and Another vs. State of Gujarat and Another*** reported in ***(2013) 9 SCC 209***. Reliance is placed on the observations in paragraph Nos.16, 17 and 18, which read as under:-

"16. It is trite that evidence within the meaning of the Evidence Act and so also within the meaning of Section 244 CrPC is what is recorded in the manner stipulated under Section 138 in the case of oral evidence. Documentary evidence would similarly be evidence only if the documents are proved in the manner recognised and provided for under the Evidence Act unless of course a statutory provision makes the document admissible as evidence without any formal proof thereof.

17. Suffice it to say that evidence referred to in Sections 244, 245 and 246 must, on a plain reading of the said provisions and the provisions of the Evidence Act, be admissible only if the same is produced and, in the case of documents, proved in accordance with the procedure established under the Evidence Act which includes the rights of the parties against whom this evidence is produced to cross-examine the witnesses concerned.

18.Secondly, because evidence under Chapter XIX(B) has to be recorded in the presence of the accused and if a right of cross-examination was

not available to him, he would be no more than an idle spectator in the entire process. The whole object underlying recording of evidence under Section 244 after the accused has appeared is to ensure that not only does the accused have the opportunity to hear the evidence adduced against him, but also to defend himself by cross-examining the witnesses with a view to showing that the witness is either unreliable or that a statement made by him does not have any evidentiary value or that it does not incriminate him. Section 245 of the Code, as noticed earlier, empowers the Magistrate to discharge the accused if, upon taking of all the evidence referred to in Section 244, he considers that no case against the accused has been made out which may warrant his conviction. Whether or not a case is made out against him, can be decided only when the accused is allowed to cross-examine the witnesses for otherwise he may not be in a position to demonstrate that no case is made out against him and thereby claim a discharge under Section 245 of the Code. It is elementary that the ultimate quest in any judicial determination is to arrive at the truth,

which is not possible unless the deposition of witnesses goes through the fire of cross-examination. In a criminal case, using a statement of a witness at the trial, without affording to the accused an opportunity to cross-examine, is tantamount to condemning him unheard. Life and liberty of an individual recognised as the most valuable rights cannot be jeopardised leave alone taken away without conceding to the accused the right to question those deposing against him from the witness box."

17. Per contra, learned SPP would vehemently contend that the accused cannot take advantage of the glitch to seek for a *de novo* trial. He would submit that right to fair trial is a right vested in the accused and it is the duty of the prosecution and the Court to ensure that the right of the accused to a fair trial is not embellished. Learned SPP would contend that the application under Section 311 of Cr.P.C. seeking for recalling of the witnesses PWs1 to 3 cannot be permitted and that the matter be remanded to a

limited extent of summoning the author of Ex.P12 and that the application under Section 311 of Cr.P.C. and the application under Section 45 of the Indian Evidence Act merit dismissal and hence, the order of the Trial Court dated 18.12.2019 does not call for any interference and the orders having attained finality and not having been challenged by the accused, interference to that extent is not warranted and the remand be limited to the extent of summoning the author of Ex.P12. Learned SPP has placed reliance on the ruling of the Hon'ble Apex Court rendered in the case of ***Zahira Habibulla H. Sheikh and Another vs. State of Gujarat and Others*** reported in ***(2004) 4 SCC 158*** and specific reliance is placed on the observations in paragraph Nos.46 to 50, which read as under:-

> *"46. Ultimately, as noted above, ad nauseam the duty of the court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer on 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 just decision in the case.

(emphasis supplied)

47. Section 391 of the Code is another salutary provision which clothes the courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this

purpose it is open to the appellate court to cali for further evidence before the appeal is disposed of. The appellate court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, especially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of a guilty man's escape through some careless or ignorant proceedings before a court or vindication of an innocent person wrongfully accused. Where the court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

48. The legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the

prosecutor and the persons prosecuted and if the appellate court finds that certain evidence is necessary in order to enable it to give a correct and proper finding, it would be justified in taking action under Section 391.

49. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the section are only to be invoked when formal proof for the prosecution is necessary. If the appellate court thinks that it is necessary in the interest of justice to take additional evidence, it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of discretion of the appellate court. As reiterated supra, the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions.

> *50. In Rambhau v. State of Maharashtra [(2001) 4 SCC 759 : 2001 SCC (Cri) 812] it was held that the object of Section 391 is not to fill in lacuna, but to subserve the ends of justice. The court has to keep these salutary principles in view. Though wide discretion is conferred on the court, the same has to be exercised judicially and the legislature had put the safety valve by requiring recording of reasons."*

18. Learned SPP would further vehemently contend that the opportunity to summon the victim cannot be construed as an opportunity to fill up any lacunas and that the remission can only be to sub-serve the ends of justice and that the Court should be circumspect in the matter of exercising its jurisdiction. Nextly, learned SPP would place reliance on the ruling of the Hon'ble Apex Court rendered in the case of ***Hanuman Ram vs. State of Rajasthan and Others*** reported in ***(2008) 15 SCC 652***. Reliance is placed on the observations in paragraph No.7, which read as under:-

"7. "26. … reference may be made to Section 311 of the Code which reads as follows:

'311. Power to summon material witness, or examine person present.—Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.'

The section is manifestly in two parts. Whereas the word used in the first part is 'may', the second part uses 'shall'. In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and

compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

27. The object underlying Section 311 of the Code is that there may not be failure of justice

on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is 'at any stage of any inquiry or trial or other proceeding under this Code'. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

28. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation : it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short 'the Evidence Act') are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be 'filling

of loopholes'. That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

29. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by the court gives evidence against the complainant, he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a court arises not under the provisions of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court could not be termed a witness of any particular party, the court should give the right of cross-examination to the complainant. These aspects were highlighted in Jamatraj Kewalji Govani v. State of Maharashtra [AIR 1968 SC 178] .

See also Rama Paswan v. State of Jharkhand (2007) 11 SCC 191 and Iddar v. Aabida (2007) 11 SCC 211."

19. From a reading of the above, it is apparent that the Hon'ble Apex Court has considered the scope and ambit of the provisions of Section 311 of Cr.P.C. and held it to be in two parts and further,learned SPP would place emphasis on the observations in the last part of paragraph No.7. Lastly, learned SPP would place reliance on the ruling of the Hon'ble Apex Court rendered in the case of ***Manju Devi vs. State of Rajasthan and Another*** reported in ***(2019) 6 SCC 203***, and emphasis is laid on the observations in paragraph No.10, wherein the Hon'ble Apex Court has placed reliance on the ruling rendered in the case of *Natasha Singh*. Learned SPP would contend that the Court must satisfy itself as to whether the examination of the said witness is essential or whether the recall is required to enable further examination in order to enable the Court to arrive at a conclusion.

20. Though reference is not made, this Court places reliance on the observations in paragraph No.13, which in our view *prima facie* removes the basis for the order rejecting the applications preferred by the accused.

21. In the above facts and circumstances, the short question that arises for consideration is whether the appeal stands vitiated on account of the accused having been denied fair opportunity and whether the accused has made out a case for remand and be provided an opportunity to the accused to summon author of Ex.P12 and further cross-examine PWs1 to 3, who are none other than the victim, de-facto complainant and victim's father.

22. We have heard the learned counsel for the appellant and the learned SPP for the respondent-State.

23. Apart from the contention that the rejection of the applications amounts to denial of an opportunity, we also find that the issue ought to be looked into from another

point of view. Section 45 of the Indian Evidence Act, 1872, deals with 'opinions of experts'. If the same is read in conjunction with Section 60 of the Indian Evidence Act, which deals with 'oral evidence', more particularly, the Proviso, we are of the opinion that the reliance on Ex.P12 without the author of the document being made available for cross-examination, in our opinion, amounts to denial of a fair trial and vitiates the finding of guilt and consequent conviction of the appellant.

24. The prosecution having deemed it fit and necessary for referring the material for examination and opinion by expert in the subject of DNA and the prosecution having received such Report and the Report having formed a part of charge sheet and the report having been marked through PW10, who is not the expert and who is not the author of Ex.P12 and the Court having placed reliance on the said evidence, the request of the accused ought to have been acceded to, by the Court in order to not only render

justice but also as stated and restated that it must appear that justice is also been done.

25. Prosecution having ventured to place reliance on the said Report, it was duty bound to subject the author of the said Report for cross-examination. The prosecution having failed to make available the author of Ex.P12 for cross-examination, in our opinion, we deem it necessary to hold that the Trial Court erred in placing reliance on the same. The Trial Court ought to have at least rendered a finding that PW10 was competent to depose in the place of the author of Ex.P12. There is no doubt that PW10 is an academic and a medical doctor too but we do not find any material, which would certify him to act as a subject expert nor is it his version that he is competent or certified to depose on the subject of DNA analysis.

26. That apart, we also find that there has been a serious infraction of right to privacy of accused in the matter of prosecution having ventured to draw blood for the

purpose of conducting DNA test. It is also settled law that no DNA analysis of any person can be conducted by the State without obtaining the consent of the party concerned. The Hon'ble Apex Court has settled the law in this regard in the case of ***Smt. Selvi and Others vs. State of Karnataka*** reported in ***(2010) 7 SCC 263.***

27. Be that as it may. It causes consternation to us that the Trial Court has thrown to the winds all caution in this regard and further proceeded to reject the application by accused himself, offering to subject himself for DNA analysis. That apart, even on merits of the case, it does not support the conclusions drawn by the Trial Court holding the accused guilty of the offence punishable under Sections 4 and 6 of the POCSO Act, which read as under:-

> ***"4. Punishment for penetrative sexual assault -*** *(1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which*

may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."

xxx

"6. Punishment for aggravated penetrative sexual assault.- *(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the*

remainder of natural life of that person and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."

28. Apparently, the vaginal smear has returned a result in the negative and the DNA analysis speaks only about seminal stains on the top of the dress i.e., chudidhar top. *Prima facie,* appraisal of the material evidence does not convince us of penetrative sexual assault much less any aggravated sexual assault. That apart, it is claimed that the child is 12 years and the provisions of Section 9 (m) of the POCSO Act, refers to sexual assault on a child below 12 years. This crucial aspect has also not been properly appreciated by the Trial Court. In fact, the appreciation of evidence by the Trial Court leaves much to be desired. The evidence at the most suggest the commission of offence as defined and stipulated under Sections 7 or 9 of POCSO Act

punishable under Sections 8 and 10 of the POCSO Act respectively.

29. Be that as it may. We decline to form any opinion with regard to the guilt or the commission of offence in view of the fact that this Court has decided to remit the matter back. As rightly contended by learned SPP, it would be a travesty of justice if the prosecution is directed or the Trial Court is directed to do a *de novo* trial, in view of the fact that much grounds have been traversed and the cross-examination of the witnesses has not resulted in any serious contradictions, which would shock the judicious conscious of this Court and thereby direct a *de novo* trial. In that view of the matter, we are of the opinion that partial re-trial be ordered as rightly contended by learned counsel on both sides.

30. The appeal is ***allowed in part***. The application under Section 293 of Cr.P.C. filed for issuing summons to

the DNA expert to lead evidence deserves to be allowed and is accordingly allowed.

31. The accused is entitled to summon the author of Ex.P12. Consequently, the Trial Court shall take appropriate steps to have the author of Ex.P12 examined-in-chief and permit his cross-examination by or on behalf of the accused. Further, cross-examination of PWs1 to 3 as prayed under the application under Section 311 of Cr.P.C. shall only be to the extent as permissible and limited to contents and conclusions of Ex.P12.

32. The remand shall enable the parties to make submissions afresh in the matter and the Trial Court shall endeavor to conclude the trial and render a judgment within a period of six months from today. In the event, the case is not concluded, the accused is entitled to seek for enlargement on bail in terms of Section 436A of Cr.P.C.

33. The appeal stands disposed of in the above terms.

34. We also record our displeasure in the manner in which the Trial Court has proceeded in concluding the trial and appreciation of evidence and more particularly, the imposition of sentence of capital punishment. This order and a copy of the judgment rendered by the Trial Court be placed before the Administrative Committee-I of the High Court.

35. In view of the appeal having been partly allowed, Criminal Referred Case in Crl.R.C.No.2/2020 stands rejected. The judgment of conviction and sentence dated 16/17.01.2020 passed by the II Additional District and Sessions Judge, Kolar in S.C.No.92/2018, is also set-aside.

36. The appellant shall be continued in custody and as noted, in the event, the trial is not concluded within a period of six months, the accused is entitled to seek for bail.

37. This order shall be communicated to the Trial Court forthwith.

It is also made clear that the appellant shall co-operate for expeditious conduct of the trial.

Sd/-
JUDGE

Sd/-
JUDGE

MH/dn/-
CT-HR