Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL Nos.656-657 OF 2019
(Arising out of Special Leave Petition (Criminal) No.809-810 of 2019)

ATMA RAM AND ORS. …Appellants

VERSUS

STATE OF RAJASTHAN …Respondent

J U D G M E N T

Uday Umesh Lalit, J.

1. Leave granted.

2. These appeals challenge the decision dated 03.12.2018 passed by the High Court of Judicature of Rajasthan at Jodhpur in D.B. Criminal Death Reference No.2 of 2017 and D.B. Criminal Appeal No.33 of 2018.

3. FIR No.493 was registered with Police Station Bhadara, District Hanumangarh on 13.10.2013 in respect of offences punishable under Sections 302, 307, 452, 447, 323, 147, 148 and 149 IPC pursuant to reporting by one

Kailash. It was stated that seven named persons including present four appellants and some other unknown persons had come to the agricultural field of the informant while harvesting operations were going on and had opened an assault. As a result, father of the informant named Bhanwarlal and brother of the informant named Pankaj died on the spot while the informant suffered injuries. It was further alleged that the same assembly, thereafter, went to the village and assaulted inmates of the house in which his grandfather named Momanram died. Later, the informant Kailash also succumbed to his injuries.

4. After due investigation, charge-sheet was filed against the appellants namely Atmaram, Omprakash, Leeladhar and Shravan Kumar while others were reported to be absconding. The trial was conducted in the Court of Additional Sessions Judge, Bhadara, District Hanumangarh. It appears that at the stage of recording of evidence, the appellants who were then in judicial custody were not produced in court. The order dated 28.10.2014 passed by the Trial Court recorded the objection of the Advocate for the appellants. The examination-in-chief of PW1-Chanduram and PW2-Chandrakala was undertaken without the appellants being present in Court and the cross-examination was deferred. The order recorded:-

> "In Evidence PW1 Chanduram & PW2 Chandrakala, Chief Examination was recorded. Advocate for accused sought time for Cross Examination. Therefore, statements of witnesses were kept reserved. Witnesses PW1 & PW2 are to be present for Cross Examination on 28.11.2014 and Witness no. 12, 13 and 143 are to be issued summons to remain present on 29.11.2014. For recording evidence be present on 28.11.2014, till then Judicial Custody of Accused Atmaram, Om Prakash, Leeladhar and Shravan is extended."

5. Similarly, following 10 witnesses were also examined in Court on dates mentioned against their names, without ensuring the presence of the appellants in Court.

PW3 Surendra Singh 13.2.2015
PW4 Dharam Pal 13.2.2015
PW 12 Vikrant Sharma 13.8.2015
PW 13 Prahlad 3.9.2015
PW 14 Ram Kumar 9.10.2015
PW 15 Sushila 9.10.2015, 5.11.2015
PW 17 Dr. Arun Tungariya 8.3.2016
PW 18 Ram Pratap 12.5.2016, 20.6.2016, 14.2.2017
PW 20 Sahab Singh 22.11.2016
PW 23 Ramesh Kumar 14.2.2017

6. The Trial Court by its judgment and order dated 03.11.2017 found that the prosecution had proved the case against the appellants beyond reasonable doubt and convicted the appellants for the offences punishable under Sections 147, 148, 452, 447, 302 read with Section 149 and Section 323 read with

Section 149 IPC. The matter was then heard on sentence. After hearing the Public Prosecutor and Advocates for the complainant, as well as the appellants, the Trial Court imposed death sentence upon the appellants, subject to confirmation by the High Court. Consequently, the matter stood referred to the High Court in D.B. Criminal Death Reference No.2 of 2017. The appellants also filed D.B. Criminal Appeal No.33 of 2018, which was heard along with the Death Reference case.

7. It was submitted *inter alia* on behalf of the appellants that the entire trial was vitiated because the Trial Court had recorded statements of as many as twelve witnesses without ensuring presence of the appellants in Court. Relying on Section 273 of the Code of Criminal Procedure, 1973 (‘the Code’, for short), it was submitted that the procedure adopted by the Trial Court of recording statements of the witnesses, without ensuring the presence of the appellants, amounted to an incurable illegality and as such the trial ought to be declared to be vitiated and the appellants be acquitted of the charges levelled against them. While opposing these submissions, the Prosecutor contended that not only did the Advocate for the appellants conduct extensive cross-examination of the witnesses but no objection was raised at any time during such cross examination. Further, no plea was raised before the Trial Court

during final arguments that the appellants were, in any way, prejudiced on account of their absence in the proceedings.

8. The High Court observed that despite "pertinent objection of the defence counsel (albeit raised at the initial stages)", the Trial Court had proceeded to record the statements of twelve witnesses in the absence of the appellants. In the light of the facts on record, the question which arose for consideration was then framed by the High Court as under:-

> "… …the significant question which arises for the Court's consideration is as to whether, the entire trial should be declared vitiated; or that the matter should be remanded to the trial court for recording the statements of these witnesses afresh by exercising powers under Section 391 Cr.P.C. or that the impugned judgment should be set aside and the de-novo trial directed by exercising powers under Section 386(b) Cr.P.C."

9. After hearing both sides, the High Court considered cases of ***State of Madhya Pradesh vs. Bhooraji***[1]***, Pandit Ukha Kolhe vs. The State of Maharashtra***[2] and ***Jayendra Vishnu Thakur vs. State of Maharashtra and Anr***[3]**.** The High Court then concluded:-

> "In the case of Pandit Ukha Kolhe, the Hon'ble Supreme Court by majority view held that the prosecution should be given opportunity to lead

[1] (2001) 7 SCC 679
[2] (1964) 1 SCR 926
[3] (2009) 7 SCC 104

> evidence on the matters indicated in the course of the judgment; the accused be examined afresh under Section 342 Cr.P.C. and the appeal be decided afresh. Thus, in this case as well, the Supreme Court directed that fresh evidence should be taken on matters of significance even at the appellate stage.
>
> Thus, none of the precedents cited by the defence counsel lays down a straightjacket formula that a de-novo trial cannot be directed in any condition. As a matter of fact, if any such view is taken, then the scope and operation of Section 386(b) Cr.P.C. would be rendered redundant.
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> 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.
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> During the course of arguments, Shri Moti Singh, Advocate representing the appellants agreed that in case, the matter is remanded for fresh trial, no direction is required to be given to record the statements of the remaining witnesses afresh because when their testimony was recorded, the accused were kept present in the course proceedings."

10. The High Court, therefore, quashed and set aside the judgment dated 03.11.2017 passed by the Trial Court in Sessions Case No.14/2014 and directed as under:-

> "… …It is hereby directed that trial court shall summon and record the statements of the witnesses P.W.1 Chandu Ram, P.W.2 Chandrakala, P.W.3 Surendra Singh, P.W.4 Dharam Pal, P.W.12 Vikrant Sharma, P.W.13 Prahlad, P.W. 14 Ram Kumar, P.W.15 Sushila, P.W.17 Dr. Arun Tungariya, P.W. 18 Ram Pratap, P.W.20 Sahab Singh and P.W.23 Ramesh Kumar afresh after securing presence of the accused in the court. Upon remand, the trial court shall conduct the proceedings on a day to day basis and shall, after recording the statements of the witnesses afresh in the above terms, re-examine the accused under Section 313 Cr.P.C.; provide them a justifiable/proper opportunity of leading defence and decide the case afresh and as per law within four months from the date of receipt of copy of this judgment."

11. The decision of the High Court is presently under challenge. Considering the nature of controversy involved and the questions raised in the matter, this Court appointed Shri Ranjit Kumar, learned Senior Advocate as *Amicus Curiae* to assist the Court. In the meantime, as a result of the order passed by the High Court, the Trial Court had proceeded with *de novo* trial as directed and those twelve witnesses were re-examined. After hearing both sides the matter was reserved for judgment. Therefore, on 07.03.2019 this Court directed the Trial Court not to pronounce the judgment till further orders. The matter was, thereafter, heard by this Court. Mr. Sanjay Hegde, learned Senior Advocate appeared on behalf of the appellants, Dr. Manish

Singhvi, learned Senior Advocate appeared on behalf of the State and Mr. Ranjit Kumar, learned Senior Advocate appeared as A*micus Curiae* at the request of the Court. After the oral submissions, the parties also filed their written submissions.

12. Mr. Sanjay Hegde, learned Senior Advocate for the appellants submitted:-

A) Section 273 of the Code opens with expression, "Except as otherwise expressly provided… …" and the only exceptions to the application of Section 273 are those expressly provided i.e. in Sections 299 and 317 of the Code. Subject to these exceptions, Section 273 Cr.P.C. is absolutely mandatory.

B) The right of an accused to watch the prosecution witnesses deposing before a Court is a valuable right and infringement of such a right is gravely prejudicial.

C) A re-trial wipes out from the record the earlier proceedings and affords the Prosecutor an opportunity to rectify the infirmities in the earlier proceedings. Therefore, it can be ordered in very rare circumstances and certainly not to take away the advantage ensuing to the accused.

D) In any case, no partial re-trial can be ordered.

13. Dr. Manish Singhvi, learned Senior Advocate appearing for the State submitted:-

A) The conclusion of the High Court that Section 273 is mandatory was accepted by the State and no appeal was preferred. Proceeding on such premise, the question was whether the trial was vitiated or the error could be rectified. Relying on Section 279 of the Code under which evidence has to be given in a language understood by the accused and infraction thereof was not found to be of such magnitude so as to vitiate the proceedings[4], he submitted that infraction of Section 273 would also not vitiate the trial.

B) Sections 460 to 465 of the Code stipulate remedies with respect to breaches of provisions of the Code and resultant effect. Contravention of Section 273 is not considered to be breach of such magnitude which ought to result in vitiation of proceedings.

[4] Shiv Narayan Kabira vs. State of Madras 1967 (1) SCR 138

C) Relying on articles from ***Harvard Law Review***[5] and ***Columbia Law Review***[6] it was submitted that theory of *Harmless Error* in criminal matters is firmly embedded in criminal jurisprudence and error in the present matter is one which comes within such category.

D) The contravention of Section 273 was remedied by the order of re-trial so that there should not be any prejudice to the accused. The order directing *de novo* examination of twelve witnesses and re-trial to that extent was just and proper.

14. Shri Ranjit Kumar, learned Senior Advocate and *Amicus Curiae* relied upon decisions of this Court in ***State of Maharashtra and another vs. Praful B. Desai***[7], ***Sakshi and others vs. Union of India***[8], ***Mahendra Chawla vs. Union of India***[9] and various provisions of the Code to submit:-

A) The provisions of Section 273 are mandatory in nature only to the extent that the evidence taken in the course of the trial ought to be in the presence of the accused or when his personal

[5] Harvard Law Review Vol. 131:2117
[6] Columbia Law Review Online – Vol.118 October 4, 2018 Pages 118-34
[7] (2003) 4 SCC 601
[8] (2004) 5 SCC 518
[9] (2018) 15 SCALE 497

attendance is dispensed with, in the presence of his pleader; and that the physical presence of the accused is not mandatory.

B) Elaborating further, it was submitted that non-compliance of the provisions of Section 273 is not an irregularity which would vitiate the criminal trial completely, as the irregularity was curable.

C) Under Sections 366 to 371 of the Code dealing with "Submission of Death Sentences for Confirmation" and Sections 372 to 394 dealing with "Appeals", the High Court was empowered to direct re-trial and record additional evidence or direct further enquiry.

D) The provisions of Chapter XXVIII dealing with Death References are wider/larger in import as compared to the powers under Chapter XXIX dealing with appeals and the view taken by the High Court was supported more strongly by the provisions of Chapter XXVIII of the Code.

E) The criminal jurisprudence also recognizes rights of victims in a criminal trial. In the present case, four male members of the family were killed, and the view taken by the

High Court was an extremely balanced view which ensured that there was no failure or miscarriage of justice for the victims as well as the accused.

15. The cases cited by the learned Amicus Curiae dealt with issues whether recording of evidence by video conferencing satisfied the mandate of Section 273 of the Code.

A) In ***State of Maharashtra*** v. ***Dr. Praful B. Desai***[10] it was observed:

> **"9.** It was submitted on behalf of the respondents, that the procedure governing a criminal trial is crucial to the basic right of the accused under Articles 14 and 21 of the Constitution of India. It was submitted that the procedure for trial of a criminal case is expressly laid down, in India, in the Code of Criminal Procedure. It was submitted that the Code of Criminal Procedure lays down specific and express provisions governing the procedure to be followed in a criminal trial. It was submitted that the procedure laid down in the Code of Criminal Procedure was the "procedure established by law". It was submitted that the legislature alone had the power to change the procedure by enacting a law amending it, and that when the procedure was so changed, that became "the procedure established by law". It was submitted that any departure from the procedure laid down by law would be contrary to Article 21. In support of this submission reliance was placed on the cases of *A.K. Gopalan* v. *State of Madras*[11], *Nazir Ahmad* v. *King Emperor*[12] and *Siva Kumar Chadda* v. *Municipal Corpn. of Delhi*[13]. There

[10] (2003) 4 SCC 601
[11] AIR 1950 SC 27
[12] AIR 1936 PC 253 (2): 37 Cri LJ 897
[13] AIR 1995 SC 915 (sic)

can be no dispute with these propositions. However, if the existing provisions of the Criminal Procedure Code permit recording of evidence by video-conferencing then it could not be said that "procedure established by law" has not been followed.

20. Recording of evidence by video-conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the accused. The accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact the accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded courtroom. They can observe his or her demeanour. In fact the facility to playback would enable better observation of demeanour. They can hear and rehear the deposition of the witness. The accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The facility of playback would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in court. All these objects would be fully met when evidence is recorded by video-conferencing. Thus no prejudice, of whatsoever nature, is caused to the accused. Of course, as set out hereinafter, evidence by video-conferencing has to be on some conditions."

B) In **Sakshi vs. Union of India**[14] the observations of this Court were:-

"27. The other aspect which has been highlighted and needs consideration relates to providing protection to a victim of sexual abuse at the time of recording his statement in court. The main

[14] (2004) 5 SCC 518

> suggestions made by the petitioner are for incorporating special provisions in child sexual abuse cases to the following effect:
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> (*i*) Permitting use of a videotaped interview of the child's statement by the judge (in the presence of a child-support person).
>
> (*ii*) Allow a child to testify via closed-circuit television or from behind a screen to obtain a full and candid account of the acts complained of.
>
> (*iii*) The cross-examination of a minor should only be carried out by the judge based on written questions submitted by the defence upon perusal of the testimony of the minor.
>
> (*iv*) Whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.

C) Recently in **Mahender Chawla and Ors. vs. Union of India (UOI) and Ors.**[15]**,** this Court stated:-

> "29. As pointed out above, in Sakshi's case, the Court had insisted about the need to come up with a legislation for the protection of witnesses. It had even requested the Law Commission to examine certain aspects, which resulted to 172nd review of rape laws by the Law Commission. However, the Court specifically rejected the suggestion of the Law Commission regarding examination of vulnerable witnesses in the absence of Accused. Having regard to the provisions of Section 273 of the Code of Criminal Procedure, which is based on the tenets of principle of natural justice, that the witness must be examined in the presence of the Accused, such a principle cannot be sacrificed in trials and in inquiries regarding sexual offences. In such a scenario examination of these witnesses through video conferencing provides the solution which balances the interest of the Accused as well as vulnerable witnesses."

[15] 2018 (15) SCALE 497

30. We will briefly refer to the statutory provisions governing the situation. Section 273 Cr.P.C. lays down that:

> "273. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader."

Sub-section (1) of Section 327 CrPC lays down that any criminal court enquiring into or trying any offence shall be deemed to be open court, to which the public generally may have access, so far as the same can conveniently contain them. Sub-section (2) of the same section says that:

> "327. (2) Notwithstanding anything contained in sub-section (1) the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted *in-camera*."

Under the proviso to this sub-section

> "the Presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court".

It is rather surprising that the legislature while incorporating sub-section (2) to Section 327 by amending Act 43 of 1983 failed to take note of offences under Sections 354 and 377 IPC and omitted to mention the aforesaid provisions. Deposition of the victims of offences under Sections 354 and 377 IPC can at times be very embarrassing to them.

> **31.** The whole inquiry before a court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 CrPC merely requires the evidence to be taken in the presence of the accused. The section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses. Recording of evidence by way of video-conferencing vis-à-vis Section 273 CrPC has been held to be permissible in a recent decision of this Court in *State of Maharashtra* v. *Dr. Praful B. Desai*[1]. There is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are handmaiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties."

16. We must also note certain observations of this Court in ***Jayendra Vishnu Thakur vs State of Maharashtra***[3] on which Mr. Hegde, learned Senior Advocate placed heavy reliance.

> **18.** The right of an accused to watch the prosecution witnesses deposing before a court of law indisputably is a valuable right. The Sixth Amendment of the United States Constitution explicitly provides therefor, which reads as under:
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> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

> informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence."
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> We may, however, notice that such a right has not yet been accepted as a fundamental right within the meaning of Article 21 of the Constitution of India by the Indian courts. In the absence of such an express provision in our constitution, we have to proceed on a premise that such a right is only a statutory one.
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> **22.** We may, however, notice that even in the United States of America, the accused's right under the Sixth Amendment is not absolute. The right of confrontment of an accused is subject to just exceptions, including an orderly behaviour in the courtroom. In case of disruptive behaviour an accused can be asked to go outside the courtroom so long he does not undertake to behave in an orderly manner. It was so held in *Illinois* v. *Allen*[16].

17. Shri Sanjay Hegde, learned Senior Advocate also relied upon the statutory exceptions to the ambit of Section 273 of the Code. We may therefore consider the provisions of Section 273, 299 and 317 of the Code at the outset. Said provisions are:-

> **"273. Evidence to be taken in presence of accused.** – Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader:
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> [Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been

[16] 397 US 337 (1970)

subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.]

299. Record of evidence in absence of accused – (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try [1][, or commit for trial] such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expenses or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India."

317. Provision for inquiries and trial being held in the absence of accused in certain cases. – (1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded that the personal attendance of the accused before the Court is not necessary in the interests of

> justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.
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> **(2)** If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately."

18. Section 273 opens with the expression "Except as otherwise expressly provided…" By its very nature, the exceptions to the application of Section 273 must be those which are expressly provided in the Code. Shri Hegde is right in his submission in that behalf. Sections 299 and 317 are such express exceptions provided in the Code. In the circumstances mentioned in said Sections 299 and 317, the contents of which need no further elaboration, the Courts would be justified in recording evidence in the absence of the accused. Under its latter part, Section 273 also provides for a situation in which evidence could be recorded in the absence of the accused, when it says "when his personal attendance is dispensed with, in the presence of his pleader". There was a debate during the course of hearing in the present matter whether such dispensation by the Court has to be express or could it

be implied from the circumstances. We need not go into these questions as the record clearly indicates that an objection was raised by the Advocate appearing for the appellants right at the initial stage that the evidence was being recorded without ensuring the presence of the appellants in Court. There was neither any willingness on the part of the appellants nor any order or direction by the trial Court that the evidence be recorded in the absence of the appellants. The matter, therefore, would not come within the scope of the latter part of Section 273 and it cannot be said that there was any dispensation as contemplated by the said Section. We will, therefore, proceed on the footing that there was no dispensation and yet the evidence was recorded without ensuring the presence of the accused. The High Court was, therefore, absolutely right in concluding that Section 273 stood violated in the present matter and that there was an infringement of the salutary principle under Section 273. The submissions advanced by Shri Sanjay Hegde, learned Senior Advocate, relying upon paragraphs in ***Jayendra Vishnu Thakur vs. State of Maharashtra and others***[17] as quoted above, that the right of the accused to watch the prosecution witness is a valuable right, also need not detain us. We accept that such a right is a valuable one and there was an infringement in the present case. What is material to

[17] (2009) 7 SCC 104

consider is the effect of such infringement? Would it vitiate the trial or such an infringement is a curable one?

19. The emphasis was laid by Dr. Manish Singhvi, learned Senior Advocate for the State on the articles relied upon by him to submit that the theory of "harmless error" which has been recognized in criminal jurisprudence and that there must be a remedial approach. Again, we need not go into these broader concepts as the provisions of the Code, in our considered view, are clearly indicative and lay down with clarity as to which infringements *per se*, would result in vitiation of proceedings. Chapter XXXV of the Code deals with "Irregular Proceedings", and Section 461 stipulates certain infringements or irregularities which vitiate proceedings. Barring those stipulated in Section 461, the thrust of the Chapter is that any infringement or irregularity would not vitiate the proceedings unless, as a result of such infringement or irregularity, great prejudice had occasioned to the accused. Shri Hegde, learned Senior Advocate was quick to rely on the passages in ***Jayendra Vishnu Thakur***[10] to submit that the prejudice in such cases would be inherent or *per se*. Paragraphs 57 and 58 of said decision were as under:-

> "57. Mr. Naphade would submit that the appellant did not suffer any prejudice. We do not agree. Infringement of such a valuable right itself causes prejudice. In ***S.L. Kapoor v. Jagmohan***[18] this Court clearly held: (SCC p. 395, para 24)
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> "24. … In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It will comes from a person who has denied justice that the person who has been denied justice is not prejudiced."
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> 58. In ***A.R. Antulay vs. R.S. Nayak***[19] a seven-Judge Bench of this Court has also held that when an order has been passed in violation of a fundamental right or in breach of the principles of natural justice, the same would be a nullity. (See also ***State of Haryana vs. State of Punjab***[20] and ***Rajasthan SRTC vs. Zakir Hussain***[21]***."***

20. The aforementioned observations in ***Jayendra Vishnu Thakur***[10] must be read in the peculiar factual context of the matter. The accused Jayendra Vishnu Thakur was tried in respect of certain offences in a Court in Delhi and at the same time he was also an accused in a trial under the provisions of TADA Act[22] in a Court in Pune. The trial in the Court in Pune proceeded on

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[18] (1980) 4 SCC 379
[19] (1988) 2 SCC 602
[20] (2004) 12 SCC 673
[21] (2005) 7 SCC 447
[22] Terrorists and Anti Disruptive Activities (Prevention) Act, 1987

the basis that Jayendra Vishnu Thakur was an absconding accused. The evidence was thus led in the trial in Pune in his absence when he was not sent up for trial, at the end of which all the accused were acquitted. However, in an appeal arising therefrom, this Court convicted some of the accused for offences with which they were tried. In the meantime, Jayendra Vishnu Thakur was convicted by the Court in Delhi and was undergoing sentence imposed upon him. Later, he was produced before the Court in Pune with a supplementary charge-sheet and charges were framed against him along with certain other accused. A request was made by the Public Prosecutor that the evidence of some of the witnesses, which was led in the earlier trial be read in evidence in the fresh trial against Jayendra Vishnu Thakur as those witnesses were either dead or not available to be examined[23]. The request was allowed which order of the Court in Pune was under challenge before this Court. It was found by this Court that the basic premise for application of Section 299 of the Code was completely absent. The Accused had not absconded. He was very much in confinement and could have been produced in the earlier trial before the Court in Pune. Since the requirements of Section 299 were not satisfied, the evidence led on the earlier occasion could not be taken as evidence in the subsequent

[23] Paras 8 & 9 of Jayendra Vishnu Thakur vs. State of Maharashtra (supra)

proceedings. The witnesses were not alive and could not be re-examined in the fresh trial nor could there be cross-examination on behalf of the accused. If the evidence in the earlier trial was to be read in the subsequent trial, the accused would be denied the opportunity of cross-examination of the concerned witnesses. Thus, the prejudice was inherent. It is in this factual context that the observations of this Court have to be considered. Same is not the situation in the present matter. It is not the direction of the High Court to read the entire evidence on the earlier occasion as evidence in the de novo trial. The direction is to re-examine those witnesses who were not examined in the presence of the appellants. The direction now ensures the presence of the appellants in the Court, so that they have every opportunity to watch the witnesses deposing in the trial and cross-examine said witnesses. Since these basic requirements would be scrupulously observed and complied with, there is no prejudice at all.

21. The learned *Amicus Curiae* was right in relying upon the provisions of Chapter XXVIII (Sections 366 to 371 of The Code) and Chapter XXIX (Sections 372 to 394 of The Code). He was also right in saying that the Chapter XXVIII was more relevant in the present matter and the judgment of the High Court was supported more strongly by provisions of Chapter

XXVIII. The provisions of Sections 366 to 368 and Sections 386 and 391 are quoted here for ready reference:-

> "**366. Sentence of death to be submitted by Court of Session for confirmation –** (1) When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.
> (2) The Court passing the sentence shall commit the convicted person to jail custody under a warrant.
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> **367. Power to direct further inquiry to be made or additional evidence to be taken –** (1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.
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> (2) Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.
>
> (3) When the inquiry or evidence (if any) is not made or taken by the High Court the result of such inquiry or evidence shall be certified to such Court.
>
> **368. Power of High Court to confirm sentence or annual conviction – In any case submitted under section 366, the High Court –**
>
> **(a)** may confirm the sentence, or pass any other sentence warranted by law, or
> **(b)** may annul the conviction, and convict the accused of any offence of which the Court of

Session might have convicted him, or order of a a new trial on the same or an amended charge, or

(c) may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

386. P*owers of the Appellate Court. –* After perusing such record and hearing the appellant or his pleader, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may –

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction –

(i) 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, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence –

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) Alter the finding maintaining the sentence, or

(iii) With or without altering the finding alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order alter or reverse such order;

(e) Make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which is in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

391. Appellate Court may take further evidence or direct it to be taken – (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

> (4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

22. According to Section 366 when a Court of Sessions passes a sentence of death, the proceedings must be submitted to the High Court and the sentence of death is not to be executed unless it is confirmed by the High Court. Section 367 then proceeds to lay down the power of the High Court to direct further enquiry to be made or additional evidence to be taken. Section 368, thereafter, lays down the power of the High Court to confirm the sentence so imposed or annul the conviction. One of the powers which the High Court can exercise is one under Section 368 (c) of the Code and that is to "acquit the accused person". Pertinently, the power to acquit the person can be exercised by the High Court even without there being any substantive appeal on the part of the accused challenging his conviction. To that extent the proceedings under Chapter XXVIII which deals with "submission of death sentences for confirmation" is a proceeding in continuation of the trial. These provisions thus entitle the High Court to direct further enquiry or to take additional evidence and the High Court may, in a given case, even acquit the accused person. The scope of the chapter is wider. Chapter XXIX of the Code deals with "Appeals". Section 391 also

entitles the Appellate Court to take further evidence or direct such further evidence to be taken. 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 re-trial, 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.

23. It is true that as consistently laid down by this Court, an order of retrial of a criminal case is not to be taken resort to easily and must be made in exceptional cases. For example, it was observed by this Court in Pandit ***Ukha Kolhe vs State of Maharashtra***[2], as under:-

> "15. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no

> jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C.J., in Ramanlal Rathi v. The State[24]
>
> "If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case."

24. The order passed by the High Court in the present matter was not to enable the Prosecutor to rectify the defects or infirmities in the evidence or to enable him to lead evidence which he had not cared to lead on the earlier

[24] AIR (1951) Cal.305

occasion. The evidence in the form of testimony of those twelve witnesses was led and those witnesses were cross-examined. There was no infirmity except the one that the evidence was not led in the presence of the appellants. The remedy proposed was only to rectify such infirmity, and not to enable the Prosecutor to rectify defects in the evidence.

25. We must also consider the matter from the stand point and perspective of the victims as suggested by the learned *Amicus Curiae*. Four persons of a family were done to death. It is certainly in the societal interest that the guilty must be punished and at the same time the procedural requirements which ensure fairness in trial must be adhered to. If there was an infraction, which otherwise does not vitiate the trial by itself, the attempt must be to remedy the situation to the 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 demeanor 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 concerned witnesses, 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 distillation from their cross-examination can be read in evidence.

26. We, therefore, see no reason to interfere with the order passed and the directions issued by the High Court in the present matter. We affirm the view taken by the High Court and dismiss these appeals. The restraint which we had placed on the Trial Court not to pronounce the judgment hereby stands vacated. The Trial Court is now free to take the matter to its logical conclusion. Let a copy of this Order be immediately transmitted to the concerned Trial Court.

27. We must say that we have not, and shall not be taken to have expressed any opinion on the merits or demerits of the case of the

prosecution, and the matter shall be gone into on its own merits at every stage of the proceedings.

28. In the end, we must express our appreciation and gratitude to the learned *Amicus Curiae* for rendering very effective and able assistance in the matter. We are indeed grateful to him.

……..…..……..……J.
(Uday Umesh Lalit)

..…….……J.
(Indu Malhotra)

New Delhi,
April 11, 2019