IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRA-D-564-DB-2014
Reserved on : 17.05.2019
Date of decision : 28.05.2019

Abhijeet Singh alias Ankur Likhari

... Appellant

Versus

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA
HON'BLE MR.JUSTICE HARINDER SINGH SIDHU

Present: Mr.Anmol Rattan Sidhu, Senior Advocate with
Mr.Pratham Sethi, Advocate
for the appellant.

Mr.S.P.S. Tinna, Addl.A.G. Punjab with
Mr.Harbir Sandhu, AAG, Punjab.

RAJIV SHARMA, J.

This appeal is instituted against judgment dated 20.02.2014 and order dated 22.02.2014 rendered by the Additional Sessions Judge, Amritsar, in Sessions Case No.0484 (22994/2013 new) of 24.03.2011 whereby the appellant along with his co-accused Sanjeev Kumar alias Babba, who were charged with and tried for offence punishable under Sections 302 of the Indian Penal Code (in short 'IPC') have been convicted thereunder and have been sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- each. Sanjeev Kumar alias Babba had filed separate appeal bearing No.CRA-D-660-DB-2014. However, he died during pendency of the appeal and his appeal stood dismissed as abated on 17.05.2019.

2. The case of the prosecution in a nutshell is that on 15.01.2010 Balwinder Kumar (PW-1) had filed complaint to the effect that he was working with Fultron Bank located at Kachehri Chowk, Amritsar. He was present in the Court Complex, Amritsar on that day in connection with some personal work. When he was present in front of main gate (cantonment side) of Court Complex, his friend Jatinder alias Raju Chikna son of Jagtar Singh and another friend Sukhwinder Singh alias Boby Pehalwan son of Mohinder Singh reached there. Both Jatinder alias Raju Chikna and Sukhwinder Singh alias Boby happened to be present in the Court in order to attend some court hearing. It was around 2.00 P.M. While they were talking to each other, a grey coloured Scropio car arrived at the scene. It came from the side of Civil Lines Chowk. Abhijeet Singh alias Ankur Likhari, Sanjeev Kumar alias Babba and one Sabhi Shivala son of Jagga alias Gursharan Singh alias Tejwinder Singh alias Teja Pardhan along with 3-4 unidentified young men were present in jeep. All of them came down from the jeep. They were armed with pistols. Sanjeev Kumar alias Baba and Abhijeet Singh alias Ankur Likhari as soon as they got down from the jeep, started hurling abuses on Jatinder alias Raju Chikna. They opened fire. Bullet hit on the head of Jatinder alias Raju Chikna. He fell down on the spot. He was removed to hospital. Police visited the spot. Blood stained earth was shifted from the spot. Police recovered 6 empty rounds of .32 bore pistol, 4 empty round of 9 mm pistol, 4 empty rounds of 7.6 mm pistol. It transpired that HC Jagjit Singh had also received injuries. His statement was recorded. Injured Jatinder alias Raj Chikna died on 17.01.2010. Recovered articles from the scene were sent for forensic examination. Investigation was

completed. The challan was put up after completing all the codal formalities.

3. The prosecution examined a number of witnesses. Statements of accused were recorded under Section 313 Cr.P.C. They denied the case of prosecution. The appellant along with his co-accused Sanjeev Kumar alias Babba was convicted and sentenced, as noticed hereinabove.

4. Learned counsel appearing on behalf of the appellant has vehemently argued that the prosecution has failed to prove the case against the appellant.

5. Learned counsel appearing on behalf of the State has supported the prosecution case.

6. We have heard learned counsel for the parties and have gone through the judgment and record very carefully.

7. PW-19 Dr.Raj Kamal had examined injured Ramesh Kumar.

8. PW-20 Dr.Kuldeep Kumar deposed that the post-mortem examination of deceased Jatinder alias Raju Chikna was conducted on 18.01.2010 by Dr. Kirpal Singh Azad. Dr.Kirpal Singh Azad was suffering from cancer and was under treatment. He brought the original post-mortem report. The cause of death in this case was due to laceration and compression of brain due to extra dural hematoma, sub-dural hematoma and sub-arachnoid hematoma which were sufficient to cause death in ordinary course of nature.

9. PW-22 Dr.Avtar Singh, Orthopadeic Surgeon had examined injured Jagjit Singh. He gave his opinion vide Ex.PW22/2.

10. PW-23 Dr.Raj Kamal, Neurosurgeon had examined Jatinder Singh.

11. PW-1 Lakhwinder Kumar testified that he had come to the Court Complex. He was talking with Raju Chikna and Sukhwinder Singh. In the meantime, a Scorpio of grey colour came on the spot. Ankur Likhari alias Abhijeet singh and Sanjeev Kumar alias Babba came down from the jeep along with Sabhi alias Shivala and Tajwinder Singh alias Tajja. They started abusing Raju Chikna. All of them started firing on Raju alias Chikna. One of bullets hit on the head of Raju Chikna. It was shot by accused Babba. Raju Chikna collapsed. He was taken to hospital.

His examination-in-chief was recorded on 10.10.2011. He was cross-examined on 20.04.2012

In his cross-examination, he deposed that he had seen the accused in Court namely Abhijeet Singh and Sanjeev Nayyar. They were not the same persons who had fired at deceased Raju Chikna. He did not know accused Sanjeev Nayyar and Ankur Likhari. He also did not know Sabhi and Taj. His statement dated 10.10.2011 was under the influence of police. His signature was obtained by the police on blank papers. He was declared hostile and was re-examined by the Public Prosecutor. He reiterated that statement made on 10.10.2011 made in the Court was not correct statement.

12. PW-2 Sukhwinder Singh alias Bobby deposed that on 15.01.2010 he had come to Court Complex, Amritsar. Jatinder alias Raju Chikna met him. When his case was adjourned, he left for his residence. He did not visit any place. He did not visit kulcha rehri along with Balwinder Kumar. No occurrence had taken place in his presence. He was declared hostile. He was cross-examined by the Public Prosecutor. He denied recording of statement on 15.01.2010.

13. PW-5 SI Lakha Singh deposed that he was posted in Police Station Civil Lines, Amritsar on 15.01.2010. He along with police party headed by Davinder Singh SHO was present at Novelty Chowk, Amritsar. Davinder Singh SHO received telephonic message regarding incident in District Courts near the gate of Cantonment side. They reached the spot. They came to know that injured Jatinder Singh alias Raju Chikna was taken to Fortis hosptial. He lifted the blood stained earth with the help of cotton. 6 empty rounds of .32 bore, 4 empty rounds of 9 mm and 4 empty rounds of 7.65 were made into parcels. These were taken into possession. He moved an application seeking opinion of doctor whether HC Jagjit Singh was fit to make statement. He recorded statement of HC Jagjit Singh injured. He also moved an application for declaring injured Jatinder alias Raju Chikna fit to make statement. Doctor declared Jatinder unfit to make statement. Accused Abhijeet Singh was arrested along with Sanjeev Kumar. Abhijeet Singh made disclosure statement that he had kept concealed one pistol along with live rounds near the hospital of Dr. Rachhpal Singh Gumtala Bypass in Kaliwali Bhathi. The disclosure statement is Ex.P16. Accused Sanjeev Kumar alias Babba also made disclosure statement Ex.P17 that he had kept concealed one revolver in the area of two hundred meters ahead of S.G. Enclave, Majitha Road. In his cross-examination, he deposed that no dying declaration statement of deceased was recorded. Jatinder alias Raju Chikna died after third day of occurrence. He further deposed that empty rounds of .32 bore were lying at distnace of 5/10 kadams from road. The empty cartridges of 9 mm and 7.65 mm were lying at distance of 10 kadams from the road.

14. PW-6 Inspector Harish Behl deposed that accused were

arrested. They made disclosure statements. Sanjeev Kumar alias Babba got recovered one polythene after digging the earth and said polythene contained 10 live rounds of .32 bore and one revolver of .32 bore bearing No.B3902 SAF, Kanpur. Rough sketch of revolver was prepared.

15. PW-8 DSP Sukhwinder Singh is the material witness. He testified that on 15.01.2010 he along with ASI Hari Singh and other police officials brought one accused Aman Rasood in FIR No.8 dated 14.01.2010. After producing the accused in Court, when he reached outside the gate of Court Complex towards Cantonment side, he saw one Scorpio bearing registration No.PB10AK-4517. It was driven by accused Abhijeet Singh alias Ankur Likhari and Sanjeev alias Babba was also sitting in that Scorpio. Sanjeev alias Babba occupant of this Scorpio fired from Scorpio bullet which hit in the head of Raju Chikna. They escaped towards Ajnala side. Sarabjit Singh alias Sabhi along with one Tejwinder Singh alias Taja Pardhan along with two unknown persons were also with them. He identified both the accused in the Court. In his cross-examination, he admitted that they were also armed with fire arms. All the officials and Ashan Arshad had witnessed the occurrence. None of them was examined in this case.

16. PW-10 HC Jagjit Singh deposed that he was deputed to escort duty in Sub Jail, Patti. He brought Amandeep Singh alias Mota for producing in Court of JMIC, Amritsar. HC Sunil Kumar, HC Gurjit Singh were also accompanying him. HC Sunil Kumar was having carbine issued by the police department. When they stepped down from the bus on western side of Court Complex, Amritsar and were about to enter the Court Complex, there was heavy rush near the gate of Court Complex. When he

along with his companion went towards Court Complex, there was firing. He was hit on his left leg. He fell down. He became unconscious. He did not know from which vehicle the bullets were fired and by whom. He did not identify the accused in the Court. He was declared hostile and was cross-examined by the learned Public Prosecutor. He admitted making statement Mark X. He had mentioned in his statement before the police that the firing was done from inside a Scropio which hit on his left leg. He also stated in Mark X that his companion HC Sunil Kumar had fired four shots in their defence. In further cross-examination by defence counsel, he deposed that accused present in the Court never fired.

17. Similarly PW-11 HC Gurjit Singh testified that when they stepped down from the bus and were about to enter the Court Complex, Amritsar, through gate from cantonment side at about 2.00 P.M., they heard the noise of firing. HC Jagjit Singh received fire injury on his leg. HC Sunil Kumar fired shots from his carbine. He took Amandip Singh inside the Court Complex, Amritsar. He did not know from which vehicle the assailants had fired. He was declared hostile and was cross-examined by the Public Prosecutor.

18. PW-12 HC Sunil Kumar had also not supported the case of prosecution. He could not identify the person who had fired nor those person were present in Court. He was declared hostile.

19. PW-13 SI Harsandeep Singh deposed that accused were handed over to him for effecting recovery as per Ex.P16. Accused got recovered pistol .32 bore which was wrapped in a glazed paper. On removing the same, two live rounds of same bore were recovered. Khakha of pistol Ex.PW13/A was prepared.

20. FSL report is Ex.PX. The result of examination is as under:-

> *"1. Firearm marked W/1, W/2 and W/3 contained respectively in parcels 'D', 'E' and 'F' under reference are in working condition.*
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> *2. 9 mm cartridge cases marked C/2 and C/3 contained in parcel 'A' had been fired from 9 mm carbine bearing No.16123873 marked W/3 contained in parcel 'F' under reference. However, no definite opinion could be offered with respect of 9 mm cartridge cases marked C/1 and C/4 contained in parcel 'A' had been fired from firearm marked W/3 or not referred above due to lack of sufficient individual characteristic marks.*
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> *3. 7.65 mm cartridge cases marked C/5 to C/8 contained in parcel 'B' had been fired from 7.65 mm pistol bearing no.RP-107565 contained in parcel 'E' under reference.*
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> *4. 0.32 inch cartridge cases marked C/9 to C/14 contained in parcel 'C' had been fired from 0.32 inch I.O.F. Revolver bearing no.B-3902 contained in parcel 'D' referred above.*
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> *5. 0.32 inch K.F.S. & WL cartridges marked L/1 to L/10 contained in parcel 'D' under reference are live cartridges.*
>
> *6. No definite opinion could be offered with respect to caliber of lead metal pieces contained in parcel 'G' under reference as these are badly damaged."*

According to FSL report Ex.PY, human blood was detected on exhibits contained in parcel 'A', i.e. soil and cotton lifted from the road with the help of cotton.

21. The cause of death was due to laceration and compression of brain due to extra dural hematoma, sub dural hematoma and sub-arachnoid hematoma which were sufficient to cause death in the ordinary course of

nature. The post-mortem report is Ex.P20/A. The injuries as per post-mortem report were due to fire arm.

22. The case of the prosecution precisely is that PW-1 Balwinder Kumar was present in front of gate of Court Complex, Amritsar in the company of PW-2 Sukhwinder Singh. Jatinder alias Raju Chikna also came on the spot. They were talking to each other. In the meantime appellant Abhijeet Singh along with Sanjeev Kumar came on the spot. They started firing indiscriminately. One of the bullet hit on the head of Jatinder alias Raju Chikna. He collapsed. He was taken to hospital. Six empty rounds of . 32 bore pistol, 4 empty rounds of 9 mm pistol, 4 empty rounds of 7.6 mm pistol were recovered. Accused made disclosure statements on the basis of which recoveries were effected. Jatinder alias Raju Chikna died on 17.01.2010.

23. PW-1 Balwinder Kumar in his examination-in-chief has categorically deposed the manner in which appellant shot at Jatinder @ Raju Chikna. He had taken Jatinder @ Raju Chikna to hospital. His examination-in-chief was recorded on 10.10.2011. However in the cross-examination recorded on 20.04.2012 he has not supported the case of prosecution. We are surprised that the trial Court had granted almost six months time for cross-examination of PW-1 Balwinder Singh. Inordinate long period was given for cross-examination of PW-1 Balwinder Singh enabling the accused to win over him. PW-2 Sukhwinder Singh has also not supported the case of prosecution. The fact of the matter is that PW-8 DSP Sukhwinder Singh who was present on the spot has supported the case of prosecution to the hilt. He had seen Sanjeev Kumar alias Babba firing at Jatinder @ Raju Chikna. Statement of PW-8 DSP Sukhwinder Singh is duly

supported by medical evidence. PW-10 HC Jagjit Singh, PW-11 HC Gurjit Singh and PW-12 HC Sunil Kumar have not supported the case of prosecution in entirety though they were police officials. However they have admitted that firing had taken place at gate of Court Complex, Amritsar. It has also come on record that PW-10 HC Jagjit Singh was hit by bullet. He was examined by PW-22 Dr.Avtar Singh. The weapon of offence, used in the incident as per FSL report Ex.PX, was recovered from the accused. The appellant was given an opportunity to explain disclosure statement made by him vide Ex.P16. However, he has not stated anything in his examination under Section 313 Cr.P.C. qua disclosure statement made by him.

24. Their Lordships of the Supreme Court in ***Dharnidhar vs. State of Uttar Pradesh and others, (2010) 7 Supreme Court Cases 759*** have held that Section 313 Cr.P.C. is to provide opportunity to accused to explain circumstances appearing against him and for Court to have an opportunity to examine accused and to elicit an explanation from him, which may be free from fear of being trapped by an embarrassing admission or statement. Their Lordships have also held in the same judgment that it is not mandatory for the prosecution to bring direct evidence of common intention on record and this depends on facts and circumstances of the case. It is not necessary for prosecution to establish, as a matter of fact, that there was pre-meeting of minds and planning before crime was committed. Their Lordships have held as under:-

> *"32. Following the law laid down in Narain Singh case, (1964)1 CriLJ 730 the Apex Court in State of Maharashtra v. Sukhdev Singh (1992 CriLJ 3454) further dealt with the question whether a statement*

recorded under Section 313 of the Cr.P.C. can constitute the sole basis for conviction and recorded a finding that the answers given by the accused in response to his examination under Section 313 of the Cr.P.C. of 1973 can be taken into consideration in such an inquiry or trial though such a statement strictly is not evidence and observed in paragraph 52 thus: (Sukhdev Singh case SCC p. 744)

> *"52. Even on the first principle we see no reason why the Court could not act on the admission or confession made by the accused in the course of the trial or in his statement recorded under Section 313 of the Cr.P.C."*

It is thus well established in law that admission or confession of accused in the statement under Section 313 of the Cr.P.C. recorded in the course of trial can be acted upon and the Court can rely on these confessions to proceed to convict him.

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38. Let us examine the judgments of this Court in relation to common intention and commission of crime by the members of an unlawful assembly. It is a settled principle of law that to show common intention to commit a crime it is not necessary for the prosecution to establish, as a matter of fact, that there was a pre-meeting of the minds and planning before the crime was committed.

39. In Surendra Chauhan vs. State of Madhya Pradesh [AIR 2000 SC 1436], this Court held that common intention can be developed on the spur of the moment. Also, under Section 34, a person must be physically present at the place of actual commission of the crime. The essence is the simultaneous consensus of the minds of persons participating in the criminal act and such consensus can be developed on the spot.

> *40. It is not mandatory for the prosecution to bring direct evidence of common intention on record and this depends on the facts and circumstances of the case. The intention could develop even during the course of occurrence. In this regard reference can be made to Ramaswamy Ayhangar vs. State of Tamil Nadu [(1976) 3 SCC 779] and Rajesh Govind Jagesh vs. State of Maharashtra [(1999) 8 SCC 428].*
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> *41. In other words, to apply Section 34, two or more accused should be present and two factors must be established i.e. common intention and participation of the accused in the crime. Section 34 moreover, involves vicarious liability and therefore, if intention is proved but no overt act is committed, the section can still be invoked. In the present case all the 4 accused had gone together armed with three guns and one sphere and after shouting, making their minds clear, had fired at Bahadur Singh causing gun injuries and sphere injury on his shoulder."*

25. Their Lordships of the Supreme Court in ***Ramnaresh and others vs. State of Chhattisgarh, AIR 2012 Supreme Court 1357*** have held that object of examination of accused under Section 313 Cr.P.C. is to give opportunity to accused to explain circumstances appearing against him as well as put forward his defence. Their Lordships have held as under:-

> *"22. It is a settled principle of law that the obligation to put material evidence to the accused under Section 313 Cr.P.C. is upon the Court. One of the main objects of recording of a statement under this provision of the Cr.P.C. is to give an opportunity to the accused to explain the circumstances appearing against him as well as to put forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused*

takes benefit of this opportunity, then his statement made under Section 313 Cr.P.C., in so far as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law."

26. Their Lordships of the Supreme Court in ***Munish Mubar vs. State of Haryana, AIR 2013 Supreme Court 912*** have held that recovery made on disclosure by accused is not affected by the fact that panch witnesses were all police personnel. Their Lordships have held as under:-

"25. In view of the aforesaid discussion, it is evident that in spite of the fact that in case there is no independent witness of recoveries and panch witnesses are only police personnel, it may not affect the merits of the case. In the instant case, the defence did not ask this issue in the cross-examination to Inspector Shamsher Singh (PW.21) as why the independent person was not made the panch witness. More so, it was the duty of the appellant to furnish some explanation in his statement under Section 313. Cr.PC., as under what circumstances his car had been parked at the Delhi Airport and it remained there for 3 hours on the date of occurrence. More so, the call records of his telephone make it evident that he was present in the vicinity of the place of occurrence and under what circumstances recovery of incriminating material had been made on his voluntary disclosure statement. Merely making a bald statement that he was innocent and recoveries had been planted and the call records were false and fabricated documents, is not enough as none of the said allegations made by the appellant could be established.

In view of the above, we do not find any force in this appeal. The appeal is therefore, dismissed accordingly."

27. According to CT scan report, multiple small pellets were seen in bilateral frontal lobes and in soft tissue of scalp in frontal region and burst fracture of frontal bone was seen on right side with fracture line extending superiorly towards left side. CT scan report is part of admission sheet of Jatinder Ex.PW23/A.

28. In the present case, the examination-in-chief of PW-1 Balwinder Kumar was recorded on 10.10.2011. According to zimni order dated 10.10.2011, cross-examination of Balwinder Kumar was deferred on request of junior counsel as Mr. Pawan Changotra, Advocate had gone to Chandigarh. He was bound down for 28.10.2011. On 28.10.2011 Balwinder Kumar was present for cross-examination but an adjournment was requested by counsel for the accused. The witness was bound down for 28.11.2011. On 28.11.2011 PW-1 Balwinder Kumar was present for cross-examination but accused were not produced by the jail authorities. The witness was bound down for 13.12.2011. Thereafter the matter was unnecessarily adjourned on flimsy grounds enabling the accused to win over PW-1 Balwinder Kumar. The trial Court should have completed cross-examiantion of PW-1 Balwinder Kumar on day-to-day basis instead of postponing it for about six months. Though PW-1 Balwinder Kumar had categorically deposed in his examination-in-chief that he had seen accused firing at the deceased, he turned hostile during his cross-examination recorded on 20.04.2012 due to considerable long time given to record his cross-examination. PW-10 HC Jagjit Singh, PW-11 HC Gurjit Singh and PW-12 HC Sunil Kumar have admitted the incident. It is settled law that entire statement of hostile witness is not effaced. The prosecution can rely on the portion which supports its case.

29. Their Lordships of the Supreme Court in ***Rameshbhai Mohanbhai Koli and others vs. State of Gujarat, (2011) 11 Supreme Court Cases 11,*** have held that the evidence of prosecution witness cannot be rejected in toto merely because prosecution chose to treat him as hostile and cross-examined him. Evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version was found to be dependable on a careful scrutiny thereof. Their Lordships have held as under:-

> "16. It is settled *legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (vide Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848 and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).*
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> *17. In State of U.P. v. Ramesh Prasad Misra and Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia and Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb and Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Naraian Shukla*

v. Daroga Singh and Ors., AIR 2008 SC 320 and Subbu Singh v. State, (2009) 6 SCC 462.

18) In C. Muniappan & Ors. vs. State of Tamil Nadu, JT 2010 (9) SC 95, this Court, after considering all the earlier decisions on this point, summarized the law applicable to the case of hostile witnesses as under:

> *"83... the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.*
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> *84. In the instant case, some of the material witnesses i.e. B. Kamal (PW.86); and R. Maruthu (PW.51) turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law. Some omissions, improvements in the evidence of the PWs have been pointed out by the learned Counsel for the appellants, but we find them to be very trivial in nature.*
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> *85. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the*

*statements of witnesses. (vide Sohrab and Anr. v. The State of M.P., AIR 1972 SC 2020; State of U.P. v. M.K. Anthony, AIR 1985 SC 48; Bharwada Bhogini Bhai Hirji Bhai v. State of Gujarat, AIR 1983 SC 753; State of Rajasthan v. Om Prakash, AIR 2007 SC 2257; Prithu @ Prithi Chand and Anr. v. State of Himachal Pradesh, (2009) 11 SCC 588; State of U.P. v. Santosh Kumar and Ors., (2009) 9 SCC 626 and State v. Saravanan and Anr, AIR 2009 S*C 151)".

30. Their Lordships of the Supreme Court in ***Himanshu alias Chintu vs. State (NCT of Delhi), (2011) 2 Supreme Court Cases 36*** have held that evidence of hostile witness remains admissible evidence and it is open to Court to rely upon dependable part of that evidence, which is found to be acceptable and duly corroborated by some other reliable evidence available on record. Their Lordships have held as under:-

"30. In Prithi v. State of Haryana decided recently, one of us (R.M. Lodha, J.) noticed the legal position with regard to a hostile witness in the light of Section 154 of the Evidence Act, 1872 and few decisions of this Court as under :-

"25. Section 154 of the Evidence Act, 1872 enables the court in its discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Some High Courts had earlier taken the view that when a witness is cross- examined by the party calling him, his evidence cannot be believed in part and disbelieved in part, but must be excluded altogether. However this view has not found acceptance in later decisions. As a matter of fact, the decisions of this Court are to the contrary. In Khujji @ Surendra Tiwari v. State of

M.P. [(1991) 3 SCC 627], a three-Judge Bench of this Court relying upon earlier decisions of this Court in Bhagwan Singh v. State of Haryana [(1976) 1 SCC 389], Sri Rabindra Kumar Dey v. State of Orissa [(1976 4 SCC 233] and Syad Akbar v. State of Karnataka [(1980) 1 SCC 30] reiterated the legal position that: (Khujji case, SCC p. 635, para 6) (2010) 8 SCC 536.

> *"6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof."*

26. In Koli Lakhmanbhai Chanabhai v. State of Gujarat [(1999) 8 SCC 624], this Court again reiterated that testimony of a hostile witness is useful to the extent to which it supports the prosecution case. It is worth noticing that in Bhagwan Singh this Court held that when a witness is declared hostile and cross-examined with the permission of the court, his evidence remains admissible and there is no legal bar to have a conviction upon his testimony, if corroborated by other reliable evidence.

27. The submission of the learned Senior Counsel for the appellant that the testimony of PW 6 should be either accepted as it is or rejected in its entirety, thus, cannot be accepted in view of the settled legal position as noticed above."

> *31. The aforesaid legal position leaves no manner of doubt that the evidence of a hostile witness remains the admissible evidence and it is open to the court to rely upon the dependable part of that evidence which is found to be acceptable and duly corroborated by some other reliable evidence available on record. The High Court and the trial court, thus, cannot be said to have erred in acting on the evidence of PW-11 which was duly corroborated by the other reliable evidence on record. We find no flaw in the judgment of the High Court affirming the conviction of A-2 and A-3 under Section 302 read with Section 34 IPC."*

31. Their Lordships of the Supreme Court in ***Haradhan Das vs. State of West Bengal, (2013) 2 Supreme Court Cases 197*** have held that statement of witness who has been declared hostile by the prosecution is neither inadmissible nor is it of no value in its entirety. The statement, particularly the examination-in-chief, insofar as it supports the case of the prosecution is admissible and can be relied upon by the Court. Their Lordships have held as under:-

> *"15. It is a settled principle of law that the statement of a witness who has been declared hostile by the prosecution is neither inadmissible nor is it of no value in its entirety. The statement, particularly the examination-in-chief, in so far as it supports the case of the prosecution is admissible and can be relied upon by the Court. It will be useful at this stage to refer to the judgment of this Court in the case of Bhajju @ Karan v. State of Madhya Pradesh [(2012) 4 SCC 327] wherein this Court, after discussing the law in some elaboration, declared the principle as follows: -*
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> > *"33. As already noticed, none of the witnesses or the authorities involved in the recording of the*

dying declaration had turned hostile. On the contrary, they have fully supported the case of the prosecution and have, beyond reasonable doubt, proved that the dying declaration is reliable, truthful and was voluntarily made by the deceased. We may also notice that this very judgment, Munnu Raja (1976) 3 SCC 104 relied upon by the accused itself clearly says that the dying declaration can be acted upon without corroboration and can be made the basis of conviction.

34. Para 6 of the said judgment reads as under: (Munnu Raja case, SCC pp. 106-07)

> *"6. … It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated (see Khushal Rao v. State of Bombay AIR 1948 SC 22). The High Court, it is true, has held that the evidence of the two eyewitnesses corroborated the dying declarations but it did not come to the conclusion that the dying declarations suffered from any infirmity by reason of which it was necessary to look out for corroboration."*

35. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the appellant-accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement

recorded under Section 161 CrPC, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution.

36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Evidence Act enables the court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The courts may rely upon so much of the testimony which supports the case of the prosecution and is

> *corroborated by other evidence. It is also now a settled canon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the following cases:*
>
> *a. Koli Lakhmanbhai Chanabhai v. State of Gujarat (1999) 8 SCC 624*
>
> *b. Prithi v. State of Haryana (2010) 8 SCC 536*
>
> *c. Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1*
>
> *d. Ramkrushna v. State of Maharashtra (2007) 13 SCC 525".."*

32. The same principles have been reiterated by the Supreme Court in ***Krishan Chander vs. State of Delhi, (2016) 3 Supreme Court Cases 108*** as under:-

> *"20. He has submitted that the High Court has rightly re-appreciated the evidence of the complainant-Jai Bhagwan and other prosecution witnesses and concurred with the findings recorded on the charges. Further it was submitted by him that the trial court while appreciating the evidence of the complainant-Jai Bhagwan relied upon the decision of this Court in the case of Sat Paul v. Delhi Administration[6], paragraphs 42 and 52 of which decision in recording the finding on the charges against the appellant, are extracted hereunder:*
>
> > *"42. The fallacy underlying this view stems from the assumption that the only purpose of cross-examination of a witness is to discredit him; it ignores the hard truth that another equally important object of cross- examination is to elicit admissions of facts which would help build the case of the cross-examiner. When a party with the*

leave of the court, confronts his witness with his previous inconsistent statement, he does so in the hope that the witness might revert to what he had stated previously. If the departure from the prior statement is not deliberate but is due to faulty memory or a like cause, there is every possibility of the witness veering round to his former statement. Thus, showing faultness of the memory in the case of such a witness would be another object of cross- examining and contradicting him by a party calling the witness. In short, the rule prohibiting a party to put questions in the manner of cross- examination or in a leading form to his own witness is relaxed not because the witness has already forfeited all right to credit but because from his antipathetic altitude or otherwise, the court feels that for doing justice, his evidence will be more fully given, the truth more effectively extricated and his credit more adequately tested by questions put in a more pointed, penetrating and searching way.

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52. From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of

> *the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto."*

33. Their Lordships of the Supreme Court in ***Ramesh and others vs. State of Haryana, (2017) 1 Supreme Court Cases 529*** have held that witnesses turning hostile may be described as "culture of compromise". Their Lordships have discussed factors and reasons for witnesses turning hostile. Their Lordships have held as under:-

> *"39. We find that it is becoming a common phenomenon, almost a regular feature, that in criminal cases witnesses turn hostile. There could be various reasons for this behaviour or attitude of the witnesses. It is possible that when the statements of such witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 by the police during investigation, the Investigating Officer forced them to make such statements and, therefore, they resiled therefrom while deposing in the Court and justifiably so. However, this is no longer the reason in most of the cases. This trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary considerations.*
>
> *40. In some of the judgments in past few years, this*

Court has commented upon such peculiar behaviour of witnesses turning hostile and we would like to quote from few such judgments. In Krishna Mochi v. State of Bihar, this Court observed as under:

> *"31. It is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power."*

41. Likewise, in Zahira Habibullah v. State of Gujarat, this Court highlighted the problem with following observations:

> *"40. "Witnesses", as Bentham said: "are the eyes and ears of justice". Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control, to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of*

frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface..... Broader public and social interest require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State representing by their presenting agencies do not suffer… There comes the need for protecting the witnesses. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth presented before the Court and justice triumphs and that the trial is not reduced to mockery.....

41. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like, caste, creed, religion, political belief or ideology. Every State is supposed to know these

fundamental requirements and this needs no retaliation (sic repetition). We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the "TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies."

42. Likewise, in Sakshi v. Union of India, the menace of witnesses turning hostile was again described in the following words:

"32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the

questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) ofsection 327 Cr.P.C. should also apply in inquiry or trial of offences under Section 354 and 377 IPC."

43. *In State v. Sanjeev Nanda, the Court felt constrained in reiterating the growing disturbing trend:*

"99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby, eroding people's faith in the system.

100. This court in State of U.P. v. Ramesh Mishra and Anr. [AIR 1996 SC 2766] held that it is equally settled law that the evidence of hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In K. Anbazhagan v. Superintendent of

Police and Anr., (AIR 2004 SC 524), this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court and they found the accused guilty.

101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1 and in Zahira Habibullah Shaikh v. State of Gujarat, AIR 2006 SC 1367, had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the Courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 of the IPC imposes punishment for giving false evidence but is seldom invoked."

44. On the analysis of various cases, following reasons can be discerned which make witnesses

retracting their statements before the Court and turning hostile:

"(i) Threat/intimidation.

(ii) Inducement by various means.

(iii) Use of muscle and money power by the accused.

(iv) Use of Stock Witnesses.

(v) Protracted Trials.

(vi) Hassles faced by the witnesses during investigation and trial.

(vii) Non-existence of any clear-cut legislation to check hostility of witness."

45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said: "witnesses are the eyes and ears of justice". When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in Zahira Habibullah's case as well.

46. Justifying the measures to be taken for witness protection to enable the witnesses to depose truthfully and without fear, Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003 has remarked as under:

"11.3 Another major problem is about safety of

witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise…Time has come for a comprehensive law being enacted for protection of the witness and members of his family."

47. Almost to similar effect are the observations of Law Commission of India in its 198th Report[11], as can be seen from the following discussion therein:

"The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Indian Penal code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be

no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Indian Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection."

48. Apart from the above, another significant reason for witnesses turning hostile may be what is described as 'culture of compromise'. Commenting upon such culture in rape trials, Pratiksha Bakshi has highlighted this problem in the following manner:

"During the trial, compromise acts as a tool in the hands of defence lawyers and the accused to pressurise complainants and victims to change their testimonies in a courtroom. Let us turn to a recent case from Agra wherein a young Dalit woman was gang-raped and the rapist let off on bail. The accused threatened to rape the victim again if she did not compromise. Nearly a year after she was raped, she committed suicide. While we find that the judgment records that the victim committed suicide following the pressure to compromise, the judgment does not criminalise the pressure to compromise as criminal intimidation of the victim and her family. The normalising function of the socio-legal category of compromise converts terror into a bargain in a context where there is no witness protection programme. This often accounts for why prosecution witnesses

routinely turn hostile by the time the case comes on trial, if the victim does not lose the will to live.

In other words, I have shown how legality is actually perceived as disruptive of sociality; in this instance, a sociality that is marked by caste based patriarchies, such that compromise is actively perceived, to put it in the words of a woman judge of a district court, as a mechanism for 'restoring social relations in society'."

49. In this regard, two articles by Daniela Berti delve into a sociological analysis of hostile witnesses, noting how village compromises (and possibly peer pressure) are a reason for witnesses turning hostile. In one of his articles, he writes:

"For reasons that cannot be explained here, even the people who initiate a legal case may change their minds later on and pursue non-official forms of compromise or adjustment. Ethnographic observations of the cases that do make it to the criminal courtroom thus provide insight into the kinds of tensions that arise between local society and the state judicial administration. These tensions are particularly palpable when witnesses deny before the judge what they allegedly said to the police during preliminary investigations. At this very moment they often become hostile. Here I must point out that the problem of what in common law terminology is called "hostile witnesses" is, in fact, general in India and has provoked many a reaction from judges and politicians, as well as countless debates in newspaper editorials. Although this problem assumes particular relevance at high-profile, well-publicized trials,

where witnesses may be politically pressured or bribed, it is a recurring everyday situation with which judges and prosecutors of any small district town are routinely faced. In many such cases, the hostile behavior results from various dynamics that interfere with the trial's outcome – village or family solidarity, the sharing of the same illegal activity for which the accused has been incriminated (as in case of cannabis cultivation), political interests, family pressures, various forms of economic compensation, and so forth. Sometimes the witness becomes "hostile" simply because police records of his or her earlier testimony are plainly wrong. Judges themselves are well aware that the police do write false statements for the purpose of strengthening their cases. Though well known in judicial milieus, the dynamics just described have not yet been studied as they unfold over the course of a trial. My research suggests, however, that the witness's withdrawal from his or her previous statement is a crucial moment in the trial, one that clearly encapsulates the tensions arising between those involved in a trial and the court machinery itself."

"In my fieldwork experiences, witnesses become "hostile" not only when they are directly implicated in a case filed by the police, but also when they are on the side of the plaintiff's party. During the often rather long period that elapses between the police investigation and the trial itself, I often observed, the party who has lodged the complaint (and who becomes the main witness) can irreparably compromise the case with the other party by means of compensation, threat or

blackmail."

34. The recovery of empty cartridges recovered from the scene matched with pistols recovered from the accused as per ballistic evidence. Both accused Abhijeet Singh and Sanjeev Kumar alias Babba had reached the spot together. Both the accused have fired shots at deceased Jatinder alias Raju Chikna in furtherance of common intention.

35. Their Lordships of the Supreme Court in ***Krishnan and another vs. State represented by Inspector of Police, (2003) 7 Supreme Court Cases 56*** have held that the applicability and rationale of common intention depends upon facts and circumstances of each case. Acts of all accused need not be the same or identically similar. They must be actuated by one and the same common intention. Their Lordships have also explained interrelation between "that act" and "the act". Their Lordships have held as under:-

> *"28. It is to be seen whether the accused persons in furtherance of their common intention caused the death of the deceased on the alleged date, time and place. A charge under Section 34 of IPC presupposes the sharing of a particular intention by more than one person to commit a criminal act. The dominant feature of Section 34 is the element of participation in actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert. There is a prearranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in Section 34 of the IPC. The existence of common intention is to be the basis of liability. That is why the prior concert and the prearranged plan is the foundation of common intention*

to establish liability and guilt.

29. Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of common intention, each person is liable for the result of them all as if he had done them himself; for "that act" and "the act" in the latter part of the section must include the whole section covered by a "criminal act" in the first part, because they refer to it. Constructive liability under Section 34 may arise in three well- defined cases. A person may be constructively liable for an offence which he did not actually commit by reason of:

(1) the common intention of all to commit such an offence (Section 34)

(2) his being a member of a conspiracy to commit such an offence (Section 120A)

(3) his being a member of an unlawful assembly, the members whereof knew that an offence was likely to be committed (Section 149). Section 34 is framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. The reason why all are deemed guilty in such cases is, that the presence of accomplices gives encouragement, support and protection to the person actually committing the act. The provision embodies the common-sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually.

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31. Applicability of Section 34 depends upon the facts and circumstances of each case. As such no hard and fast rule can be laid down as to the applicability or non-applicability of Section 34. For applicability of the

section it is not necessary that the acts of several persons charged with commission of an offence jointly, must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

36. Their Lordships of the Supreme Court in ***Balu alias Bala Subramaniam and another vs. State (UT of Pondicherry), (2016) 15 Supreme Court Cases 471*** have laid down principle when Section 34 IPC can be invoked. Their Lordships have held as under:-

"11. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that:- (i) there was common intention on the part of several persons to commit a particular crime and (ii) the crime was actually committed by them in furtherance of that common intention. The essence of liability under Section 34 IPC is simultaneous conscious mind of persons participating in the criminal action to bring about a particular result. Minds regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. Common intention implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Common intention is an intention to commit the crime actually committed and each accused person can be convicted of that crime, only if he has participated in that common intention.

12. The classic case on the subject is the judgment of the Privy Council in Mahbub Shah v. Emperor, AIR 1945 PC 118, wherein it was held as under:-

"...Section 34 lays down a principle of joint liability in the doing of a criminal act. The section

does not say "the common intentions of all" nor does it say "an intention common to all". Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of Section 34successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."

(emphasis supplied)

Reiterating the above principles laid down by the Privy Council in Mahbub Shah's case, in Shankerlal Kacharabhai and Others vs. State of Gujarat, AIR 1965 SC 1260, this Court held that the criminal act mentioned in Section 34 IPC is the result of the concerted action of more than one person and if the said result was reached in furtherance of the common intention, each person is liable for the result as if he had done it himself.

13. In Ramesh Singh v. State of A.P., (2004) 11 SCC 305, this Court held as under:-

"12. … As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held guilty. By introducing Section 34 in the Penal Code the legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principle of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered from the manner in which the accused arrived at the scene and mounted the attack, the determination and concert with which the attack was made, and from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion

whether the accused had the common intention to commit an offence of which they could be convicted. (See Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra, (1970) 1 SCC 696)"

(emphasis supplied)

14. Common intention is seldom capable of direct proof, it is almost invariably to be inferred from proved circumstances relating to the entire conduct of all the persons and not only from the individual act actually performed. The inference to be drawn from the manner of the origin of the occurrence, the manner in which the accused arrived at the scene and the concert with which attack was made and from the injuries caused by one or some of them. The criminal act actually committed would certainly be one of the important factors to be taken into consideration but should not be taken to be the sole factor.

15. Under Section 34 IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. The question whether there was any common intention or not depends upon the inference to be drawn from the proving facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted."

37. Their Lordships of the Supreme Court in ***Bablu Kumar and others vs. State of Bihar and another, (2015) 8 Supreme Court Cases 787*** have held that the Presiding Judge has to play proactive role of Court to

ensure fair trial. The Court cannot be a silent spectator or mute observer when it presides over trial. It is duty of Court to see that neither prosecution nor accused play truancy with criminal trial or corrode sanctity of the proceedings. The law does not countenance a "mock trial". Their Lordships have held as under:-

> *"1. The pivotal issues, quite disturbing and disquieting, that emanate in this appeal by special leave for scrutiny, deliberation and apposite delineation, fundamentally pertain to the role of the prosecution and the duty of the court within the requisite paradigm of fair trial which in the ultimate conceptual eventuality results in appropriate stability of criminal justice dispensation system. The attitude of callousness and nonchalance portrayed by the prosecution and the total indifferent disposition exhibited by the learned trial Judge in shutting out the evidence and closing the trial after examining a singular formal witness, PW 1, in a trial where the accused persons were facing accusations for the offences punishable under* ***Sections 147, 148, 149, 341, 342 and 302 of the Penal Code, 1860*** *(IPC), which entailed an acquittal under Section 232 of the Criminal Procedure Code, 1973 (CrPC), are really disconcerting; and indubitably cause discomfort to the judicial conscience. It seems that everyone concerned with the trial has treated it as a farce where the principal protagonists compete with each other for gaining supremacy in the race of closing the case unceremoniously, burying the basic tenets of fair trial, and abandoning one's duty to serve the cause of justice devoutly. It is a case where the prosecution has played truant and the learned trial Judge, with apathy, has exhibited impatience.*
>
> *2. Fortunately, the damage done by the trial court*

has been rectified by the High Court in exercise of the revisional jurisdiction under Section 401 CrPC; but what is redemption for the conception of the fair trial has caused dissatisfaction to the accused persons, for they do not intend to face the retrial. It is because at one point of time, the High Court had directed1 for finalisation of the trial within a fixed duration and the learned trial Judge, in all possibility, harboured the impression that even if the prosecution witnesses had not been served the notice to depose in court, and the prosecution had not taken any affirmative steps to make them available for adducing evidence in court, yet he must conclude the trial by the target date as if it is a mechanical and routine act. The learned trial Judge, as it appears to us, has totally forgotten that he could have asked for extension of time from the High Court, for the High Court, and we are totally convinced, could never have meant to conclude the trial either at the pleasure of the prosecution or the desire of the accused.

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8. On a scrutiny of the orders passed by the learned trial Judge from time to time, we find that the learned trial Judge has really not taken pains to verify whether the summons had really been served on the witnesses or not. The High Court has rightly observed that the trial court has also not tried to verify from the record whether the warrants had been executed or not. As is manifest, he had directed the prosecution to produce the witnesses and mechanically recorded that the witnesses were not present and proceeded to direct the prosecution to keep them present. Eventually, as we have stated earlier, the trial Judge posted the matter to 23-5-2008 and passed an order under Section 232 CrPC.

9. The question that arises for consideration is whether under these circumstances the High Court while

dealing with the revision under Section 401 CrPC should have interfered and directed for the retrial of the case.

10. In this regard, we may refer with profit to the decision in K. Chinnaswamy Reddy v. State of A.P ***AIR 1962 SC 1788****, wherein a three-Judge Bench while dealing with the power of the High Court for directing retrial has ruled thus: (AIR pp. 1791-92, para 7)*

> *"7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice.* ***Sub-section (4) of Section 439*** *forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision.*

> *These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law. These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of Section 439(4).”*

From the aforesaid decision, it is apparent that the High Court would be justified to interfere with an order of acquittal if the trial court has wrongly shut out the evidence which the prosecution wishes to produce. It is one of the instances given by the Court in the aforesaid verdict.

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17. In the present context, it is also necessary to appreciate the basic concept behind a fair trial. In Sidhartha Vashisht Alias Manu Sharma v. State (Nct Of Delhi) 2010 6 SCC 1 it has been stated that: ***(SCC pp. 79-80, para 197)***

> *“**197**. In the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places*

human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in ***Articles 20 and 21 of the Constitution*** *of India."*

(emphasis supplied)

18. *In* ***Rattiram v. State of M.P*** *2012 4 SCC 516 a three-Judge Bench has ruled thus: (****SCC p. 534****, para 39)*

"39. … Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism."

*And again: (****SCC p. 542****, para 62)*

"62. … Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury

signifying nothing."

*19. In this regard, it is apt to reproduce a passage from Natasha Singh v. Central Bureau Of Investigation (State). 2013 5 SCC 741 wherein it has been laid down: (**SCC p. 749**, para 16)*

> *"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."*

20. In J. Jayalalithaa v. State of Karnataka 2014 2 SCC 401 the Court dealing with the concept of a fair trial has opined that: (SCC pp. 414-15, para 29)

> *"29. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution."*

*21. The same principle has also been stated in **NHRC v. State of Gujarat** 2009 6 SCC 767, State Of Karnataka v. K. Yarappa Reddy. 1999 8 SCC 715, Ram Bali v.*

State Of U.P.2004 10 SCC 598, Karnel Singh v. State Of M.P. 1995 5 SCC 518 and Dayal Singh v. State of Uttaranchal 2012 8 SCC 263.

22. Keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court, it can irrefragably be stated that the court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. The law does not countenance a "mock trial". It is a serious concern of society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The court is under the legal obligation to see that the witnesses who have been cited by the prosecution are produced by it or if summons are issued, they are actually served on the witnesses. If the court is of the opinion that the material witnesses have not been examined, it should not allow the prosecution to close the evidence. There can be no doubt that the prosecution may not examine all the material witnesses but that does not necessarily mean that the prosecution can choose not to examine any witness and convey to the court that it does not intend to cite the witnesses. The Public Prosecutor who conducts the trial has a statutory duty to perform. He cannot afford to take things in a light manner. The court also is not expected to accept the version of the prosecution as if it is sacred. It has to

apply its mind on every occasion. Non-application of mind by the trial court has the potentiality to lead to the paralysis of the conception of fair trial."

38. Their Lordships of the Supreme Court in ***State (NCT of Delhi) vs. Shiv Kumar Yadav and another, (2016) 2 Supreme Court Cases 402*** have held that fairness of trial should not only be from point of view of accused, but also from point of view of victim and society. Their Lordships have held as under:-

"11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross- examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.

12. In Rajaram case, the complainant was examined but he did not support the prosecution case. On account

of subsequent events he changed his mind and applied for recall under Section 311 Cr.P.C. which was declined by the trial court but allowed by the High Court. This Court held such a course to be impermissible, it was observed :

> *"13. .. In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 CrPC, as well as Section 138 of the Evidence Act. The same are extracted hereunder:*
>
> ***Section 311, Code of Criminal Procedure***
>
> ***"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."*
>
> * * *
>
> ***Section 138, Evidence Act***
>
> ***"138. Order of examinations**.—Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.*
>
> *The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.*
>
> ***Direction of re-examination.**—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court,*

introduced in re-examination, the adverse party may further cross-examine upon that matter."

14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision

is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re- examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

(emphasis in original)

13. After referring to earlier decisions on the point, the Court culled out following principles to be borne in mind :

"17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the

case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not

brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 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 care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

14. In Hoffman Andreas case, the counsel who was conducting the case was ill and died during the progress

of the trial. The new counsel sought recall on the ground that the witnesses could not be cross-examined on account of illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses. It was observed :

> *"6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."*

39. Their Lordships of the Supreme Court in ***Vinod Kumar vs. State of Punjab, (2015)3 Supreme Court Cases 220*** have held that calling

of a witness for cross-examination after a long span of time is anathema to concept of proper and fair trial. Their Lordships have summerised the duty of Court which are required to be taken into consideration while conducting trial. Their Lordships have held as under:-

> *"57. Before parting with the case we are constrained to reiterate what we have said in the beginning. We have expressed our agony and anguish the manner in which trials in respect of serious offences relating to corruption are being conducted by the trial courts.*
>
> *57.1 Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of.*
>
> *57.2 As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurize the witness and to gain over him by adopting all kinds of tactics.*
>
> *57.3 There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The Court has a sacred duty to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of rule of law and eventually turn such trials to a farce. It is legally impermissible and jurisprudentially abominable. The trial courts are*

expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons.

57.4 In fact, it is not all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in- chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial.

57.5 The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute."

40. Their Lordships of the Supreme Court in ***Ajay Singh and another vs. State of Chhattisgarh and another, (2017) 3 Supreme Court Cases 330*** have held that a trial Judge in a criminal case has immense responsibility as he has a lawful duty to record the evidence in the

prescribed manner keeping in mind the command postulated in Section 309 Cr.P.C. and pronounce the judgment as provided under the Cr.P.C. Their Lordships have held as under:-

> *"29. The case at hand constrains us to say that a trial Judge should remember that he has immense responsibility as he has a lawful duty to record the evidence in the prescribed manner keeping in mind the command postulated in Section 309 of the CrPC and pronounce the judgment as provided under the Code. A Judge in charge of the trial has to be extremely diligent so that no dent is created in the trial and in its eventual conclusion. Mistakes made or errors committed are to be rectified by the appellate court in exercise of "error jurisdiction". That is a different matter. But, when a situation like the present one crops up, it causes agony, an unbearable one, to the cause of justice and hits like a lightning in a cloudless sky. It hurts the justice dispensation system and no one, and we mean no one, has any right to do so. The High Court by rectifying the grave error has acted in furtherance of the cause of justice. The accused persons might have felt delighted in acquittal and affected by the order of rehearing, but they should bear in mind that they are not the lone receivers of justice. There are victims of the crime. Law serves both and justice looks at them equally. It does not tolerate that the grievance of the victim should be comatosed in this manner."*

41. Their Lordships of the Supreme Court in ***Doongar and others vs. State of Rajasthan, (2019) 1 Supreme Court Cases (Crl) 410*** have held that in criminal case, trial Court has to be mindful that for protection of witness and also in interest of justice mandate of Section 309 requiring expeditious disposal of proceedings by examining all witnesses on

continuous basis unless Court finds adjournment of same beyond following day to be necessary for reasons to be recorded, need to be strictly complied with. Their Lordships have further held that unless this is done there is every chance of witnesses succumbing to pressure/threat of accused. Their Lordships have held as under:-

> *"3. Before parting with this matter, we must record a disturbing feature in the conduct of the trial of the present case. After recording examination-in-chief of the star witness, PW-14 Prabhu Singh, on 13th April, 2010, the matter was adjourned on the request of defence counsel to 25th August, 2010 i.e. for about more than four months. After that, part evidence of the witnesses was recorded on 24th September, 2010 and the matter was again adjourned to 11th October, 2010. Before that, four witnesses of the same family in their statements recorded on 10th April, 2010 had become hostile.*
>
> *4. In a criminal case of this nature, the trial court has to be mindful that for the protection of witness and also in the interest of justice the mandate of Section 309 of the Cr.P.C. has to be complied with and evidence should be recorded on continuous basis. If this is not done, there is every chance of witnesses succumbing to the pressure or threat of the accused.*
>
> *5. This aspect of the matter has received the attention of this Court on number of occasions earlier. In State of U.P. versus Shambhu Nath Singh and Others1 this Court observed it was a pity that the Sessions Court adjourned the matter for a long interval after commencement of evidence, contrary to the mandate of Section 309 of the Cr.P.C. Once examination of witnesses begins, the same has to be continued from day-to-day unless evidence of the available witnesses is recorded, except when adjournment beyond the*

following day has to be granted for reasons recorded. This Court observed:

> *"12. Thus, the legal position is that once examination of witnesses started, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are "special reasons", which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court.*
>
> *13. Now, we are distressed to note that it is almost a common practice and regular occurrence that trial courts flout the said command with impunity. Even when witnesses are present, cases are adjourned on far less serious reasons or even on flippant grounds. Adjournments are granted even in such situations on the mere asking for it. Quite often such adjournments are granted to suit the convenience of the advocate concerned. We make it clear that the legislature has frowned at granting adjournments on that ground. At any rate inconvenience of an advocate is not a "special reason" for bypassing the mandate of Section 309 of the Code.*
>
> *14. If any court finds that the day-to-day examination of witnesses mandated by the legislature cannot be complied with due to the non-cooperation of the accused or his counsel the court can adopt any of the measures indicated in*

the sub-section i.e. remanding the accused to custody or imposing cost on the party who wants such adjournments (the cost must be commensurate with the loss suffered by the witnesses, including the expenses to attend the court). Another option is, when the accused is absent and the witness is present to be examined, the court can cancel his bail, if he is on bail (unless an application is made on his behalf seeking permission for his counsel to proceed to examine the witnesses present even in his absence provided the accused gives an undertaking in writing that he would not dispute his identity as the particular accused in the case).

15. The time-frame suggested by a three-Judge Bench of this Court in Raj Deo Sharma v. State of Bihar2 is partly in consideration of the legislative mandate contained in Section 309(1) of the Code. This is what the Bench said on that score: (SCC p. 516, para 16)

> *"16. The Code of Criminal Procedure is comprehensive enough to enable the Magistrate to close the prosecution if the prosecution is unable to produce its witnesses in spite of repeated opportunities. Section 309(1) CrPC supports the above view as it enjoins expeditious holding of the proceedings and continuous examination of witnesses from day to day. The section also provides for recording reasons for adjourning the case beyond the following day."*
>
> *xxx xxx xxx*

17. We believe, hopefully, that the High Courts would have issued the circular desired by the Apex

Court as per the said judgment. If the insistence 2 (1998) 7 SCC 507 made by Parliament through Section 309 of the Code can be adhered to by the trial courts there is every chance of the parties cooperating with the courts for achieving the desired objects and it would relieve the agony which witnesses summoned are now suffering on account of their non-examination for days.

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19. In some States a system is evolved for framing a schedule of consecutive working days for examination of witnesses in each sessions trial to be followed. Such schedule is fixed by the court well in advance after ascertaining the convenience of the counsel on both sides. Summons or process would then be handed over to the Public Prosecutor in charge of the case to cause them to be served on the witnesses. Once the schedule is so fixed and witnesses are summoned the trial invariably proceeds from day to day. This is one method of complying with the mandates of the law. It is for the presiding officer of each court to chalk out any other methods, if any, found better for complying with the legal provisions contained in Section 309 of the Code. Of course, the High Court can monitor, supervise and give directions, on the administration side, regarding measures to conform to the legislative insistence contained in the above section."

6. The above decision has been repeatedly followed. In Mohd.Khalid versus State of W.B. 3, this Court noted how adjournment can result in witnesses being won over. It was observed:

"54. Before parting with the case, we may point out that the Designated Court deferred the cross-

examination of the witnesses for a long time. That is a feature which is being noticed in many cases. Unnecessary adjournments give a scope for a grievance that the accused persons get a time to get over the witnesses. Whatever be the truth in this allegation, the fact remains that such adjournments lack the spirit of Section 309 of the Code. When a witness is available and his examination-in-chief is over, unless compelling reasons are there, the trial court should not adjourn the matter on the mere asking. These aspects were highlighted by this Court in State of U.P. versus Shambhu Nath Singh and N.G. Dastane versus Shrikant S. Shivde … … …"

7. Again in Vinod Kumar versus State of Punjab 6 this Court noted how unwarranted adjournments during the trial jeopardise the administration of Justice. It was observed:

"3. The narration of the sad chronology shocks the judicial conscience and gravitates the mind to pose a question: Is it justified for any conscientious trial Judge to ignore the statutory command, not recognise "the felt necessities of time" and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracising the concept that a civilised and orderly society thrives on the rule of law which includes "fair trial" for the accused as well as the prosecution?

4. In the aforesaid context, we may recapitulate a passage from Gurnaib Singh v. State of Punjab (SCC p. 121, para 26)

"26. … we are compelled to proceed to reiterate the law and express our anguish

> *pertaining to the manner in which the trial was conducted as it depicts a very disturbing scenario. As is demonstrable from the record, the trial was conducted in an extremely haphazard and piecemeal manner. Adjournments were granted on a mere asking. The cross-examination of the witnesses were deferred without recording any special reason and dates were given after a long gap. The mandate of the law and the views expressed by this Court from time to time appears to have been totally kept at bay. The learned trial Judge, as is perceptible, seems to have ostracised from his memory that a criminal trial has its own gravity and sanctity. In this regard, we may refer with profit to the pronouncement in Talab Haji Hussain v. Madhukar Purshottam Mondkar8 wherein it has been stated that an accused person by his conduct cannot put a fair trial into jeopardy, for it is the primary and paramount duty of the criminal courts to ensure that the risk to fair trial is removed and trials are allowed to proceed smoothly without any interruption or obstruction."*

8. In spite of repeated directions of this Court, the situation appears to have remained unremedied. We hope that the Presiding Officers of the trial courts conducting criminal trials will be mindful of not giving such adjournments after commencement of the evidence in serious criminal cases. We are also of the view that it is necessary in the interest of justice that the eye-witnesses are examined by the prosecution at the earliest.

> *9. It is also necessary that the statements of eye-witnesses are got recorded during investigation itself under Section 164 of the Cr.P.C. In view of amendment to Section 164 Cr.P.C. by the Act No. 5 of 2009, such statement of witnesses should be got recorded by audio-video electronic means.*
>
> *10. To conclude:*
>
> *10.1 The trial courts must carry out the mandate of Section 309 of the Cr.P.C. as reiterated in judgments of this Court, inter alia, in State of U.P. versus Shambhu Nath Singh and Others, Mohd. Khalid versus State of W.B. and Vinod Kumar versus State of Punjab.*
>
> *10.2 The eye-witnesses must be examined by the prosecution as soon as possible.*
>
> *10.3 Statements of eye-witnesses should invariably be recorded under Section 164 of the Cr.P.C. as per procedure prescribed thereunder."*

42. Their Lordships of the Supreme Court in ***State of U.P. vs. Shambhu Nath Singh and others, (2001) 4 Supreme Court Cases 667*** have held that when witnesses are in Court, they will have to be examined except for "special reasons" which are to be recorded in the order of adjournment. Inconvenience of advocate is not a special reason. Their Lordships have held as under:-

> *"8. If the Sessions Judge had succumbed to the collusive tactics of the parties in serious offences like murder by acquitting the accused on the ground of want of evidence in spite of witnesses being present on a large number of dates the public confidence in the efficacy of the administration of criminal justice would be further drained considerably. In the present case, when PW-1 was examined in chief the court should have posted the case to the next working day for completion of cross-examination of that witness. What a pity when a Sessions*

Court was engaged in adjourning and again adjourning the case at long intervals in spite of the presence of eye witnesses willing to be examined fully. If the trial court thought it fit to close the evidence on a day when the witness could not be present, the accused would have had the last laugh.

9. We make it abundantly clear that if a witness is present in court he must be examined on that day. The court must know that most of the witnesses could attend the court only at heavy cost to them, after keeping aside their own avocation. Certainly they incur suffering and loss of income. The meagre amount of Bhatta (allowance) which a witness may be paid by the court is generally a poor solace for the financial loss incurred by him. It is a sad plight in the trial courts that witnesses who are called through summons or other processes stand at the doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be reformed by presiding officers of the trial courts and it can be reformed by every one provided the presiding officer concerned has a commitment to duty. No sadistic pleasure in seeing how other persons summoned by him as witnesses are stranded on account of the dimension of his judicial powers can be a persuading factor for granting such adjournments lavishly, that too in a casual manner.

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12. Thus, the legal position is that once examination of witnesses started the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the

court has to examine them. Only if there are special reasons, which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court.

13. Now, we are distressed to note that it is almost a common practice and regular occurrence that trial courts flout the said command with immunity. Even when witnesses are present cases are adjourned on far less serious reasons or even on flippant grounds. Adjournments are granted even in such situations on the mere asking for it. Quite often such adjournments are granted to suit the convenience of the advocate concerned. We make it clear that the legislature has frowned at granting adjournments on that ground. At any rate inconvenience of an advocate is not a special reason for bypassing the mandate of Section 309 of the Code.

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18. It is no justification to glide on any alibi by blaming the infrastructure for skirting the legislative mandates embalmed in Section 309 of the Code. A judicious judicial officer who is committed to his work could manage with the existing infrastructure for complying with such legislative mandates. The precept in the old homily that a lazy workman always blames his tools, is the only answer to those indolent judicial officers who find fault with the defects in the system and the imperfections of the existing infrastructure for his tardiness in coping up with such directions.

19. In some states a system is evolved for framing a schedule of consecutive working days for examination of witnesses in each sessions trial to be followed. Such schedule is fixed by the Court well in advance after ascertaining the convenience of the counsel on both

sides. Summons or process would then be handed over to the Public Prosecutor incharge of the case to cause them to be served on the witnesses. Once the schedule is so fixed and witnesses are summoned the trial invariably proceeds from day today. This is one method of complying with the mandates of the law. It is for the presiding officer of each court to chalk out any other methods, if any found better, for complying with the legal provisions contained in Section 309 of the Code. Of course, the High Court can monitor, supervise and give directions, on the administration side, regarding measures to conform to the legislative insistence contained in the above section.

20. We have no doubt that in this case a miscarriage of justice has occasioned due to the failure of the trial court to comply with the mandatory directions contained in the Code. Criminal justice cannot be allowed to be defeated solely on account of inaction or lapses of the court in adhering to the mandates of law. When the State of UP moved the High Court of Allahabad, in this case, seeking leave to appeal, the above aspect should have been considered by the learned Judges and set right the grave miscarriage of justice occasioned on account of flouting the directions of law.

21. We, therefore, allow this appeal and set aside the order of the acquittal passed by the trial court. We direct the trial court to proceed with the further examination of PW-1 and examination of other witnesses to whom the court should issue process if so requested by the prosecution. (It is open to the prosecution to produce such witnesses without bothering the Court to issue summons to them). The case shall be disposed of after taking all the remaining steps, in accordance with law."

43. Their Lordships of the Supreme Court in ***Mohd. Khalid vs.***

State of Punjab, (2002) 7 Supreme Court Cases 334 have reiterated that when a witness is available and his examination-in-chief is over, unless compelling reasons are there, trial Court should not adjourn the matter on the mere asking. Their Lordships have held as under:-

> *"54. Before parting with the case, we may point out that the Designated Court deferred the cross examination of the witnesses for a long time. That is a feature which is being noticed in many cases. Unnecessary adjournments give a scope for a grievance that accused persons get a time to get over the witnesses. Whatever be the truth in this allegation, the fact remains that such adjournments lack the spirit of Section 309 of the Code. When a witness is available and his examination-in-chief is over, unless compelling reasons are there, the Trial Court, should not adjourn the matter on mere asking. These aspects were highlighted by this Court in State of U.P. v. Shambhu Nath Singh and Ors., [2001] 4 SCC 667 and N.G. Dastance, v. Shrikant S. Shivde and Anr., [2001] 6 SCC 135. In Shambhu Nath Singh's case (supra) this Court deprecated the practice of courts adjourning cases without examination of witnesses when they are in attendance with following observations:*
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> > *"9. We make it abundantly clear that if a witness is present in court he must be examined on that day. The court must know that most of the witnesses could attend the court only at heavy cost to them, after keeping aside their own avocation. Certainly they incur suffering and loss of income. The meagre amount of bhatta (allowance) which a witness may be paid by the court is generally a poor solace for the financial loss incurred by him. It is a sad plight in the trial courts that witnesses who are called through summons or other*

> *processes stand at the door stamp from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be reformed by the presiding officers of the trial courts and it can be reformed by everyone provided the presiding officer concerned has a commitment towards duty. No sadistic pleasure, in seeing how other persons summoned by him as witnesses are stranded on account of the dimension of his judicial powers, can be persuading factor for granting such adjournments lavishly, that too in a casual manner."*

In the instant case, first adjournment was granted to postpone the cross-examination only on the request made by junior counsel that senior counsel was away to Chandigarh. However, the witness was always present to be cross-examined.

44. Their Lordships of the Supreme Court in ***Akil alias Javed vs. State (NCT of Delhi), (2013) 7 Supreme Court Cases 125*** have held that false / induced portion of testimony when the witness has been won over may be disregarded more particularly when witness completely has changed stand in cross-examination and exculpated accused as compared to chief examination in which said witness had inculpated accused. In this case cross-examination was held after two days. Their Lordships have held as under:-

> *"19. This sequence was consistently maintained by complainant – PW.17 before the Court which was fully supported by the other eye-witnesses, namely, PWs.19, 20, 23 and 25. When it came to the question of identifying the accused, out of the three only two, appellant and co- accused alone, were apprehended and*

proceeded against and they were in Court. Since the other accused was absconding and continue to abscond even as on date the trial Court proceeded with the trial. When it came to the question of such identification, the judgment of the trial Court as well as that of the High Court has elaborately considered and found that while the other witnesses could not identify the appellant and the other co-accused even in the Court. PW.20 was able to identify the appellant as the person who attempted to molest the complainant – PW.17 and when the deceased raised a protest the appellant shot him and thereafter the deceased fell down. Unfortunately, on 18.09.2000, the trial Court adjourned the case for cross-examination of PW.20 by two months. His cross-examination was conducted only on 18.11.2000 as the case was adjourned. The reason for the adjournment was a mere request on behalf of the appellant that his counsel was busy in the High Court. The High Court in the impugned judgment has stated that such a long adjournment provided scope for maneuvering.

20. In the course of cross-examination PW.20 made a different statement as regards the identity of the appellant by stating that he was tutored by Inspector Rajinder Gautam who met him before his examination-in- chief. In the light of the said development it was contended on behalf of the appellant that irrespective of the crime as described by the eye-witnesses taken place on the fateful day there was absolutely no legally acceptable evidence to connect the appellant with the crime. Learned counsel relied upon Section 155 of the Evidence Act in support of his submission. The learned counsel also relied upon the decisions reported in Paramjeet Singh (supra) and Suraj Mal (supra). We can also refer to some of the decisions reported in Kunju Muhammed alias Khumani and another V. State of

Kerala - (2004) 9 SCC 193, Nisar Khan alias Guddu and others V. State of Uttaranchal - (2006) 9 SCC 386,Mukhtiar Ahmed Ansari V. State (NCT of Delhi) - (2005) 5 SCC 258 and Raja Ram V. State of Rajasthan - (2005) 5 SCC 272 in respect of the said proposition of law.

21. Both the trial Court as well as the High Court ignored the inconsistency in the statement of PW.20 as regards the identity of the appellant and proceeded to rely upon what was stated by him in the chief-examination while convicting the appellant and ultimately imposing him the sentence. It is relevant to mention that the appellant as well as the co-accused were charged under Section 392 IPC as well apart from the charge under Section 302 read with 34 IPC. In fact, we find from the judgment of the trial Court that specific charge was framed against the appellant for the offences under Sections 302 read with 34 and 392 read with 34 IPC. They were charged under Section 354 read with 34 IPC and were acquitted for the said offence.

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27. In the earlier part of our judgment we have referred to the reliance placed upon by the trial Court as well as by the High Court on the evidence of PW.20 as regards the identity of the appellant. Both the Courts had made a pointer to the adjournment granted at the instance of the accused for the cross-examination of PW.20. The chief- examination of PW.20 was recorded on 18.09.2000 and for the purpose of cross-examination the case was adjourned by two months and was posted on 18.11.2000. The reason for adjournment was a request on behalf of the appellant that his counsel was busy in the High Court. PW.20 identified the appellant as the person who attempted to molest the complainant

PW.17 and that when the same was questioned by the deceased the appellant shot at him who fell down on the bed and who was later declared dead by the doctors. However, in the cross- examination PW.20 stated that the identity of the appellant on the earlier occasion was at the instance of Inspector Rajinder Gautam who tutored him to make such a statement.

28. It is also relevant to note that the said witness was not treated as a hostile witness in spite of diametrically opposite version stated by him as regards the identity of the appellant. Nevertheless, both the Courts below proceeded to hold that the identity made by PW.20 cannot be ignored. By relying upon Section 155 of the Evidence Act and also the decision reported in Paramjeet Singh alias Pamma (supra) and Suraj Mal (supra) learned counsel for the appellant contended that such a testimony of the witness is wholly unreliable. In Paramjeet Singh alias Pamma (supra), this Court held that howsoever gruesome an offence may be and revolt the human conscience, an accused can be convicted only on legal evidence and not on surmises and conjecture. In the decision reported in Suraj Mal (supra) it was held that:

> *"2..... where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses become unreliable and unworthy of credence and in the absence of special circumstance no conviction can be based on the evidence of such witnesses."*

29. Apart from the above decisions relied upon by learned counsel for the appellant, we ourselves have noted in the decisions reported in Kunju Muhammed alias Khumani (supra), Nisar Khan alias Guddu (supra), Mukhtiar Ahmed Ansari (supra), Raja Ram (supra),

wherein this Court has specifically dealt with the issue as regards hostile witness who was not treated hostile by the prosecution and now such evidence would support the defence (i.e.) the benefit of such evidence should go to the accused and not to the prosecution. In paragraph 16 of the decision reported in Kunju Muhammed alias Khumani (supra), this Court has held as under:

> *"16. We are at pains to appreciate this reasoning of the High Court. This witness has not been treated hostile by the prosecution, and even then his evidence helps the defence. We think the benefit of such evidence should go to the accused and not to the prosecution. Therefore, the High Court ought not to have placed any credence on the evidence of such unreliable witness."*

30. In Nisar Khan alias Guddu (supra) in paragraph 9 this Court has held as under:

> *"9.…We are of the view that no reasonable person properly instructed in law would allow an application filed by the accused to recall the eyewitnesses after a lapse of more than one year that too after the witnesses were examined, cross-examined and discharged."*

31. In Mukhtiar Ahmed Ansari (supra), this Court in paragraphs 29 and 30 dealt with the hostile witness who was not declared hostile and the extent to which the version of the said witness can be relied upon as under:

> *"29. The learned counsel for the appellant also urged that it was the case of the prosecution that the police had requisitioned a Maruti car from Ved Prakash Goel. Ved Prakash Goel had been examined as a prosecution witness in this case as PW 1. He, however, did not support the prosecution. The prosecution never declared PW 1 "hostile". His evidence did not support the*

prosecution. Instead, it supported the defence. The accused hence can rely on that evidence.

30. A similar question came up for consideration before this Court in Raja Ram v. State of Rajasthan. In that case, the evidence of the doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the doctor and it was binding on the prosecution."

32. In the decision reported in Raja Ram (supra) a similar issue was dealt with in paragraph 9 and was held as under:

"9. But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined."

33. We have referred to the above legal position relating to the extent of reliance that can be placed upon a hostile witness who was not declared hostile and in the same breath, the dire need for the Courts dealing with

cases involving such a serious offence to proceed with the trial commenced on day to day basis in de die in diem until the trial is concluded. We wish to issue a note of caution to the trial Court dealing with sessions case to ensure that there are well settled procedures laid down under the Code of Criminal Procedure as regards the manner in which the trial should be conducted in sessions cases in order to ensure dispensation of justice without providing any scope for unscrupulous elements to meddle with the course of justice to achieve some unlawful advantage. In this respect, it is relevant to refer to the provisions contained in Chapter XVIII of the Criminal Procedure Code where under Section 231 it has been specifically provided that on the date fixed for examination of witnesses as provided under Section 230, the Session's Judge should proceed to take all such evidence as may be produced in support of the prosecution and that in his discretion may permit cross-examination of any witnesses to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.

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43. It is unfortunate that in spite of the specific directions issued by this Court and reminded once again in Shambhu Nath (supra) such recalcitrant approach was being made by the trial Court unmindful of the adverse serious consequences affecting the society at large flowing therefrom. Therefore, even while disposing of this appeal by confirming the conviction and sentence imposed on the appellant by the learned trial Judge, as confirmed by the impugned judgment of the High Court, we direct the Registry to forward a copy of this decision to all the High Courts to specifically follow the instructions issued by this Court in the decision reported in Rajdeo Sharma (supra) and reiterated in Shambhu

Nath (supra) by issuing appropriate circular, if already not issued. If such circular has already been issued, as directed, ensure that such directions are scrupulously followed by the trial Courts without providing scope for any deviation in following the procedure prescribed in the matter of a trial of sessions cases as well as other cases as provided under Section 309 of Cr.P.C. In this respect, the High Courts will also be well advised to use their machinery in the respective State Judicial Academy to achieve the desired result. We hope and trust that the respective High Courts would take serious note of the above directions issued in the decisions reported in Rajdeo Sharma (supra) which has been extensively quoted and reiterated in the subsequent decision of this Court reported in Shambhu Nath (supra) and comply with the directions at least in the future years.

44. In the result, while we upheld the conviction and sentence imposed on the appellant, we issue directions in the light of the provisions contained in Section 231 read along with Section 309 of Cr.P.C. for the trial Court to strictly adhere to the procedure prescribed therein in order to ensure speedy trial of cases and also rule out the possibility of any maneuvering taking place by granting undue long adjournment for mere asking. The appeal stands dismissed."

45. In the instant case, the cross-examination of PW1 Lakhwinder Kumar was undertaken after about six months. Three official witnesses also turned hostile. It is the prime duty of the State Government to protect the witnesses to undertake fair scientific investigation and fair trial. The witnesses have a right to be protected by the State Government being an essential component of criminal justice delivery system. It would be pertinent to take into consideration the dire need to provide protection to the

witnesses.

46. The Court can take judicial notice of the fact that the trials are not concluded expeditiously. The accused try to influence the witnesses. The witnesses are threatened of dire consequences. The witnesses are always under threat by the accused. In the instant case also, three official witnesses were declared hostile, since they have not supported the case of the prosecution in entirety. The cross-examination of PW-1 Lakhwinder Kumar was done after six months. There is urgent need to provide protection to the witnesses to enable them to depose fearlessly.

47. Their Lordships of the Hon'ble Supreme Court in ***State of Gujarat vs. Anirudhsing & another, 1997 (6) SCC 514,*** have held that merely because a witness has turned hostile his evidence cannot be rejected in its entirety. The Court must carefully analyse his evidence and see whether that part of the evidence which is consistent with the prosecution case is acceptable or not. Their Lordships have further held that every criminal trial is a voyage in quest of truth for public justice to punish the guilty and restore peace, stability and order in the society. Every citizen who has knowledge of the commission of cognizable offence has a duty to lay information before the police and cooperate with the investigating officer who is enjoined to collect the evidence and if necessary summon the witnesses to give evidence. He is further enjoined to adopt scientific and all fair means to unearth the real offender, lay the chargesheet before the court competent to take cognizance of the offence. It is the salutary duty of every witness who has the knowledge of the commission of crime, to assist the State in giving evidence; unfortunately for various reasons, in particular deterioration in law and order situation and the principle of self-

preservation, many a witness turn hostile and in some instances even direct witnesses are being liquidated before they are examined by the Court. Their Lordships have held as under:-

> *"3. Every criminal trial is a voyage in quest of truth for public justice to punish the guilty and restore peace, stability and order in the society. Every citizen who has knowledge of the commission of cognizable offence has duty to lay information before the police and co-operate with the investigating officer who is enjoined to collect the evidence and if necessary summon the witnesses to give evidence. He is further enjoined to adopt scientific and all fair means to unearth, the real offender, lay the charge-sheet before the Court competent to take cognizance of the offence. The charge-sheet needs to contain the facts constituting the offences charged. The accused is entitled to a fair trial. Every citizen who assists the investigation is further duty-bound to appear before the Court of session or competent criminal Court, tender his ocular evidence as a dutiful and truthful citizen to unfold the prosecution case as given in his statement. Any betrayal in that behalf is a step to stabilize social peace, order and progress.*
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> *xxx xxx xxx*
>
> *29. In view of the above settled legal position, merely because some of the witnesses have turned hostile, their ocular evidence recorded by the Court cannot be held to have been washed off or unavailable to the prosecution. It is the duty of the Court to carefully analyse the evidence and reach a conclusion whether that part of the evidence consistent with the prosecution case, is acceptable or not. It is the salutary duty of every witness who has the knowledge of the commission of crime, to assist the State in giving the evidence; unfortunately for various reasons, in particular deterioration in law and*

order situation and the principle of self-preservation, many a witness turn hostile and in some instances even direct witnesses are being liquidated before they are examined by the Court. In such circumstances, it is high time that the Law Commission looks into the matter. We are informed that the Law Commission has recommended to the Central Government to make necessary amendments to the Cr. PC. and this aspect of the matter should also be looked into and proper principles evolved in this behalf. Suffice it to state that responsible persons like Sub-Divisional Magistrate turned hostile to the prosecution and most of the responsible persons who were present at the time of flag hoisting ceremony on the Independence Day and in whose presence a ghastly crime of murdering a sitting M.L.A. was committed, have derelicted their duty in assisting the prosecution and to speak the truth relating to the commission of the crime. However, we cannot shut our eyes to the realities like the present ghastly crime and would endeavour to evaluate the evidence on record. Therefore, it is the duty of the trial Judge or the appellate Judge to scan the evidence, test it on the anvil of human conduct and reach a conclusion whether the evidence brought on record even of the turning hostile witnesses would be sufficient to bring home the commission of the crime. Accordingly, we undertake to examine the evidence in this case."

48. Their Lordships of the Supreme Court in ***Swarn Singh vs. State of Punjab, 2000 (5) SCC 668,*** and analogous matter, have highlighted the problems faced by witnesses and have made suggestions for improving their position in terms of unwarranted adjournments, amenities and diet money. Their Lordships have held as under:-

"36. A criminal case is built on the edifice of evidence,

evidence that is admissible in law. For that witnesses are required whether it is direct evidence or circumstantial evidence. Here are the witnesses who are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the court many times and at what cost to his own self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witnesses tries and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tried. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the court. He is pushed out from The crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witnesses is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all. High Courts have to be vigilant in these matters. Proper diet money must be paid immediately to the witness (not only when he is examined but for every adjourned hearing) and even sent to him and he should not be left to be harassed by the subordinate staff. If the criminal justice system is to be put on a proper pedestal, the system cannot be left in the

> *hands of unscrupulous lawyers and the sluggish State machinery. Each trial should be properly monitored. Time has come that all the courts, direct courts, subordinate courts are linked to the High Court with a computer and a proper check is made on the adjournments and recording of evidence. The Bar Council of India and the State Bar Councils must play their part and lend their support to put the criminal system back on its trial. Perjury has also become a way of life in the law courts. A trial judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself which deters him from filing the complaint. Perhaps law needs amendment to Clause (b) of Section 340(3) of the Cr.P.C. in this respect as the High Court can direct any officer to file a complaint. To get rid of the evil of perjury, the court should resort to the use of the provisions of law as contained in Chapter XXVI of the Cr.P.C."*

49. Their Lordships of the Supreme Court in ***Zahira Habibulla H. Sheikh & another vs. State of Gujarat & others, 2004 (4) SCC 158***, have held that crimes are public wrongs, in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to society in general. Their Lordships have also highlighted the role of state in witness protection, pressing and urgent need for legislative measures to protect witnesses. Their Lordships have held as under:-

> *"30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operating principles for a fair trial permeate the common law in both civil*

and criminal contexts. Application of these principles involve a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

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35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a more recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves.

Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

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

the witnesses to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the "TADA Act") have taken note of the reluctance shown by witnesses to depose against dangerous criminals-terrorists. In a milder form also the reluctance and the hesitation of witnesses depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies.

42. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance if not more, as the interests of the individual accused. In this courts have a vital role to play.

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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 the discretion of the appellate Court. As re-iterated 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.

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57. This Court in Vineet Narain v. Union of India 1998CriLJ1208 has directed that steps should be taken immediately for the constitution of able and impartial agency comprising persons of unimpeachable integrity to perform functions akin to these of the Director of Prosecution in England. In the United Kingdom, the Director of Prosecution was created in 1879. His appointment is by the Attorney General from amongst the members of the Bar and he functions under the supervision of Attorney General. The Director of Prosecution plays, a vital role in the prosecution system. He even administers "Witness Protection Programmes"". Several countries for example Australia, Canada and USA have even enacted legislation in this regard. The Witness Protection Programmes are imperative as well as imminent in the context of alarming rate of somersaults by witnesses with ulterior

motives and purely for personal gain or fear for security. It would be a welcome step if something in those lies are done in our country. That would be a step in the right direction for a fair trial. Expression of concern merely in words without really the mind to concretise it by positive action would be not only useless but also amounts to betrayal of public confidence and trust imposed."

50. Their Lordships of the Supreme Court in ***Sakshi vs. Union of India & others, 2004 (5) SCC 518,*** have held that 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. Their Lordships have held as under:-

"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 Cr.P.C. 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-a-vis Section 273 Cr.P.C. has been held to be permissible in a recent decision of this Court in State of Maharashtra v. Dr. Praful B Desai 2003CriLJ2033. 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 hand-maiden 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."

51. Their Lordships of the Hon'ble Supreme Court in ***Himanshu Singh Sabharwal vs. State of M.P. & others, AIR 2008 SC 1943,*** have held that as a prosecutor of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Their Lordships have held as under:-

> *"13. "Witnesses" as Benthem said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smoother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy,*

oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and the trial is not reduced to mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the 'TADA Act') have taken note of the reluctance shown by witnesses to depose against dangerous criminals-terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies.

14. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any

> *undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance if not more, as the interests of the individual accused. In this Courts have a vital role to play."*

52. The Division bench of Delhi High Court in ***Neelam Katara vs. Union of India & others, 2003 ILR (2) Delhi 377***, has highlighted and laid emphasis for "Witness Protection Programme".

53. The "Committee on Reforms of Criminal Justice System", in its report Volume-I has made following recommendations for treating the witnesses with respect and to take steps for his protection as under:-

> *"11.1 Witness is an important constituent of the administration of justice. By giving evidence relating to the commission of the offence he performs a sacred duty of assisting the court to discover truth. That is why before giving evidence he either takes oath in the name of God or makes a solemn affirmation that he will speak truth, the whole of truth and nothing but truth. The witness has no stake in the decision of the criminal court when he is neither the accused nor the victim. The witness performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He sacrifices his time and takes the trouble to travel all the way to the court to give evidence. He submits himself to cross-examination and cannot refuse to answer questions on the ground that the answer will criminate him. He will incur the displeasure of persons against whom he gives evidence. He takes all this trouble and risk not for any personal benefit but to advance the cause of justice. The witness should be*

treated with great respect and consideration as a guest of honour. But unfortunately quite the reverse is happening in the courts. When the witness goes to the court for giving evidence there is hardly any officer of the court who will be there to receive him, provide a seat and tell him where the court he is to give evidence is located or to give him such other assistance as he may need. In most of the courts there is no designated place with proper arrangements for seating and resting while waiting for his turn to be examined as a witness in the court. Toilet facility, drinking water and other amenities like food and refreshment are not provided.

11.2 The witness is not adequately compensated for the amount of money he spends for his traveling and staying in the town where the court is located. Rates of allowance fixed long back are quite unrealistic and not adequate to meet the minimum needs of the witness. Steps should therefore be taken to review the scales of traveling and other allowances taking into account the prevailing cost in the area where the court is located. What is worse is that even the allowances fixed are not paid to the witness immediately on the ostensible ground that funds are not available. There are also complaints of corrupt officials of the administration who draw the allowances and do not pay them to the witnesses. This is an un-pardonable crime against the witnesses. Therefore effective steps have to be taken to ensure that payment of the allowances to the witness is neither denied nor delayed. Full proof arrangements should be made to see that the allowances are paid immediately. An official should be designated to attend to the witnesses and be responsible for paying the allowances promptly.

11.3 Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of

the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise. Some times holding of in-camera proceedings may be sufficient to protect the interest of the witness. If, however, the circumstances indicate that the life of any particular witness is in danger, the court must take such measures as are necessary to keep the identity of the witness secret and make arrangements to ensure protection to the witness without affecting the right of the accused to crossexamine him. The threat from the accused side may be before he gives his statement before the police officer or evidence before the court or after the conclusion of the trial. There is a growing tendency of subjecting the witness and his family members to serious threats to life, abduction or raping, or damaging the witnesses' property or harming his image and interest in other ways. The witness has no protection whatsoever. Many countries in the world have enacted laws for witnesses' protection. There is no such law in India. Time has come for a comprehensive law being enacted for protection of the witness and members of his family.

11.4 The witness also suffers in the court in various other ways. When he comes to the court to give evidence he is often told that the case has been adjourned and is asked to come back on another day. When a case is adjourned, the witnesses in attendance are quite often not paid the allowances. The witnesses should not be punished by denying him reimbursement of the expenses for no fault of his. Steps should therefore be taken to

ensure that the witnesses are paid allowances on the same day if the case is adjourned. Quite often more than one witnesses is summoned to prove the same point, much of it being of a formal character. The prosecutor may pay attention to reduce duplication of evidence resulting in unnecessary waste of time of courts and expenses. The evidence of Medical witnesses, Government scientific experts and Officers of mint contemplated by Sections 291, 292 and 293 of the Code shall be tendered as evidence in the form of Affidavits and the challenge to the same by the opposite party shall be by means of a counter Affidavit. The Court may permit an Affidavit in reply being filed by these experts. If the Court is satisfied that in the interest of justice, examination of these witnesses is necessary, it shall as far as possible be done through Video Conferencing. It is only if it is practicable that the witnesses may be summoned for giving evidence before the Court. Evidence of such witnesses should be recorded on priority basis and summoning such experts again should be avoided. The DNA experts should be included in sub section 4 of section 293 of the Code. This repeats again and again. No concern is shown for the valuable time of the witness and the trouble he takes to come to the court again and again to give evidence. Therefore there is need to infuse sensitivity in the minds of the court and the lawyers about the hardship and inconvenience which the witness suffers when the case is adjourned. Therefore only such number of cases should be listed which can be taken on that particular day so that the witness is not required to return only to come again for giving evidence. The directions given from time to time that the trial should proceed on day to day basis are not being followed. Time has now come to hold the Judge accountable for such lapses. Appropriate remedial

measures through training and supervision may have to be taken in this behalf by the respective High Courts.

11.5 The next aspect is about the way the witness is treated during trial. As already stated the witness is entitled to be treated with courtesy when he arrives for giving evidence. Similarly due courtesy should be shown to him when he enters the court hall for giving evidence. The present practice is to make the witness stand and give his evidence from the place designated for that purpose. Comfort, convenience and dignity of the witness should be the concern of the Judge. In the opinion of the Committee the present practice must be changed. A chair should be provided for the witness and requested to take his seat for giving evidence. The lawyer for the defence in order to demonstrate that the witness is not truthful or a reliable person would ask all sorts of questions to him. When the questions are likely to annoy, insult or threaten the witness, the Judge does not object and often sits as a mute spectator. It is high time the Judges are sensitised about the responsibility to regulate cross examination so as to ensure that the witness is not ill-treated affecting his dignity and honour. Therefore the High Courts should take measure through training and supervision to sensitize the Judges of their responsibility to protect the rights of the witnesses.

11.6 So far as witness is concerned, it is his primary duty to give true evidence of what he knows. Unfortunately this is not happening and the problem of perjury is growing."

54. The Law Commissions of India have also dealt with separately the issue of witness identity and protection. The Law Commission has also dealt with this delicate issue in its 14th Report as under:-

"4.1 In the 14th Report of the Law Commission (1958),

'witness protection' was considered from a different angle. The Report referred to inadequate arrangements for witnesses in the Courthouse, the scales of traveling allowance and daily batta (allowance) paid for witnesses for attending the Court in response to summons from the Court. This aspect too is important if one has to keep in mind the enormous increase in the expense involved and the long hours of waiting in Court with tension and attending numerous adjournments. Here the question of giving due respect to the witness's convenience, comfort and compensation for his sparing valuable time is involved. If the witness is not taken care of, he or she is likely to develop an attitude of indifference to the question of bringing the offender to justice.

4.2 Between 1958 and 2004, there has been a total change in the crime scene, in as much as, not only crime has increased and cases of convictions have drastically fallen, but there is more sophistication in the manner of committing offences for, today, the offender too has the advantages of advances in technology and science. There are now more hostile witnesses than before and the witnesses are provided allurements or are tampered with or purchased and if they remain firm, they are pressurized or threatened or even eliminated. Rape and sexual offence cases appear to be the worst affected by these obnoxious methods.

Fourth Report of the National Police Commission (1980): handicaps of witnesses:

In June 1980, in the Fourth Report of the National Police Commission, certain inconveniences and handicaps from which witnesses suffer have been referred to. The Commission again referred to the inconveniences and harassment caused to witnesses in attending courts. The Commission referred to the contents of

a letter received from a senior District and Sessions Judge to the following effect:

"A prisoner suffers from some act or omission but a witness suffers for no fault of his own. All his troubles arise because he is unfortunate enough to be on the spot when the crime is being committed and at the same time 'foolish' enough to remain there till the arrival of the police."

The Police Commission also referred to the meager daily allowance payable to witnesses for appearance in the Courts. It referred to a sample survey carried out in 18 Magistrates' Courts in one State, which revealed that out of 96,815 witnesses who attended the Courts during the particular period, only 6697 were paid some allowance and even for such payment, an elaborate procedure had to be gone through.

4.4 154th Report of the Law Commission (1996): Lack of facilities and wrath of accused referred:

In the 154th Report of the Commission (1996), in Chapter X, the Commission, while dealing with 'Protection and Facilities to Witnesses', referred to the 14th Report of the Law Commission and the Report of the National Police Commission and conceded that there was 'plenty of justification for the reluctance of witnesses to come forward to attend Court promptly in obedience to the summons". It was stated that the plight of witnesses appearing on behalf of the State was pitiable not only because of lack of proper facilities and conveniences but also because witnesses have to incur the wrath of the accused, particularly that of hardened criminals, which can result in their life falling into great peril. The Law Commission recommended, inter alia, as follows:

"6. We recommend that the allowances payable to the witnesses for their attendance in courts should be fixed on a realistic basis and that payment should be effected through a simple procedure which would avoid delay and inconvenience. … Adequate facilities should be provided in the court premises for their stay. The treatment afforded to them right from the stage of investigation upto the stage of conclusion of the trial should be in a fitting manner giving them due respect and removing all causes which contribute to any anguish on their part. Necessary confidence has to be created in the minds of the witnesses that they would be protected from the wrath of the accused in any eventuality.

7. Listing of the cases should be done in such a way that the witnesses who are summoned are examined on the day they are summoned and adjournments should be avoided meticulously. … The courts also should proceed with trial on day-to-day basis and the listing of the cases should be one those lines. The High Courts should issue necessary circulars to all the criminal courts giving guidelines for listing of cases."

The following points emerge from the above recommendations:

(a) Realistic allowance should be paid to witnesses for their attendance in Courts and there should be simplification of the procedure for such payment.

(b) Adequate facilities should be provided to witnesses for their stay in the Court premises. Witnesses must be given due respect and it is also necessary that efforts are made to remove all reasonable causes for their anguish.

(c) Witnesses should be protected from the wrath of the accused in any eventuality.

(d) Witnesses should be examined on the day they are summoned and the examination should proceed on a day-today basis.

4.5 172nd Report of the Law Commission (2000) : Reference by Supreme Court to the Law Commission: screen technique:

In March 2000, the Law Commission submitted its 172nd Report on 'Review of Rape Laws'. The Law Commission took the subject on a request made by the Supreme Court of India (vide its order dated 9th August, 1999, passed in Criminal Writ Petition (No. 33 of 1997), Sakshi vs. Union of India.

The petitioner 'Sakshi', an organization, interested in the issues concerning women, filed this petition, seeking directions for amendment of the definition of the expression 'sexual intercourse', as contained in section 375 of the IPC. The Supreme Court requested the Law Commission 'to examine the issues submitted by the petitioners and examine the feasibility of making recommendations for amendments of the Indian Penal Code or to deal with the same in any other manner so as to plug the loopholes'.

The Law Commission discussed the issues raised by the petitioner with Petitioner NGO and other women organizations. The Commission also requested 'Sakshi' and other organizations to submit their written suggestions for amendment of procedural laws as well as the substantial law.

Accordingly, these women organizations submitted their suggestions for amendment of Cr.P.C. and the Evidence Act and also I.P.C. One

of the views put forward by the organizations was that a minor complainant of sexual assault shall not have to give his/her oral evidence in the presence of the accused, as this will traumatic to the minor. It was suggested that appropriate changes in the law should be made for giving effect to this provision.

It was further suggested that a minor's testimony in a case of child sexual abuse should be recorded at the earliest possible opportunity in the presence of a judge and the child-support person, which may include a family friend, relative or social worker whom the minor trusts. For the purpose of proper implementation of the above suggestion, it was urged that the court should take steps to ensure that at least one of the following methods is adopted:

(i) permitting use of a video-taped interview of the child's statement by the judge in the presence of a child support person;

(ii) allowing 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 the 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 shall be given as and when required by the child.

The Commission considered the above suggestions along with other issues raised and the order of the Supreme Court and gave its 172nd Report on 25th March, 2000. In respect of the suggestion that a minor who has been assaulted

sexually, should not be required to give his/her evidence in the presence of the accused and he or she may be allowed to testify behind the screen, the Law Commission referred to section 273 of the Cr.P.C., which requires that 'except as otherwise expressly provided, all evidence taken in the course of a 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'. The Law Commission took the view that his general principle, which is founded upon natural justice, should not be done away with altogether in trials and enquiries concerning sexual offence. However, in order to protect the child witness the Commission recommended that it may be open to the prosecution to request the Court to provide a screen in such a manner that the victim does not see the accused, while at the same time providing an opportunity to the accused to listen to the testimony of the victim and give appropriate instructions to his advocate for an effective crossexamination. Accordingly, the Law Commission in para 6.1 of its 172nd Report recommended for insertion of a proviso to section 273 of the Cr.P.C. 1973 to the following effect:

"Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused".

In respect of other suggestions mentioned

above, made by Sakshi organization, the Law Commission expressed its view that these suggestions were impracticable and could not be accepted.

178th Report of the Law Commission (2001): preventing witnesses turning hostile:

In December, 2001, the Commission gave its 178th Report for amending various statutes, civil and criminal. That Report dealt with hostile witnesses and the precautions the Police should take at the stage of investigation to prevent prevarication by witnesses when they are examined later at the trial. The Commission recommended three alternatives, (in modification of the two alternatives suggested in the 154th Report). They are as follows:

"1. The insertion of sub-section (1A) in Section 164 of the Code of Criminal Procedure (as suggested in the 154th Report) so that the statements of material witnesses are recorded in the presence of Magistrates. [This would require the recruitment of a large number of Magistrates].

2. Introducing certain checks so that witnesses do not turn hostile, such as taking the signature of a witness on his police statement and sending it to an appropriate Magistrate and a senior police officer.

3. In all serious offences, punishable with ten or more years of imprisonment, the statement of important witnesses should be recorded, at the earliest, by a Magistrate under Section 164 of the Code of Criminal Procedure, 1973. For less serious offences, the second alternative (with some modifications) was found viable."

4.6 However, it is to be noted that the Law

Commission, in the above Report, did not suggest any measures for the physical protection of witnesses from the 'wrath of the accused' nor deal with the question whether the identity of witnesses can be kept secret and if so, in what manner the Court could keep the identity secret and yet comply with the requirements of enabling the accused or his counsel to effectively cross examine the witness so that the fairness of the judicial procedure is not sacrificed.

4.7 The Criminal Law (Amendment) Bill, 2003: preventing witnesses turning hostile: In the Criminal Law (Amendment) Bill, 2003, introduced in the Rajya Sabha in August, 2003, the above recommendations have been accepted by further modifying the recommendation (3) of recording statement before a Magistrate to apply where the sentence for the offence could be seven years or more. A further provision is being proposed for summary punishment of the witness by the same Court if the witness goes back on his earlier statement recorded before the Magistrate. Another provision is also being made to find out whether the witness is going back on his earlier statement because of inducement or pressure or threats or intimidation.

4.8 Thus, the above analysis of the various recommendations of the Law Commission made from time to time, including the 178th Report shows that they do not address the issue of 'protection' and 'anonymity' of witnesses or to the procedure that has to be followed for balancing the rights of the witness on the one hand and the rights of the accused to a fair trial. In the absence of such a procedural law, the Supreme Court has

> *had to step in on the judicial side in recent case to give various directions and these judgments will be discussed in the next chapter, Chapter V.*
> *4.9 It is, therefore, proposed to deal with the above gaps in the law, in detail in the Consultation Paper.*

55. The witnesses are the integral part of the administration of justice. They have to be given utmost respect and honour. The witnesses are not adequately compensated for the amount they spent from their pocket. They have to travel long distances. There are no separate rooms for them to sit. They are entitled to reasonable realistic allowances for boarding and lodging at the expenses of State Government, if they have to stay back in the town. There is constant threat perception to the witnesses and their families. The witnesses have to depose at times against the gangsters, terrorists, smugglers, muscle men and persons involved in heinous crimes. The threat perception at times keeps the witness away from the courts. The threat perception persists during the course of investigation, during trial and also after the conclusion of trial. Unnecessary adjournments are given by the trial courts prolonging the trial and causing mental agony to the witnesses. The trial should be held on day-to-day basis. The witnesses are required to be shown utmost respect and their dignity has to be maintained during the course of investigation and at the time of trial. The entire system is required to be sensitized. Since the witnesses are under constant threat, there is an increasing tendency of turning them hostile.

56. According to the 4th report of the National Police Commission, 1980, the Police Commission has referred to the meager daily allowances payable to witnesses for appearance in the Courts. It referred to a sample survey carried out in 18 Magistrates' Courts in one State, which revealed

that out of 96,815 witnesses, who attended the Courts during the particular period, only 6697 were paid some allowance and even for such payment, an elaborate procedure had to be gone through. The 154th Report of the Commission, 1996, as discussed hereinabove, has highlighted the "Protection and Facilities to Witnesses."

57. The conviction rate in India is lowest. It is not more than 40%. In advance countries, like in Japan, the conviction rate is about 98%.

58. The prosecution has proved the case against the appellant beyond any reasonable doubt. The trial Court has convicted the appellant under Section 302 IPC read with Section 34 IPC as per the zimni order. However, in the judgment, Section 34 IPC was inadvertently omitted. Accordingly, the appellant would stand convicted under Section 302 read with Section 34 IPC.

59. Accordingly the appeal is dismissed.

60. However, before parting with the judgment, it is observed that the official witnesses PW-10 HC Jagjit Singh, PW-11 HC Gurjit Singh and PW-12 HC Sunil Kumar have not supported the case of prosecution in entirety. They were declared hostile. They were present on the spot. One of them, PW-10 Jagjit Singh was also injured. He proclaimed falsely that he became unconscious, thus, could not see anything. The tendency on the part of the official witnesses turning hostile is alarming. It is expected from official witnesses to support the case of the prosecution. The trial Court instead of resorting to conclude the trial on day-to-day basis, has given inordinate period of six months for recording cross-examination of PW-1 Balwinder Kumar. The result was that he was won over along with PW-2 Sukhwinder Singh.

61. Their Lordships of the Supreme Court in ***Writ petition (Criminal) No.156 of 2016*** titled ***Mahender Chawla and others vs. Union of India and others,*** have directed the Union of India as well as States and Union Territories to enforce the Witness Protection Scheme, 2018 in letter and spirit vide judgment dated 05.12.2018. The Witness Protection Scheme, 2018 as quoted by the Hon'ble Supreme Court in para 25 of the judgment, reads as under:-

> **"1. SHORT TITLE AND COMMENCEMENT:**
>
> (a) The Scheme shall be called **"Witness Protection Scheme, 2018"**
>
> (b) It shall come into force from the date of Notification.
>
> **Part I**
>
> **2. DEFINITIONS:**
>
> (a) **"Code"** means the Code of Criminal Procedure, 1973 (2 of 1974);
>
> (b) "**Concealment of Identity of Witness**" means and includes any condition prohibiting publication or revealing, in any manner, directly or indirectly, of the name, address and other particulars which may lead to the identification of the witness during investigation, trial and post-trial stage; (c) "**Competent Authority**" means a Standing Committee in each District chaired by District and Sessions Judge with Head of the Police in the District as Member and Head of the Prosecution in the District as its Member Secretary.
>
> (d) "**Family Member**" includes parents/guardian, spouse, live-in partner, siblings, children,grandchildren of the witness;
>
> (e) "**Form**" means "Witness Protection Application Form" appended to this Scheme;
>
> (f) "**In Camera Proceedings**" means proceedings wherein the Competent Authority/Court allows only those persons who are necessary to be present while hearing and deciding the witness protection application or deposing in the court;
>
> (g) "**Live Link**" means and include a live video link or other such arrangement whereby a witness, while not being physically present in the courtroom for deposing in the matter or interacting with the Competent Authority;

(h) "**Witness Protection Measures**" means measures spelt out in Clause 7, Part-III, Part-IV and Part V of the Scheme.

(i) "**Offence**" means those offences which are punishable with death or life imprisonment or an imprisonment up to seven years and above and also offences punishable punishable under Section 354, 354A, 354B, 354C, 354D and 509 of IPC.

(j) "**Threat Analysis Report**" means a detailed report prepared and submitted by the Head of the Police in the District Investigating the case with regard to the seriousness and credibility of the threat perception to the witness or his family members. It shall contain specific details about the nature of threats by the witness or his family to their life, reputation or property apart from analyzing the extent, the or persons making the threat, have the intent, motive and resources to implement the threats.

It shall also categorize the threat perception apart from suggesting the specific witness protection measures which deserves to be taken in the matter;

(k) "Witness" means any person, who posses information or document about any offence;

(l) "Witness Protection Application" means an application moved by the witness in the prescribed form before a Competent Authority for seeking Witness Protection Order. It can be moved by the witness, his family member, his duly engaged counsel or IO/SHO/SDPO/Prison SP concerned and the same shall preferably be got forwarded through the Prosecutor concerned;

(m) "Witness Protection Fund" means the fund created for bearing the expenses incurred during the implementation of Witness Protection Order passed by the Competent Authority under this scheme;

(n) "Witness Protection Order" means an order passed by the Competent Authority detailing the witness protection measures to be taken

(o) "Witness Protection Cell" means a dedicated Cell of State/UT Police or Central Police Agencies assigned the duty to implement the witness protection order.

Part II

3. **CATEGORIES OF WITNESS AS PER THREAT PERCEPTION:**

Category 'A' : Where the threat extends to life of witness or his family members, during investigation/trial or thereafter.

Category 'B' : Where the threat extends to safety, reputation or property of the witness or his family members, during the investigation/trial or thereafter.

Category 'C' : Where the threat is moderate and extends to harassment or intimidation of the witness or his family member's, reputation or property, during the investigation/trial or thereafter.

4. STATE WITNESS PROTECTION FUND:

(a) There shall be a Fund, namely, the Witness Protection Fund from which the expenses incurred during the implementation of Witness Protection Order passed by the Competent Authority and other related expenditure, shall be met.

(b) The Witness Protection Fund shall comprise the following:-

i. Budgetary allocation made in the Annual Budget by the State Government;

ii. Receipt of amount of costs imposed/ordered to be deposited by the courts/tribunals in the Witness Protection Fund;

iii. Donations/contributions from Charitable Institutions/ Organizations and individuals permitted by Central/State Governments.

iv. Funds contributed under Corporate Social Responsibility.

(c) The said Fund shall be operated by the Department/Ministry of Home under State/UT Government.

5. FILING OF APPLICATION BEFORE COMPETENT AUTHORITY:

The application for seeking protection order under this scheme can be filed in the prescribed form before the Competent Authority of the concerned District where the offence is committed, through its Member Secretary along with supporting documents, if any.

6. PROCEDURE FOR PROCESSING THE APPLICATION:

(a) As and when an application is received by the Member Secretary of the Competent Authority, in the prescribed form, it shall forthwith pass an order for calling for the Threat Analysis Report from the ACP/DSP in charge of the concerned Police Sub-Division.

(b) Depending upon the urgency in the matter owing to imminent threat, the Competent Authority can pass orders for interim protection of the witness or his family members during the pendency of the application.

(c) The Threat Analysis Report shall be prepared expeditiously while maintaining full confidentiality and it shall reach the Competent Authority within five working days of receipt of the order.

(d) The Threat Analysis Report shall categorize the threat perception and also include suggestive protection measures for providing adequate protection to the witness or his family.

(e) While processing the application for witness protection, the Competent Authority shall also interact preferably in person and if not possible through electronic means with the witness and/or his family members/employers or any other person deemed fit so as to ascertain the witness protection needs of the witness.

(f) All the hearings on Witness Protection Application shall be held in-camera by the Competent Authority while maintaining full confidentiality.

(g) An application shall be disposed of within five working days of receipt of Threat Analysis Report from the Police authorities.

(h) The Witness Protection Order passed by the Competent Authority shall be implemented by the Witness Protection Cell of the State/UT or the Trial Court, as the case may be. Overall responsibility of implementation of all witness protection orders passed by the Competent Authority shall lie on the Head of the Police in the State/UT.

However the Witness Protection Order passed by the Competent Authority for change of identity and/or relocation shall be implemented by the Department of Home of the concerned State/UT.

(i) Upon passing of a Witness Protection Order, the Witness Protection Cell shall file a monthly follow-up report before the Competent Authority.

(j) In case, the Competent Authority finds that there is a need to revise the Witness Protection Order or an application is moved in this regard, and upon completion of trial, a fresh Threat Analysis Report shall be called from the ACP/DSP in charge of the concerned Police Sub Division.

7. **TYPES OF PROTECTION MEASURES**:

The witness protection measures ordered shall be proportionate to the threat and shall be for a specific duration not exceeding three months at a time. They may include:

(a) Ensuring that witness and accused do not come face to face during investigation or trial;

(b) Monitoring of mail and telephone calls;

(c) Arrangement with the telephone company to change the witness's telephone number or assign him or her an unlisted telephone number;

(d) Installation of security devices in the witness's home such as security doors, CCTV, alarms, fencing etc;

(e) Concealment of identity of the witness by referring to him/her with the changed name or alphabet;

(f) Emergency contact persons for the witness;

(g) Close protection, regular patrolling around the witness's house;

(h) Temporary change of residence to a relative's house or a nearby town;

(i) Escort to and from the court and provision of Government vehicle or a State funded conveyance for the date of hearing;

(j) Holding of in-camera trials;

(k) Allowing a support person to remain present during recording of statement and deposition;

(l) Usage of specially designed vulnerable witness court rooms which have special arrangements like live video links, one way mirrors and screens apart from separate passages for witnesses and accused, with option to modify the image of face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable;

(m) Ensuring expeditious recording of deposition during trial on day to day basis without adjournments;

(n) Awarding time to time periodical financial aids/grants to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting a new vocation/profession, if desired;

(o) Any other form of protection measures considered necessary.

8. <u>MONITORING AND REVIEW:</u>

Once the protection order is passed, the Competent Authority would monitor its implementation and can review the same in terms of follow-up reports received in the matter. However, the Competent Authority shall review the Witness Protection Order on a quarterly basis based on the monthly follow-up report submitted by the

Witness Protection Cell.

Part III

9. **PROTECTION OF IDENTITY** :-

During the course of investigation or trial of any offence, an application for seeking identity protection can be filed in the prescribed form before the Competent Authority through its Member Secretary.

Upon receipt of the application, the Member Secretary of the Competent Authority shall call for the Threat Analysis Report. The Competent Authority shall examine the witness or his family members or any other person it deem fit to ascertain whether there is necessity to pass an identity protection order.

During the course of hearing of the application, the identity of the witness shall not be revealed to any other person, which is likely to lead to the witness identification. The Competent Authority can thereafter, dispose of the application as per material available on record.

Once, an order for protection of identity of witness is passed by the Competent Authority, it shall be the responsibility of Witness Protection Cell to ensure that identity of such witness/his or her family members including name/parentage/occupation/address/digital footprints are fully protected.

As long as identity of any witness is protected under an order of the Competent Authority, the Witness Protection Cell shall provide details of persons who can be contacted by the witness in case of emergency.

Part IV

10. CHANGE OF IDENTITY:-

In appropriate cases, where there is a request from the witness for change of identity and based on the Threat Analysis Report, a decision can be taken for conferring a new identity to the witness by the Competent Authority.

Conferring new identities includes new name/profession/parentage and providing supporting documents acceptable by the Government Agencies. The new identities should not deprive the witness from existing educational/ professional/property rights.

Part V

11. RELOCATION OF WITNESS:

In appropriate cases, where there is a request from the witness for relocation and based on the Threat Analysis Report, a decision can be taken for relocation of the witness by the Competent Authority.

The Competent Authority may pass an order for witness relocation to a safer place within the State/UT or territory of the Indian Union keeping in view the safety, welfare and well being of the witness. The expenses shall be borne by the Witness Protection Fund.

Part VI

12. WITNESSES TO BE APPRISED OF THE SCHEME:

Every state shall give wide publicity to this Scheme. The IO and the Court shall inform witnesses about the existence of "Witness Protection Scheme" and its salient features.

13. CONFIDENTIALITY AND PRESERVATION OF RECORDS:

All stakeholders including the Police, the Prosecution Department, Court Staff, Lawyers from both sides shall maintain full confidentiality and shall ensure that under no circumstance, any record, document or information in relation to the proceedings under this scheme shall be shared with any person in any manner except with the Trial Court/Appellate Court and that too, on a written order.

All the records pertaining to proceedings under this scheme shall be preserved till such time the related trial or appeal thereof is pending before a Court of Law. After one year of disposal of the last Court proceedings, the hard copy of the records can be weeded out by the Competent Authority after preserving the scanned soft copies of the same.

14. RECOVERY OF EXPENSES:

In case the witness has lodged a false complaint, the Home Department of the concerned Government can initiate proceedings for recovery of the expenditure incurred from the Witness Protection Fund.

15. REVIEW:

In case the witness or the police authorities are aggrieved by the decisions of the Competent Authority, a review application may be filed within 15 days of passing of the orders by the Competent

Authority.

Witness Protection Scheme, 2018

Witness Protection Application

under

Witness Protection Scheme, 2018

Before, (To be filed in duplicate)

The Competent Authority,

District.....

Application for:

1. Witness Protection
2. Witness Identity Protection
3. New Identity
4. Witness Relocation

1. Particulars of the Witness (Fill in Capital):

1) Name ----------

2) Age ----------

3) Gender (Male/Female/Other) ----------

4) Father's/Mother's Name ----------

5) Residential Address ----------

6) Name and other details of family members of the witness who are receiving or perceiving threats ----------

7) Contact details (Mobile/e-mail) ----------

2. Particulars of Criminal matter:

1) FIR No. ----------

2) Under Section ----------

3) Police Station ----------

4) District ----------

5) D.D. No. (in case FIR not yet registered) ----------

6) Cr.Case No. (in case of private complaint) ----------

3. Particulars of the Accused (if available/known):

1) Name ----------

2) Address ----------

3) Phone No. ----------

4) Email id ----------

4. Name & other particulars of the

person giving/suspected of giving threats ----------

5. Nature of threat perception. Please give brief details of threat received in the matter with specific date, place, mode and words used ----------

6. Type of witness protection measures prayed by/for the witness ----------

7. Details of Interim / urgent Witness Protection needs, if required ----------

• Applicant/witness can use extra sheets for giving additional information.

_____

(Full Name with signature)

Date: .....

Place:.....…

UNDERTAKING

1. I undertake that I shall fully cooperate with the competent authority and the Department of Home of the State and Witness Protection Cell.

2. I certify that the information provided by me in this application is true and correct to my best knowledge and belief.

3. I understand that in case, information given by me in this application is found to be false, competent authority under the scheme reserves the right to recover the expenses incurred on me from out of the Witness Protection Fund.

_____

(Full Name with signature)

Date: .....

Place:.....…"

62. Accordingly, we issue following mandatory directions to ensure fair and expeditious enquiry, investigation and trials:-

1. All the trial Courts through State of Punjab are directed to comply with mandate of Section 309 Cr.P.C. and to examine

the eye witnesses expeditiously on day-to-day basis / continuous basis. Adjournments for next day shall be granted only after recording cogent, convincing and special reasons.

2. The Reporting Officers are directed to enter adverse remarks in Annual Confidential Reports of the Judicial Officers who do not hold the trial on day-to-day basis.

3. The State of Punjab is directed to make suitable amendments in the Indian Penal Code and the Code of Criminal Procedure to punish the persons inducing, threatening and pressurizing any witness to give false statement, within three months.

4. The State of Punjab is also directed that all the witnesses should be paid reasonable amount as travelling allowance on the date of recording of their statement and if the statement spills over to the next date, the boarding and lodging of the witnesses should be provided by the State Government from State Exchequer.

5. The State of Punjab is also directed that the material witnesses in heinous and sensitive matters are insured on short-term or long term basis to enable them to fearlessly testify before the Court and also protecting their identity, changing their identity and relocating the witnesses.

6. The State of Punjab should install security devices in the witness's home such as security door, CCTVs, alarms, fencing etc.

7. The Police must have emergency contact numbers of

witnesses, close protection for the witnesses, regular patrolling around the witness's house, escort to the Court and from the Court to their home with provision of Government vehicle or a State funded conveyance on the date of hearing.

8. All the investigating officers in the State of Punjab are directed to record the statement under Section 161 Cr.P.C. by audio, video, and electronic means forthwith, as per Section 161 Cr.P.C.

9. The State of Punjab is also directed to initiate disciplinary proceedings against PW-10 HC Jagjit Singh, PW-11 HC Gurjit Singh, PW-12 HC Sunil Kumar within three months, for dereliction of their duties for not supporting the case of prosecution though they were on the spot.

10. The Secretary Home, State of Punjab shall be personally responsible to implement the directions issued hereinabove.

(RAJIV SHARMA)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

May 28, 2019.
Davinder Kumar

Whether speaking / reasoned Yes/No
Whether reportable Yes/No