IN THE HIGH COURT OF JUDICATURE AT PATNA
DEATH REFERENCE No.1 of 2022

Arising Out of PS. Case No.-137 Year-2021 Thana- MAHILA P.S. District- Araria

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The State of Bihar

... ... Petitioner/s

Versus

Md. Major, S/o Late Shamser Resident of Birnagar- Paschim, P.S.- Bhargama, District- Araria, Bihar

... ... Respondent/s

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WITH

CRIMINAL APPEAL (DB) No. 203 of 2022

Arising Out of PS. Case No.-137 Year-2021 Thana- MAHILA P.S. District- Araria

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Md. Major @ Mejar, S/o Late Shamser R/o village- Birnagar Paschim, P.S.- Bhargama, District- Araria

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Appearance :

(In DEATH REFERENCE No. 1 of 2022)

For the Petitioner/s	:	Mr. Prince Kumar Mishra, Amicus Curiae
		Mr. Satya Narayan Prasad, APP
		Mr. Vijay Kumar, Advocate
For the Respondent/s	:	Mr. Sanjay Singh, Sr. Advocate
		Mr. Raj Kumar, Advocate
		Mr. Vijay Kumar, Advocate
		Mr. Sudhanshu Shekhar, Advocate
		Mr. Rajnish Kumar, Advocate
		Mr. Sarvottam Kumar, Advocate

(In CRIMINAL APPEAL (DB) No. 203 of 2022)

For the Appellant/s	:	Mr. Sanjay Singh, Sr. Advocate
		Mr. Raj Kumar, Advocate
		Mr. Vijay Kumar, Advocate
		Mr. Sudhanshu Shekhar, Advocate
		Mr. Rajnish Kumar, Advocate
		Mr. Sarvottam Kumar, Advocate
For the Respondent/s	:	Mr. Satya Narayan Prasad, APP
		Mr. Prince Kumar Mishra, Amicus Curiae
For the Informant	:	Mr. Ranjit Kumar Thakur, Advocate

Mr. Munish Om Prakash Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
and
HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE A. M. BADAR)
Date : 16-08-2022

This Death Reference u/s. 366 Cr.P.C. and the connected appeal of the convict reminds this Court the following oft-quoted observation of Lord Hewart made while quashing the conviction nearly 100 years ago:-

> *"It is not merely of some importance but it is of fundamental importance that the justice should not only be done but should manifestly and undoubtedly be seem to be done."*

Lord Hewart went on to observe that what was important was not what was actually done but what might appear to have been done and said:-

> "Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

This dictum 'Justice should manifestly and undoubtedly be seen to be done' can be satisfied by observance of rule of '*audi alteram partem*' and the opportunity of being heard contemplated in this rule of principle of natural justice

has to be real, reasonable and effective. The same should not be for name sake – a paper opportunity particularly when the life and liberty of an accused is at the stake. This principle is a ‘sine qua non’ of every civilized society. Corollary deduced from this rule is “ qui aliquid statuerit, parte inaudita altera aeuquum licet dixerit, haud aequum facerit” (he who shall decide anything without the other side having been heard although he may have said what is right will not have done what is right). The primary aim of the principles of natural justice is to ensure equity in the economic undertakings of society and people. It also defends individual liberty against any arbitrary action.

The idea of natural justice may not be manifestly seen in the Indian constitution. However, authorities consider it as an element mandatory for the management of justice. It is an idea of usual law which originates from “jus natural”, which stands for the law of nature. In simple terms, principles of natural justice establish the differences between right and wrong. Even if we go back to the ancient era during the reign of ‘Adam’ and ‘Kautilya’s Arthashastra’, the rule of law has had this stamp of natural justice, which used to be called as social justice. It was said that the king should shower justice in a manner water flows out from fountains; that is without any

bias and must fall into everyone's hand.

Having said so, undoubtedly, an accused in a criminal trial is required to be given an impartial hearing by an unbiased Judge by extending him an opportunity to set up his defence along with an opportunity to controvert the evidence adduced by the prosecution by leading the defence evidence if he so desires. Each and every Judge is required to keep this basic concept of fair play in action in mind while conducting criminal trial. With this prelude, let us turn to the facts of the instant case.

2. The present Death Reference and the connected Criminal Appeal arise out of judgment of conviction and order of sentence dated 25.01.2022 and 27.01.2022 respectively, passed by the learned Special Judge (POCSO), Araria, in Special POCSO Case No.1 of 2022, arising out of Araria Mahila Police Station Case No.137 of 2021. By this impugned judgment and order, the learned Trial Court has been pleased to convict the appellant of the offences punishable under Section 376AB of the Indian Penal Code, 1860, (IPC for the sake of brevity), under Section 4 of the Protection of Children from Sexual Offence Act, 2012, (POSCO Act for the sake of brevity) and under Section 3(2)(v) of the Scheduled Castes and

Scheduled Tribe (Prevention of Atrocities) Act, 1989, (Prevention of Atrocities Act for the sake of brevity). By the impugned order of sentence, the appellant **c**ame to be sentenced to death penalty for committing the offence under Section 376AB of the IPC with a direction that he be hanged by neck till he is dead. For the offence punishable under Section 3(2)(v) of the Prevention of Atrocities Act, the accused is directed to suffer imprisonment for life apart from a direction to pay fine of rupees ten thousand. It seems that no separate sentence is awarded to the accused for the offence punishable under Section 4 of the POCSO Act, by the impugned order. The learned Trial Court has directed that substantive sentences shall run concurrently. For the sake of convenience, the appellant shall be referred to in their original capacity as an accused.

3. The facts leading to the prosecution of the accused projected from the police report can be summarized thus:-

(a). The incident of penetrative sexual assault on the victim female child i.e., PW 2 Ms. S (identity concealed) allegedly took place after 6:00 PM of 01.12.2021. The victim female child used to reside, along with her parents and grandfather at village Majrahi Chakra, Ward No.4, falling

under jurisdiction of the Police Station Bhargama of District-Araria. The victim female child was aged about seven years at the time of incident. On the date of incident i.e. on 01.12.2021, she was playing in front of her house. Her mother PW 1 Mrs. M (identity concealed) was cooking food in the house. Accused Major is their neighbor. He was on visiting terms with the prosecuting party. The accused, at the relevant time came at the door of house of PW 2 the victim female child and asked her to give him water in the pot in order to enable him to go for easing. When PW 2 the victim female child gave water to the accused in the pot, the accused threw that pot, pressed her mouth by his hand and took her in the nearby field. The accused then committed penetrative sexual assault on PW 2- the victim female child due to which she started bleeding. The victim was frightened as the accused threatened her. The accused then left her near her house. On return to her house, PW 2 the victim female child had disclosed the incident of commission of penetrative sexual assault on her by the accused to her mother i.e., PW 1 Mrs. M. In the meanwhile, PW 4 Mr. B (identity concealed)-grandfather of the victim female child had also returned to the house.

(b). Parental relative of PW 2 the victim female

child then disclosed the incident to the villagers. The villagers insisted that the matter can be settled by compromising. PW 1 Mrs. M then disclosed the incident telephonically to her husband. That is how the police were informed about the incident on the next day. Thereafter, PW 1 Mrs. M went to Araria Mahila Police Station and lodged report under Section 154 of the Code of Criminal Procedure 1973 (the Cr.P.C. for the sake of brevity) against the accused.

(c) On the basis of the FIR lodged by PW 1 Mrs. M, Crime No.137 of 2021 came to be registered against the accused at the Mahila Police Station, Araria, for offences punishable under Section 376AB of the IPC, under Section 4 of the POCSO Act as well as under Section 3(2)(v) of the Prevention of Atrocities Act on 02.12.2021 by preparing the formal FIR. The wheels of investigation were then set in motion.

(d) Routine investigation followed. The victim female child was sent for medical examination. The Investigator recorded statement of witnesses under Section 161 Cr.P.C. Their statement under Section 164 Cr.P.C. were got recorded from the concerned Magistrate. Spot of the incident was inspected. The Paijama worn by the victim female child

was seized vide seizure memo Exhibit-5. The accused was arrested. His sample of blood was seized vide seizure memo Exhibit-6. Seized articles were then sent to the FSL at Bhagalpur. On completion of routine investigation, the accused was charge sheeted on 20.01.2022.

(e). The learned Trial Court took cognizance of the offence on 20.01.2022 itself. The accused was then directed to be produced through the Video Conferencing and the trial was then fixed for supplying the police papers to the accused and for framing of the charge on 22.01.2022.

(f). On 22.01.2022, learned Trial Court supplied the police report under Section 173 of the Cr.P.C. which is commonly called as the charge sheet with its annexures to the Advocate for the accused. The charges against the accused were framed. By producing the accused before the learned Trial Court by Video Conferencing, charges were explained to the accused. The accused pleaded not guilty and claimed trial. On 22.01.2022 itself, by allowing the application filed by PW 5 Anima Kumari, the Investigating Officer, evidence of four prosecution witnesses viz. PW 1 Mrs. M. - mother of the victim female child, PW2 – Ms. S. the victim female child, P.W. 3 Dr. Shaila Kunwar - the Medical Officer, forbisganj Sub-Divisional

Hospital and P.W. 4 Mr. B, the grandfather of the victim female child came to be recorded. Then on 24.01.2022 evidence of both the Investigators i.e. PW 5 Anima Kumari Police Sub-Inspector and PW 6 Rita Kumari, Station House Officer of Mahila Police Station, Araria, was recorded. Immediately thereafter PW 5 Anima Kumari, the Investigating Officer, submitted an application for deciding the case on the very same day. By allowing that application partly on 22.01.2022 itself, statement of the accused was recorded under Section 313 of the Cr.P.C. The accused had set up a plea of alibi. He alleged false implication and prayed for the opportunity to adduce defence evidence. Learned Trial Court then fixed the case for defence evidence on 25.01.2022.

(g). By rejecting the application for grant of adjournment of one week for adducing the defence evidence, on 25.01.2022, the defence evidence came to be closed by the learned Trial Court. Arguments of both sides were heard finally and the accused came to be convicted as indicated in the opening para of this judgment on 25.01.2022 itself. The case was then adjourned for hearing the accused on quantum of sentence to 27.01.2022 and on that day after hearing, the accused came to be sentenced to death penalty as indicated in

the opening para of this judgment.

4. We heard Mr. Singh the learned Senior Advocate appearing for the appellant/accused. He made the following submissions.

By taking us through the order sheets of the proceedings of the Special POCSO Case No. 1 of 2022, he argued that the learned Trial Court has failed to accord fair trial to the accused. The accused was supplied with police papers and on the very same day charges were framed. After framing of the charge, on the very same day, evidence of four prosecution witnesses came to be recorded. All this happened in ugly haste and effective opportunity of hearing was not granted to the accused. The accused was prevented from adducing the defence evidence despite his two oral and one written request and the learned Trial Court has unfairly closed the defence side. In order to show compliance of provisions of Section 309 of the Cr.P.C. as well as provision of the POCSO Act, the trial against the accused came to be concluded without granting any opportunity to the accused to defend himself and the learned Trial Court has flouted all the principles of natural justice.

5. The learned Senior Advocate for the accused placed reliance on para 10 of judgment in **Hussainara**

Khatoon and Others vs. Home Secretary, State of Bihar reported in **(1980) 1 Supreme Court cases 98** and argued that concept of fair trial includes grant of sufficient time to the accused for preparing his case. Reliance is also placed on the judgment in the matter of **Anokhilal vs. State of Madhya Pradesh** reported in **(2019) 20 Supreme Court cases 196**. With the aid of this ruling, it is argued that where death sentence could be one of the alternative punishment, the Trial Court is supposed to be vigilant in order to see that full opportunity of hearing is granted to the accused to present his defence. Reliance is also placed on **State of Bihar vs. Balram Singh (2022) 2 PLJR 625** for contending that denial of fair trial to the accused results in quashing the impugned judgment and sentence. The learned Senior Counsel for the accused has also relied on **Krishna Janardhan Bhat vs. Dattatraya G. Hegde** reported in **(2008) 4 Supreme Court Cases 54** for contending that it is not necessary for the accused to step into the witness box for proving the defence and that the accused has right to maintain silence. By placing reliance on **David vs. State of Kerala** reported in **2020 SCC Online Kerala 3368,** it is argued on behalf of the appellant that the accused is not obliged to produce defence evidence and he can show on the

totality of all the material available on record that the fact presumed can not be said to have been proved on the touch stone of preponderance of probability. Lastly, by placing reliance on **Manoj Pradeep Singh vs. The State of Rajasthan** reported in **2022 Live Law (SC) 557,** it is argued that special reasons means exceptional reasons for awarding death penalty and the case in hand does not satisfy that criteria.

6. The learned Additional Public Prosecutor appearing for the State of Bihar argued that the accused is "Dabang" person from the village and he had taken the minor girl for committing rape on her. The accused has criminal history. No argument were advanced by the learned APP to rebut the contention that fair trial was not accorded to the accused.

7. When we started hearing of the appeal as well as the Death Reference, initially for few dates, the learned Additional Public Prosecutor was absent. Hence, vide order dated 04.07.2022 we were constrained to appoint learned Advocate Mr. Prince Kumar Mishra to act as an *Amicus Curiae* in order to protect the interest of all stake holders. That is how we have also heard Mr. Prince Kumar Mishra, the learned *Amicus Curiae* at sufficient length of time. By taking us to the

entire order-sheets of the case, it is argued by him that on 22.01.2022 after supplying the police papers to him, the accused or his learned Advocate have not sought any adjournment. They have not objected even for recording evidence of prosecution witnesses on that day. He argued that the accused participated in the trial without any demur or protest. Similarly, even on the next date of hearing i.e., on 24.01.2022 also the accused had not applied for adjournment. In submission of the learned *Amicus Curiae,* on 24.01.2022, after closure of prosecution evidence, statement of the accused under Section 313 Cr.P.C. came to be recorded and there was no question of granting adjournment at that stage. He further argued that the learned Trial Court had granted an opportunity to the accused to produce defence evidence on 25.01.2022 but the accused failed to avail that opportunity. Therefore, learned Trial Court has rightly decided the case by pronouncing judgment on that day keeping in mind the mandate of Section 309 of the Cr.P.C. as well as that of Section 35 of the POCSO Act. He further argued that after suffering the judgment of conviction by participating in the trial, the accused now can not be permitted to urge that proper opportunity of defending himself was not granted by the learned Trial Court. The learned

Amicus Curiae attempted to distinguish judgment in the matter of **Anokhilal** (supra) by contending that facts of that case were otherwise. In that matter, the charge was framed in absence of the defence Advocate and subsequently, the Advocate from the panel of Legal Aid was not granted sufficient time by the learned Trial Court. By placing reliance on judgment in the matter of **Zahira Habibulla H. Sheikh and Another vs. State of Gujarat and Others** reported in **(2004) 4 SCC 158** the learned *Amicus Curiae* argued that proper opportunity of hearing was granted to the accused in the case in hand. He also placed reliance on judgment in **State of U.P vs. Sambhunath Singh and Others** reported in **(2001) 4 SCC 667** and contended that legislative mandate of Section 309 of the Cr.P.C. is required to be followed scrupulously. He further placed reliance on judgment in **Mrs. Maneka Sanjay Gandhi and Another vs. Ms. Rani Jethmalani** reported in **(1979) 4 Supreme Court cases 167** and contended that assurance of fair trial is the principle of natural justice and the defence cannot adopt hyper sensitive approach to urge that fair trial was not granted to the accused.

8. On merits of the matter, Mr. Prince Kumar Mishra, the learned *Amicus Curiae* argued that the case being

that of rape on the minor female child, the Court is supposed to shoulder heavy responsibility by appreciating evidence of the prosecution on broader probabilities of the case. Minor discrepancies in such cases are required to be ignored. He further relied on judgment in **State of Punjab vs. Gurumit Singh** reported in **(1996) 2 SCC 384** for contending that evidence of the victim of rape if found to be truthful can be accepted without corroboration. He argued that evidence of PW 2 the victim female child is clear, cogent and trustworthy. Therefore, there is no need to interfere in conviction of the accused. By placing reliance on Judgment in **P Ramesh -vs-State (2019)20 SCC 593**, he argued that the victim female child is a witness of truth and competent witness whose evidence can be relied to base conviction. However, the learned *Amicus Curiae* submitted that the case in hand is not falling under the category of rarest of rare case and, therefore, is not warranting the death penalty. The accused can be sentenced alternatively, as per law.

9. We have considered submissions so advanced. We have also perused the record and proceedings. We have also gone through all the cases cited by both the parties meticulously. At the outset itself, we feel to say that we may be

excused for repetition of facts in this case involving extreme penalty of death sentence as while dealing with the matter from different angles, it is inevitably necessary.

10. Considering the nature of crime and delay in disposal of trial, the Legislature has made trials of certain offence time bound, nevertheless it is fundamental right of every accused to have a speedy trial. As per the legislative mandate of Sec. 309 of the Cr.P.C., the trial of the offence under Section 376 AB of the IPC is required to be completed within a period of two months from the date of filing of the charge sheet. Section 35 of the POSCO Act mandates that the trial of the offence punishable under Section 4 thereof shall be completed, as far as possible, within a period of one year from the date of taking cognizance of the offence. Despite these provisions meant for speedy trial of sexual offences against women and children, one will have to keep in mind that each stake holder including the accused has an inbuilt constitutional right declared in Article 21 of the Constitution to be dealt with fairly in a criminal trial, by adherence to the procedure which must be reasonable, just and fair. Failure to adopt such procedure and non-compliance of statutory procedure so also error in the procedure adopted at the trial can entail the

consequence of setting aside the conviction and sentence imposed on the accused. In an overzealous efforts to decide the trial of a grave offence warranting extreme penalty, it is not expected of a trial Judge to compromise the due process of law. Cause of justice in such cases cannot be made to suffer by lightly brushing aside the basic principle of fair opportunity of defending himself to the accessed.

11. The criminal trial is a quest for truth in which an unbiased Judge is supposed to give fair trial to both – the prosecuting agency as well as the accused, in order to unearth the truth to arrive at a reasonable conclusion and then, for imposing appropriate punishment to the accused if his guilt is established beyond all reasonable doubt. In the matter of **Mrs. Maneka Sanjay Gandhi** (supra) relied by Mr. Mishra, the learned amicus curiae, the Supreme Court has observed that assurance of a fair trial is the first imperative of the dispensation of justice. The notion of a free trial has close link with the basic and universally accepted human rights. The question whether a criminal trial is fair or not will have to be examined by keeping in mind varied factors including the gravity of the accusation, the time and resources which the society can reasonably afford to spend, the quality of the

available resources, the social values etc. Let us therefore meticulously examine the record of the learned Trial Court in order to ascertain as to whether in the case in hand, the learned Trial Court by acting as an impartial adjudicator has accorded fair trial to the accused by granting him real opportunity of hearing by following due process of law, while keeping in mind the mandate of Article 21 of the Constitution of India. Ultimately, nobody can be deprived of his life or personal liberty except according to procedure established by law.

12. Now let us examine how procedural law i.e. the Cr.P.C. takes care of principle of natural justice and fair play in action while conducting the trial. In the case in hand, on 20.01.2022, cognizance of the offences under Section 376AB of the IPC, Section 4 of the POCSO Act and Section 3(2)(v) of the Prevention of Atrocities Act was taken on 20.01.2022. Section 207 of the Cr.P.C. mandates that the accused must be provided **without delay** the documents including complete set of the police Report filed under Section 173 of the Cr.P.C., the First Information Report recorded under Section 154 of the Cr.P.C., statements of witnesses recorded under Section 161 of the Cr.P.C., confessions and statements recorded under Section 164 of the Cr.P.C. etc., free of cost

before commitment of case to the court of sessions. This is obviously for following principles of natural justice and in order to enable the accused to know well in advance the case against him and evidence by which the prosecution proposes to prove the charge against him. By complying this provision, the State gives an opportunity to the accused to think of his defence even at the initial stage, before framing of the charge and to enable him to point out to the court that evidence collected by the Investigator is not sufficient to frame a charge against him, at the next stage which is of hearing on the charge contemplated by Section 227 of the Cr.P.C. By going through the police papers relating to investigation, the accused gets a broad idea of allegations against him immediately, in order to enable him to give instructions to his advocate for effectively defending him at the time of hearing on the charge contemplated under Section 227 of the Cr.P.C.

13. We have already noted the provision of Section 207 of the Cr.P.C. found in Chapter-XVI of the Cr.P.C. dealing with commencement of proceedings, which mandates that in the proceedings instituted on a police report, the copy of the police report under Section 173, the FIR recorded under Section 154, statements recorded under Section 161, confessions and

statements recorded under Section 164 and all documents etc. sought to be relied by the Prosecution for establishing the guilt of the accused are required to be supplied to him **WITHOUT DELAY.** To supplement this provision of Section 207 of the Cr.P.C. under its rule making power, the Patna High Court has framed Rules titled as 'Criminal Court Rules of the High Court of Judicature at Patna'. Rule 50 A thereof reads thus-

> **"50-A. Supply of Documents under Sections 173, 207 and 208 Cr.P.C.-**Every Accused shall be supplied with statements of witness recorded under Sections 161 and 164 Cr.P.C. and a list of documents, material objects and exhibits seized during investigation and relied upon by the Investigating Officer (I.O.) in accordance with Sections 207 and 208 Cr.P.C."

Thus Trial Courts in the State are again reminded by this Court to make strict compliance of Section 207, keeping in mind the object thereof to apprise the accused of allegations against him forthwith. This compliance is required to be done prior to hearing the parties on the point of framing of the charge i.e. prior to the stage as envisaged by Sections 227 & 228 of the Cr.P.C.

14. As one of the offence alleged against the accused is punishable under Section 4 of the POCSO Act, the

Special Court is required to follow the provisions of Section 33 thereof which mandates that the trial is required to be conducted in accordance with the procedure specified in the Cr.P.C. for a trial before a Court of Session. Chapter XVIII of the Cr.P.C. deals with the procedure to be followed by the Sessions Judge while conducting the trial before it. At the outset, the Prosecutor has to unfold the case against the accused by describing the charge and by disclosing the evidence with which he proposes to prove the guilt of the accused. After completion of this stage, prescribed by Section 226 of the Cr.P.C., the Sessions Judge is required to hear submissions of the accused and the prosecution and to apply his mind to the record of the case. Both the parties have a right of audience at this stage and the accused is at a liberty to demonstrate at the very threshold itself that he is entitled for discharge from the case. The opportunity of hearing contemplated at the stage of Section 227 Cr.P.C. is not an empty formality and this right cannot be denied to the accused. That opportunity needs to be sufficient, adequate and reasonable. If the Sessions Judge, on the basis of material reflected in the charge-sheet is of the opinion that there is ground for presuming that the accused has committed the

offence exclusively triable by the Court of Sessions, he is required to frame the charge in writing. That charge is not only required to be read over but also explained to the accused. Thus, on framing charge under Section 228 of the Cr.P.C. the accused becomes precisely aware as to the case against him, which he shall be required to answer in the trial. After making the accused aware about the case which he is liable to meet and if the accused pleads not guilty and claims trial, the Sessions Judge is required to fix a date for examination of prosecution witnesses as per mandate of Section 230 of the Cr.P.C., on some later date.

15. If the Charge is of grave, severe and complex nature, the accused is naturally required to be given sufficient time to prepare his defence after receipt of the charge sheet with complete papers of investigation and after being made aware of the exact charge against him by the Trial Court under Section 228 of the Cr.P.C. The above proposition flows from the entitlement of fair hearing which is applicable to all judicial proceedings. Procedural fairness is even otherwise essential for enabling the Judge for arriving at correct decision and the same is the mandate of Sections 207, 226, 227 and 230 of the Cr.P.C., Section 230 of the Cr.P.C. requires that after

framing the charge, the case should be adjourned and fixed at a later date for recording evidence of prosecution witnesses. The Trial Court, considering the extreme penalty to which the accused becomes liable in the case relating to the charge of grave nature, is always duty bound to fix the case for recording evidence of the prosecution after passage of few days after framing the charge in order to enable the accused to think carefully about the case and then to consult his Advocate, to instruct his Advocate and to prepare his defence after effective consultation with his Advocate. Having interaction by conference with his Advocate for this purpose is sine qua non for grant of fair trial to the accused. Therefore, procedural code i.e., the Cr.P.C. does not contemplate recording of evidence of prosecution witnesses immediately on the very same day after framing of the charge. On the contrary, it provides for posting the case on some later date for this purpose. It is expected of the trial Judge to see that the accused and particularly an under trial accused gets proper, full, meaningful and sufficient opportunity to defend himself by consulting his advocate and by instructing him appropriately. For adhering to the principles of natural justice, the Trial Court is therefore supposed to adjourn the case for recording

evidence of prosecution after a gap of few days after framing of the charge. Ugly hurry in recording evidence of prosecution immediately on the very same day after framing of the charge, particularly, when the accused is an under trial prisoner would defeat the ends of justice and can cause prejudice to both the parties. In many cases even the prosecution has to secure attendance of witnesses through the process of the Court. Principles of natural justice, therefore cannot be perverted to achieve the very opposite end, by starting recording of evidence of prosecution after framing of the charge on the very same day as in such eventuality, sometimes even the prosecuting agency can be prejudiced. For all these reasons, strict compliance of Sections 207, 226, 227 and 230 of the Cr.P.C. is mandatory and right conferred on the accused at these stages cannot be denied to him by the trial Judge.

16. After recording evidence of the prosecution, **s**o also the statement of the accused under Section 313 of the Cr.P.C and after hearing the parties, if the Sessions Judge is of the opinion that there is no evidence that the accused committed the offence, the accused becomes entitled for acquittal as per provision of Section 232 of the Cr.P.C. However, when the accused could not secure acquittal at that

stage, then the Judge is duty bound to call the accused to enter into his defence for strict adherence to the principle of natural justice which is embodied in the procedural law itself as per mandate of Section 233 of the Cr.P.C. Apart from filing his written statement of defence, the accused is also entitled to examine defence witnesses for placing his case before the court and for this purpose he can apply for the issuance of process for compelling the attendance of any witnesses which he wants to examine or for production of any document or thing. Section 233 of the Cr.P.C. provides that except when such request is made for the purpose of vexation or delay or for defeating the ends of justice, the Judge has no alternative but to issue such process. Refusal on the part of the Sessions Judge to accede to such request has to be supported by reasons to be recorded. Recording of reason is mandated to prevent unfairness or arbitrariness or infiltration of bias. Provision of Section 233 of the Cr.P.C. is thus mandatory and failure to comply with this provision in its true letter and spirit amounts to failure of justice. The salutary provision contended in Section 233 is for adherence to the principles of natural justice as nobody can be condemned unheard. In a case relating to serious charges like the one in hand, the Court cannot bypass this provision which

enables the accused to put forth his case by examining defence witnesses or by entering in the dock himself after complying provision of Section 315 of the Cr.P.C. This is so because in the case in hand the accused has set up the plea of alibi and false implication due to political enmity.

17. Law recognizes and values the obligation to hear the other or both sides as no person should be condemned unheard i.e., *audi alteram partem.* The rules of natural justice are flexible and their application depends on facts of each case as well as the applicable statutory provisions, i.e., the Cr.P.C. in the case in hand. Judiciary as an organ of the State is controlled and regulated by the Rule of Law and therefore it becomes the primary duty of the every trial Judge to act justly and fairly and not arbitrarily or capriciously. Therefore, when procedural law i.e., Section 233 of the Cr.P.C. mandates that the accused is entitled to examine witnesses to establish by preponderance of probability that he has not committed the crime in question, the Court cannot shut its door for depriving the accused to avail this opportunity provided by the Statute. The Court is bound to ensure that provision of Section 233 of the Cr.P.C. is scrupulously followed by allowing the accused to enter in his defence particularly when plea of alibi is raised by

the accused by claiming absence from the spot. Ultimately burden is always on the accused to establish this plea and for that purpose it becomes necessary for him to adduce defence evidence. For fair and honest compliance of this provision of Section 233 of the Cr.P.C., the Trial Court has to grant sufficient time to the accused to apply for issuance of process and to secure attendance of his witnesses before the Court through the Court. More sensitiveness on this aspect is expected from the Trial Court when such an accused is suffering incarceration and as such is unable to contact his advocates or at least relatives in order to give instructions on this aspect. Seriousness of such situation gets more intensified when such an under trial prisoner is not having an advantage of appearing before the Trial Court physically because of restrictions imposed due to COVID-19 pandemic. In such situation, it becomes virtually impossible for the accused to defend himself effectively unless and until the Trial Court follows the provision of Section 233 Cr.P.C. in its true letter and spirit. When under trial prisoner has no access to his advocate or family members due to virtual hearing before the Court because of COVID-19 pandemic, it becomes the duty of theTrial Court to comply with the provision of Section 233 of

the Cr.P.C. scrupulously for preventing miscarriage of justice. Omission to comply this provision which is in fact essence of principles of natural justice undoubtedly amounts to the flagrant breach of the principles of natural justice if such non-compliance results in severe and substantial prejudice to the accused and consequently failure of justice. In such fact situation, hot haste in literally bypassing this stage of the trial by making a show of pseudo-compliance thereof certainly amounts to deprivation of fair trial to the accused.

18. Now let us examine the law laid down by the Supreme Court dealing with adherence to principles of natural justice and procedural fairness required to be adopted by the learned Trial Court while conducting criminal trial. Article 21 of the Constitution guarantees life and personal liberty to all persons. It read thus:

> "No person shall be deprived of his life or liberty except according to procedure established by law".

In the matter of **Anokhilal** (Supra), the Supreme Court has considered the question as to how and to what extent the procedure established by law is required to be followed while trying the accused in criminal case.

Following are relevant observations of the Supreme Court:

> ***"21.*** *In the present case, the Amicus Curiae, was appointed on 19-2-2013, and on the same date, the counsel was called upon to defend the accused at the stage of framing of charges. One can say with certainty that the Amicus Curiae did not have sufficient time to go through even the basic documents, nor the advantage of any discussion or interaction with the accused, and time to reflect over the matter. Thus, even before the Amicus Curiae could come to grips of the matter, the charges were framed.*
>
> ***22.*** *The provisions concerned viz. Sections 227 and 228 of the Code contemplate framing of charge upon consideration of the record of the case and the documents submitted therewith, and after "hearing the submissions of the accused and the prosecution in that behalf". If the hearing for the purposes of these provisions is to be meaningful, and not just a routine affair, the right under the said provisions stood denied to the appellant.*
>
> ***23.*** *In our considered view, theTrial Court on its own, ought to have adjourned the matter for some time so that the Amicus Curiae could have had the advantage of sufficient time to prepare the matter. The approach adopted by theTrial Court, in our view, may have expedited the conduct of trial, but did not further the cause of justice. Not only were the charges framed the same day as stated above,*

but the trial itself was concluded within a fortnight thereafter. In the process, the assistance that the appellant was entitled to in the form of legal aid, could not be real and meaningful.

25. *In V.K. Sasikala v. State [(2012) 9 SCC 771 : (2013) 1 SCC (Cri) 1010] a caution was expressed by this Court as under : (SCC p. 790, para 23.4)*

"23.4. While the anxiety to bring the trial to its earliest conclusion has to be shared it is fundamental that in the process none of the well-entrenched principles of law that have been laboriously built by illuminating judicial precedents are sacrificed or compromised. In no circumstance, can the cause of justice be made to suffer, though, undoubtedly, it is highly desirable that the finality of any trial is achieved in the quickest possible time."

26. *Expeditious disposal is undoubtedly required in criminal matters and that would naturally be part of guarantee of fair trial. However, the attempts to expedite the process should not be at the expense of the basic elements of fairness and the opportunity to the accused, on which postulates, the entire criminal administration of justice is founded. In the pursuit for expeditious disposal, the cause of justice must never be allowed to suffer or be sacrificed. What is paramount is the cause of justice and keeping the basic ingredients which secure that as a core idea and ideal, the process*

may be expedited, but fast tracking of process must never ever result in burying the cause of justice.

27. *In the circumstances, going by the principles laid down in Bashira v. State of U.P., [(1969) 1 SCR 32 : AIR 1968 SC 1313 : 1968 Cri LJ 1495], we accept the submission made by Mr Luthra, the learned Amicus Curiae and hold that the learned counsel appointed through Legal Services Authority to represent the appellant in the present case ought to have been afforded sufficient opportunity to study the matter and the infraction in that behalf resulted in miscarriage of justice. In light of the conclusion that we have arrived at, there is no necessity to consider other submissions advanced by Mr Luthra, the learned Amicus Curiae.*

28. *All that we can say by way of caution is that in matters where death sentence could be one of the alternative punishments, the courts must be completely vigilant and see that full opportunity at every stage is afforded to the accused".*

This makes it clear that the trial Judge is required to follow the procedural law meticulously and scrupulously at each and every stage of criminal trial in order to see that fair trial is granted to the accused.

19. It is also apposite to quote observation of the Supreme Court made in paragraphs 38 to 41 in the matter of

Zahira Habibulla H. Sheikh (Supra), which is commonly known as the 'Best Bakery Case'. Those read thus:

> *"38. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny.*
>
> *39. Failure to accord fair hearing either to the accused or the prosecution violates even*

minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.

40. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

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 ……."

It is also observed by the Supreme Court that the concept of fair trial entails familiar triangulation of interests of the accused, the State and prosecuting agencies. Thus as of prosecuting agencies, interest of the accused is also required to be taken care of in convicting him of the grave offence.

20. In the matter of **Balram Singh** (supra) the Division Bench of this Court had set aside the conviction and resultant sentence by holding that the accused in that case was not provided with any basic documents or sufficient time to had the advantage of any discussion or interaction with the lawyer.

21. The learned Senior Advocate for the appellant had also placed reliance on para 10 of the Judgment in **Hussainara Khatoon (IV)** (Supra). However we are unable to understand properly of placing reliance on this ruling which states that the State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. Plea of poverty cannot come in the way of speedy Justice. The ratio of this ruling cannot inure to the benefit of the accused, as in the case in hand within few days from filing of the charge sheet, the subject trial was over.

22. How the trial against the accused proceeded

and how it ended in imposing death penalty to him is required to be put on record for testing whether fair, just and reasonable procedure, in the light of relevant provisions of the Cr.P.C. was followed or not by the learned Trial Court in convicting and sentencing the accused to suffer the death penalty. The trial in the instant case proceeded thus, as seen from the order sheets/ Roznama maintained by the learned Trial Court.

23. **Proceedings Which Took Place Before The learned Trial Court On 20.01.2022 As Per The Order-Sheet:-**

The charge sheet came to be filed against the accused on this day. Then Special (POCSO) Case No.1 of 2022 came to be registered against the accused. It was put up for taking cognizance of the offence in second half of that day. The Bench Clerk of the Court made endorsement on the order sheet as- "No power on behalf of accused has been filed till today i.e., on 20.01.2022. However, his brother was informed." Thereafter, in second half of that day the accused came to be produced through the Video Conferencing. He was directed by the learned Trial Court to engage the Advocate. The accused expressed his inability to engage the Advocate because of his incarceration in the prison. Learned Trial Court took

cognizance of the offences punishable under Section 376AB of the IPC, under Section 4 of the POCSO Act and under Section 3(2)(v) of Prevention of Atrocities Act. Learned Trial Court informed the accused that the case is adjourned to 22.01.2022 for supplying the police papers to him and for framing the Charge against him. He was also informed that if he so requires, free legal aid would be provided to him.

24. <u>Proceedings Which Took Place Before The Learned Trial Court On 22.01.2022 As Per The Order-Sheet:-</u>

Police papers were supplied to the accused through his Advocate who was engaged by the accused on 21.01.2022. Endorsement of the Advocate of the accused depicting supply of the police papers to him was taken on the order sheet of the case. The Prosecutor as well as the learned Advocate for the accused were heard by the learned Trial Court on the point of framing of the charge. Charges for offences punishable under Section 376AB of the IPC, under Section 4 of the POCSO Act and under Section 3(2)(v) of the Prevention of Atrocities Act were framed. Thereafter, by securing presence of the accused via Video Conferencing, those were read over to the accused. The accused pleaded not guilty and claimed trial by pleading

innocence.

Learned Trial Court then directed the Office to issue summons to the prosecution witnesses named in the charge sheet. Accordingly, summons were issued to the prosecution witnesses.

Investigating Officer (PW 5 Anima Kumari) through the Special Public Prosecutor then submitted an application dated 22.01.2022 under her signature before the learned Trial Court requesting the learned Trial Court that evidence of the prosecution witnesses including that of the victim female child should be recorded on the very same day i.e., 22.01.2022 itself for the reason that secret information is received to the effect that brother and members of family of the accused are unnecessarily pressurizing the prosecution party. (**The order sheet does not reflect that say of the accused was called on this application).** Learned Trial Court heard both the parties on the said application and allowed the said application. The order sheet further reveals that from **11:30 AM** of that day i.e. **22.01.2022** work of recording deposition of four prosecution witnesses through Video Conferencing was started. PW 1- mother of the victim female child, PW 2- the victim female child, PW 3 Dr. Shaila Kunwar-

the Medical Officer and PW 4- grandfather of the victim female child were examined and cross-examined on that day. Some documents were got proved during the course of deposition of the prosecution witnesses. The learned Trial Court then directed that the case shall be heard on day to day basis and it shall be disposed of expeditiously for delivering justice to the victim female child. It was then fixed on 24.01.2022, 23.01.2022 being the holiday.

It is apposite to quote the order passed on the application of PW 5 Anima Kumari, Investigating Officer, on 22.01.2022 by theTrial Court reads which as under:

> *"Seen and heard both sides and for the interest of victim and its family members and also keeping in view of POCSO Act in my mind this petition is allowed. And office is directed to post the date of this case on day to day basis and further all the witnesses present today have been produced accordingly and their deposition were taken down in the interest of justice."*

25. <u>Proceedings Which Took Place Before The Learned Trial Court On 24.01.2022 As Per The Order-</u>

Sheet:-

Evidence of PW 5 Anima Kumari, Police Sub-Inspector of Mahila Police Station Araria and evidence of PW 6 Rita Kumari, Station House Officer of Mahila Police Station, Araria, came to be recorded. Some documents were got proved by these witnesses. Evidence of the prosecution came to be closed.

Then, on 24.01.2022 itself PW 5 Anima Kumari, Police Sub-Inspector filed a written application under her signature alleging that the accused party is giving allurement and also threatening the victim female child and her family members by going to their house. Therefore**,** she prayed that the Special POCSO Case No.1 of 2022 should be decided on that day i.e., on 24.01.2022 itself. (**The order sheet does not show that the learned Trial Court called for say of the accused on this application).** Learned Trial Court heard both sides. The order sheet reflects that at that point of time itself, the learned Advocate for the accused prayed for grant of at least one week's time. (**Obviously, adjournment was sought for postponing recording of statement of the accused under Section 313 Cr.P.C.).** Learned Trial Court observed that the learned Advocate for the accused has not

shown any concrete reason and further recorded that the accused is protracting the trial without reason. Learned Trial Court partly allowed the application of PW 5 Anima Kumari, Investigating Officer, with the following order passed on that application on 24.01.2022 itself:-

> "Heard and partially permitted due to seriousness of the offence and special status of the victim and her kith and kin."

The order sheet reveals that instead of adjourning the case for one week, as prayed by the learned Advocate for the accused, the learned Trial Court directed production of the accused through Video Conferencing on the very same day for recording his statement under Section 313 of the Cr.P.C. **[This implies that at the time of recording evidence of prosecution witnesses he was not before the Court.]** Accordingly, the accused was produced through the Video Conferencing before the learned Trial Court at 4:15 PM of 24.01.2022 and his statement under Section 313 Cr.P.C. was recorded immediately. The accused then expressed his willingness to adduce defence evidence. Once again the learned Advocate for the accused sought one week time in the matter. Learned Trial Court after hearing the parties directed

the accused to produce the documents, if any, and to keep defence witnesses ready before the Trial Court at 10:30 AM of 25.01.2022 with an observation that 'one who seek justice must come with clean hand' and 'justice delayed, justice denied'. Learned Trial Court made a record that it had insisted the learned Advocate for the accused to adduce defence evidence on that day i.e., on 24.01.2022 itself but the learned Advocate for the accused had not shown any regards to this suggestion. With these notings, the learned Trial Court fixed the case for recording evidence of defence witnesses on 25.01.2022 i.e. on the very next day after recording evidence of the prosecution and the statement of the accused under Section 313 of the Code of Criminal Procedure.

26. <u>Proceedings Which Took Place Before The Learned Trial Court On 25.01.2022 As Per The Order-Sheet:</u>

The learned Trial Court recorded that up to 11:00 AM of 25.01.2022, the Advocate for the accused as well as defence witnesses were not present. The learned Trial Court further recorded that at about 11.10 AM, an application in writing seeking adjournment on behalf of the accused came to be filed with a reason that for want of time the accused could

not get copies of depositions of prosecution witness and due to paucity of time, defence witnesses could not be informed and therefore they are not present in the Court. With these reasons, time for adducing the defence evidence was sought on behalf of the accused. Learned Trial Court then directed the office to supply copies of depositions of prosecution witnesses to the learned Advocate for the accused. At about 11:30 PM of 25.01.2022, as per the record, copies of depositions of prosecution witnesses were supplied to the Advocate for the accused. Learned Trial Court then recorded in the order-sheet that despite supply of copies of deposition of prosecution witnesses neither the defence witnesses were produced nor the list of defence witnesses was filed. Learned Trial Court questioned the Advocate for the accused about propriety of filing the application for adjournment by informing him that now the copies of deposition are supplied. It is further recorded in the order-sheet that thereafter, the advocate for the defence orally expressed his inability to produce defence witnesses. He informed the Court that the application for adjournment for examining the defence witnesses was filed as per instructions of relatives of the accused namely, Changez and Sattar. The defence Advocate further informed that

relatives of the accused have not disclosed names of the defence witnesses. Learned Trial Court then recorded in the order sheet he had impressed upon the Advocate for the accused need to dispose of the case immediately. The Court observed that however, this had no effect on the learned defence counsel. Learned Trial Court then recorded that finally the case be fixed at 2:00 PM for recording evidence of the defence witnesses with a warning that on failure, defence evidence shall be closed and final arguments shall be heard.

Then at 2:00 PM of 25.01.2022, learned Trial Court made a record in the order sheet that no defence witnesses are produced by the advocate for the accused nor list of such witness is filed by his relatives. Learned Trial Court further recorded in the order sheet that then he called for the report from the office in which it is mentioned that the Advocate for the accused does not want to examine defence witnesses. **[No such report of the office could be located in the record of the Trial Court.]**

At 2:30 PM of 25.01.2022, learned Trial Court has recorded in the order-sheet that list of defence witnesses or documents are not filed and when the advocate for the accused was asked to co-operate, he informed the Court that due to

pressure of 40-50 relatives of the accused, he is unable to give in writing that the accused does not want to adduce defence evidence. It is further recorded that the advocate for the accused has stated that he will give the application for closing the defence evidence in 10 minutes. It is further mentioned in the order sheet that the Advocate for the accused has pointed out that the Court should pass judgments in other cases which are fixed on that day for passing judgment.

At 2:45 PM of 25.01.2022, it is recorded in the order sheet that the application for grant of adjournment filed by the accused on that day is disposed of by considering it as a pressurizing tactics and excuse. **[No such order is found to have been passed by the learned Trial Court on the application for adjournment which was moved by the accused on 25.01.2022.]** Learned Trial Court made a record in the order sheet of 25.02.2022 that arguments in the case were heard up to 6:30 PM and the case be put up for pronouncement of judgment at 7:00 PM of that day i.e., 25.01.2022.

At 7:10 PM of 25.01.2022, it is recorded in the order sheet that the learned Trial Court has pronounced the judgment and convicted the accused of the offences punishable

under Section 376AB of the IPC, Section 4 of the POCSO Act and Section 3(2)(v) of the Prevention of Atrocities Act. The case was then adjourned to 10:30 AM of 27.01.2022 for hearing on quantum of sentence.

27. <u>Proceedings Which Took Place Before The Learned Trial Court On 27.01.2022 As Per The Order-Sheet:</u>

It is recorded in the order-sheet of 27.01.2022 that at 10:30 AM both parties were heard on quantum of sentence and in presence of the accused, he is sentenced to death for committing the offence under Section 376 AB of the IPC. He be hanged by neck till he is dead. The order sheet also makes a record of other sentences imposed on the accused apart from a direction to make a reference for confirmation of death sentence.

28. Life and personal liberty of any person can not be taken away except in accordance with procedure established by law. The basic procedure for trial of a criminal case as prescribed by the Cr.P.C. is elaborately dealt with by us in foregoing paras. After putting on record how the trial progressed now let us examine whether the learned Trial Court was alive to or aware about fundamental rules for conducting

criminal trial as envisaged in the procedural code i.e. the Cr.P.C. as well as the Criminal Court Rules framed by this Court apart from principles enshrined in Article 21 of the Constitution and whether the same were strictly followed while conducting the trial which ended by imposing death penalty to the accused.

29. In the instant case, the charge-sheet i.e. Police Report under Section 173 of the Cr.P.C. was filed on 20.01.2022 and presence of the accused was also secured by the learned Trial Judge through Video Conferencing. Despite taking cognizance of offence against him, on that day, the accused was not provided with the Police Report with all its annexures by ignoring the mandate of Section 207 of the Cr.P.C. which direct supply of the entire set of papers of investigation without any delay to the accused. Learned Trial Court instead of complying provision of Section 207 of the Cr.P.C. adjourned the case to 22.01.2022 for supply of police papers as well as for framing of charge. Thus salutary principle enshrined in Section 207 of the Cr.P.C. and Rule 50A of the Criminal Court Rules is blatantly violated by the learned Trial Court thereby depriving the accused to become aware of the case against him and to have a broad idea of accusation against him well in advance so as to enable him to prepare himself to instruct his Advocate

appropriately beforehand for hearing on the point of framing of charge and for claiming discharge during that hearing. The accused was not provided sufficient time to go through the entire set of papers of investigation, ponder over it and then to consult as well as instruct his Advocate for opposing the request of the prosecution for framing of charges against him and from claiming discharge.

30. Accused Md. Major, an under trial prisoner, was not even having the advantage of physical production before the Court due to COVID-19 Pandemic restrictions. He was having no opportunity to contact his advocate who was engaged just a day earlier (i.e. on 21.01.2022). In compliance of due procedure prescribed by Section 207 of the Cr.P.C., the learned Trial Court ought to have supplied the police papers to the accused through the authorities of the prison at least on 21.01.2022 i.e., the day when the defence Advocate came to be engaged.

31. What happened on 22.01.2022 before the learned Trial Court is a glaring example of blatant violation of procedural law by the learned Trial Court and the events that took place on that day smacks of bias attitude of the learned Trial Court towards the accused. On that day police papers of

investigation were supplied to the advocate of the accused as the accused was not physically produced before the learned Trial Court. The record of the learned Trial Court reveal that because of restrictions imposed due to COVID-19 Pandemic, the accused was never produced physically before the Court at any point of time. Whenever directed by the learned Trial Court, he used to be produced before the learned Trial Court through Video Conferencing. Record of the learned Trial Court does not reflect that from the date of taking cognizance of offence till conclusion of the trial, the learned defence Counsel had a single opportunity to meet, consult or discuss the case with the accused at least by Video Conferencing. In fact, the accused had no opportunity to read the charge sheet with papers of investigation which was supplied to his Advocate few minutes earlier to hearing on the point of charge on 22.01.2022 and by that time the accused was not directed to be produced via Video Conferencing by the learned Trial Court. Then without giving any opportunity to the learned defence counsel for having interaction with the accused for seeking instructions after explaining the contents of the papers of investigation to the accused, the learned counsel for the accused was required to argue the case on the point of framing of charge as contemplated

by Section 227 of the Cr.P.C. All this seems to have taken place within a short span of time at the opening hours of the day and before 11.30 AM on 22.01.2022.

32. The accused, by that time, was not even aware of anything contained in the police papers of investigation which was incriminating him. He was as such unable to brief the defence counsel for putting his stand before the court at the stage of hearing contemplated by Section 227 of the Cr.P.C. On 22.01.2022, neither the accused nor the defence counsel were having any means to communicate with each other for imparting and seeking instructions, for putting forth the stand of the accused before the Court. The order sheet of the learned Trial Court is not even showing that the accused was produced before the learned Trial Court at the time of hearing on the charge through the video conferencing and that the learned defence counsel was in a position to communicate with him at least at that point of time for getting instructions for putting forth his stand during the course of hearing contemplated by Section 227 of the Cr.P.C. It is crystal clear that the learned defence counsel was made to argue the case on the point of framing of charge without having actual and real opportunity of getting instructions from the accused immediately after furnishing

police report to him. This makes it clear that due procedure of law as prescribed by Section 207 and 227 of the Cr.P.C. was not at all followed by the learned Trial Court by adopting totally insensitive approach to the case relating to the serious offence for which the alternate punishment was death sentence. In fact, perusal of the order sheet dated 22.01.2022 does not leave any ambiguity or creates a slightest doubt in our mind that the learned defence counsel was not even granted a breathing time to have a glance, leave apart sufficient time to go through the entire set of the charge sheet which was supplied to him on that day just few minutes earlier. He must have placed his submissions, if any, under compelling circumstances on point of framing charge immediately thereafter. This aspect will be clear from the events which took place subsequently in quick succession on that day i.e., 22.1.2022. In fact, instead of being the mute spectator to the happenings before him in the most natural course it was expected of the learned Trial Court to raise to the occasion by adjourning the case suo motu after supplying police papers to the defence Advocate for enabling him to present his case after seeking instructions from the accused for defending him meaningfully and effectively from the stage of framing of the charge. It is obvious that the learned Trial Court

has considered the hearing on the point of framing of charge as empty formality by its failure to adjourn the case to some other date on 22.01.2022 after supplying the charge sheet to the defence Advocate. In the meanwhile, the learned trial Court ought to have permitted him to seek instructions from the accused through video conferencing. This was not done and mandatory provisions of Section 207 and 227 of the Cr.P.C. were breached with impurity by the learned Trial Court due to undue haste in framing the charge on the very same day. This breach of procedural law certainly deprived the accused of his right to have a fair trial. This is how the charge was framed by the learned Trial Court and then by getting the accused produced through the Video Conferencing, it was explained to him.

33. Immediately after the framing of the charge, PW 5 Anima Kumari, a Police Sub-Inspector, had filed an application before the learned Trial Court with a prayer that evidence of prosecution witnesses should be recorded on the very same day, i.e. 22.01.2022 itself for the reason that secret information is received by her to the effect that the brother and members of the family of the accused are unnecessarily pressurizing the prosecution party. It is crystal clear that without passing any order on that application from 11.30 AM of

22.01.2022, the learned Trial Court started work of recording depositions of four witnesses viz. PW 1 to PW 4. The learned Advocate for the accused was made to cross-examine those witnesses instantaneously on the very same day. Dias hours in the Trial Court starts from 10.30 AM. In opening period of one hour i.e. from 10.30 AM to 11.30 AM, the learned Trial Court had supplied police papers to the learned Advocate for the accused, shown to have heard the parties on framing of the charge, framed charges for the grave offences against the accused. The learned Trial Court further made the record that the charges so framed were read over and explained to the accused by getting him produced through Video Conferencing and his plea was also recorded thereafter. One fails to understand how such judicial work requiring application of mind can be done within a short period of one hour, in addition to entertaining the application of the Investigating Officer PW 5 Anima Kumari which was made for recording evidence of prosecution witnesses on that day itself. Ultimately, after perusing the entire papers of investigation and applying mind to the submissions made by both parties, charges are required to be framed and this exercise is certainly time consuming exercise. Trial Judge is undoubtedly aware about the actual time

consumed in framing charge which requires perusal of the entire police papers, hearing submissions of both sides and application of mind to the record to frame the charge. As such, it is practically and humanly impossible to do this exercise in a short span of time which ultimately leads us to the conclusion that the Trial Court has done this exercise as mere formality bypassing the mandate of law and the actual spirit of it. Within such short span of time, the learned Trial Court has also shown that it heard both parties on the application of PW 5 Anima Kumari, I.O. and passed an order thereon. In fact, perusal of the said order of the learned Trial Court which we have reproduced earlier shows that instead of actually deciding that application for recording evidence of the prosecution witnesses forthwith, initially, the learned Trial Judge had recorded evidence of all four prosecution witnesses and then he had in fact passed the order on the said application of the Investigating Officer. Recitals in the said order passed by the learned Trial Court are to the effect that "…….and further all witnesses present today have been produced and their depositions were taken down in the interest of justice." These wordings clearly show that as soon as PW 5 Anima Kumari, I.O., had tendered the application for recording evidence of four prosecution witnesses, the work of recording of

deposition of four witnesses must have commenced at 11.30 AM of 22.01.2022 and after completion of their deposition, the order must have been written allowing that application. Thus, even the order sheet is not depicting the events as happened before the Court on that day, correctly. That apart, procedure adopted by the learned Trial Court for expediting the trial did not secure the ends of justice. Rather cause of justice suffered by the manner in which the trial was conducted.

34. This lightening speed by which the learned Trial Court proceeded in the matter on 22.01.2022 by jumping the stages prescribed by the procedural Code must have made it impossible for the learned Advocate for the accused even to go through the police papers including statements of prosecution witnesses recorded under Sections 161 and 164 of the Cr.P.C. as well as other documents of investigation, for conducting effective cross-examination of four prosecution witnesses examined on that day. To crown this all, the learned Advocate for the accused was not in a position to communicate with the accused as the accused was not even physically present before the learned Trial Court. Rather the record shows that the accused was in incommunicado state right from the inception to end of the trial as he was used to be produced through the Video

Conferencing as and when the learned Trial Court required his presence either for warning him to appoint defence Advocate or for explaining the charge and for recording his plea.

35. The order-sheet even does not show that at the time of recording of evidence of all four prosecution witnesses who were examined on 22.01.2022, the accused was present before the Court at least through Video Conferencing to hear evidence which was surfacing against him on that day. Recording of evidence of the prosecution witnesses in presence of the accused is minimum requirement of fair trial to the accused. It is seen from the order-sheet that the accused was not made to remain present even through Video Conferecning while recording evidence of six prosecution witnesses on 22.01.2022 and 24.01.2022. Evidence of all prosecution witnesses is seen to have been recorded in absence of the accused. Entire evidence in this case was recorded by Video Conferencing in which only the Advocate of the accused participated from remote point. At this stage, it is relevant to note mandatory provision of Section 273 of the Cr.P.C. which reads thus:

> **"273. Evidence to be taken in presence of accused.**-Except as otherwise expressly provided, all evidence taken in the course of the

> trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader:
>
> [Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused]"

This mandatory provision of recording evidence in presence of the accused is flouted by the learned Trial Court as the record and proceedings i.e. the order-sheet does not depict presence of the accused either physically or through Video Conferencing before the court while recording evidence of **prosecution witnesses** on any date.

36. The learned Trial Court committed error of procedure and breach of Section 230 of the Cr.P.C. by acceding the request of the Investigator to record evidence of the

prosecution witnesses immediately after framing of the charge, which was done after supplying police papers to the Advocate for the accused on the very same day and in quick succession. This course of conducting trial adopted by the learned Trial Court violated the right of the accused to have fair trial. Needless to mention that the charges which the accused was facing were grave, severe and complex in nature. The accused was in an incommunicado state having no access to his Advocate. His Advocate was supplied with the charge sheet just few minutes back and work of recording evidence of the witnesses commenced. There was no scope with the Advocate for the accused to prepare defence of the accused after effective consultation with and seeking instructions from the accused. As stated earlier, the accused had no opportunity even to go through the police papers which were not with him on 22.01.2022 rather the same were given to his Advocate on that day. The undue haste and hurry shown by the learned Trial Court in accepting the request of the Investigator by flouting the mandate of Section 230 of the Cr.P.C. resulted in defeating the ends of justice and causing prejudice to the accused in his defence. Breach of the principles of natural justice in such eventuality is writ large from the record of the learned Trial Court itself

rendering the impugned Judgment and Order void. The application of the Investigator was totally uncalled for. The reason mentioned in the said application by the Investigator was totally absurd. The averments in that application of the Investigator makes it clear that not a single person from the family of the victim female child had raised a grievance about exerting pressure by the brother and family members of the accused. The Investigator claimed that she received secret information to that effect. She is not attributing it to the family members of the victim female child. The accused was lodged inside the prison. Witness Protection Scheme 2018 framed by the Government of India as per the directions of the Supreme Court so also the Witness Protection Scheme of 2018 framed by the State Government were holding the field. The Investigator was empowered to act pursuant to those Schemes if she was apprehending that the prosecution witnesses were pressurized by the family members of the accused. However, ignoring these Schemes, the Investigator insisted for committing procedural error and the learned Trial Court meekly surrendered to such illegal request of the Investigator and precipitated the matter by recording evidence of four prosecution witnesses on the day on which police papers were supplied to the learned defence

Advocate and charge was also framed against the accused immediately thereafter, who was in an incommunicado state. This shows scant regard for following the procedure established by law while conducting the trial in which the accused was liable for death penalty on proof of the charges levelled by the prosecution.

37. We have perused evidence of all four prosecution witnesses examined immediately after supplying the police papers to the defence Advocate. Evidence of P.W.3 Dr. Shaila Kunwar Medical Officer of Forbesganj Sub-Divisional Hospital who had medically examined the victim female child is full of medical terminologies. She had proved the papers of medical examination of PW 2 the victim female child. The learned defence Advocate who was supplied with the police papers just few minutes prior to examination of this witness could not effectively cross-examine this Medical Officer. We have also noticed that the learned defence Advocate could not effectively cross-examine even P.W.1 Mrs. M- mother of the victim female child. Rather it seems that as the learned Advocate for the accused was short of instructions, in cross-examination of mother of the victim female child, certain materials which is incriminating the accused has surfaced on the

record. This has certainly happened because the learned Advocate for the accused had literally no time at his disposal to read the charge sheet and previous statements of the mother of the victim female child. Similar is the fact situation in respect of the other witnesses who were requiring to be cross-examined by the learned Advocate for the accused within at the most one hour of supplying the police papers to him, in absence of briefing from the accused, who was under trial prisoner having no access to his Advocate. The learned Trial Court was oblivious of the plights of the accused so also of mandatory provisions of the procedural law which required strict compliance in order to ensure fair trial to the accused.

38. On the next day, i.e. 24.01.2022, learned Trial Court recorded evidence of P.W.5 Anima Kumari and P.W.6 Rita Kumari, the Investigating Officers, and the record shows that on this occasion also accused was not produced by Video Conferencing. At least the order sheet does not mention the fact that the accused was present through Video Conferencing during the course of recording evidence of these two witnesses. Thus, on that day also commission of procedural lapses continued. The prosecution has closed its side on examining both these Investigating Officers on 24.01.2022.

39. What happened on 24.01.2022 is also disturbing. Over enthusiastic Investigator P.W.5 Anima Kumari then moved one more application with a request to the learned Trial Court that the trial should be decided on that day i.e. 24.01.2022 itself by pronouncing the Judgment and Order. She gave reason that the accused party is giving allurement as well as threat to the family members of the victim female child. When evidence of the prosecution witnesses was over by that time, one fails to understand why relatives, if any, of the accused, who was undergoing incarceration can chose to adopt this course of alluring or pressurizing the members of the prosecuting party in a non-compoundable offence. Nothing could have been achieved by that. Instead of rejecting the said application outright, the learned Trial Court had partly allowed that application with a reason that the offence is serious and the victim and her relatives enjoy the special status. Be that as it may, then by acceding to the request made in writing by P.W.5 Anima Kumari, the learned Trial Court had chosen to record statement of the accused under Section 313 of the Code of Criminal Procedure on that day i.e. 24.01.2022 itself, by rejecting oral request of the learned defence Advocate for adjournment of one week. His request was rejected by observing

that without any reason, he is protracting the trial. The learned Trial Court then directed its Bench Clerk to secure presence of the accused through Video Conferencing for recording his statement under Section 313 of the Cr.P.C. Accordingly, at 04.15 P.M. of 24.01.2022, statement of the accused came to be recorded under Section 313 of the Cr.P.C. During his examination by the court, the accused has categorically stated that he wants to adduce defence evidence. The learned Advocate for the accused then again requested for one week time for adducing defence evidence. His request was again rejected by keeping the case for adducing defence evidence on the very same day i.e. 24.01.2022. The order-sheet of that date shows that the learned Trial Court was insisting the learned Advocate for the accused to adduce defence evidence then and there itself after recording of statement under Section 313 of the Cr.P.C. We fail to understand the reasons for resorting to such an ugly haste in deciding the case involving the serious charge entailing death penalty by the learned Trial Court. Ultimately, the trial was adjourned to 25.01.2022.

40. We have already noted that on 25.01.2022, the learned Advocate for the accused filed a written application for grant of a week's adjournment by stating that he has not

received copies of depositions of the prosecution witnesses and due to paucity of time, defence witnesses could not be informed to remain present in the Court. The proceedings which took place before the learned Trial Court on 25.01.2022 which we have elaborately mentioned in the foregoing paragraphs makes it clear that the learned Trial Court was hell bent upon to deliver Judgment on that day and for that purpose, a farce of giving few hours' time to examine defence evidence was made. Request of the accused was for one week's time adjournment for adducing defence evidence. The learned Trial Court insisted the learned defence Advocate, as seen from the order sheet by saying that as copies of depositions of the prosecution witnesses are supplied on that day i.e. 25.01.2022, defence witness should be examined on that day itself. This was despite the fact that the written application on behalf of the accused was with a reason that because of paucity of time, witnesses could not be informed to attend Court. The case was just an overnight part heard case in which the accused was the under trial prisoner who was unable to meet any body including his Advocate. The record maintained by the learned Trial Court shows that the learned Trial Court even questioned the defence Advocate about the propriety of filing such application for grant of adjournment.

The learned Trial Court was throughout insisting the Advocate for the accused, of the need to dispose of the case immediately. The learned Trial Court on 25.01.2022 had adopted shocking procedure for adjourning the case on several times throughout that day for insisting the learned defence Advocate to adduce defence evidence. When at the beginning of the day itself through the written application it was made clear that as the presence of defence witness could not be secured for want of time, adjournment of one week be granted. In spite of this, the learned Trial Court has made a record that the Office Report shows that the defence Advocate is not desirous of examining the defence witness. Even with the assistance of the learned Advocates for the parties, we are unable to find out such office report from the record and proceedings. On that day i.e., on 25.01.2022 even the learned Advocate for the accused had dared to point out to the learned Trial Court that it can do the work of dictating Judgments in other cases which are fixed on the daily board of that day for passing Judgments, instead of insisting him to close the defence side. Ultimately, the learned Trial Court at about 2.45 P.M. of 25.01.2022, without passing any separate order on the application for adjournment to adduce defence evidence filed by the accused, had observed in the

order-sheet of that day that the said application is disposed of as it is outcome of pressurizing tactics and excuse of the accused. The way in which the learned Trial Court proceeded on 25.01.2022 on hour to hour basis despite written request for a week's adjournment for adducing defence evidence reflect flagrant disregard to the principles of natural justice by the learned Trial Court. Each and every Trial Court is duty bound that defence of the accused must be heard fairly. In the case in hand, in utter haste to decide the case, the learned Trial Court has given complete go-by to the principles of fairness in procedure, rather considered it as mere formality to be meant for surpass. There was nothing on record to suggest that the request for adjournment was for the purpose of vexation or delay or for defeating the ends of justice. The defence of the accused as seen from cross-examination of the prosecution witnesses as well as from his statement under Section 313 of the Cr.P.C. was that of total denial. The accused has set up the plea of alibi. He has specifically contended in his statement under Section 313 of the Cr.P.C. that on the day of the incident he was at the house of Arjun Ram situated at the western side of the canal and as such it was not possible for him to commit the crime in question. He has further stated in his statement under Section 313 of the

Cr.P.C. that his brother Sattar had contested the election for the post of Mukhiya of the village and his another brother Changez had contested the election for the post of Member of the Zila Parishad. Because of this, Mohammad Shahid who is Mukhiya of the village as well as Journalist Aslam and one Md. Nazim were annoyed and that is how he is falsely implicated in the crime in question at their instance. The accused had specifically pleaded in his statement under Section 313 Cr.P.C. that he wants to adduce defence evidence. Thus, genuine case for examining the defence witnesses was made out by the accused and for that purpose he had sought only one week's time for producing defence witnesses, after closure of the prosecution evidence and after recording his statement under Section 313 of the Cr.P.C. However, unfortunately, the accused was not permitted by the learned Trial Court to examine the defence witnesses by giving reasonable time of one week as sought by him. Here also prejudice caused to the accused is writ large from the record. Defence witnesses were incapacitated from acting as eyes and ears of justice due to closure of defence evidence.

41. After closing evidence of the accused by refusing to adjourn the case on 25.01.2022 itself, the learned

Trial Court insisted for hearing the arguments and made it a record that arguments continued upto 06.30 P.M. of 25.01.2022. The learned Trial Court then directed the case to be kept at 07.00 P.M. of the same day for pronouncement of the Judgment. Ultimately, the judgment was pronounced at 07.10 P.M. of 25.01.2022 convicting the accused of all the offences alleged against him. Thus, the learned Trial Court, after approximately 40 minutes of completion of arguments had dictated and pronounced the Judgment of conviction in the case relating to capital offence. We ourselves have perused that Judgment of conviction which runs into 59 paragraphs consuming 27 pages in Font No.12. Our practical experience says that this is humanly impossible. It is mystery as to how such voluminous Judgment which requires application of mind to the record could have been dictated and pronounced by the learned Trial Court in just 40 minutes after hearing the arguments of both the parties. A lurking doubt arises as to whether the Judgment was kept ready and farcical hearing was granted to the parties. This is so because the learned Trial Court has repeatedly made it a record that the case is required to be decided expeditiously in order to do justice to the victim female child. To quote some such instances from the record, on 21.01.2022 the case was

adjourned to 24.01.2022 with a reason that for delivering justice to the victim female child, the case is required to be heard on day to day basis. On that day, the application of the Investigator to record evidence immediately after framing charges was allowed mainly for the reason that interest of the victim and her family members need to be protected. On 24.01.2022, similar application of the Investigator to decide the case immediately after recording evidence of the prosecution was partly allowed again with a similar reason that status of the victim and her kith and kin requires the Court to do so. Then, on that day oral requests for adjournment made by the defence were rejected with insistence by the Court to the learned defence Advocate to adduce defence evidence on that day only. On 25.01.2022, the learned Trial Court, as seen from the record impressed the learned defence Advocate, the need to decide the case immediately and rejected his written application for grant of adjournment of one week by holding that it is a pressurizing tactics and excuse. It was the very first date fixed for recording defence evidence. It is duty of the court to do justice to both the parties rather than leaning in favour of one side. This conduct on the part of the learned Trial Court gives an indication of biased attitude of the Court towards the accused.

Every trial began with a presumption of innocence in favour of the accused and the provision of the Cr.P.C. are so framed that the criminal trial should begin with and be throughout governed by this essential presumption.

42. Fair trial obviously means a trial before the impartial Judge which precisely means that the Court should be bias free while judging the matter. In the case in hand, in view of aforestated facts depicting conduct of the trial, it is reasonable on the part of the accused to infer bias. The learned Trial Court on two occasions by giving complete go-by to the mandatory procedural law had acceded to the request of the Investigator P.W.5 Anima Kumari and ventured to record evidence of prosecution witnesses on the day on which police papers were supplied to the learned Advocate for the accused and when the accused had no opportunity to go through those police papers and to impart instructions to his Advocate. Learned Trial Court on each stage of the trial was giving complete go by to the mandatory procedure prescribed by the Cr.P.C. by making it the part of record that for giving justice to the victim, this course of conduct is necessary. Total obliviation was shown to the procedural law as well as the concept of fair trial by the learned Trial Court despite reiterating in the order

sheets maxims such as "Justice hurried-Justice buried" and "Justice Delayed is Justice Denied".

43. At this juncture, it needs to mention here that in the matter of ***M.V.Ganesh Prasad v. M.L.Vasudevamurthy & Ors.*** reported in **AIR 2003 SC 39**, the Supreme Court has observed that it must be kept in mind that the apprehension of bias on the part of a litigant should be a 'bona fide, reasonable apprehension and not a mere apprehension of the litigant. What amounts to bias is aptly explained by the Supreme Court in ***Ranjit Thakur v. Union of India*** reported in **(1987) 4 SCC 611.** Paragraphs 16 to 21 of that Judgment needs to be quoted for proper adjudication of the case in hand. Those read thus :

> ***"16.*** *It is the essence of a judgment that it is made after due observance of the judicial process; that the Court or Tribunal passing it observes, at least the minimal requirements of natural justice, is composed of impartial persons. acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial 'coram non judice'. [See* ***Vassiliades v. Vassiliades,*** *reported in* ***AIR 1945 PC 38]***
>
> ***17.*** *As to the tests of the likelihood of bias what is relevant is the reasonableness of the*

apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?" ; but to look at the mind of the party before him.

18. *Lord Esher in Allinson Vs. General Council of Medical Education and Registration, reported in [1894] 1 Q.B. 750 :*

> *"The question is not, whether in fact he was or was not biased. The Court cannot inquire into that ..... In the administration of justice, whether by a recognised legal court or by persons who, although not a legal public court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased."*

19. In *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*, [1969] 1 Q.B. 577, 599, Lord Denning M.R. Observed:

> *". .. in considering whether there was a*

real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.

20. Frankfurter, J. in *Public Utilities Commission of the District of Columbia Vs. Pollack (343 US 451 at 466-67 : 96 L ed 1068, 1079)* :

"The judicial process demands that a judge move within the framework of relevant legal rules and the court covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it.

It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment."

21 Referring to the proper test, *Ackner LJ in Regina Vs. Liverpool City Justices, Ex-parte Topping, [1983] I WLR 119 :-*

"Assuming therefore, that the justices had applied the test advised by Mr. Pearson : 'Do I feel prejudiced ?' then they would have applied the wrong test, exercised their discretion on the wrong principle and the same result,

namely, the quashing of the conviction, would follow."

From bare perusal of the law laid down by the Supreme Court, it is clear that the Court is expected to use arm chair of the litigant in order to determine the apprehension and likelihood of bias. Natural justice is a sense of what is wrong and what is right. What is relevant is not to look into its own mind, but to look into the mind of the litigant to consider whether such litigant feels that the Judge is biased against him and that he may not get justice at the hands of that Judge. If answer to this is in affirmative then genuine case of bias can be said to be established, having regards to other attending circumstances. In the case in hand, the accused was not given any opportunity to go through the police papers, he was throughout in incommunicado state having no means to even contact his Advocate for briefing him. He had no opportunity even to read the charge sheet comprising of paper of investigation till the end of the trial. His two oral and one written application for adjournment were refused by not even granting him chance to adduce defence evidence despite raising plea of alibi by him. Evidence in the case was recorded in his absence. Relevant Provisions of the Cr.P.C. were flouted with

impunity while conducting the trial. In such situation, it is not possible to infer that the accused was fairly dealt with by an unbiased Judge in an atmosphere of judicial calm.

44. There is no doubt that at the minimum the courts must not take any decisions without affording all parties a meaningful opportunity of hearing, and every decision by a judge must rest on sound legal reasoning. The due process of law must not be compromised in any attempt at providing speedy justice. What is still more important for ensuring the due process of law is that, firstly, the procedure provided by law must be such as to advance the cause of substantial and complete justice, and, secondly, the procedure so laid down is duly followed by the courts in administering justice. While a judge could do away with a technicality coming in the way of substantial justice, the entire procedure governing a civil or criminal proceeding should not be considered a mere formality or technicality. Because once you start belittling the significance of procedure your ability to appreciate its relevance and value to the administration of justice and resultantly your interest and respect for the procedure would start declining. It would not be surprising if you start disregarding the procedure considering it yet another impediment in the way of justice and wastage of the

courts time which eventually will lead to a disastrous situation. It is interesting that there is a saying in Arabic to the effect that ‘haste is from shaitaan’. In formulating and effecting the justice system, the judges should be made more efficient to be able to deliver justice in a timely and not a hurried manner. The Trial Courts are expected to remind themselves of the intent of legislature behind legislating such an exhaustive and elaborate procedure to conduct Trials keeping in mind every aspect with respect to fairness to both victim and accused. There is a scientific research and study done by the legislators before legislating any act and the court must adhere to it in a reasonable manner by keeping in mind the overall practical difficulties and societal changes. The courts are not expected to be either hyper technical or to completely wash away and surpass the procedure, as is done in the instant case.

45. For these reasons, there is no alternative but to hold that the learned Trial Court failed to follow due procedure of law while convicting the accused and imposing him death penalty and has also failed to act neutrally while conducting the trial. The accused is justified in apprehending that justice is not done to him and because of flagrant violation of the principles of natural justice and blatant disregard to the

mandatory statuary provisions of the Cr.P.C. as well as the Rules framed thereunder. This apprehension is ultimately found to be reasonable, genuine and justifiable by us. In the light of facts emerging from the record of the Trial Court and noted by us in foregoing paras, we feel that consciously the learned Trial Court was prejudiced in the matter, may be as a result of predetermination to decide the case in a particular manner and in a record breaking time frame by disregarding the law crystallized by the procedural Code as well as abovenoted judgments of the Supreme Court. No doubt, the trial was over in a record breaking time but that was at the cost of compromising fair trial by breach of mandatory procedure prescribed by law and victimizing the cause of justice.

46. We may give one more instance from the evidence on record and the resultant Judgment declared instantaneously which would show that the learned Trial Court in a hurry to dispose of the trial has failed to do real and substantial justice.

47. The learned Trial Court, by the impugned judgment had convicted the accused of the offence punishable under Section 3(2)(v) of the Prevention of Atrocities Act. Because of this conviction in addition to death penalty, the

accused is directed to suffer imprisonment for life and to pay a fine of rupees ten thousand. Relevant portion of Section 3 of the Prevention of Atrocities Act reads thus:-

> "Section 3. **Punishments for offences of atrocities**.- (1) …….
>
> (2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe.- …..
>
> (v) Commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine"

This section prescribes enhanced punishment with regard to the offence under the IPC punishable with imprisonment for a term of ten years or more committed against a person or property knowing that the victim is a member of a Scheduled Caste or a Scheduled Tribe. Following are the observations of the Supreme Court in the matter of **Khunam Singh Vs. State of Madhya**

Pradesh reported in **2019 (4) PLJR 130**, found in paragraph-13:

> "13. In Dinesh alias Buddha V. State of Rajasthan, (2006) 3 SCC 771, the Supreme Court held as under:-
>
> "15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) of the Atrocities Act been applicable then by operation of Law, the sentence would have been imprisonment for life and fine."
>
> As held by the Supreme Court, the offence must be such as to attract the offence under Section 3(2)(v) of the Act.

> The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar"-Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable."

In the case in hand, there is no iota of evidence on the record of the learned Trial Court to show that PW 2, the victim female child was either belonging to any Scheduled Caste or any Scheduled Tribe. Entire evidence adduced by the prosecution is conspicuously silent on this fact. Therefore, while recording the statement of the accused under Section 313 of the Cr.P.C., he was not questioned on this aspect by the learned Trial Court. We seriously believe that as the impugned

judgment is shown to have been prepared and delivered within a short time of 40 minutes immediately after hearing arguments, the learned Trial Court could not have noticed this aspect. He, however, went on to observe in para-20 of the impugned judgment that the accused was aware of the fact that the victim belongs to Scheduled Caste community and the accused had knowledge of this fact being the villager and neighbour. This finding of the learned Trial Court is wholly perverse in the wake of the fact that there is no evidence in the entire record and proceedings of the learned Trial Court to show that the victim female child belongs to any Scheduled Caste and that the accused was aware of this fact. Thus, while fast tracking the case, ends of justice came to be perverted.

48. The manner in which the trial was commenced, conducted and concluded clearly displays and demonstrates glaring abuse and misuse of judicial power by learned Trial Court, while exercising judicial function. In view of foregoing reasons, we are unable to concur with the impugned judgment and order of the learned Trial Court. It deserves to be quashed and set aside. There is no alternative but to direct for De-novo Trial of the accused from the stage before framing of charge as breach of mandatory provisions of law

commenced before framing of the charge causing miscarriage of justice.

49. We do not wish to burden this lengthy Judgment with other authorities cited by the learned Senior Advocate for the appellant as those are not furthering the cause of the appellant. Main contention on behalf of the accused is no opportunity to adduce defence evidence is given to him. The ratio of Judgment in the case of **David** (Supra) is that the accused is not obliged to produce defence evidence. This proposition, in the instant case cannot be of any assistance to the appellant. Similarly, we have dealt with the aspect of breach of principles of natural Justice in the light of facts of the instant case. Hence case of **Shambhunath** (supra) has no application to the instant case.

50. In the light of the view which we have taken while deciding the instant matter, it is not necessary to go into the merits of the case in order to find out whether the prosecution is successful in proving the guilt of the accused or not. We, therefore, refuse to dwell upon merits of the matter.

51. As we have dealt with the issue of procedural fairness while conducting the trial, we direct the learned Registrar General of this Court to circulate this Judgment to the

Judicial Officers in the District Judiciary of the State of Bihar.

52. Hence, the following order:-

I. The present Death Reference is answered in negative and the death sentence passed by the learned Trial Court is not confirmed.

II. The impugned judgment and order passed by the learned Trial Court in i.e., Special Judge (POCSO), Araria, in Special POCSO Case No.1 of 2022, arising out of Araria Mahila Police Station Case No.137 of 2021 is quashed and set aside.

III. Cr. Appeal (DB) No. 203 of 2022 filed by the accused-appellant is partly allowed to the extent indicated hereinbefore. We make it clear that we have not expressed any opinion regarding the merits of the case and our observations are limited only to the extent that accused was not awarded fair trial in the instant case.

IV. Since the trial is vitiated, the matter is remanded to the learned Trial Court for fresh trail from before the stage of framing charge.

53. We record our deep sense of appreciation for the valuable assistance rendered by Mr. Prince Kumar Mishra, the learned Amicus Curiae. We direct the Patna High Court

Legal Services Committee to pay an amount of Rs.10,000/- (Ten Thousand) to Mr. Prince Kumar Mishra, learned Amicus Curiae, as consolidated fee for the assistance rendered by him to the Court in the present appeal.

(A. M. Badar, J)

(Rajesh Kumar Verma, J)

P.S./Mkr./Bhardwaj/-

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