



2025 INSC 712

REPORTABLE
IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO(S). 429-430 OF 2020

WARIS

....APPELLANT(S)

VERSUS

**STATE OF MADHYA
PRADESH**

....RESPONDENT(S)

ORDER

Mehta, J.

1. Heard.

2. The appellant herein¹ was arraigned as an accused in connection with FIR bearing Crime No. 98 of 2018 dated 24th April, 2018 registered at Police Station Piploda, District Ratlam for the offences punishable under Sections 302, 201, 376(2)(i), and 376AB of the Indian Penal Code, 1860² and Sections 5/6 of the Protection of Children from Sexual Offences Act, 2012³. The charge against the accused-appellant was of subjecting his own step-daughter being Musst. 'A' to sexual assault and then throttling her to death. The prime witness of the incident was none other than the mother of the child victim and wife of the accused-appellant, namely, Smt. Salma Bi (PW-1). A charge sheet was filed against the accused-appellant for the

¹ Hereinafter, referred to as "accused-appellant".

² Hereinafter, being referred to as 'IPC'.

³ Hereinafter, being referred to as 'POCSO Act'.

aforesaid offences in the Court of Second ASJ and Special Judge (POCSO Act), Jaora, District Ratlam, Madhya Pradesh⁴ where Special Case No. 3 of 2018 came to be registered on 18th June, 2018.

3. The matter was posted by the trial Court for consideration of arguments on charge on 21st June, 2018, on which date, advocate engaged by the accused-appellant appeared and refused to plead on his behalf. On this, the accused-appellant requested that he may be given some time to address the argument on charge because he would be engaging another counsel to represent him in the trial. The matter was thereupon, deferred to 2nd July, 2018. On that date, Advocate Mr. Mohd. Ahmad Khan put in appearance on behalf of the accused-appellant and was permitted to file his

⁴ Hereinafter, being referred to as 'trial Court'.

vakalatnama. On the same day, the trial Court framed charges against the accused-appellant for the offences punishable under Sections 376(2)(f), 376(2)(i), 376(2)(n), 376AB, 302 and 201 of the IPC and Sections 5/6 of the POCSO Act. The accused-appellant abjured his guilt and claimed trial. The trial Court posted the matter on 6th July, 2018 for fixing the calendar of trial.

4. On 6th July, 2018, Advocate Mr. Mohd. Ahmad Khan appeared on behalf of the accused-appellant. The prosecution suggested two dates for examining its witnesses. On the first date, i.e., 16th July, 2018, the star prosecution witness i.e., Smt. Salma Bi (PW-1) was to be summoned whereas, two more witnesses were to be summoned on 17th July, 2018.

5. On 16th July, 2018, the accused-appellant was presented before the trial Court from jail. The counsel

engaged by him i.e., Advocate Mr. Mohd. Ahmad Khan was not present. The accused-appellant pleaded that he could not afford the fees of his counsel and thus, was unable to engage a counsel on his own. He prayed to the trial Court for being provided the services of a legal aid defence counsel. The trial Court accepted the said prayer of the accused-appellant and appointed Advocate Mr. Ajay Srivastava as a legal aid defence counsel to represent the accused-appellant. On the very same day, the trial Judge proceeded to record the evidence of the star prosecution witness, i.e., Salma Bi (PW-1) and also ensured that the legal aid defence counsel completed the cross-examination from the said witness.

6. The trial Court upon conclusion of the trial convicted the accused-appellant, *vide* judgment dated

17th December, 2018 for the offences punishable under Sections 376(2)(f), 376(2)(n), 376AB, 302 and 201 of the IPC and Sections 5/6 of the POCSO Act and sentenced him in the terms indicated below: -

<u>Sections</u>	<u>Sentence Awarded</u>
376AB IPC	Death sentence along with fine of Rs. 5,000/- and in default to undergo 1-year rigorous imprisonment.
302 IPC	Death sentence along with fine of Rs. 5,000/- and in default to undergo 1-year rigorous imprisonment.
201 IPC	Rigorous imprisonment of 5 years along with fine of Rs. 5,000/-.

7. The accused-appellant preferred an appeal⁵ assailing his conviction and the trial Court forwarded a reference⁶ under Section 366 of the Code of Criminal Procedure, 1973⁷ to the High Court of Madhya Pradesh at Indore⁸ for confirmation of the death sentence.

⁵ Criminal Appeal No. 1854 of 2019.

⁶ Criminal Reference No. 1 of 2019.

⁷ For short "CrPC".

⁸ Hereinafter, being referred to as 'High Court'.

8. Before the High Court, a specific plea was taken on behalf of the accused-appellant that he was not provided proper opportunity of defence inasmuch as the legal aid defence counsel appointed on his behalf was totally inexperienced. Thus, evidently, the accused-appellant had raised an objection regarding the competence and capability of the legal aid defence counsel. However, the High Court did not give much credence to the said pertinent objection raised on behalf of the accused-appellant and *vide* judgment dated 18th November, 2019 proceeded to dismiss his appeal while answering the reference in affirmative thereby, confirming the penalty of death sentence awarded to the accused-appellant by the trial Court.

9. Being aggrieved, the accused-appellant has preferred the instant appeal by special leave before this Court.

10. Learned senior counsel Mr. Chander Uday Singh appearing on behalf of the accused-appellant at the very outset, vehemently and fervently urged that the accused-appellant has been seriously prejudiced on account of the fact that the legal aid defence counsel appointed by the trial Court to conduct the proceedings on his behalf was an inexperienced hand and in addition thereto, the said counsel was not given even the bare minimum time required to prepare the brief and conduct the cross-examination from the witnesses. The free legal aid counsel was appointed on 16th July, 2018 because the accused-appellant expressed his inability to pay the fees of the counsel engaged by him.

On the very same day, the trial Court appointed a legal aid defence counsel and compelled him to conduct the cross-examination from the star prosecution witness, i.e., Smt. Salma Bi (PW-1), on whose testimony the entire fulcrum of the prosecution case is based.

11. He contended that the accused-appellant deserves an opportunity to fair trial by setting aside the impugned judgments and remanding the matter to the trial Court for *de novo* proceedings.

12. *Per contra*, learned counsel representing the respondent-State has opposed the submissions advanced by learned senior counsel appearing on behalf of the accused-appellant. He urged that the accused-appellant never raised the issue of denial of fair opportunity or prejudice either before the trial Court or the High Court. This contention is being raised for the

first time before this Court. He urged that if at all, the accused-appellant felt that he had been deprived of an opportunity to effectively cross-examine the prosecution witnesses, he could have moved an application under Section 311 CrPC before the trial Court itself for recalling the concerned witnesses. This highly belated plea of lack of opportunity to fair trial is nothing but a ploy to sabotage the case of the prosecution, and to make an effort to win over the witnesses by asking for a *de novo* trial.

13. We have given our thoughtful consideration to the submissions advanced at bar and have gone through the material available on record.

14. The documents available on the record indicate that the accused-appellant was shown to be educated till 4th standard only. Thus, there is no dispute on the

aspect that the accused-appellant was a semi-literate, rustic villager. The fact that the accused-appellant hails from a very poor background is also borne out from the record inasmuch as, he could not even afford the fees of the lawyer he had engaged to defend him, in a case which had the potential of capital punishment right from the inception.

15. This Court has observed time and again that denial of a competent experienced defence counsel to an accused tantamounts to deprivation of fair trial. This apprehension would be magnified where the accused-appellant is charged for offences punishable with life imprisonment/death penalty. There is a plethora of similar cases where this Court has been compelled to acquit the accused or remand the proceedings to the trial Court for conducting *de novo* trial after providing

an experienced free legal aid defence counsel to the accused. We may gainfully refer to ***Mohd. Hussain @ Zulfikar Ali v. State (Government of NCT of Delhi)***⁹; ***Anokhilal v. State of Madhya Pradesh***¹⁰ and ***Ashok v. State of Uttar Pradesh***¹¹.

16. At this stage, it must be observed that significant strides have been made by legal aid authorities in India for creation of a robust mechanism so as to provide effective and efficient legal aid services to the poor and needy in the criminal justice system. The National Legal Services Authority (NALSA) has been at the forefront of these efforts and has played a major role in expanding legal aid services to people in need throughout the country. This has been further supplemented by the

⁹ (2012) 2 SCC 584.

¹⁰ (2019) 20 SCC 196.

¹¹ (2025) 2 SCC 381.

introduction of the Legal Aid Defense Counsel Scheme, 2022, which embodies the following core principles: -

- Increase in Availability and accessibility of Legal Aid Defense counsels;
- Effective and efficient representation by experienced lawyers;
- Timely and lively Client Consultations;
- Effective monitoring and mentoring of legal aided cases;
- Professional management of legal aid work in criminal matters;
- Enhanced responsiveness leading to updating legal aid seekers about the progress of their cases;
- Ensuring accountability on the part of the legal aid providers.

The realization of the aforesaid principles will go a long way in providing qualitative and competent legal services in criminal matters to all eligible persons. This will further help with the management and implementation of the legal aid system in a more professional manner, especially in criminal matters.

17. Providing an experienced legal aid defence counsel to an unrepresented accused in criminal proceedings is within the scope of the Fundamental Right guaranteed by Article 22(1) of the Constitution of India and gets along with the aims and objectives of the Legal Aid Defence Counsel Scheme floated by NALSA.

18. It cannot be gainsaid that once a legal aid defence counsel is provided to the accused, more particularly, in a case involving offences where capital punishment is provided as a sentence, the trial Court must ensure that the counsel so appointed gets a reasonable opportunity to prepare and conduct the case on behalf of the accused. Failure to do so would vitiate the proceedings as being a case of a mistrial. This is what has precisely happened in this case.

19. It is clearly borne out from the record that initially the lawyer engaged on behalf of the accused-appellant refused to plead the case on his behalf. The second lawyer appointed by the accused-appellant did not appear before the trial Court on 16th July, 2018 when the star prosecution witness i.e., Smt. Salma Bi (PW-1) had been summoned to testify at the trial. The trial Court accepted the request of the accused-appellant and appointed Advocate Shri Ajay Srivastava as a free legal aid defence counsel to conduct the trial on behalf of the accused-appellant. The order sheets of the trial Court clearly indicate that the legal aid counsel was appointed on 16th July, 2018 and on the very same day, the trial Court proceeded to record the complete deposition of Smt. Salma Bi (PW-1), including the cross-examination from the said witness. The order sheet of

the trial Court does not even indicate whether the legal aid defence counsel was provided with the copies of the documents relied upon by the prosecution by following the mandate of Section 207 CrPC, which is equivalent to Section 230 of Bhartiya Nagrik Suraksha Sanhita, 2023¹².

20. We have perused the cross-examination conducted by the legal aid defence counsel from the star prosecution witness, i.e., Smt. Salma Bi (PW-1) and find that there are certain vital aspects of the case on which hardly any question was put to the said witness. Thus, grave prejudice caused by undue haste is writ large on the face of record by the manner in which the trial Court proceeded to provide the services of the free legal aid counsel to the accused-appellant and thereafter

¹² For short “BNSS”.

proceeded to record the testimony of the star prosecution witness, i.e., Smt. Salma Bi (PW-1).

21. We hasten to add that apart from the said deviation, the trial Court conducted the proceedings with remarkable precision and thoroughness warranted in a case of this nature and completed the trial of the case within 6 months from the date of filing of the chargesheet. However, the aforesaid deviation by the trial Court (*supra*) which may have been unintentional and inadvertent has led to grave prejudice being caused to the defence thereby compelling us to exercise powers under Section 408 BNSS (corresponding, Section 367 CrPC) read with Section 432 of BNSS (corresponding, Section 391 CrPC). For ready reference, the aforesaid provisions are quoted herein below: -

“408. Power to direct further inquiry to be made or additional evidence to be taken. —

(1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

(2) Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.

(3) When the inquiry or evidence (if any) is not made or taken by the High Court, the result of such inquiry or evidence shall be certified to such Court.

432. Appellate Court may take further evidence or direct it to be taken. —

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

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

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

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

22. In this regard, we may gainfully refer to the judgment of this Court in *Atma Ram v. State of Rajasthan*¹³, wherein it was held: -

“22. According to Section 366 when a Court of Session passes a sentence of death, the proceedings must be submitted to the High Court and the sentence of death is not to be executed unless it is confirmed by the High Court. **Section 367 then proceeds to lay down the power of the High Court to direct further enquiry to be made or additional evidence to be taken.** Section 368, thereafter, lays down the power of the High Court to confirm the sentence so imposed or annul the conviction. One of the powers which the High Court can exercise is one under Section 368(c) of the Code and that is to “acquit the accused person”. Pertinently, the power to acquit the person can be exercised by the High Court even without there being any substantive appeal on the part of the accused challenging his conviction. To that extent, the proceedings under Chapter XXVIII which deal with “submission of death sentences for confirmation” is a proceeding in continuation of the trial. These provisions thus entitle the High Court to direct further enquiry or to take additional evidence and the High Court may, in a given case, even acquit the accused person. **The scope of the chapter is wider. Chapter XXIX of the Code deals with “Appeals”. Section 391 also entitles the appellate court to take further evidence or direct such further evidence to be taken. Section 386 then enumerates powers of the appellate court which inter alia includes the power to “reverse the**

¹³ (2019) 20 SCC 481.

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

23. It is true that as consistently laid down by this Court, an order of retrial of a criminal case is not to be taken resort to easily and must be made in exceptional cases. For example, it was observed by this Court in *Ukha Kolhe v. State of Maharashtra* [*Ukha Kolhe v. State of Maharashtra*, (1964) 1 SCR 926 : AIR 1963 SC 1531 : (1963) 2 Cri LJ 418] , as under: (AIR p. 1537, para 11)

“11. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the

appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of retrial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C.J., in *Ramanlal Rathi v. State* [*Ramanlal Rathi v. State*, 1950 SCC OnLine Cal 62 : AIR 1951 Cal 305] : (SCC OnLine Cal para 10)

‘10. If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witnesses who should, have been heard. But, I have never known of a case where a retrial can be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case.’ ”

24. The order passed by the High Court in the present matter was not to enable the prosecutor to rectify the defects or infirmities in the evidence

or to enable him to lead evidence which he had not cared to lead on the earlier occasion. The evidence in the form of testimony of those twelve witnesses was led and those witnesses were cross-examined. There was no infirmity except the one that the evidence was not led in the presence of the appellants. The remedy proposed was only to rectify such infirmity, and not to enable the prosecutor to rectify defects in the evidence.”

(emphasis supplied)

23. In the circumstances indicated above, we are unequivocal on the aspect that the trial Court ought to have given proper time and opportunity to the legal aid defence counsel to prepare the matter and should have deferred the cross-examination of Smt. Salma Bi (PW-1) by a reasonable time so as to ensure fairness in the proceedings both for the prosecution and the defence and thereby, dispelling the sense of prejudice to the accused-appellant.

24. We further feel that providing such an opportunity to the accused-appellant was absolutely essential and imperative for a just decision of the case.

25. In wake of the decision made hereinabove, we hereby exercise powers under Section 408 BNSS (corresponding, Section 367 CrPC) read with Section 432 of BNSS (corresponding, Section 391 CrPC) and remit the matter back to the trial Court, i.e., Second ASJ and Special Judge (POCSO Act), Jaora, District Ratlam, Madhya Pradesh for further examination of the star prosecution witness, i.e., Smt. Salma Bi (PW-1).

26. The witness Smt. Salma Bi (PW-1) shall be summoned in the Court and the accused-appellant shall be provided appropriate opportunity to conduct cross-examination from the said witness. There has been a significant time gap between the incident and

the direction to recall the witness. Thus, there would be an imminent possibility of the defence trying to win over the witness or the witness experiencing diminished memory owing to the long-time gap. We, therefore, direct that the trial Court and the District Superintendent of Police shall ensure that appropriate protection is provided to the witness as warranted under the 'witness protection scheme'. The witness may be provided proper counselling by a Senior/Special Public Prosecutor before stepping into the witness box for deposition. If desired, an experienced legal aid defence counsel shall be appointed to represent the accused-appellant for conducting cross-examination from the witness.

27. If required, the trial Court shall ensure that the complete record is provided to the legal aid defence

counsel well in advance and at least 15 days before the date on which the witness is to be summoned for further examination. The prosecution, if so required, shall be given a reasonable opportunity to put additional questions to the witness by way of re-examination.

28. It is made clear that the accused-appellant would be at liberty to engage his own counsel or he may also get the cross-examination conducted by the counsel assisting him under Project 39A. If the original trial Court record has been summoned, the Registry of this Court shall remit the same back to the trial Court forthwith.

29. The accused-appellant shall be permitted to remain present in the proceedings virtually from jail by strictly adhering to the procedure provided for trials under the POCSO Act. The trial Court shall summon

Smt. Salma Bi (PW-1) for further examination in the terms indicated above on 11th June, 2025. The original record along with the additional statement of Smt. Salma Bi (PW-1) recorded in compliance of this order shall be forwarded to this Court forthwith once such proceedings are completed.

30. List on 17th July, 2025 for hearing.

.....**J.**
(VIKRAM NATH)

.....**J.**
(SANJAY KAROL)

.....**J.**
(SANDEEP MEHTA)

NEW DELHI;
May 08, 2025.

