IN THE HIGH COURT OF JHARKHAND AT RANCHI

Death Reference No. 02 of 2020

State through informant Sadhu Rai .... **Appellant**

Versus

1.Mithu Rai, S/o Late Jiyalal Rai, R/o village-Dahujore, PS-Ramgarh, District-Dumka
2. Ashok Rai, S/o Ramchandra Rai
3. Pankaj Mohali, S/o Dashrath Mohali
Both resident of village-Pipara, PS-Poraiyahat, District-Godda

.... **Respondents**

With

Cr. Appeal (DB) No. 493 of 2020

1. Mithu Rai, S/o Late Jiyalal Rai, R/o village-Dahujore, PO&PS-Ramgarh, District-Dumka (Jharkhand)
2. Ashok Rai, S/o Ramchandra Rai
3. Pankaj Mohali, S/o Dashrath Mohali
Both resident of village & PO-Pipara, PS-Poraiyahat, District-Godda (Jharkhand)

.... **Appellants**

Versus

The State of Jharkhand .... **Respondent**

CORAM : HON'BLE MR. JUSTICE SHREE CHANDRASHEKHAR
HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

For the Appellant-State : Mr. Pankaj Kumar, Public Prosecutor
[in Death Reference No.02 of 2020]
For Accused No.1 : Mr. Kumar Vaibhav, *Amicus*
[in both cases]
For Accused Nos.2 & 3 : Mr. Rajeeva Sharma, Sr. Advocate
Mr. Ritesh Kumar, Advocate
[in both cases]

JUDGMENT

C.A.V on 14/09/2023 Pronounced on 18/10/2023

Per, Shree Chandrashekhar, J.

Death Reference No.02 of 2020 has been registered by virtue of the proceedings in POCSO Act Case No.08 of 2020 submitted to the High Court under section 366 of the Code of Criminal Procedure for confirmation of a sentence of death awarded to Mithu Rai, Ashok Rai and Pankaj Mohali. The abovenamed condemned prisoners have preferred Criminal Appeal (DB) No.493 of 2020 to challenge the judgment of conviction recorded against

them under sections 366/34, 376-DB/34, 376-A/34, 302/34 and 201/34 of the Indian Penal Code and section 6 of the Protection of Children from Sexual Offences Act, 2012[1] and the order of sentence passed thereon, separately on each count except under section 376-A/34 of the Indian Penal Code.

2. On 7th February 2020, a First Information Report was lodged under sections 376, 302 and 201 of the Indian Penal Code and sections 4 and 8 of the POCSO Act against Mithu Rai. In the written report given to the Officer-in-Charge of Ramgarh PS, Sadhu Rai stated that Mithu Rai aged about 26 years visited his house on 5th February 2020 with two friends and took his 6-year old daughter[2] to the village fair but she did not return home till late at night. Upon inquiry, Mithu Rai said that he had left 'V' at the doors of his house. The informant alleged that Mithu Rai and his friends came in the night around 11:30 PM and slept in his house but early morning they were found missing from the house. The informant further alleged in the written report dated 7th February 2020 that Mithu Rai committed rape upon his daughter and killed her and to cause the disappearance of the dead body concealed the same in the field. A postmortem over the dead body of 'V' was conducted around 10:40 AM on 8th February 2020 by Dr. Gautam Kumar who was posted as Assistant Professor in the Department of Forensic Medicine and Toxicology at Dumka Medical College and Hospital. The autopsy doctor found marks of forceful penetration in the private parts of 'V' and opined that sexual violence cannot be ruled out. Therefore, for detection of spermatozoa, semen and human DNA, oral smear and vaginal and anal swabs were taken. The cause of death was smothering and homicidal in nature. 'V' was wearing a jacket, frock, pajama, sandals and a red color sacred thread with an amulet found around her neck and three bangles on each wrist. All the clothes were soiled and blood stains were found on the frock, pajama and panty of 'V'. All these materials were handed over by the autopsy doctor to the Investigating Officer. A production-cum-seizure of the articles handed over by Dr. Gautam Kumar was prepared around 01:20 PM on 8th February 2020 in the presence of Patwari Rai and Mantu Rai. The Investigating Officer came back to the police station at 02:00 PM and deposited these articles in the Malkhana.

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1 In short "POCSO Act"

2 The victim is referred as 'V'

3. On 10th February 2020, Mithu Rai was arrested by Jharkhand police at Kalyan in the State of Maharashtra and a transit warrant was obtained by the police party to bring him to Ramgarh PS. A mobile phone having IMEI Nos. 864054042398414 and 864054042398406 and SIM card number 7041715927 were seized from the possession of Mithu Rai and a seizure memo was prepared at 04:00 PM in the presence of Diwali Rai and Prem Prakash Choubey. The accused was brought to Ramgarh PS the next day where he gave a disclosure statement at 06:05 PM before Rajiv Prakash. This is the case of the prosecution that on the basis of the disclosures made by Mithu Rai the other two accused were arrested from their house at village Pipra. Ashok Rai was taken into custody at 09:50 PM and his confessional statement was recorded by Rajiv Prakash at 10:00 PM. The arrest memo vide Ext.19 contains an endorsement of Ashok Rai to the effect that he received a copy thereof. Ext.19 records the time of arrest of Ashok Rai at 10:30 PM on 11th February 2020 in connection to Ramgarh PS Case No.8 of 2020 dated 7th February 2020. Ext.19 further records that Ashok Rai was arrested in the presence of Dashrath Mohali and Rukmani Devi who put their thumb impressions at column no.7 therein. Pankaj Mohali was taken into custody at 10:50 PM and his confessional statement was recorded by Rajiv Prakash at 11:00 PM. Ext.20, the arrest memo of Pankaj Mohali who was arrested from his house at village Pipra within Poraiyahat PS records the time of arrest at 11:40 PM on 11th February 2020 in connection to Ramgarh PS Case No.8 of 2020 dated 7th February 2020. Ext.20 also bears an endorsement of Pankaj Mohali to the effect that he received a copy of the arrest memo which contained thumb impressions of Dashrath Mohali and Rukmani Devi. Almost simultaneously, a jeans pant belonging to Pankaj Mohali was seized from his house in the presence of Rukmani Devi and Dashrath Mohali and a seizure memo vide Ext.21 was prepared around 11:50 PM on 11th February 2020. On 12th February 2020, the appellants were produced before the Special Court (POCSO) at Dumka at 02:20 PM and the necessary permission was taken from the Court to take them to Dumka Medical College and Hospital for collection of their blood samples and urethral swabs.

4. Next day, a team of two members of the State Forensic Science Laboratory at Ranchi one of which was Jwala Kumar Nand a Scientific

Assistant with the State Forensic Science Laboratory at Ranchi came to Dumka and packed and sealed the materials collected by the Investigating Officer vide Ext. 13. Fourteen samples were prepared containing different materials such as clothes, blood samples, oral swab, anal swab, etc. and labeled as mark-A to mark-N. The samples were sent to State Forensic Science Laboratory at Ranchi through memo no.28 dated 13th February 2020 endorsed by the District & Sessions Judge-I-cum-Special Judge (POCSO), Dumka. In mark A which was a brown color undergarment of 'V' there were five spots marked as A1 to A5. The spots at A1 to A4 were yellowish-white stains probably semen stains and A5 was a reddish-brown stain thought to be a blood stain. The white color pajama of 'V' marked C also contained a yellowish-white semen stain. Those sealed articles were brought by ASI Baidhnath Besra to Ranchi and deposited at the Forensic Laboratory on 14th February 2020. According to the prosecution, the samples marked as A to K contained human blood and the samples marked as A, B, C, D, I, and J contained human semen. As per the requisition dated 13th February 2020, the State Forensic Science Laboratory was required to generate and match DNA profiles of the samples labeled as A, B, C, D, G, H, I, J and K with the samples labeled as F, L, M and N. The reports from the State Forensic Science Laboratory were received vide Exts. 14 & 15. The DNA profiles of A1, A2, A3, A4, and C disclosed that the semen stains over the clothes of 'V' were from the same male source and matched with the DNA profile of the blood sample of Mithu Rai. The DNA profile of A5 matched with other samples of 'V' such as blood, nail clippings and vaginal, anal swabs and oral swabs. The jeans pants seized from the house of Pankaj Mohali had a reddish-brown spot marked as E1 and a yellowish-white spot marked as E2. The DNA profiling of E1 matched with the samples of 'V' and it had a mixed DNA profile from more than one human source. The most important revelation in the DNA reports is that the mixed DNA profile of E1 matched with DNA profile generated from the blood sample of Pankaj Mohali marked as M1 and Ashok Rai marked as N1.

5. The observations in the DNA Examination Report dated 18th February 2020 are to the following effect:

> 1. The DNA profile generated from the source of Spot Al of exhibit marked-A (Source: Semen positive panty cuttings), Spot A2 of exhibit marked-A (Source:

Semen positive panty cuttings), Spot A3 of exhibit marked-A (Source: Semen positive panty cuttings), Spot A4 of exhibit marked-A (Source: Semen positive panty cutting), and Exhibit marked-C (Source: Semen positive blood negative pajama cuttings) is from one and the same human male source of origin which is matched with the male DNA profile generated from the Exhibit marked-L1(Source: Blood positive gauze piece cuttings of Mithu Rai).

2. The DNA profile generated from the source of spot El of exhibit marked-E (Source: Blood positive semen negative jeans pants cuttings) is a mixed DNA profile from more than one human sources.

3. The DNA profile generated from the source of Spot A5 of exhibit marked-A (Source: Blood positive semen negative panty cuttings), Exhibit marked-F (Source: Blood sample of deceased), Exhibit marked-G (Source: Blood negative nail clippings of left hand), Exhibit marked-H (Source: Blood negative nail clippings of right hand), Exhibit marked-I (Source: Blood positive semen negative vaginal swab cuttings), Exhibit marked-J (Source: Semen and blood negative anal swab cuttings) and Exhibit marked-K (Source: Semen and blood negative oral swab cuttings) are from one and the same human female source of origin which is also found to be present in the mixed DNA profile generated from the source of spot El of exhibit marked E (Source: Blood positive semen negative jeans pants cuttings).

4. The DNA profile generated from the source of Exhibit marked-N1 (Source: Blood positive gauze piece cuttings of Ashok Rai) and Exhibit marked-M1 (Source: Blood positive gauze piece cuttings of Pankaj Mohali) are from two different human male source of origin which are found to be present in the mixed DNA profile generated from the source of spot El of exhibit marked E (Source: Blood positive semen negative jeans pants cuttings).

5. Partial DNA profile could be generated from the source of Exhibit marked-L2 (Source: Semen negative cotton bud cuttings) and Exhibit marked-M2 (Source: Semen positive cotton bud cuttings) are from human male source of origin.

6. DNA profile could not be generated from the source of Exhibit marked-B1 (Source: Blood positive semen negative top cuttings), Exhibit marked-B2 (Source: Blood positive semen negative frock cuttings) and Exhibit marked-D (Source: Blood positive semen negative jacket cuttings) as amplifiable DNA could not be extracted.

Conclusion:

The DNA test performed on the exhibits noted above is sufficient to conclude that:

1. The DNA profile generated from the source of Spot A1 of exhibit marked-A (Source: Semen positive panty cuttings), Spot A2 of exhibit marked-A (Source: Semen positive panty cuttings), Spot A3 of exhibit marked-A (Source: Semen positive panty cuttings), Spot A4 of exhibit marked-A (Source: Semen positive panty cutting), and Exhibit marked-C (Source: Semen positive blood negative pajama cuttings) is from one and the same human male source of origin which is matched with the male DNA profile generated from the Exhibit marked-L1(Source: Blood positive gauze piece cuttings of Mithu Rai).

2. The DNA profile generated from the source of spot El of exhibit marked-E (Source: Blood positive semen negative jeans pants cuttings) is a mixed DNA profile from more than one human sources.

3. The DNA profile generated from the source of Spot A5 of exhibit marked-A (Source: Blood positive semen negative panty cuttings), Exhibit marked-F (Source: Blood sample of deceased), Exhibit marked-G (Source: Blood negative nail clippings of left hand), Exhibit marked-H (Source: Blood negative nail clippings of right hand), Exhibit marked-I (Source: Blood positive semen negative vaginal swab cuttings), Exhibit marked-J (Source: Semen and blood negative anal swab cuttings) and Exhibit marked-K (Source: Semen and blood negative oral swab cuttings) are from one and the same human female source of origin which is also found to be present in the mixed DNA profile generated from the source of spot E1 of exhibit marked E (Source:

Blood positive semen negative jeans pants cuttings).
4. The DNA profile generated from the source of Exhibit marked-N1 (Source: Blood positive gauze piece cuttings of Ashok Rai) and Exhibit marked-M1 (Source: Blood positive gauze piece cuttings of Pankaj Mohali) are from two different human male source of origin which are found to be present in the mixed DNA profile generated from the source of spot El of exhibit marked E (Source: Blood positive semen negative jeans pants cuttings).
5. Partial DNA profile could be generated from the source of Exhibit marked-L2 (Source: Semen negative cotton bud cuttings) and Exhibit marked-M2 (Source: Semen positive cotton bud cuttings) are from human male source of origin.
6. DNA profile could not be generated from the source of Exhibit marked-B1 (Source: Blood positive semen negative top cuttings), Exhibit marked-B2 (Source: Blood positive semen negative frock cuttings) and Exhibit marked-D (Source: Blood positive semen negative jacket cuttings) as amplifiable DNA could not be extracted.

6. On receiving the DNA reports, the Investigating Officer formed a prima facie opinion and submitted a chargesheet against the appellants on 25th February 2020 for committing the offence under sections 302, 201/34 and 376-DB of the Indian Penal Code and sections 4, 6 and 10 of the POCSO Act. The trial Judge took cognizance of the offence under sections 366, 376-A, 376-DB, 302 and 201 read with section 34 of the Indian Penal Code and section 6 of the POCSO Act, and framed charges on six counts by an order dated 27th February 2020 for committing the aforementioned crimes. The prosecution case is that 'V' was taken away by Mithu Rai to a fair around 07:10 PM on 5th February 2020. At that time, Ashok Rai and Pankaj Mohali were also with him. The prosecution adduced evidence through PW4 that 'V' was at the fair in the company of Mithu Rai, Ashok Rai and Pankaj Mohali around 08:30 PM. PW5 also came in the witness box to support PW4 inasmuch as he also deposed in the Court that between 08:00 PM and 10:00 PM on 5th February 2020 he found 'V' in the fair in the company of these accused. The related witnesses reiterated their statements made before the Investigating Officer that the appellants again came in the night around 11:00 PM and slept on the verandah inside the house. Around 03:00 AM, they were found missing from the house when PW2, PW5 and PW6 returned home tired and unsuccessful in finding 'V' in the fair. As PW1, a chowkidar of village Mohbana tendered evidence that he received information around 02:00 PM on 7th February 2020 that the dead body of a girl was found in Kusumdih Bahiyar. He stated in Court that he gave telephonic information through the mobile phone of Sardar Nirodh Manjhi to the police station after

he reached Kusumdih Bahiyar. He was at home when he heard *hulla gulla* in the village and within ten minutes reached Kusumdih Bahiyar which was a half kilometer from the place of occurrence. PW2 identified Mithu Rai and the other two accused who came to his house around 03:00 PM on 5th February 2020 and went to the village fair which was organized just in front of his house on the occasion of Saraswati Puja. Around 07:00 PM, these accused came again and took away 'V' on the pretext of getting balloons for her in the village fair but 'V' did not come back home in the night. Around 11:00 PM, Mithu Rai and his friends came again to his house and on a query informed him that they gave biscuits to 'V' and had left her at the door of the house. The accused asked for beddings from PW2 and slept in his house. PW2 then went to Mela with his son Ghanshyam Rai and son-in-law Sadhu Rai to search for her. But she was not found there and they came home after midnight around 03:00 AM. According to PW2, he asked Sadhu Rai to make inquiries from Mithu Rai and others but they were not found in the house and had fled away. He further stated that the village fair is visible from his house and his son and daughter-in-law had gone there and returned around 09:30 PM. As PW3, Ranju Devi who is the mother of 'V' deposed in the Court that her husband brought 'V' to her father's house to take her to the village fair. She is another witness who saw Mithu Rai taking away 'V' to the village fair and, at that time, Ashok Rai and Pankaj Mohali were with him. She stated that Mithu Rai and his friends came back around 11:00 PM and asked for the beddings to sleep. At that time, her husband asked them about their daughter and Mithu Rai said that he had left 'V' at the gate. The next day, her husband made inquiries from the relatives and he went to village Dahujore but Mithu Rai was not found in his house and her daughter was also not found there. She further stated that around 02:00 PM on 7th February 2020 there was a commotion in the village that a girl child was found buried in Kusumdih Bahiyar. She went there and found that it was the dead body of her daughter. PW4 is the maternal aunt and PW6 is the father of 'V'. PW5 is the maternal uncle of 'V' who narrated in the Court the story of the missing of 'V' who was last seen with the accused in the village fair and going towards Bahiyar. PW4 and PW6 also stepped into the witness box to support the prosecution case.

7. PW7 Vijay Kumar Thakur who was posted as the Revenue Sub-Inspector prepared the inquest report vide Ext.1. PW8 Santosh Kumar was the Probationer Sub-Inspector and PW9 Prem Prakah Choubey was the ASI who were members of the police party which arrested Mithu Rai at Kalyan. PW8 proved memo of arrest, seizure list of mobile and transit remand of Mithu Rai vides Exts. 7, 8 and 9. PW10 Dr. Gautam Kumar who was posted as the Assistant Professor in the Department of Forensic Medicine and Toxicology at Dumka Medical College and Hospital conducted the postmortem examination and proved the postmortem report vide Ext.10. PW12 Shri Ram Samad was posted as Dy. S.P. Cyber Crime and he was in-charge of the Technical Cell at Dumka Police. He proved the certificate given under section 65(B) of the Evidence Act vide Ext.16 and the photocopy of the Aadhar Card of Mithu Rai which he had produced for the purchase of the SIM card vide Ext. 17. He also proved the Call Details Report of mobile no. 7041715927 vide Ext.18. PW13 Bulbul Kumar was the Videographer and PW14 Amit Kumar constable 59 was deployed in the technical cell of S.P Dumka who played the Compact Disk in the trial Court. PW15 Rajiv Prakash, the Officer-in-Charge of Ramgarh PS, is the Investigating Officer of the case who proved his endorsement and signature over the FIR, search-cum-seizure list of dress materials of the deceased vide Exts. 3/1 and 2/2 respectively. He further proved the memo of arrest of Ashok Rai and Pankaj Mohali, seizure of the jeans pant of Pankaj Mohali and the forwarding letter for the DNA examination to the Director of the State Forensic Science Laboratory, Ranchi vide Exts. 19, 20, 21 and 22. PW16 Baidhnath Besra who was posted in the rank of ASI produced the material exhibits in the Court vide Material Exts. I to XII.

8. There were only eight witnesses cited in the chargesheet dated 25th February 2022 and eight more witnesses were brought in the trial by filing the applications under section 311 of the Code of Criminal Procedure, who were examined on 29th February 2020 and 2nd March 2020. On 2nd March 2020, the accused were examined under section 313 of the Code of Criminal Procedure and the case was posted for arguments on the next day. The trial Judge pronounced a judgment of conviction on 3rd March 2020 convicting the accused on the aforementioned six counts under sections 366/34, 376-A/34,

376-DB/34, 302/34 and 201/34 of the Indian Penal Code and section 6 of the POCSO Act – the judgment runs into 72-pages.

9. At 03:00 PM, on the same day, the trial Judge heard the convicts on the point of sentence and in an order spread over another 10-pages referred to *"Bachan Singh"* [3], *"Machhi Singh"* [4], *"Dhananjoy Chatterjee"* [5], *"Laxman Naik"* [6], *"Kamta Tiwari"*[7], *"Satish"* [8], *"Purushottam Dashrath Borate"* [9] and *"Mukesh & Anr."*[10], to award death sentence and a fine of Rs. 50,000/- each on two counts viz. section 302/34 and section 376-DB/34 of the Indian Penal Code; imprisonment for life and a fine of Rs. 25,000/- under section 6 of the POCSO Act with a default stipulation to undergo RI for five years; RI for ten years and a fine of Rs. 15,000/- under section 366/34 of the Indian Penal Code with a default sentence of RI for two years and; RI for five years and a fine of Rs. 5,000/- under section 201/34 of the Indian Penal Code with a default sentence of RI for one year.

10. On 3rd March 2020, the trial Judge pronounced the judgment of conviction and passed a sentence of death penalty and other sentences for allied offences in the following manner:

> "All the three accused Mithu Rai, Ashok Rai and Pankaj Mohali have been produced from Jail custody.
>
> The learned defence counsel Mr. Rajendra Prasad Sinha and learned Spl. P.P are present and have advanced their respective arguments at length.
>
> Heard. Perused the record. From meticulous perusal of the evidence and other allied materials available on the record, I find and hold that the prosecution have been able to drive home the charges U/ss 366/34, 302/34, 201/34, 376(A)/34, 376(DB)/34 I.P.C and also U/s 6 of the POCSO Act beyond any doubt by adducing clinching, trustworthy and reliable evidence on the record. Accordingly, I hold all the accused above named guilty of having committed the offences punishable U/ss 366/34, 302/34, 201/34, 376(A)/34, 376(DB)/34 of the I.P.C and also U/s 6 of POCSO Act. The record is ordered to be put up at 03.00 p.m for hearing on the point of sentence likely to be imposed on the convicts.
>
> Later on 03.03.2020
>
> The case record is now placed for hearing on the quantum of sentence, likely to be passed against the convicts who have been produced from jail.
>
> After hearing the learned defence counsels as well as the learned Addl. P.P, the judgment comprising 82 pages (in separate sheets) is pronounced in the open Court by reading the operative part of the same over to the convicts, which are as follows;

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3 Bachan Singh v. State of Punjab: (1980) 2 SCC 684
4 Machhi Singh v. State of Punjab: (1983) 3 SCC 470
5 Dhananjoy Chatterjee v. State of W.B.: (1994) 2 SCC 220
6 Laxman Naik v. State of Orissa: (1994) 3 SCC 381
7 Kamta Tiwari v. State of M.P.: (1996) 6 SCC 250
8 State of U.P. v. Satish : (2005) 3 SCC 114
9 Purushottam Dashrath Borate v. State of Maharashtra: (2015) 6 SCC 652
10 Mukesh & Anr. v. State (NCT of Delhi) & Ors.: (2017) 6 SCC 1

(a) All the convicts Mithu Rai, Ashok Rai and Pankaj Mohali are punished and sentenced to undergo rigorous imprisonment for ten years and pay a fine of Rs. 15,000/- each U/s 366/34 of the Indian Penal Code and in default of payment of fine they will have further to undergo rigorous imprisonment for two years.
(b) All the convicts Mithu Rai, Ashok Rai and Pankaj Mohali are further punished with death sentence and to pay a fine of Rs. 50,000/- each U/s 302/34 of the Indian Penal Code and in default of payment of fine they will have further to undergo R.I for five years. All the convicts shall be hanged by their neck till death.
(c) All the convicts Mithu Rai, Ashok Rai and Pankaj Mohali are further punished and sentenced to undergo rigorous imprisonment for five years and pay a fine of Rs. 5,000/- each U/s 201/34 of the Indian Penal Code and in default of payment of fine they will have further to undergo R.I for one year.
(d) All the convicts Mithu Rai, Ashok Rai and Pankaj Mohali are further punished with death sentence and to pay a fine of Rs. 50,000/- each U/s 376DB/34 of the Indian Penal Code. All the convicts shall be hanged by their neck till death.
(e) All the convicts Mithu Rai, Ashok Rai and Pankaj Mohali are further punished and sentenced to undergo rigorous imprisonment for life till their last breath and to pay a fine of Rs. 25,000/- each U/s 6 of POCSO Act and in default of payment of fine they will have further to undergo rigorous imprisonment for five years.

As capital punishment has already been awarded U/s 302/34 and 376(DB)/34 of the Indian Penal Code to all the convicts, no separate sentence is passed U/s 376(A)/34 of the Indian Penal Code.

Office to issue conviction warrant and send it to the jail authority for serving the sentence upon the convicts and to write to Secretary, D.L.S.A, Dumka for adequate compensation to the parents of the victim U/s 357(A) Cr.PC. The fines realized from the convicts shall be paid to the legal heirs or survivors of the little angel in addition to the compensation likely to be awarded U/s 357(A) Cr.P.C.

As all the convicts have been awarded death sentence on two different heads of offence, the proceeding of this Court shall be submitted to the Hon'ble High Court U/s 366 Cr.PC and the sentences of death shall not be executed unless the same are confirmed by the Hon'ble High Court.

All the convicts are ordered to be committed to the jail with proper warrant under sentence of death. A copy of the judgment of conviction and final order of sentence are hereby ordered to be supplied to all the convicts without any cost and without any delay.

The Jail Superintendent, Central Jail, Dumka is further directed not to execute the death sentences without confirmation of the Hon'ble High Court. Office is directed to send the warrant of commitment of the convict under the sentence of death, open a supplementary record of the case and to submit the record of the proceedings before the Registrar General, Hon'ble High Court, Jharkhand, Ranchi for needful."

11. Pursuant to a communication dated 3rd March 2020 from the Additional Sessions Judge-I (Special Judge) at Dumka relating to POCSO Act Case No. 08 of 2020, Death Reference No. 02 of 2020 has been instituted. Against the judgment of conviction and the order of sentence both dated 3rd March 2020, the condemned prisoners filed Criminal Appeal (DB) No. 493 of 2020 on 17th August 2020. The Death Reference No. 02 of 2020 was admitted on 20th May 2020 and by an order dated 4th November 2020 Criminal Appeal (DB) No. 493 of 2020 was also admitted for hearing and directed to

be heard along with Death Reference No. 02 of 2020. On 12th May 2023, the State of Jharkhand was directed to obtain a report of the Probation Officer and the Psychiatrist and Physiological Evaluation Report of the convicts from a trained Psychiatrist or a Professor of Physiology and such reports were placed on record.

12. On the sixth date of hearing, when these matters were ready for hearing, a supplementary affidavit raising a plea of juvenility on behalf of Ashok Rai and Pankaj Mohali was pressed by Mr. Rajeeva Sharma, the learned senior counsel.

13. The history of legislative intervention in the field of child welfare goes back to the Apprentice Act, 1850 which provided some vocational training for the rehabilitation of the convicted children of the age group of 10 years to 18 years. This covered the children found destitute by the trying Magistrate but no power was vested in the Magistrates to put the children in a reformatory school. This gap was filled by the Reformatory Schools Act, 1876 which vested discretion in the Courts to detain a child below 15 years in a reformatory school for a period of three to seven years. There was also a provision for the release of a boy over 14 years on license if suitable employment was found for him. For about half a century, there was no legislation to take the cause of the children and it was on the recommendation of the Indian Jail Committee (1919-20) that the Madras Children Act, 1920 which provided definitions of child, young person and youthful offender was enacted. Then came, the Bengal Children Act, 1922, the Assam Students and Juvenile Smoking Act, 1923, the Bombay Children Act, 1924, the Child Marriage Restraint Act, 1929, the Suppression of Immoral Traffic Act, 1930 and, the Vagrancy Act, 1943.

14. The problem of juvenile justice cuts across national boundaries and the issue was discussed at the United Nations Congress on the Prevention of Crime and Treatment of Offenders (2nd) at London in 1960 and some therapeutic recommendations were made. The need for uniform legislation was voiced in various forums and finally the Juvenile Justice Bill, 1986 was introduced in the Lok Sabha in the exercise of the powers by the Central Government under Article 253 of the Constitution read with Entry 14 of the Union List to bring the juvenile justice system in the country in conformity

with the UN Standard Minimum Rules for the Administration of Juvenile Justice. The Preamble to the Juvenile Justice Act, 1986 recites that it has been enacted to provide for the care, protection, treatment, development and rehabilitation of neglected and delinquent juveniles and for the adjudication of certain matters relating to and disposition of the delinquent juveniles. Section 21 enlisted the kind of orders that may be passed in respect of a delinquent juvenile. Section 21 which started with a non-obstante clause provided for the release of the juvenile after advice or admonition; on probation of good conduct on executing a bond with or without surety by the parent, guardian or other fit person; release on probation of good conduct with a direction to be placed under the care of any fit institution for any period not exceeding three years; or, the juvenile to be sent to a special home. Section 22 also started with a non-obstante clause and provided that no delinquent shall be sentenced to death or imprisonment, or committed to prison in default of payment of fine or in default of furnishing security. Section 24 provided that no juvenile shall be charged with or tried for any offence together with a person who is not a juvenile.

15. The working of the Juvenile Justice Act, 1986 faced serious problems and was repealed and the Juvenile Justice (Care and Protection of Children) Act, 2000 was enacted on 30th December 2000 for laying down the basic principles for administrating justice to a juvenile or the child; to make the juvenile justice system more appreciative of the developmental need in comparison to criminal justice system as applicable to adults; to prescribed a uniform age of 18 years for both boys and girls; to ensure the speedy disposal of cases by the authorities; to create a special juvenile police unit with a humane approach, and the matters like that. Section 7 provided that when any Magistrate not empowered to exercise the powers of Board forms an opinion that a person brought before him under any of the provisions of the Act is a juvenile or the child, he shall without any delay record such opinion and forward the juvenile or the child and record the proceeding to the competent authority having jurisdiction over the proceeding. Section 15 which dealt with the orders that may be passed regarding the juveniles contained several provisions different from section 21 of the Act of 1986. Section 16 brought in substitution of section 22 of the Act of 1986 was also different from the earlier

provision in many respects. The Act of 2000 was repealed w.e.f. 15th January 2016 and the Juvenile Justice (Care and Protection of Child) Act, 2015 [11] was enacted. The necessity for bringing a new law regarding juvenile justice was felt because the Act of 2000 was amended twice to address the gaps in implementation and make the law more child-friendly but several issues arose such as increasing incidents of abuse of children in institutions, inadequate facilities, quality of care and rehabilitation measures in Homes, high pendency of cases, etc.

16. The provisions of sections 14, 15, 18 and 19 of the Act of 2015 which are relevant for the present purposes may usefully be referred to at this stage:

> **14. Inquiry by Board regarding child in conflict with law.**— (1) Where a child alleged to be in conflict with law is produced before Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under Sections 17 and 18 of this Act.
> (2) The inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension.
> (3) A preliminary assessment in case of heinous offences under Section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board.
> (4) If inquiry by the Board under sub-section (2) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated:
> Provided that for serious or heinous offences, in case the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate, for reasons to be recorded in writing.
> (5) The Board shall take the following steps to ensure fair and speedy inquiry, namely—
> (*a*) at the time of initiating the inquiry, the Board shall satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment;
> (*b*) in all cases under the Act, the proceedings shall be conducted in simple manner as possible and care shall be taken to ensure that the child, against whom the proceedings have been instituted, is given child-friendly atmosphere during the proceedings;
> (*c*) every child brought before the Board shall be given the opportunity of being heard and participate in the inquiry;
> (*d*) cases of petty offences, shall be disposed of by the Board through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973 (2 of 1974);
> (*e*) inquiry of serious offences shall be disposed of by the Board, by following the procedure, for trial in summons cases under the Code of Criminal Procedure, 1973 (2 of 1974);

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[11] In short "Act of 2015"

(*f*) inquiry of heinous offences,-
(*i*) for child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Board under clause (*e*);
(*ii*) for child above the age of sixteen years as on the date of commission of an offence shall be dealt with in the manner prescribed under Section 15.

15. Preliminary assessment into heinous offences by Board.—(1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of Section 18:
Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.
Explanation.—For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.
(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973 (2 of 1974):
Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of Section 101:
Provided further that the assessment under this section shall be completed within the period specified in Section 14.

18. Orders regarding child found to be in conflict with law.—(1) Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, or a child above the age of sixteen years has committed a heinous offence and the Board has, after preliminary assessment under Section 15, disposed of the matter] then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,—
(*a*) allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;
(*b*) direct the child to participate in group counselling and similar activities;
(*c*) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;
(*d*) order the child or parents or the guardian of the child to pay fine:
Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;
(*e*) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;
(*f*) direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years;
(*g*) direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformative services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home:
Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in

a special home, the Board may send such child to the place of safety.
(2) If an order is passed under clauses (*a*) to (*g*) of sub-section (1), the Board may, in addition pass orders to-
(*i*) attend school; or
(*ii*) attend a vocational training centre; or
(*iii*) attend a therapeutic centre; or
(*iv*) prohibit the child from visiting, frequenting or appearing at a specified place; or
(*v*) undergo a de-addiction programme.
(3) Where the Board after preliminary assessment under Section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences.
19. Powers of Children's Court.—(1) After the receipt of preliminary assessment from the Board under Section 15, the Children's Court may decide that—
(*i*) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) and pass appropriate orders after trial subject to the provisions of this section and Section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere;
(*ii*) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of Section 18.
(2) The Children's Court shall ensure that the final order, with regard to a child in conflict with law, shall include an individual care plan for the rehabilitation of child, including follow-up by the probation officer or the District Child Protection Unit or a social worker.
(3) The Children's Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail:
Provided that the reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support shall be provided to the child during the period of his stay in the place of safety.
(4) The Children's Court shall ensure that there is a periodic follow-up report every year by the probation officer or the District Child Protection Unit or a social worker, as required, to evaluate the progress of the child in the place of safety and to ensure that there is no ill-treatment to the child in any form.
(5) The reports under sub-section (4) shall be forwarded to the Children's Court for record and follow-up, as may be required."

17. In the process of age determination of an accused whether he is 16 years of age or above, Rule 10-A of Juvenile Justice (Care and Protection of Children) Model Rules, 2016 lays down the procedure, as under:

"**10-A. Preliminary assessment into heinous offences by Board.** — (1) The Board shall in the first instance determine whether the child is of sixteen years of age or above; if not, it shall proceed as per provisions of Section 14 of the Act.
(2) For the purpose of conducting a preliminary assessment in case of heinous offences, the Board may take the assistance of psychologists or psycho-social workers or other experts who have experience of working with children in difficult circumstances. A panel of such experts may be made available by the District Child Protection Unit, whose assistance can be taken by the Board or could be accessed independently.
(3) While making the preliminary assessment, the child shall be presumed to be innocent unless proved otherwise.
(4) Where the Board, after preliminary assessment under Section 15 of the Act,

passes an order that there is a need for trial of the said child as an adult, it shall assign reasons for the same and the copy of the order shall be provided to the child forthwith."

18. The Juvenile Justice (Care and Protection of Children) Act, 2015 provides for the general principles of care and protection of children and mandates under section 3 that while implementing the provisions of the Act the Central Government, the State Government, the Board, and the other agencies shall be guided by the fundamental principles of (a) presumption of innocence (b) of participation (c) of best interest (d) of non-waiver of rights and (e) of natural justice. The provisions under Chapter IV deal with the procedure in relation to children in conflict with the law and provide that the J.J. Board shall hold an inquiry regarding a child in conflict with the law. Clause (12) of section 2 of the Act of 2015 defines "child" to mean a person who has not completed 18 years of age. Under section 8, the powers, functions and responsibilities of the Board have been elaborately dealt with and provided thereunder. Section 9 lays down the procedure to be followed by a Magistrate who has not been empowered under the Act to exercise the powers of the Board. In cases where the accused is said to be a child before or after the commencement of the Act of 2015 the claim of juvenility has to be determined in accordance with the provisions of the Act. Proviso to sub-section 2 of section 9 clarifies that a claim of juvenility can be raised before any Court and at any stage even after the case has been finally decided. Sub-section 3 further provides that if the accused was a child on the date of commission of the offence the J.J. Board is required to pass appropriate orders and, if any sentence was imposed by the Court, the same shall be deemed to have had no effect.

19. By an order dated 16th June 2023, the Juvenile Justice Board at Dumka[12] was directed to conduct an inquiry in terms of section 9(2) of the Act of 2015. By an order dated 10th July 2023, the Principal Magistrate of the J.J. Board at Dumka rendered a decision that Ashok Rai and Pankaj Mohali were juveniles at the time of the occurrence.

20. The order dated 10th July 2023 passed by the Principal Magistrate records the following reasons for holding Ashok Rai and Pankaj Mohali as

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[12] in short, "J.J. Board"

juveniles at the time of the occurrence:

> "As per the direction of the Hon'ble High Court of Jharkhand, Ranchi vide order dt. 16.06.2023 passed in Death Reference (DB) No. 02 of 2020 with Cr. Appeal (D.B.) No. 493 of 2020, an enquiry has been conducted for the assessment of the age of Ashok Rai, S/o Ramchandra Rai and Pankaj Mohli, S/o Dashrath Mohali in connection with Ramgarh PS. Case No. 08/2020, corresponding to POCSO Case No. 08/2020.
>
> The Ld. Counsel for the petitioners filed a petition along with original certificate of Secondary Examination, 2019 of delinquent Ashok Ray issued by Jharkhand Academic Council, Ranchi of and Photo-copy of Admission Register of Utkramit High School, Poraiyahat, Godda wherein name of delinquent Pankaj Mohali is mentioned for determination of the age of petitioners.
>
> Heard and perused the case record. From perusal of same, it transpires that instant case arose on lodging of Ramgarh PS Case No. 08/2020 dated 07.02.2020 against the Mithu Rai for the offence punishable U/s 376, 302, 201 of Indian Penal Code and U/s 4/8 of POCSO Act, on the basis of written report of the informant Sadhu Rai. Further on careful perusal of written report and F.I.R. it is apparent that the occurrence took place on 05.02.2020 which at present, is focal point for determination of the age of the petitioners so as to declare them juvenile.
>
> On the point of declaring the delinquent Ashok Rai, petitioner has produced his original certificate of Secondary Examination, 2019 issued by the Jharkhand Academic Council, Ranchi.
>
> On the basis of aforesaid documentary evidence, available on record, it is crystal clear that the date of birth of delinquent Ashok Rai is 13.10.2003, whereas the date of occurrence as alleged is 05.02.2020. Hence, on calculation the age of Ashok Ray must have been 16 years, 3 months and 21 days on the date of occurrence.
>
> On the point of declaring, Pankaj Mohali as juvenile, petitioner has got examined one inquiry witness Le. EW I namely Sanjay Kumar.
>
> EW1 namely Sanjay Kumar being In-charge Headmaster, Utkramit Uccha Vidyalay, Poraiyahat, Godda came along with school admission register of the year 2012-13 to 2016-17, in which the name of petitioner Pankaj Mohli is mentioned at Serial No. 39 on page No. 50-51, who admitted in Class-VI on 04.04.2016 and the date of birth of delinquent is mentioned as 30.12.2003. He identified the entry made at Serial No. 39 in column 1 to 18 by Assistant Teacher Subhash Mishra and he also identified his signature on the same, which has been marked as Exhibit EW1. During cross-examination, he stated that at the time of admission of delinquent Pankaj Mohli, Transfer Certificate of Class V was taken and on the basis of the same the date of birth was mentioned.
>
> On the basis of aforesaid oral as well as documentary evidence, available on record, it transpires that the date of birth of petitioner Pankaj Mohli is 30.12.2003 and date of occurrence is 05.02.2020. Hence, on calculation the age of Pankaj Mohli must have been 16 years, 01 month & 04 days on the date of occurrence.
>
> Accordingly, delinquent namely Ashok Rai and Pankaj Mohali are juvenile at the time of occurrence. Resultantly, the both the petitioners Ashok Rai and Pankaj Mohali are declared juvenile Under the Juvenile Justice (Care and Protection of Children) Act-2015."

21. The above findings of the learned Principal Magistrate have been challenged on the ground that under section 94 of the Act of 2015 a Certificate from the school or the Matriculation Certificate or any equivalent Certificate

from an Examination Board can be considered for ascertaining the age of an accused and if such a document is not available then the Birth Certificate issued by a Corporation, Municipal Authority or Panchayat should be considered. Mr. Pankaj Kumar, the learned Public Prosecutor contended that in a case where none of the aforementioned documents is available the accused should undergo an ossification test or other medically approved age determination test. The submission made by the learned Public Prosecutor is that only on the basis of an entry in the School Admission Register Pankaj Mohali cannot be declared a juvenile on the date of the occurrence.

22. In the proceedings before the J.J. Board, Pankaj Mohali produced a photocopy of the Transfer Certificate issued from the Upgraded Middle School and filed an application to issue a summons to the Headmaster of the said school to produce the Admission Register. Similarly, Ashok Rai also produced a photocopy of the School Leaving Certificate, Mark Sheet of Jharkhand Academic Council issued for the Secondary Examination conducted in 2019 and Admit Card issued to him for the said examination. The Admission Register of the Upgraded Middle School for the Academic Sessions 2012-13 to 2016-17 was produced and proved through Sanjay Kumar who was in-charge Headmaster of the Upgraded Middle School. The statements given by Sanjay Kumar, in-charge Headmaster of Upgraded Middle School, before the J.J. Board on 7th July 2023 are reproduced below:

मैं वर्तमान में प्रभारी प्रधानाध्यापक उत्क्रमित उच्च विद्यालय पोड़ैयाहाट गोड्डा के पद पर कार्यरत हूँ। बोर्ड किशोर न्याय बोर्ड के द्वारा मुझे सम्मन प्राप्त हुआ जिसके अनुपालन में मैं आज किशोर न्याय बोर्ड दुमका में अपने विद्यालय का नामांकन रजिस्टर के साथ उपस्थित हुआ हूँ। यह नामांकन पंजी वर्ष 2012–13 से 2016–17 तक का है। प्रस्तुत नामांकन पंजी अभिप्रमाणित है। विधि विरूद्ध बालक पंकज मोहली मेरे विद्यालय उत्क्रमित उच्च विद्यालय पोडैयाहाट का छात्र था। मेरे विद्यालय के नामांकन पंजी वर्ष 2012–13 से 2016–17 के क्रम संख्या 39 में बालक पंकज मोहली पिता दशरथ मोहली ग्राम–'पहरीडीह, पोस्ट–चतरा, थाना–पौड़ैयाहाट, जिला–गोड्डा का नाम अंकित है जिसके अनुसार बालक/छात्र पंकज मोहली का जन्म तिथि 30.12.2003 अंकित है। उक्त प्रविष्टि मेरे विद्यालय के सहायक शिक्षक सुभाष मिश्र के लिखावट में है जिसे पहचानता हूँ। हस्ताक्षर के कॉलम में मेरा स्वंय का हस्ताक्षर है जिसे मैं पहचानता हूँ। क्रमांक 39 के कॉलम 1 से कॉलम 18 तक की प्रविष्टि एवं हस्ताक्षर को प्रदर्श/मार्क X/EW1 अंकित किया जाता है।

Cross Examination

पंकज मोहली के नामांकन के समय उसकी जन्म तिथि से संबंधित पांचवॉ पास का स्थानांतरण प्रमाण पत्र लिया था और उसी के आधार पर जन्म तिथि अंकित किया था लेकिन उसका जिक्र प्रवेश पुस्तिका के किसी भी कॉलम में नहीं किया गया हैं।

हमलोगों द्वारा T.C या जन्म से संबंधित अन्य दस्तावेज किसी फाईल में संधारित किया जाता है लेकिन कुछ दिन के बाद उसका महत्व नहीं रहने के कारण संरक्षित नहीं रखा जाता है।

मैं पंकज मोहली का T.C नामांकन के समय देखा था।

Translation in English

Presently, I am posted as In-charge, Headmaster of Upgraded High School, Poraiyahat, Godda. I received summon from the Juvenile Justice Board and in compliance of the same, I have appeared today before the Juvenile Justice

Board, Dumka with the Admission Register of my school. This Admission Register is for the year 2012-13 to 2016-17. The instant Admission Register is attested. The child in conflict with law, Pankaj Mohali was a student of my school Upgraded High School, Poraiyahat. The name of the child Pankaj Mohali, S/o Dashrath Mohali, Village-Pahridih, P.O.-Chatra, P.S.-Poraiyahat, District-Godda is recorded in our School Admission Register for the year 2012-13 to 2016-17 in Page Nos. 50-51 at Sl. No.39. As per the records, the date of birth of child/student Pankaj Mohali is 30.12.2003. The aforesaid entry is made by the Assistant Teacher of my school named Subhash Mishra in his pen which I identify. Along with this entry, there is my signature in the column of signature of the Headmaster. I identify it. Entries of Column-1 to Column-18 of Sl. No 39 along with signatures are marked as Exhibit-1/E.W.1.

Cross Examination

I had received the fifth pass school transfer certificate of Pankaj Mohali at the time of his admissions a proof of his date of birth and on the basis of the same I had entered his date of birth, but I have not mentioned it in any column of Admission Register.

We keep records of T.C. or proof of date of birth in files but due to lack of importance we do not maintain them after some days.

I had seen T.C. of Pankaj Mohali at the time of his admission.

23. In the affidavit dated 18th August 2023, the State did not question the age determination of Ashok Rai who had produced a Matriculation Certificate issued from the Jharkhand Academic Council at Ranchi. In fact, the Superintendent of Police at Dumka received a verification report from the Joint Secretary (Verification) of the Jharkhand Academic Council through a letter dated 1st August 2023 affirming that the date of birth of Ashok Rai was 13th October 2003. There is also no challenge to the entries in the Admission Register in which at serial no.39 on page nos.50-51 there is an entry in the name of Pankaj Mohali son of Dasrath Mohali. In the order dated 10th July 2023, the Principal Magistrate of the J.J. Board referred to the oral and documentary evidence and has held that Ashok Rai was born on 13th October 2003 and the date of birth of Pankaj Mohali is 30th December 2003. As noticed above, the Admission Register was duly proved by the in-charge Headmaster of the school who deposed in the Court that the date of birth of Pankaj Mohali in the school records is 30th December 2003. In *"Shah Nawaz"* [13] the Hon'ble Supreme Court has held that a School Leaving Certificate is a valid document to be considered for age determination of an accused who claimed juvenility. The insistence of Mr. Pankaj Kumar, the learned Public Prosecutor for an ossification test cannot be accepted. The ossification test gives a broad assessment of the age and there is always an element of margin of one or two years. The State of Jharkhand which

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[13] Shah Nawaz v. State of U.P.: (2011) 13 SCC 751

conducted an inquiry as to the genuineness of the certificate issued to Ashok Rai did not endeavor to make any inquiry in respect of Pankaj Mohali. We are satisfied that Ashok Rai and Pankaj Mohali were below the age of 18 years and accept the report of the J.J. Board declaring them juveniles.

24. Section 21 puts a restriction on the powers of the Court to pass an order against a child in conflict with law to be sentenced to death or life imprisonment without the possibility of release, for any such offence either under the provisions of the Act of 2015 or under the provisions of the Indian Penal Code or any other law for the time being in force. A conjoint reading of sections 15, 18 and 21 makes it clear that a child above the age of 16 years who has committed a heinous offence on a preliminary assessment by the Board is found to have the mental and physical capacity to commit such offence and ability to understand the consequences of the offence, subject to the circumstances in which he allegedly committed the offence, can be sentenced to a term of life imprisonment but without any negative stipulation as to the possibility of release. This is too well settled now that an accused declared as a juvenile on the date of the occurrence cannot avoid his conviction for the offence committed by him only for the reason that he was a child on the date of the occurrence. In *"Jitendra Singh"*[14] the Hon'ble Supreme Court held that if the juvenile is found to be guilty he cannot be allowed to go unpunished. In a concurring judgment, the Hon'ble Justice T.S Thakur (as His Lordship was then) held as under:

> "82. A careful reading of the above would show that although a claim of juvenility can be raised by a person at any stage and before any court, upon such court finding the person to be a juvenile on the date of the commission of the offence, it has to forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed shall be deemed to have (sic no) effect. There is no provision suggesting, leave alone making it obligatory for the court before whom the claim for juvenility is made, to set aside the conviction of the juvenile on the ground that on the date of commission of the offence he was a juvenile, and hence not triable by an ordinary criminal court. Applying the maxim expressio unius est exclusio alterius, it would be reasonable to hold that the law insofar as it requires a reference to be made to the Board excludes by necessary implication any intention on the part of the legislature requiring the courts to set aside the conviction recorded by the lower court. Parliament, it appears, was content with setting aside the sentence of imprisonment awarded to the juvenile and making of a reference to the Board without specifically or by implication requiring the court concerned to alter or set aside the conviction. That perhaps is the reason why this Court has in several decisions simply set aside the sentence awarded to the juvenile without interfering with the conviction recorded by the court concerned and thereby complied with the

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[14] Jitendra Singh v. State of U.P.: (2013) 11 SCC 193

mandate of Section 7-A(2) of the Act."

25. *"Mahesh"*[15] referred to *"Jitendra Singh"*[14] and held as under:

"4. In the aforesaid facts, two questions arise for determination in the present appeals before us. The first is with regard to the validity/correctness of the conviction recorded by the learned trial Court and affirmed by the High Court and, secondly, if the conviction to be maintained what should be the appropriate measure of punishment/sentence and whether the same should be imposed by this Court or the matter be remanded to the Juvenile Justice Board in accordance with the provisions of Section 20 of the Act of 2000.

5. The position in law in this regard is somewhat unsettled as has been noticed and dealt with by this Court in Jitendra Singh alias Babboo Singh v. State of Uttar Pradesh wherein in paragraphs 24 to 27 four categories of cases have been culled out where apparently different approaches had been adopted by this Court. The net result is summed up in paragraph 28 of the aforesaid report which explains the details of the categorization made in the earlier paragraphs of the said report. Paragraph 28 of the said report, therefore, would require a specific notice and is reproduced below:

"28. The sum and substance of the above discussion is that in one set of cases this Court has found the juvenile guilty of the crime alleged to have been committed by him but he has gone virtually unpunished since this Court quashed the sentence awarded to him. In another set of cases, this Court has taken the view, on the facts of the case that the juvenile is adequately punished for the offence committed by him by serving out some period in detention. In the third set of cases, this Court has remitted the entire case for consideration by the jurisdictional Juvenile Justice Board, both on the innocence or guilt of the juvenile as well as the sentence to be awarded if the juvenile is found guilty. In the fourth set of cases, this Court has examined the case on merits and after having found the juvenile guilty of the offence, remitted the matter to the jurisdictional Juvenile Justice Board on the award of sentence."

6. The validity of the conviction in respect of the incident which occurred almost two decades back, in our considered view, ought to be decided in these appeals and the entire of the proceedings including the punishment/sentence awarded should not be interfered with on the mere ground that the accused appellants were juveniles on the date of commission of the alleged crime. Judicial approaches must always be realistic and have some relation to the ground realities. We, therefore, adopt one of the possible approaches that has been earlier adopted by this Court in the four categories of cases mentioned above to examine the correctness of the conviction of the accused appellants under the provisions of the IPC, as noticed above.

7. In this regard, having perused the materials on record we find no ground whatsoever to take a view different from what has been recorded by the learned trial Court and affirmed by the High Court. The conviction of the accused appellants under Sections 323, 324, 325, 427, 455 read with Section 149 IPC accordingly shall stand affirmed."

26. In *"Karan alias Fatia"*[16] the Hon'ble Supreme Court referred to previous the judgments of the Court[17 & 18] and held that section 9 of the Act of 2015 does not specifically or even impliedly provide that the conviction recorded by any Court, with respect to a person who has subsequently after

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15 Mahesh v. State of Rajasthan: 2018 SCC OnLine SC 3655

16 Karan Alias Fatiya v. State of Madhya Pradesh: (2023) 5 SCC 504

17 Raju v. State of Haryana : (2019) 14 SCC 401

18 Ashok Kumar Mehra v. State of Punjab: (2019) 6 SCC 132

the disposal of the case been found to be juvenile or a child, would also lose its effect; rather it is only the sentence if any passed by the Court would be deemed to have no effect. The Hon'ble Supreme Court has in *"Karan alias Fatiya"*[16] held as under:

> "33. The above judgments relate to an offence covered by either the Juvenile Justice Act, 1986 ("the 1986 Act") or the 2000 Act. We now proceed to briefly discuss the provisions under the 2015 Act. Section 9 of the 2015 Act is already reproduced in the earlier part of this judgment. According to sub-section (3) of Section 9 of the 2015 Act, the Court which finds that the person who committed the offence was a child on the date of commission of such offence would forward the child to the JJB for passing appropriate orders and sentence, if any, passed by the court shall be deemed to have no effect. This does not specifically or even impliedly provide that the conviction recorded by any court with respect to a person who has subsequently after the disposal of the case been found to be juvenile or a child, would also lose its effect; rather it is only the sentence if any passed by the court would be deemed to have no effect.
> 34. There is another reason why a trial conducted and conviction recorded by the Sessions Court would not be held to be vitiated in law even though subsequently the person tried has been held to be a child.
> 35. The intention of the legislature was to give benefit to a person who is declared to be a child on the date of the offence only with respect to its sentence part. If the conviction was also to be made ineffective then either the jurisdiction of regular Sessions Court would have been completely excluded not only under Section 9 of the 2015 Act but also under Section 25 of the 2015 Act, provision would have been made that on a finding being recorded that the person being tried is a child, a pending trial should also be relegated to the JJB and also that such trial would be held to be null and void. Instead, under Section 25 of the 2015 Act, it is clearly provided that any proceeding pending before any Board or court on the date of commencement of the 2015 Act shall be continued in that Board or court as if this Act had not been enacted.
> 36. Section 25 of the 2015 Act is reproduced hereunder:
> "25. Special provision in respect of pending cases.—Notwithstanding anything contained in this Act, all proceedings in respect of a child alleged or found to be in conflict with law pending before any Board or court on the date of commencement of this Act, shall be continued in that Board or court as if this Act had not been enacted."
> 37. Having considered the statutory provisions laid down in Section 9 of the 2015 Act and also Section 7-A of the 2000 Act which is identical to Section 9 of the 2015 Act, we are of the view that merits of the conviction could be tested and the conviction which was recorded cannot be held to be vitiated in law merely because the inquiry was not conducted by JJB. It is only the question of sentence for which the provisions of the 2015 Act would be attracted and any sentence in excess of what is permissible under the 2015 Act will have to be accordingly amended as per the provisions of the 2015 Act. Otherwise, the accused who has committed a heinous offence and who did not claim juvenility before the trial court would be allowed to go scot-free. This is also not the object and intention provided in the 2015 Act. The object under the 2015 Act dealing with the rights and liberties of the juvenile is only to ensure that if he or she could be brought into the mainstream by awarding lesser sentence and also directing for other facilities for welfare of the juvenile in conflict with law during his stay in any of the institutions defined under the 2015 Act.
> 38. In view of the above discussion and the position in law as laid down by the aforesaid judgments and many others referred to in the above judgments, we approve the view taken by this Court in Jitendra Singh, Mahesh and Satya Deo.
> 39. For all the reasons recorded above, it is ordered as follows : The conviction of the appellant is upheld; however, the sentence is set aside. Further as the

> appellant at present would be more than 20 years old, there would be no requirement of sending him to the JJB or any other child care facility or institution. The appellant is in judicial custody. He shall be released forthwith. The impugned judgment shall stand modified to the aforesaid extent."

27. Therefore, different consequences may follow to Mithu Rai, Ashok Rai and Pankaj Mohali if their conviction is upheld in the present proceeding.

28. The proceedings in POCSO Act Case No.08 of 2020 reveal that cognizance of the offence under sections 366, 376-A, 376-DB, 302 and 201 read with section 34 of the Indian Penal Code and section 6 of the POCSO Act was taken on 26th February 2020 and a judgment of conviction was pronounced in the open Court on 3rd March 2020 – within seven Court working days. Six witnesses out of whom five persons are intimately related to 'V' were examined and cross-examined on 28th February 2020. On the next day, another four witnesses including two additional witnesses were produced by the prosecution and, on 2nd March 2020, which was the next Court working day, six more witnesses were examined by virtue of another order passed by the Court under section 311 of the Code of Criminal Procedure.

29. In the background of the above facts, it was contended that the trial was conducted in a manner prejudicial to fair trial and guilt of the accused was pre-determined. The provisions under Chapter XXXV and, more particularly, sections 461, 462 and 465(1) of the Code of Criminal Procedure provide that every error, omission or irregularity in the proceedings held before or during the trial or in any inquiry is not the ground for axing down the proceedings. A repetition of the whole proceeding afresh is not visualized by the legislature unless there was such error, omission or irregularity which occasioned "a failure of justice". In *"Bhooraji"*[19] the Hon'ble Supreme Court held that any omission or even illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial.

30. In *"Bhooraji"*[19] the Hon'ble Supreme Court held as under:

> "8. … A de novo trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial. This is because the appellate court has plenary powers for revaluating and reappraising the evidence and even to take additional evidence by the appellate court itself or to direct such additional

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[19] State of M.P. v. Bhooraji : (2001) 7 SCC 679

> evidence to be collected by the trial court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence the said course can be resorted to when it becomes unpreventable for the purpose of averting "a failure of justice". The superior court which orders a de novo trial cannot afford to overlook the realities and the serious impact on the pending cases in trial courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation."

31. In *"Bhooraji"*[19] the Hon'ble Supreme Court held that a re-trial may be ordered to avert "a failure of justice" and in no other circumstance because the appellate Court has plenary powers for re-evaluating and reappraising the evidence or to take additional evidence by itself or to direct additional evidence to be collected by the trial Court. In "*Mohd. Hussain*"[20] the Hon'ble Supreme Court observed that a de novo trial or retrial of the accused should be ordered by the appellate Court in exceptional and rare cases and only when in the opinion of the appellate Court such recourse becomes indispensable to avert "a failure of justice". In *"Mohd. Hussain"*[20] the accused was denied the right to be represented through a counsel. The Hon'ble Supreme Court held that the accused was denied due process of law and the trial was conducted in breach of the procedure prescribed under the provisions of the Code of Criminal Procedure.

32. *"Mohd. Hussain"*[20] held as under:

> "44. It cannot be ignored that the offences with which the appellant has been charged are of very serious nature and if the prosecution succeeds and the appellant is convicted under Section 302 IPC on retrial, the sentence could be death or life imprisonment. Section 302 IPC authorises the court to punish the offender of murder with death or life imprisonment. Gravity of the offences and the criminality with which the appellant is charged are important factors that need to be kept in mind, though it is a fact that in the first instance the accused has been denied due process. While having due consideration to the appellant's right, the nature of the offence and its gravity, the impact of crime on the society, more particularly the crime that has shaken the public and resulted in death of four persons in a public transport bus cannot be ignored and overlooked. It is desirable that punishment should follow offence as closely as possible. In an extremely serious criminal case of the exceptional nature like the present one, it would occasion in failure of justice if the prosecution is not taken to the logical conclusion. Justice is supreme. The retrial of the appellant, in our opinion, in the facts and circumstances, is indispensable. It is imperative that justice is secured after providing the appellant with the legal practitioner if he does not engage a lawyer of his choice."

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20 Mohd. Hussain v. State (Govt. of NCT of Delhi): (2012) 9 SCC 408

33. *"Bhooraji"*[19] and *"Mohd. Hussain"*[20] are not the cases in isolation and one may find numerous examples where the trial was vitiated on account of serious procedural errors or due to non-observance of due process of law. A criminal trial must be conducted with the object to meet out justice, to convict the guilty, and to protect the innocent. In *"Nirmal Singh Kahlon"*[21] the Hon'ble Supreme Court pointed out that the concept of fair investigation and fair trial are concomitant to preservation of the fundamental rights of the accused under Article 21 of the Constitution of India. This is a case where the investigation was conducted with an object in mind to put someone on trial as early as possible; the public outcry seems to be the reason. The prosecutor also failed in his duty and the trial Judge threw all cannons of fair trial to the wind. The Code of Criminal Procedure provides and deals with the duties and powers of the investigating officer and public prosecutor. In *"Jamuna Chaudhary"* [22] the Hon'ble Supreme Court observed that "the investigating officers is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but to bring out the real unvarnished truth". As to the duty of a prosecutor, the Hon'ble Supreme Court has held in "*Deepak Aggarwal*"[23] that he is not a mouthpiece of the investigating agency and must ensure that the trial does not lead to conviction of an innocent.

34. "*Deepak Aggarwal*"[23] held as under:

> "81. In India, the role of Public Prosecutor is no different. He has at all times to ensure that an accused is tried fairly. He should consider the views, legitimate interests and possible concern of witnesses and victims. He is supposed to refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods. His acts should always serve and protect the public interest. The State being a prosecutor, the Public Prosecutor carries a primary position. He is not a mouthpiece of the investigating agency. In Chapter II of the BCI Rules, it is stated that an advocate appearing for the prosecution of a criminal trial shall so conduct the prosecution that it does not lead to conviction of the innocent; he should scrupulously avoid suppression of material capable of establishing the innocence of the accused."

35. The Courts in foreign jurisdictions have also laid much stress on fair investigation and impartiality of the prosecutor. The Courts in New Zealand have explained that the Crown's duty is to present its case fairly and

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21 Nirmal Singh Kahlon v. State of Punjab: (2009) 1 SCC 441
22 Jamuna Chaudhary v. State of Bihar: (1974) 3 SCC 774
23 Deepak Aggarwal v. Keshav Kaushik: (2013) 5 SCC 277

completely and to be as firm as the circumstances warrant, but the Crown must never "struggle for a conviction"[24].

36. A similar view was expressed by the Supreme Court of United States. About ninety years back, Sutherland[25] observed that, "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. The twofold aim of the United States Attorney is that guilt shall not escape or innocence suffer. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one".

37. This was an abdication of his statutory duty that the trial Judge permitted examination of six witnesses in such a serious case in one single day who were examined, cross-examined and discharged, on 28th February 2020. On the next day, an application under section 311 of the Code of Criminal Procedure was moved by the prosecution for adducing evidence through Santosh Kumar and Prem Prakash Choubey and the application was allowed on the ground that no objection was raised by the defense lawyer. These witnesses were examined on the same day as PW8 and PW9 alongwith PW7 and PW10, and the inquest report, certificate of videography, memo of arrest, seizure list, transit remand, postmortem report and DNA reports were proved through them. On 2nd March 2020, six more prosecution witnesses were examined through another petition under section 311 of the Code of Criminal Procedure and the prosecution evidence was closed. On the same day, the examination of the accused under section 313 of the Code of Criminal Procedure was completed and the case was adjourned for the next day for arguments. Having regard to the gravity of offence and the enormity of the punishment that may be awarded by the Court, there is little doubt that the trial Judge proceeded with the trial in a most unfair manner and did not adjourn the proceedings so as to afford sufficient time to the legal aid lawyer to prepare the defense.

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[24] R. v. Roulston: (1976) 2 NZLR 644

[25] Berger v. United States: 295 US 78 (1935)

38. Section 309 of the Code of Criminal Procedure provides that the proceedings in every inquiry or trial shall be continued from day to day until all the witnesses in attendance have been examined. The trial Court may adjourn the proceedings beyond the following dates if it finds it necessary and records a reason thereof. By the Criminal Law (Amendment) Act, 2013 in sub-section (1) to section 309 the expressions; *'in every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded'* – were substituted by the expressions; *'in every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded'*. The first proviso to section 309 further provides that the inquiry or trial relating to an offence under section 376, section 376-A, section 376-AB, section 376-B, section 376-C, section 376-D, section 376-DA or section 376-DB of the Indian Penal Code shall as far as possible be completed within a period of two months from the date of filing of the chargesheet. Sub-section (2) further indicates that the commencement of the trial or any adjournment in the inquiry or trial after the Court took cognizance of an offence shall be only for the reasons to be recorded. With such clear provision for adjournment, this was intellectual truancy to misconstrue the provisions of section 309 which are intended to protect a right flowing to the accused under Article 21 of the Constitution of India.

39. The accused could not engage a counsel of their choice as, it seems, they did not possess sufficient means to do so. It was a mere formality to provide a legal aid lawyer to the accused. On 27th February 2020, the District Legal Services Authority provided legal aid to the accused and appointed Mr. Rajendra Prasad Sinha, the learned lawyer to defend the accused in the trial. On the same day, police papers were supplied to the learned defense counsel and the opinion of Dr. Gautam Kumar was tendered in the Court by the Special Public Prosecutor, and the matter was posted for the framing of charge at 02:30 PM on the same day. There can be no doubt

that Mr. Rajendra Prasad Sinha, the learned legal aid lawyer had no time even to go through the records as six witnesses among whom five are star witnesses for the prosecution were examined on the next day after his appointment as the legal aid lawyer. A heavy duty is cast on the criminal Courts to ensure that no one is deprived of life and liberty without a fair and reasonable opportunity to prove his innocence. There are three accused and, as the prosecution case goes, they might set up separate defenses in the trial. The trial Judge was so oblivious of his statutory duty that in his zeal to record a judgment of conviction and to award the death penalty he did not even bother to turn to the Act of 2015 inasmuch as the investigating officer admitted in the cross-examination that Ashok Rai stated before him that he is a matriculate but he did not take his Matriculation certificate.

40. The Constitution guarantees an indefeasible right to legal representation at the cost of the State to a person charged with a crime for which capital punishment can be awarded. Article 39-A was brought in by 42nd amendment to the Constitution to ensure that opportunities to secure justice are not denied to any citizen by reason of economic or any other disability. The Constitution mandates that the State shall ensure that the operation of the legal system promotes justice on a basis of equal opportunity and shall in particular provide free legal aid. To promote the avowed object under Article 39-A, the Legal Services Authorities Act, 1987 was enacted which *inter alia* provides under section 12 that every person who has to file or defend a case shall be entitled to legal services if he or she is in custody. Long, long years before that, in *"Hussainara Khatoon (IV)"*[26] the Hon'ble Supreme Court held that free legal service is an inalienable element of "reasonable, fair and just" procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. In *"Suk Das"*[27] the Hon'ble Supreme Court held that free legal assistance at the State's cost is a fundamental right of a person accused of an offence which may involve peril to his life or personal liberty.

41. The legal assistance provided to the accused must be effective and a trial should be conducted with Hewartarian proposition that: it is not

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26 Hussainara Khatoon (IV) v. Home Secy., State of Bihar: (1980) 1 SCC 98

27 Suk Das v. Union Territory of Arunachal Pradesh: (1986) 2 SCC 401

merely of some importance but it is of fundamental importance that the justice should not only be done but should manifestly and undoubtedly be seen to be done[28]. The appointment of a legal aid lawyer by the trial Judge was a pretention of compliance with the rules of natural justice and section 304 of the Code of Criminal Procedure. We are not required to engage in a second guess on how much time should have been provided to the legal aid lawyer to prepare for the defense – the trial commenced the next day of his appointment. The tearing hurry with which the trial Judge conducted the trial leaves one exasperated and no amount of explanation can justify his actions. With shattered hope, the accused were mute spectators of the spectacle of a fast and furious trial. Indeed, in a case where an accused is deprived of his life without complying with the procedure prescribed by law the Court is not even required to turn to whether any prejudice was caused to the accused.

42. On merits, Mr. Vaibhav Kumar, the learned *Amicus* contended that the evidence on last-seen-together was not conclusive and merely on the basis of last-seen-together evidence the accused could not have been convicted for committing rape and murder of 'V'. The learned *Amicus* contended that the material witnesses were intimately related to the victim and they failed to explain their unusual conduct in not reporting the missing of 'V' to the police. As regards the adverse inference to be drawn under section 18 of the POCSO Act, the submission is that the chain of the incriminating circumstances was not complete and the accused were convicted merely on suspicion. It is further contended that no semen stain was detected in the vaginal or anal or oral swab of 'V' vide spots I, J and K, and Dr. A.K. Bapuli and Dr. Ajay Kumar Rana who conducted the forensic tests and authored the DNA reports were not produced in the trial. The prosecution did not examine the person who extracted blood samples and took penile swabs of the accused and no witness was produced to vouch for the sanctity of the procedure of sample drawing. It was further contended that no evidence was produced as to the techniques applied by the expert and thus the reports of DNA profiling became highly vulnerable and the collection and sealing of the samples sent for examination were not free from suspicion. The learned Amicus referred to

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[28] Lord Hewart CJ in The King v. Sussex Justices. Ex parte McCarthy: (1924) 1 KB 256

"*Rahul*"[29] wherein the Hon'ble Supreme Court held that merely exhibiting a document would not prove its contents.

43. The submissions made by the learned *Amicus* raise a serious concern in law. That, in cases of graver offence the accused must be provided sufficient opportunity to defend himself. The opportunity to defend provided to the accused must be real and not a mere formality and for that purpose whenever it is necessary the trial of a criminal case may be postponed by recording a reason as provided under section 309 of the Code of Criminal Procedure. On a glance at the deposition of the prosecution witnesses, it is easily demonstrable that the legal aid lawyer had no time to go through the records and was ill-prepared for the trial. The prosecution witnesses were posed just a few questions in their cross-examination and discharged. More importantly, on 2nd March 2020 the witnesses who proved the DNA and postmortem reports were produced and examined in a hurried manner inasmuch as there is no cross-examination on the point of sealing/tampering of the samples and the techniques used in DNA profiling, etc. As to the reports of DNA profiling, it is a well-known fact that this scientific report may turn clinching to conclusively establish the guilt of the accused.

44. Lord Taylor, CJ, described the process of DNA profiling in *"R v. Deen"*[30]. The learned Chief Justice explained that when crime stain DNA and sample DNA from the suspect are run in separate tracks through the gel the resultant auto-radiography can be compared. The two DNA profiles can then be said either to match or not. In the present case, the process and procedure adopted for DNA profiling are under challenge. It is contended by the learned *Amicus* that there are missing links which suggest that there were chances of fabricating blood stains on the seized clothes of the accused with the blood of 'V'. The learned *Amicus* pointed out that the blood stains of Ashok Rai and Pankaj Mohali found on the jeans pant seized from the house of Pankaj Mohali vide spot E1 is very intriguing and not explained by the prosecution. According to the learned *Amicus,* there was a possibility of tempering with the seized articles inasmuch as there could not have been blood stains of Ashok Rai on the jeans pants of Pankaj Mohali. The technicalities and

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29 Rahul v. State (NCT of Delhi): (2023) 1 SCC 83

30 reference, The Times 10th January 1994, transcript: 21st December 1993

intricacies of the processes involved in DNA profiling are so complicated that it would require a few days for any person to understand the DNA reports. It is, therefore, important for the Court that the prosecution explains everything about DNA profiling in the Court and the defense is afforded ample opportunity to demonstrate lacunae in the report, if any. As the prosecution evidence goes, it seems that the witnesses were hurled in hordes just to complete the formality.

45. There is an implied challenge that due process of law was not followed and the procedure adopted by the trial Judge was not fair and transparent. The undue haste of the trial Judge reminds the Court the maxim *"qui aliquid statuerit parte inaudita altera aequum licet dixerit haud aequum"* which means "he who determines any matter without hearing both the sides, though he may have decided rightly, has not done justice". A fair trial is a human right and the fairness of trial is implicit in Article 21 of the Constitution. This is the duty of the trial Judge to provide equal opportunity to the prosecution and the defense to present the case without any hindrance. This is also a duty of the trial Judge to maintain judicial balance and observe intellectual discipline and bear in mind that his judgment should be in consonance with the law and not cause ripples in an otherwise tranquil judicial system. In the case of *"T.C. Mathai"*[31] the Hon'ble Supreme Court held as under:

> 8. "The work in a court of law is a serious and responsible function. The primary duty of a criminal court is to administer criminal justice. Any lax or wayward approach, if adopted towards the issues involved in the case, can cause serious consequences for the parties concerned. It is not just somebody representing the party in the criminal court who becomes the pleader of the party. In the adversary system which is now being followed in India, both in civil and criminal litigation, it is very necessary that the court gets proper assistance from both sides."

46. The District and Additional Sessions Judge-I at Dumka recorded the conviction of the accused in a judgment spread over 72 pages. At the time of examining the records, when I came across these startling facts a doubt cropped up in my mind whether on 3rd March 2020 after hearing the arguments the trial Judge had delivered a previously prepared judgment. I made some Google searches to acquaint myself with how many hours it

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[31] T.C. Mathai v. District & Sessions Judge, Thiruvananthapuram: (1999) 3 SCC 614

would take to write a 82-page judgment on a legal-size paper with a medium font size. As per my estimation, it would take about one hour to dictate a 10-page order and it would take a further one and a half hour to type the contents thereof. Under illustration (e) to section 114 of the Indian Evidence Act, all judicial and official acts are presumed to have been regularly performed. This Court is also not oblivious to the hard work of the judicial officers and the sincerity and dedication with which they perform their duty. This is also true that our judgment cannot be based on mere guesswork and, therefore, we would not make any further comment and close this issue here. But one thing is clear that the trial in POCSO Act Case No.08 of 2020 was a mockery of fair trial and justice and an aberration on an otherwise robust criminal justice dispensation system in India; the trial in POCSO Act Case No.08 of 2020 must be held improper, unfair and illegal and, thus, vitiated. In *"Gopi Chand"*[32] a Constitution Bench of the Hon'ble Supreme Court held that the judicial custody undergone by the accused for some time should not be a ground not to order a de novo trial.

47. As noticed above, the hearing on the sentence commenced at 03:30 PM on 3rd March 2020 and the sentence of death was pronounced on the same day. The provision under sub-section (2) to section 235 of the Code of Criminal Procedure, 1973 puts the Criminal Court under a statutory duty to hear the accused on the question of sentence after delivering a judgment of conviction. This provision shall apply in cases where the offence committed by an accused is punishable by a penal provision under an enactment to which the provisions of the Code of Criminal Procedure shall apply and the Court convicting the accused does not proceed under section 360 of the Code of Criminal Procedure. Sub-section (2) to section 235 of the Code of Criminal Procedure provides that after the pronouncement of a judgment of conviction the trial Judge shall hear the accused on the question of sentence, and then pass sentence on him according to law, unless the trial Judge decides to proceed under section 360. The provisions under section 235 definitely break into two stages; first, judgment of conviction and second, award of sentence. In every case, these two stages involved in section 235 may not necessarily take place on two different dates one after another but certainly cannot be

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32 Gopi Chand v. Delhi Admn.: AIR 1959 SC 609

clubbed together in any case. This is not necessary that in every case to achieve the object under sub-section (2) to provide an opportunity to the convict to adduce materials on mitigating circumstances the trial Judge must adjourn the hearing on the question of sentence, but then, a real and effective opportunity must be afforded to the convict. The use of the expression "shall" in sub-section (2) provides ample indications to the legislative intention that it is mandatory for the trial Judge to hear the accused on the question of sentence. This legislative intendment has been made clearer by the use of "comma" followed by the expression "and then pass sentence".

48. The trial Judge or for that matter the High Court is required to exercise extreme caution, a high degree of concern and sensitivity in the choice of sentence. The choice however becomes almost onerous in the sense that in cases of the offence punishable with death the choice is only between the death penalty and life imprisonment. Sub-section (3) to section 354 of the Code of Criminal Procedure provides that the judgment shall state the reason for the sentence awarded where the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years. Sub-section (3) further provides that in the case of a sentence of death the trial Judge must record the special reason(s) of such sentence. Section 354 of the Code of Criminal Procedure therefore casts a duty on the trial Judge to state reasons and explain his choice for the sentence. In "*Allauddin Mian*"[33] the Hon'ble Supreme Court observed that the requirement of hearing the accused is intended to satisfy the rule of natural justice and, in fact, is a fundamental requirement of fair play. The Hon'ble Supreme Court has held as under:

> "10. Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the judge follow for determining the punishment to be imposed in each case to fit the crime ? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. That sub-section reads as under :
>
> If the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the

[33] Allauddin Mian v. State of Bihar: (1989) 3 SCC 5

question of sentence, and then pass sentence on him according to law. The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. Mr. Garg was, therefore, justified in making a grievance that the trial court actually treated it as a mere formality as is evident from the fact that it recorded the finding of guilt on 31-3-1987, on the same day before the accused could absorb and overcome the shock of conviction they were asked if they had anything to say on the question of sentence and immediately thereafter the decision imposing the death penalty on the two accused was pronounced. In a case of life or death as stated earlier, the presiding officer must show a high decree of concern for the statutory right of the accused and should not treat it as a mere formality to be crossed before making the choice of sentence. If the choice is made, as in this case, without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc., before the court, the court's decision on the sentence would be vulnerable. We need hardly mention that in many cases a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision; a fortiori, therefore, the principle of fair play must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of sub-section (2) of Section 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the mitigating as well as the aggravating circumstances placed before it, it must pronounce the sentence. We think as a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender. In the present case, as pointed out earlier, we are afraid that the learned trial Judge did not attach sufficient importance to the mandatory requirement of sub-section (2) of Section 235 of the Code. The High Court also had before it only the scanty material placed before the learned Sessions Judge when it confirmed the death penalty."

49. The Courts cannot overlook the factum of widespread illiteracy among the persons accused of serious crimes and that is more a reason to take

greater care to see that sub-section (2) of section 235 is given a meaningful interpretation and adherence. Sub-section (2) to section 235 of the Code of Criminal Procedure incorporates a safeguard against unguided and arbitrary award of a sentence of death. The mandatory compliance of sub-section (2) protects a person from arbitrary sentencing and also lends credibility to the Court proceedings on the question of sentence. The Latin maxim *"salus populi suprema lex"* which means "the safety of the people is the supreme law" may not always be given primacy but, undoubtedly, the provisions in a penal statute must be scrupulously followed. The failure to adhere to the mandate under sub-section (2) of section 235 is not a mere irregularity and must be held incurable. There cannot be any leeway in favor of the prosecution and the right of the convict of hearing on the question of sentence must be strictly construed and followed. The only exception is the award of a minimum prescribed sentence to the convict but, in all other cases, even where there may seem no possibility of the alteration of sentence after affording a right of hearing the provisions of sub-section (2) to section 235 must be strictly followed. Therefore, if without hearing the accused a composite judgment of conviction and order of sentence is passed that shall infringe the provisions under sub-section (2) to section 235 and, consequently, the sentence awarded to the accused must necessarily be set aside. Thereafter, the High Court in exercise of the powers under section 386 of the Code of Criminal Procedure can remand the matter to the trial Judge for hearing on the question of sentence or may decide to hear the accused on the question of sentence and pass an appropriate order of sentence. In *"Santosh Kumar Satishbhushan Bariyar"*[34] the Hon'ble Supreme Court did not approve the pronouncement of the judgment of conviction and conducting the hearing for sentencing on the same day. In *"Chhannu Lal Verma"*[35] the Hon'ble Supreme Court held that the trial Judge committed a procedural impropriety while hearing the convict on the question of sentence on the same day observing that by adopting such a procedure the trial Court did not provide necessary time to the convict to furnish further material or mitigating circumstance(s) relevant to sentencing.

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34 Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra: (2009) 6 SCC 498

35 Chhannu Lal Verma v. State of Chhattisgarh: (2019) 12 SCC 438

50. The provisions under sub-section (2) to section 235 are imperative in nature and non-compliance thereof shall vitiate the sentence awarded to the accused. A procedural impropriety in adherence to the provisions under sub-section (2) or a departure from the manner in which the procedure laid down therein has to be followed shall get a hit by Article 14 and Article 21 of the Constitution of India. There can be no measure of doubt that any procedure that suffers from procedural impropriety cannot be said to be a just, fair and reasonable procedure. There are then bound to be questions of denial of natural justice and ignoring the dignity of human beings which are firmly rooted in the equality and liberty clauses under Chapter-III of the Constitution of India. In the matters of criminal conviction which is fraught with the imminent possibility of loss of life this is the duty of the trial Judge to inform the convict that he has a right to be heard on the question of sentence and he has also a right to effectuate this right of hearing by producing further material and/or evidence, if he so desires. Now the time has come that *Miranda* [36] which is applied in narcotics and psychopathic laws and preventive detention laws is made a part of the duty of the Court hearing on sentence. In our opinion, in every case where the statute provides death penalty the Court must adjourn "further" hearing on sentence after clearly informing the accused that he has a right to produce material(s) on mitigating circumstance(s). This only can be the manner in which the provisions under sub-section (2) to section 235 of hearing the prisoner on the question of sentence can effectively be achieved. In all other cases, where the convict does not intend to lead any evidence and is satisfied with an opportunity for an oral hearing the trial Judge shall pass a sentence on him according to law. However, the trial Judge should make an endorsement and record in the proceedings of the Court as well as in the order of sentence that the convict was informed about his right and offered an opportunity to lead further evidence, oral as well as documentary.

51. The duty on the Court cast under the penal statutes to choose between death and imprisonment for life is of unimaginable degree and proportion. In *"Rajendra Pralhadrao Wasnik"*[37] the Hon'ble Supreme Court

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36 Miranda v. Arizona : 384 US 436

37 Rajendra Pralhadrao Wasnik v. State of Maharashtra: (2019) 12 SCC 460

observed that the convict must be afforded adequate opportunity to produce relevant material(s) where the death penalty may be awarded. In *"Anguswamy"*[38] which is reported in the same volume of Supreme Court Cases just nine pages after "*Allauddin Mian*"[33], the Hon'ble Supreme Court again reiterated that the requirement of sub-section (2) of section 235 of the Code of Criminal Procedure is mandatory. We are definite in our opinion and feel fortified through the aforementioned judgments in *"Santosh Kumar Satishbhushan Bariyar"*[34], *"Chhannu Lal Verma"*[35], *"Rajendra Pralhadrao Wasnik"*[37], "*Allauddin Mian*"[33] and "*Anguswamy*"[38], that an infraction of the right of the convict under sub-section (2) of section 235 of the Code of Criminal Procedure shall vitiate the order of sentence. There cannot be any compromise with such right of the convict and the High Court shall be denuded of any powers to examine whether the provisions under sub-section (2) to section 235 of the Code of Criminal Procedure were "substantial" or "sufficiently" complied with. Any such procedure adopted by the High Court shall be contrary to well-settled law and beyond the jurisdiction and powers of the High Court and would result in taking away a valuable right of the convict which no Court has powers to do so.

52. Quite clearly, the judgment of conviction and order of sentence both dated 3rd March 2020 cannot bear the loads of so many procedural illegalities which in turn violated the Constitutional rights of the accused with impunity. The duty cast by the statute on the appellate Court is a sacrosanct duty. The duty of the appellate Court under sections 374, 378 and 386 of the Code of Criminal Procedure emanates from the Constitutional philosophy of providing justice to all. The sacred duty of a judge gets more accentuated when the matter concerns the offence for which the death penalty is a possibility. Looking at the illegalities committed during the trial of POCSO Act Case No. 08 of 2020, we hold that the trial was vitiated and, accordingly, the judgment of conviction and order of sentence both dated 3rd March 2020 are set aside.

53. Ashok Rai has crossed the age of 20 years and Pankaj Mohali would also attain the age of 20 years within next 2 months. Section 15

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38 Anguswamy v. State of T.N.: (1989) 3 SCC 33

provides that a child who has completed or is above the age of 16 years if alleged to have committed a heinous offence a primary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequence of the offence and the circumstances in which he allegedly committed the offence has to be conducted and an order in this regard shall be passed as per sub-section (3) of section 18. Sub-section (2) of section 15 provides that where the Board is satisfied on the preliminary assessment that the matter should be disposed of by the Board, it shall follow the procedure as far as may be for the trial in summons case under the Code of Criminal Procedure. After the preliminary assessment, an order under sub-section 3 to section 18 is passed and the case is transferred to the Children's Court, if the Board is of the opinion that the child needs to be tried as an adult. Otherwise, the case is tried as a summons case by the Board itself following the procedure under the Code of Criminal Procedure, 1973. This needs no reiteration that the enquiry conducted by the J.J. Board is based on a preliminary assessment and any order passed under sub-section (3) of section 18 is not a final adjudication on the question of trying the child as an adult. The Act of 2015 provides for a further enquiry in terms of sub-section (1) of section 19 by the competent Children's Court and that is a mandatory requirement in law[39]. The trial of a child as an adult and trial as a juvenile by J.J. Board have different consequences. Therefore, after an enquiry if the Children's Court comes to the conclusion that there is no need to try the child as an adult any action can be taken against the child only in terms of section 18 of the Act of 2015.

54. In the result, the reference under section 366 of the Code of Criminal Procedure is declined and Death Reference No. 02 of 2020 is dismissed.

55. Criminal Appeal (DB) No. 493 of 2020 is allowed and POCSO Act Case No. 08 of 2020 is restored to its original records.

56. Consequently, we issue the following directions:

(i) The case records of Ashok Rai and Pankaj Mohali shall be transmitted to the J.J. Board at Dhanbad which shall conduct an

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[39] Criminal Appeal No.3023 of 2023 titled Ajeet Gurjar v. The State of Madhya Pradesh

inquiry under section 15 of the Act of 2015 and transmit a report thereof to the Court seized with POCSO Act Case No.08 of 2020 which is a Children's Court;

(ii) Ashok Rai and Pankaj Mohali shall appear before the J.J. Board at Dhanbad on 22nd November 2023 (after Court vacation);

(iii) POCSO Act Case No.08 of 2020 shall also be listed in the Court concerned on 22nd November 2023 on which date ~~Pankaj Mohali~~ Mithu Rai shall appear in person in the Court concerned and;

(iv) The Children's Court shall conduct an inquiry under section 19 of the Act of 2015 and proceed in accordance with law after the receipt of a report from the J.J. Board at Dhanbad.

57. We further direct that the trial of POCSO Act Case No. 08 of 2020 shall commence afresh and shall be heard and decided by another Court of competent jurisdiction; not by the same judge who delivered the judgment of conviction on 3rd March 2020.

I agree

(Shree Chandrashekhar, J.)

(Anubha Rawat Choudhary, J.)

(Anubha Rawat Choudhary, J.)

Jharkhand High Court, Ranchi
Dated: 18th October 2023
R.K./Amit
N.A.F.R.