IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.807 of 2015

Arising Out of PS. Case No.-14 Year-2013 Thana- KATHAIYA District- Muzaffarpur

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Ranjeet Thakur @ Ranjeet Kumar Son of Late Dukhit Thakur, Resident of Village - Kuriya, P.S. - Kathaya, District - Muzaffarpur.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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Appearance :
For the Appellant : Mr. Nafisuzzoha, Advocate
Mr. Md. Naushaduzzoha, Advocate
For the State : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 18-09-2023

This appeal is filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") against the judgment of conviction dated 16th July, 2015 and order of sentence dated 16th of July, 2015, passed by learned 7th Additional Sessions Judge, Muzaffarpur in Sessions Trial No.523 of 2013, arising out of Kathaiya P.S. Case No.14 of 2013, whereby the concerned Trial Court has convicted the sole appellant Ranjeet Thakur @ Ranjeet Kumar for the offences punishable under Sections- 376, 302, 120B of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for ten years under Section-376 of the I.P.C. and fine of Rs.10,000/-

and in default of payment of fine, further to undergo rigorous imprisonment for six months. He has been further convicted and sentenced to undergo rigorous imprisonment for life till his death and fine of Rs.10,000/- and in default of payment of fine, to further undergo rigorous imprisonment for six months. The sentences have been ordered to run concurrently.

2. The prosecution story, in brief, is as under:

> "The informant on 06.03.2013 at about 09:00 p.m. after taking dinner along with her deceased daughter Deepu Kumari and minor son Rahul Kumar had slept in southern side room and Deepu Kumari had slept in south-eastern side room and her son Rahul had slept in north-eastern side room. When she woke up for natural call, she did not find Deepu Kumari in her room and searched for her and when she did not find any trace of Deepu Kumari, she called her son Rahul and they both searched for Deepu Kumari and they did not disclose to anyone about the said occurrence to save their prestige and they waited for morning. When she did not return till morning, her son Rahul proceeded towards Deoriya Road, Baruraj and Thika to search for her. In the meantime, her villager Saroj Devi informed her through telephone that dead body of Deepu Kumari was lying in the backside of her house and at this, her son Rahul returned to her house and stated the informant that Deepu was lying dead in the mustard field. She along with her son Rahul went there and saw that the neck of deceased daughter Deepu

Kumari was cut and one blade was also found there beside her dead body."

3. After registration of the FIR, the Investigating Officer carried out the investigation. During course of investigation, he recorded the statement of witnesses. The dead body of the deceased was sent for *post mortem*. Inquest *Panchnama* was also prepared before sending the dead body for *post mortem*. After investigation was over, the Investigating Officer filed charge-sheet against the accused before the concerned Magistrate Court. As the case was exclusively triable by Court of Sessions, the concerned Magistrate committed the same to the Sessions Court where the same was registered as Sessions Trial No. 523 of 2013.

4. During course of trial, the prosecution has examined 13 witnesses, namely, P.W. 1- Rahul Kumar Singh, P.W. 2- Saroj Devi, P.W. 3-Shankar Singh, P.W. 4- Krishna Singh, P.W. 5- Priyanka Devi, P.W. 6- Laxmi Singh, P.W. 7- Indira Devi, P.W. 8- Dr. Sanjay Kumar Gupta, P.W. 9- Dr. Bipin Kumar, P.W.10- Ram Narayan Sharma, P.W. 11-Sandip Singh, P.W. 12- Mithilesh Kumar, P.W. 13- Anulika Kumari and also produced documentary evidence. After the evidence of the prosecution was over, further statement of the appellant-accused was recorded under Section 313 of the Code. The defence has

also examined D.W.1 Suresh Thakur and D.W.2 Champa Kuwar. The Trial Court, after considering the documentary as well as oral evidence produced by the prosecution, passed the impugned order of conviction, as observed hereinabove. The sole appellant-convict has, therefore, filed the present appeal.

5. We have heard the arguments of Mr. Nafisuzzoha learned counsel for the appellant, assisted by Md. Naushaduzzoha and Mr. Sujit Kumar Singh, learned APP for the respondent-State.

6. Learned counsel appearing for the appellant has mainly contended that in the present case, there is no eye-witness to the incident in question and case of the prosecution rests on circumstantial evidence. Learned advocate referred the depositions of the prosecution witnesses and thereafter submitted that the informant, who is the mother of the deceased girl, as well as the brother of the deceased are not the eye-witnesses to the incident in question.

7. It is submitted on behalf of the appellant that the prosecution has failed to prove the case against the appellant-accused beyond reasonable doubt and chain of the evidence collected by the prosecution is not complete so as to prove that only the appellant herein has killed the deceased after

committing rape on her.

It is further submitted that the prosecution has also not followed the provisions contained in Section-53A of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code). The appellant-accused was not sent for medical examination before the doctor. At this stage, it is further submitted that though the blood sample of the appellant-accused was collected, the prosecution has not exhibited the document showing the blood group of the appellant-accused before the learned Trial Court. Even the D.N.A. profile of the appellant-accused has not been produced before the Court.

At this stage, learned counsel for the appellant would further submit that the appellant-accused has been convicted on the basis of the confessional statement made before the police. It is also submitted that though it is alleged that the under garments as well as *Gamchha* were seized from the house of the appellant, the prosecution has failed to prove that the blood and semen found on the said articles were either of the deceased or of the appellant. Learned counsel, therefore, urged that the trial Court has committed an error while passing the order of conviction and, therefore, the said judgment and order be quashed and set aside.

8. Learned counsel for the appellant has placed reliance upon the various decisions rendered by the Hon'ble Supreme Court in the cases of **Sharad Birdhichand Sarda v. State of Maharashtra**, reported in **AIR 1984 SC 1622**, **Anjan Kumar Sarma Vs. State of Assam**, reported in **(2017) 14 SCC 359**, **Ravi Vs. State of Karnataka**, reported in **(2018) 16 SCC 102** and **Reena Hazarika Vs. State of Assam**, reported in **(2019) 3 SCC 289**. Learned counsel has also placed reliance on the decision rendered in Cr. Appeal No.361-362 of 2018, **Chotkau Vs. State of Uttar Pradesh** on 28th of *Se*ptember, 2022.

9. On the other hand, learned APP has opposed this appeal by contending that though there is no eye-witness to the incident in question, the prosecution has proved the case against the appellant-accused beyond reasonable doubt by producing cogent and relevant evidence.

It is submitted that the appellant was arrested and he has confessed his guilt before the police authorities. However, thereafter, on the basis of the said confessional statement, when the investigating officer has collected the material which corroborates the say of the appellant-accused, it cannot be said that the appellant has been wrongly convicted by

the trial court. It is pointed out that the slippers of the deceased were recovered at the instance of the appellant and discovery *panchnama* under Section-27 of the Indian Evidence Act was prepared by the investigating officer. It is further submitted that the investigating officer has also sent the clothes of the deceased and semen which was found near the dead body to the F.S.L. for necessary examination. Further, certain articles, including the under garments of the appellant as well as *Gamchha,* were also seized from the house of the appellant. The same were also sent for necessary examination to F.S.L. Learned A.P.P. has referred the F.S.L. report/serological report. After referring to such materials, it is submitted that human blood was found having Antigen-A and Antigen-B on all the articles which were seized/collected from various places. On the basis of the same, the prosecution has proved the complete chain of circumstance. Thus, the trial court has not committed any error while passing the impugned order of conviction. Learned A.P.P., therefore, urged that this appeal be dismissed.

10. We have considered the submissions canvassed by learned counsel appearing for the parties. We have also perused the entire evidence produced by the prosecution before the Trial Court. It would emerge from the record that the F.I.R.

in question has been filed by P.W. -7, Indira Devi- Mother of the deceased, wherein she had not given the name of any accused. However, during the course of investigation, the appellant was arrested and thereafter his confessional statement has been recorded by the Investigating Officer. P.W. 7 Indira Devi, has deposed before the Court that the incident in question took place 10 months prior to the date of her deposition when her family went to sleep, after having dinner. When she woke up in the midnight, she did not find her daughter sleeping in her bed room and on searching along with her son, she could not find her daughter. She did not inform the neighbours during night hours. Thereafter, they started searching her daughter in the morning. It is further stated that her son Rahul went on the motorcycle of his uncle during morning hours to search her daughter. At that time, her neighbour Saroj Devi informed them that a dead body is lying in the Mustard field in the backyard of their house. When she reached the agricultural field, she found the dead body of her daughter. Her mouth was tied and neck was cut with a blade which was also found near the dead body. Pant of her daughter was loose open. Thereafter, Saroj Devi informed Rahul about the same. It is revealed that somebody has committed rape on her daughter and thereafter cut the neck. Her statement was

recorded by the police which was read before her and she put her thumb impression on the said complaint.

During cross-examination, she had stated that her daughter was aged approximately 15 years and was studying in Class-IX. On the night of the incident, when she did not find her daughter in her bed room, she did not tell anyone out of the family because of fear of loss of reputation. She has further stated that her family had no interaction with the accused neither had any enmity.

11. P.W. 1 Rahul Kumar Singh is the brother of the deceased. The said witness in his examination-in-chief has stated that the incident took place during night hours of 6th March, 2013. At that time, he was sleeping in his room. His mother and his sister were also sleeping in other rooms. When the mother of the said witness woke up in the midnight, she did not find Deepu and, therefore, they searched her in the house, however, did not inform the neighbours. On the next morning, he went on motorcycle with his uncle in search of his sister. At that time, neighbour Saroj Devi informed him on telephone that the dead body of his sister is lying in a field. When he reached at that place, he found the dead body of his sister. The mouth of his sister was tied and neck was cut. A stainless steel blade was also

found near the dead body. White semen type substance was also found on the earth. The police collected the blade and the blood stained soil and the other materials from the spot and prepared the seizure list. He signed the said seizure list. Said witness identified his signature. The said witness, during cross-examination, has admitted that he is not an eye-witness to the incident/occurrence in question. They have no enmity with the accused.

12. P.W. 2 Saroj Devi is the neighbour of the deceased. The said witness in her deposition has stated that when she was cooking food in the morning of 07.03.2013, she heard a *Hulla* near the Mustard field and, therefore, she went to the said field and at that time she found that Deepu Kumari was lying dead at that place and her mouth was tied and neck was cut. Pant was open and she was dead. Blood stains were found near the dead body. Blood was also found. Thereafter, she informed Rahul on telephone about the incident. She further stated that the house of the appellant is near the house of Deepu and after the dead body of Deepu was found, Ranjeet Kumar (appellant herein) was missing. When the police asked Ranjeet Kumar in presence of the said witness, he admitted that he had killed Deepu. Thereafter, police seized the blood stained clothes

of the appellant from the house of the appellant-accused. She identified the appellant who was present in the Court. In the cross-examination, she has also stated that she had not seen the appellant-accused with Deepu at any point of time.

13. P.W. -3 Shankar Singh is the witness who has signed the seizure list. The said witness stated that in his presence police had seized the clothes and mobile phone of the appellant-accused. The police also seized *Gamchha*, *Ganji* and Pant and there were blood stains on the clothes of the appellant. The said witness has signed the seizure memo. Thereafter, one lady slipper was found from the back side of the house of the deceased which was covered under the Banana leaves. The said slipper was identified by the informant. The said witness also stated that the slipper was discovered at the instance of the appellant and at that time he was present.

During cross-examination, said witness has stated that the articles which were seized in his presence by the police are not shown to him during his examination before the Court and there was no enmity between the family of the deceased and the family of the appellant.

14. P.W. 4 Krishna Singh is the 2nd Panchnama witness. The said witness has stated exactly on the same line as

deposed by P.W. 3 Shankar Singh.

15. P.W. 5 Priyanka Devi is the younger sister of the deceased Deepu. She has stated that she got the information of death of her sister on 07.03.2013. At that time, she was in her in-laws' house. Her mother informed her on telephone about the occurrence. Therefore, she came to her parental house. When she reached the place of occurrence, she found the dead body of her sister Deepu. Thereafter, concerned D.S.P. came at the place of occurrence with sniffer dog and the said dog went up to the door of Ranjeet (appellant herein). Thereafter, police searched Ranjeet who was arrested on 11th of March, 2013. Thereafter, police interrogated Ranjeet and during that interrogation, Ranjeet stated before the police in presence of the villagers and the said witness that he has committed rape on Deepu and thereafter killed her. Thereafter, the police seized blood stained clothes i.e. his Pant, *Ganji*, underwear and *Gamchha* from the house of the appellant. Slipper of Deepu was also found under the Banana leaves.

During cross-examination, the said witness has stated that, in her statement given before the police, she had not stated that Ranjeet Thakur had admitted his guilt in her presence. She had also not stated before the police about the

seizure of the clothes and *Gamchha* of the appellant having blood stains from his house.

16. P.W. -6 Laxshmi Singh is a witness to the seizure-list. He has just detailed the articles seized/collected from the house of the appellant in his presence.

17. P.W. 8 Dr. Sanjay Kumar Gupta is the doctor who examined the blood sample of the appellant-accused in presence of Vijay Prasad, Clerk and on the request of S.I. Ram Narayan Sharma. He had only taken blood sample of the accused, but had not examined the same as the same was not produced before him.

18. P.W. 9 Dr. Bipin Kumar Rai is the doctor who performed the *post mortem* examination of the dead body of the deceased Deepu Kumari. He found following injuries:

> "I. One incised wound over front and middle of neck just above thyroid cartilage 4"x1" cavity deep. Wound margins were clean cut, cutting muscles blood vessels and trachea. There was presence of cut mark over tracheal ring. There was presence of blood in the cavity.
>
> II. Abrasion:- 1"x1/2"x1/2" and 1/2"x1/4" over lower part lower lip.
>
> III. Abrasion 1/2"x1/4" over right side of labia mazora (vagina)
>
> IV. Abrasion- 1/2"x1/4" over labia mazora and grudging of vaginal wall with presence of blood mixed fluid.
>
> Opinion- The deceased died due to

haemorrhage and shock, as a result of above mentioned injuries.

Injury No.I is caused by sharp cutting weapon and rest were caused by impact of hard and blunt object."

19. P.W.-10 Ram Narayan Sharma is the Investigating Officer of the present case. He, in his deposition, has stated that after taking the charge as IO for the case, he visited and investigated the Incident spot (The house of the informant where the deceased had slept and the place where the dead body of the deceased was found (field of Pawan Singh)) and again took statement of the informant. He has further stated that he had found blood spilled/stains on the land and Mustard crop near the head of the deceased which gave signal that victim was killed somewhere different and was subsequently moved to that spot.

He has also stated that he had recovered blood stained soil in addition to Vijay stainless blade and the blade cover from the place of occurrence and prepared a seizure list, exhibit 1/7(A) He also recovered semen like substance from near the drain on the spot- Ex-1/8. 5. While arresting the accused, he found a blood- stained *Gamchha, Ganji, underwear* and mobile which was exhibited as Exh-1/9. He has further stated in para 17 that he recorded the confessional statement of arrested accused and

had read that over to him on which the accused had duly signed (Ex-5). He has also extracted the call details of the accused with the help of surveillance unit. He had sent the materials (A blood stained rod from the deceased's house, blood stained soil, clothes of the deceased, Clothes of the accused, blood sample of the accused along with other seized materials) to F.S.L. for testing, he is not aware of the F.S.L. report.

In his cross-examination, he has stated that the confessional statement was not written in the handwriting of the accused, though the accused had given his signature on it. He has further stated that he did not take any blood and semen sample from the body of the deceased. He also did not find any spot of semen on the panty of the deceased. He had seized the clothes of the accused only after he found blood stains on the clothes of the accused. In the call details of the accused he had found two call logs - to the Sister of the accused and to the mother of the deceased.

20. P.W. 11 Sandeep Singh is the Lab Officer of F.S.L. who has stated that he along with his team had collected the blood samples from the spot of occurrence and marked various exhibits but, in his cross-examination, has stated that he examined the blood samples primarily himself, though usually

they examine the blood in their lab. He was not sure as to whose blood was there on the handpump of the deceased, neither is he sure as to whose blood was there on the window rod and in the soil.

21. P.W. 12 Mithilesh Kumar, an officer who was working in Forensic Science Laboratory, Patna has stated in his examination-in-chief that the blood stains which were collected from the place of occurrence was sent for examination and in the said letter he had signed. The said witness identified his signature. During cross-examination, the said witness has admitted that in the examination report, nobody's name is mentioned. It is further said that they examined the blood and the semen which were collected. However, they did not compare the said blood or semen with the blood or semen of others.

22. P.W. 13 Anulika Kumari was also an officer working in Forensic Science Laboratory, Patna. The said officer and members of the team seized the sample of blood from the place of occurrence. The said witness also signed the document and she identified her signature. During cross-examination, it is stated that thereafter report was prepared by one of the members of the team, namely, Sandeep Singh.

23. The defence also has examined two witnesses,

i.e., D.W.1 Suresh Thakur and D.W.2 Champa Kuer.

23.1 D.W.1 Suresh Thakur stated in his examination-in-chief that the appellant-accused is his brother-in-law. On the day of occurrence, he was in his in laws' house. Ranjeet Thakur slept beside him. We were together continuously from 09:00 p.m. This witness has further stated in his examination-in-chief that he did not get any information regarding the occurrence till morning. This witness further said in his examination-in-chief that at 12:00 O' clock in the night, the mother of the deceased came to call the appellant and the appellant replied that I am sleeping and he did not go with her. D.W.1 further stated in his examination-in-chief that Ranjeet was with him continuously in the night.

24. D.W.2 Champa Kuer stated in her examination-in-chief that she knows Indira Devi, wife of Balendra Singh. The daughter of Indira Devi was murdered. She could not tell that before how many days, the deceased died. This witness further stated in paragraph-2 of her examination-in-chief that before one night of the occurrence, her son was in my house. She further deposed that son of Indira Devi, namely, Rahul Singh had committed the murder of Deepu Kumari at about 07:00-08:00 in the evening thereafter, her son had slept after

taking meal. This witness further deposed that she was at her house. In paragraph-2 of her deposition, this witness stated that mother of Rahul came at her house at 11:00 p.m. in the night and wanted to know the whereabouts of her son from Ranjeet and Ranjeet told her that he does not know where is Rahul and thereafter mother of Rahul returned. D.W.2 Champa Kuer in paragraph-3 of her deposition stated that her son slept again and he went on his work at 06:00 a.m. in the morning. It is further deposed by this witness that he heard *hulla* about fleeing of the deceased and thereafter she heard about the murder of the deceased. The deceased was thrown in the mustard field after killing her. This witness further deposed that after 3-4 days, name of her son was given in this case. There was no dispute between her son and the deceased. This witness further deposed in paragraph-5 of her examination-in-chief that due to village rivalry, her son has falsely been implicated. D.W.2 in her cross-examination has stated that she slept at 09:00 pm. on the night of occurrence. She further stated that she woke up at 03:00-04:00 a.m. in the morning. This witness further stated in her cross-examination that there is no paper regarding dispute with the family of Balendra Singh. She has no paper and evidence regarding dispute from the villagers. She does not know about

the relationship of her son with others. After the occurrence, police came with dog squad and the dog sat on the road in front of my house and on this ground police searched my house and arrested her son. The police also seized the cloth of her son. This witness further deposed in her cross-examination that she has three sons and Ranjeet is the youngest son.

25. Relying upon the aforesaid witnesses examined by the prosecution, the prosecution has contended that the appellant-accused has been arrested in connection with the occurrence in question and thereafter his confessional statement was recorded. On the basis of the same, one slipper of the deceased was discovered. It is also contended that blood and semen were found from the undergarments and *Gamchha* which were seized from the house of the appellant and, therefore, the appellant has killed the deceased.

26. We have gone through the evidence of the prosecution witnesses. From the evidence of the prosecution, it is revealed that there is no eye-witness to the occurrence in question and the case of the prosecution is based on circumstantial evidence. It is the case of the prosecution that on the basis of suspicion, appellant was arrested and thereafter during course of investigation, undergarments and *Gamchha*

were recovered from the house of the appellant. On the said articles, blood as well as semen were found. The same was sent to Forensic Science Laboratory. Further it is the case of the prosecution that semen, blood stains soil as well as blade by which the neck of the deceased was cut were also collected from the place of occurrence and were sent for necessary analysis. Now, it is the case of the prosecution that human blood was found having Antigen-A and Antigen-B on all the articles. However, it is pertinent to note that the prosecution has failed to bring on record the blood group of the deceased and the appellant-accused. From the evidence of one of the prosecution witnesses, it is revealed that blood sample of the appellant was taken by the concerned doctor. However, when we examined the case diary, it is revealed that blood group of the appellant is ‘B’ but the said document has not been produced on record by the prosecution. Further we failed to understand the case of the prosecution that one of the slippers of the deceased was discovered at the instance of the appellant-accused covered by leaves of Banana plant. There was no reason for the appellant-accused to hide the slipper when the so called murder weapon, i.e., the stainless steel blade, by which it is alleged that neck of the deceased was cut, was found from the spot. Further the

prosecution has also failed to point out from the record that at which place the rape has been committed upon the deceased, whether at the house or at the mustard field. Further if the slipper of the deceased is discovered at the instance of the appellant then it is not coming out on the record that whether the deceased herself had gone at the place of occurrence wearing slippers during night hours on her own.

27. At this stage, we would like to refer the provisions contained in Section 53A of the Code of Criminal Procedure, 1973, which reads as under:

> "53A. Examination of person accused of rape by medical practitioner, -
>
> (1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place whether the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.
>
> (2) The registered medical practitioner conducting such examination shall, without delay, examine

such person and prepare a report of his examination giving the following particulars, namely;

"(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in Clause (a) of sub-section (5) of that section."

27.1 From the aforesaid provision, the examination of a person accused of rape is required to be conducted by the medical practitioner.

28. At this stage, we would like to refer the decision passed by the Hon'ble Supreme Court in the case of **Chotkau** (supra) wherein the Hon'ble Supreme Court has observed in paragraphs 75 to 81 as under:

"75. Even in a case where the victim of rape was alive and testified before the Court and the accused was also examined by a doctor, this Court found in Krishan

Kumar Malik vs. State of Haryana that the failure to obtain the report of the Forensic Sciences Laboratory was fatal. Paragraph 40 of the said decision reads as follows:

"40. The appellant was also examined by the doctor, who had found him capable of performing sexual intercourse. In the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the appellant. This lacuna on the part of the prosecution proves to be fatal and goes in favour of the appellant."

76. On the scope of the newly inserted Section 53A, this Court said in Krishan Kumar Malik (supra) as follows:

"44. Now, after the incorporation of Section 53A in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 266, even without the aforesaid specific provision in CrPC the prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching o semen of the Appellant with that found on the undergarments of the prosecutrix to make it a food proof case, but they did not do so, thus they must face the consequences."

77. It is true that a three member Bench of this Court indicated in Rajendra Pralhadrao Wasnik vs. State of Maharashtra that Section 53A is not mandatory. It was held in paragraphs 40 and 50 of the said decision as follows:-

"49. While Section 53-A CrPC, is not mandatory, it certainly requires a positive decision to be

taken. There must be reasonable grounds for believing that the examination of a person will afford evidence as to the commission of an offence of rape or an attempt to commit rape. If reasonable grounds exist, then a medical examination as postulated by Section 53-A(2) CrPC must be conducted and that includes examination of the accused and description of material taken from the person of the accused for DNA profiling. Looked at from another point of view, if there are reasonable grounds for believing that an examination of the accused will not afford evidence as to the commission of an offence as mentioned above, it is quite unlikely that a charge-sheet would even be filed against the accused for committing an offence of rape or attempt to rape.

50. Similarly, Section 164-A CrPC requires, wherever possible, for the medical examination of a victim of rape. Of course, the consent of the victim is necessary and the person conducting the examination must be competent to medically examine the victim. Again, one of the requirements of the medical examination is an examination of the victim and description of material taken from the person of the woman for DNA profiling."

78. After saying that Section 53A is not mandatory, this Court found in paragraph 54 of the said decision that the failure of the prosecution to produce DNA evidence, warranted an adverse inference to be drawn. Paragraph 54 reads as follows:-

"54. For the prosecution to decline to produce DNA evidence would be a little unfortunate particularly when the facility of DNA profiling is available in the country. The prosecution would be well advised to take advantage of this, particularly in view of the provisions of Section 53-A and Section 164-A CrPC. We are not going to the extent of suggesting that if there is no DNA profiling, the prosecution case cannot be proved but we are certainly

of the view that where DNA profiling has not been done or it is held back from the trial court, an adverse consequence would follow for the prosecution."

79. It is necessary at this stage to note that by the very same Amendment Act 25 of 2005, by which Section 53A was inserted, Section 164A was also inserted in the Code. While Section 53A enables the medical examination of the person accused of rape, Section 164A enables medical examination of the victim of rape. Both these provisions are somewhat similar and can be said approximately to be a mirror image of each other. But there are three distinguishing features. They are:-

(i) Section 164A requires the prior consent of the women who is the victim of rape. Alternatively, the consent of a person competent to give such consent on her behalf should have been obtained before subjecting the victim to medical examination. Section 53A does not speak about any such consent;

(ii) Section 164A requires the report of the medical practitioner to contain among other things, the general mental condition of the women. This is absent in Section 53A;

(iii) Under Section 164A(1), the medical examination by a registered medical practitioner is mandatory when, "it is proposed to get the person of the women examined by a medical expert" during the course of investigation. This is borne out by the use of the words, "such examination shall be conducted". In contrast, Section 53A(1) merely makes it lawful for a registered medical practitioner to make an examination of the arrested erson if "there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence".

80. In cases where the victim of rape is alive and is in a position to testify in court, it may be possible for

> the prosecution to take a chance by not medically examining the accused. But in cases where the victim is dead and the offence is sought to be established only by circumstantial evidence, medical evidence assumes great importance. The failure of the prosecution to produce such evidence, despite there being no obstacle from the accused or anyone, will certainly create a gaping hole in the case of the prosecution and give rise to a serious doubt on the case of the prosecution. We do not wish to go into the question whether Section 53A is mandatory or not. Section 53A enables the prosecution to obtain a significant piece of evidence to prove the charge. The failure of the prosecution in this case to subject the appellant to medical examination is certainly fatal to the prosecution case especially when the ocular evidence is found to be not trustworthy.
>
> 81. Their failure to obtain the report of the Forensic Sciences Laboratory on the blood/semen stain on the salwar worn by the victim, compounds the failure of the prosecution."

29. From the aforesaid observations made by the Hon'ble Supreme Court, it can be said that though Section 53A Cr.PC. is not mandatory, where DNA profiling has not been done or it is held back from the trial court, an adverse consequence would follow for the prosecution. It is further revealed that where the victim is dead and the offence is sought to be established only by circumstantial evidence, the medical evidence assumes great importance. The failure of the prosecution to produce such evidence, despite there being no obstacle from the accused or anyone, will certainly create a

gaping hole in the case of the prosecution and give rise to a serious doubt on the case of the prosecution.

30. Keeping in view the aforesaid decision and the provision of law, if the facts of the present case are examined, it is revealed that though the FSL has submitted serology report of the blood samples which were collected from the place of occurrence and from the articles which were seized from the house of the appellant, it is not revealed that the blood found on all the articles was of the appellant-accused. Further it is relevant to note, at this stage, that we also examined the case diary from which it is revealed that DNA profile was obtained and even finger prints were also taken. However, the report of the same has not been produced before the Trial Court and the same has not been exhibited thus, it appears that the prosecution, for the reasons best known to it, has held back the said material from the Trial Court and, therefore, in the facts of the present case, adverse inference is required to be drawn against the prosecution.

31. At this stage, we would like to refer the decision rendered by the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda** (supra) wherein the Hon'ble Supreme Court has observed in paragraph 150 to 160 as under:

> "150. It is well settled that the prosecution must stand or fall

on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.

151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh 1952 SCR 1091 : (AIR 1952 SC 343) . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of Uttar Pradesh, (1969) 3 SCC 198 and Ramgopal v. State of Maharashtra, AIR 1972 SC 656. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (at pp. 345-46 of AIR) (supra):

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion

consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

154. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in The King v. Horry, (1952) NZLR 111, thus:

"Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."

155. Lord Goddard slightly modified the expression 'morally certain' by 'such circumstances as render the commission of the crime certain'.

156. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry's case (supra) was approved by this Court in Anant Chintaman Lagu v. State of Bombay, (1960) 2 SCR 460 : (AIR 1960 SC 500). Lagu's case as also the principles enunciated by this Court in Hanumant's case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases — Tufail case (1969) 3 SCC 198 (supra), Ramgopal's case (AIR 1972 SC 656) (supra), Chandrakant Nyalchand Seth v. State of Bombay (Criminal Appeal No 120 of 1957 decided on 19-2-1958), Dharambir Singh v. State of Punjab (Criminal Appeal No 98 of 1958 decided on 4-11-1958). There are a number of other cases where although Hanumant's case has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration, (1974) 2 SCR 694 (696) : (AIR 1974 SC

691 at p. 693), Mohan Lal Pangasa v. State of U.P., AIR 1974 SC 1144 (1146), Shankarlal Gyarasilal Dixit v. State of Maharashtra, (1981) 2 SCR 384 (390) : (AIR 1981 SC 765 at p. 767) and M.G. Agarwal v. State of Maharashtra, (1963) 2 SCR 405 (419) : (AIR 1963 SC 200 at p. 206) a five-Judge Bench decision.

157. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in Deonandan Mishra v. State of Bihar, (1955) 2 SCR 570 (582) : (AIR 1955 SC 801 at p. 806), to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

"But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation. . . such absence of explanation or false explanation would itself be an additional link which completes the chain."

158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and

situation.

159. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal's case (AIR 1981 SC 765) (supra) where this Court observed thus:

"Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."

160. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant's case (AIR 1952 SC 343) (supra). Unfortunately, however, the high Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the Court. When the prosecution is unable to prove any of the essential principles laid down in Hanumant's case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General."

32. From the aforesaid decision rendered by the Hon'ble Supreme Court, it can be said that in the case of circumstantial evidence, certain conditions must be fulfilled before the case against the appellants-accused based on

circumstantial evidence can be said to be fully established. There must be chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused and none else. Various links in the chain of evidence led by the prosecution has to be satisfactorily proved.

33. We would also like to refer and rely upon the decision rendered by the Hon'ble Supreme Court in the case of **Anjan Kumar Sarma Vs. State of Assam** (supra), wherein the Hon'ble Supreme Court has observed in paragraphs 14, 17 and 23 as under:

> "14. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (3) the circumstances should be of a conclusive nature and tendency;
>
> (4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (See Sharad Birdhichand Sarda v. State of Maharashtra, SCC p. 185, para 153; M.G. Agarwal v. State of Maharashtra, AIR SC para 18.)

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17. It is settled law that inferences drawn by the court have to be on the basis of established facts and not on conjectures. (See Sujit Biswas v. State of Assam [Sujit Biswas v. State of Assam, (2013) 12 SCC 406 : (2014) 1 SCC (Cri) 677] , SCC paras 13-18.) The inference that was drawn by the High Court that the death was caused on 28-12-1992 within the time of 48 hours as mentioned in the post-mortem report is not correct. The post-mortem examination was conducted on 30-12-1992 at 12.00 noon and it was opined by PW 11 that the death occurred 24 to 48 hours prior to the time of post-mortem examination. Even if the time is stretched to the maximum of 48 hours, the death was after 12.00 noon on 28-12-1992. The deceased was in the company of the accused till 9.00 p.m. on 27-12-1992. The inference drawn by the High Court that the accused had killed the deceased on 28-12-1992 in the night-time and thrown the body on the railway track is not on the basis of any proved facts. The trial court is right in holding that there is no evidence on record to show that the deceased was with the accused after 12.00 noon on 28-12-1992.

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23. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other

circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in State of Goa v. Sanjay Thakran in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under: (SCC p. 776, para 34)

"34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other

> than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case."

34. We would also like to refer and rely upon the decision rendered by the Hon'ble Supreme Court in the case of **Ravi Vs. State of Karnataka** (supra) wherein the Hon'ble Supreme Court has observed in paragraphs 3 and 5 as under:

> "3. The appellant-accused and the deceased along with Suma (PW 1) and Rama Nayak (PW 2) were together on 26-12-2004, the precise time being around 1.30 p.m. The dead body was recovered after a gap of four (4) days i.e. on 30-12-2004. The post-mortem report indicated that the death had occurred 30 hours prior to the time of post-mortem examination. The medical evidence, therefore, would be suggestive of the fact that the dead body was recovered after about two (2) days from 1.30 p.m. of 26-12-2004.
>
> 5. "Last seen together" is certainly a strong piece of circumstantial evidence against an accused.

However, as it has been held in numerous pronouncements of this Court, the time-lag between the occurrence of the death and when the accused was last seen in the company of the deceased has to be reasonably close to permit an inference of guilt to be drawn. When the time-lag is considerably large, as in the present case, it would be safer for the court to look for corroboration. In the present case, no corroboration is forthcoming. In the absence of any other circumstances which could connect the appellant-accused with the crime alleged except as indicated above and in the absence of any corroboration of the circumstance of "last seen together" we are of the view that a reasonable doubt can be entertained with regard to the involvement of the appellant-accused in the crime alleged against them. The burden under Section 106 of the Evidence Act, 1872 would not shift in the aforesaid fact situation, a position which has been dealt with by this Court in Malleshappa v. State of Karnataka [Malleshappa v. State of Karnataka, (2007) 13 SCC 399 : (2009) 2 SCC (Cri) 394] wherein the earlier view of this Court in Mohibur Rahman v. State of Assam [Mohibur Rahman v. State of Assam, (2002) 6 SCC 715 : 2002 SCC (Cri) 1496] has been extracted. The said view in Mohibur Rahman [Mohibur Rahman v. State of Assam, (2002) 6 SCC 715 : 2002 SCC (Cri) 1496] may be profitably extracted below: (Malleshappa case [Malleshappa v. State of Karnataka, (2007) 13 SCC 399 : (2009) 2 SCC (Cri) 394] , SCC p. 408, para 23)

"23. … '10. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may

> be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. In the present case there is no such proximity of time and place. As already noted the dead body has been recovered about 14 days after the date on which the deceased was last seen in the company of the accused. The distance between the two places is about 30-40 km. The event of the two accused persons having departed with the deceased and thus last seen together (by Lilima Rajbongshi, PW 6) does not bear such close proximity with the death of the victim by reference to time or place. According to Dr Ratan Ch. Das the death occurred 5 to 10 days before 9-2-1991. The medical evidence does not establish, and there is no other evidence available to hold, that the deceased had died on 24-1-1991 or soon thereafter. So far as the accused Mohibur Rahman is concerned this is the singular piece of circumstantial evidence available against him. We have already discussed the evidence as to recovery and held that he cannot be connected with any recovery. Merely because he was last seen with the deceased a few unascertainable number of days before his death, he cannot be held liable for the offence of having caused the death of the deceased. So far as the offence under Section 201 IPC is concerned there is no evidence worth the name available against him. He is entitled to an acquittal.' (Mohibur Rahman [Mohibur Rahman v. State of Assam, (2002) 6 SCC 715 : 2002 SCC (Cri) 1496] , SCC pp. 720-21, para 10)"

35. At this stage, we would like to refer and rely upon the decision rendered by the Hon'ble Supreme Court in the case of **Reena Hazarika Vs. State of Assam** (supra), wherein the Hon'ble Supreme Court has observed in paragraph 9 as

under:

> "9. The essentials of circumstantial evidence stand well established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it to observe that in a case of circumstantial evidence the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. Mere invocation of the last-seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act, 1872 unless the prosecution first establishes a prima facie case. If the links in the chain of circumstances itself are not complete, and the prosecution is unable to establish a prima facie case, leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused, and the benefit of doubt will have to be given."

36. From the aforesaid decision, it can be said that if the prosecution is unable to establish a prima facie case leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused and the benefit of doubt will have to be given to the accused. Further, mere invocation of the last seen theory, *sans* the facts and the evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act, unless the prosecution first establishes a *prima facie* case.

37. From the aforesaid decisions rendered by the Hon'ble Supreme Court, it can be said that the circumstances from which the conclusion of guilt is to be drawn should be

fully established. Further the fact so established should be consistent with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency and they should exclude every possible hypothesis except the one to be proved, and there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. The inferences drawn by the Court have to be on the basis of the established facts and not on conjectures.

38. Keeping in view the aforesaid decisions, if the facts of the present case, as discussed hereinabove, are carefully examined, we are of the view that the prosecution has failed to prove the complete chain and even the prosecution has also failed to prove by leading cogent evidence that the appellant-accused was lastly seen in the company of the deceased. Thus, the prosecution has failed to prove the case against the appellant beyond reasonable doubt and, therefore, we are of the view that the appellant-accused is required to be acquitted.

39. Looking to the over all facts and circumstances of the present case, we are inclined to allow this appeal and, accordingly, the appeal stands allowed. The impugned judgment

of conviction and order of sentence dated 16.07.2015 passed by learned 7th Additional Sessions Judge, Muzaffarpur in connection with Sessions Trial No.523 of 2013, arising out of Kathaiya P.S. Case No.14 of 2013 is quashed and set aside. The appellant, namely, Ranjeet Thakur @ Ranjeet Kumar is acquitted of the charges levelled against him by the learned trial court. Since appellant, above-named is in jail, he is directed to be released forthwith, if his presence is not required in any other case.

40. It goes without saying that if the appellant-accused has deposited the fine, the same shall be returned to him.

(Vipul M. Pancholi, J.)

(Chandra Shekhar Jha, J.)

K.C.Jha/Sanjay

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