JUDICIAL ACADEMY
LEARNING
ENDURING JUSTICE

Judicial Academy Jharkhand

For Private Circulation Only

CONFERENCE ON

MEDICO LEGAL JURISPRUDENCE

Target Group :-
48 Additional Sessions Judges,
260 Doctors (One from each block),
100 Police officers in the rank
of Inspector / Sub-Inspectors

on 22nd January, 2017 at Judicial Academy, Dhurwa, Ranchi

JUDICIAL ACADEMY JHARKHAND

FOR PRIVATE CIRCULATION ONLY

READING MATERIAL

CONFERENCE ON MEDICO LEGAL JURISPRUDENCE

Date : 22nd January, 2017 (Sunday)

Venue : Judicial Academy Jharkhand

Organised by :

Judicial Academy Jharkhand

INDEX

DEPARTMENT OF HEALTH RESEARCH (DHR)

FORENSIC MEDICAL CARE FOR VICTIMS OF SEXUAL ASSAULT DHR GUIDELINES

ACKNOWLEDGEMENTS

I would like to place on record my gratitude to the Department of Health Research, Ministry of Health and Family Welfare, Government of India for initiating and supporting this important work.

I am thankful to Dr. Arvind Nath Scientist 'C' & Programme Officer of DHR with whom I was in constant touch while drafting this manual and format.

I would also like to thank Shri DS Mehta, President, Kasturba Health Society (KHS), Sewagram, Wardha, Dr. P. Narang, Secretary, KHS, Dr. BS Garg, Dean, Mahatma Gandhi Institute of Medical Sciences (MGIMS), Sewagram and Dr. SP Kalantri, Medical Superintendent, Kasturba Hospital, Sewagram for their constant support & encouragement.

I would like to thank the Dr. BH Tirpude, Professor and Head, Dept of Forensic Medicine, MGIMS and all the staff of my department who supported me, to complete this task.

I would like to thank Dr. OP Murty, Professor of Forensic Medicine, All India Institute of Medical Sciences, New Delhi, Dr. Sunita Sharma, Senior Medical Officer, Civil Hospital Gurgaon, Dr BL Chaudhary, Asst Professor of Forensic Medicine, Lady Harding Medical College, New Delhi members of the Task Force who helped to conceptualize this work through initial discussions and the Center for Enquiry into Health and Allied Themes (CEHAT), Mumbai whose publications along with others helped to develop these protocols.

I would also like to thank Dr. Ranjana Paradhi, Advocates Vijay Patait, Kalpna Pathak, & Swapnil Pathak who helped me to initiate the process of preparation of uniform formats and manual for forensic medical care for the Government of Maharashtra through Public Interest Litigation.

I also like to thank Dr. SD Nanandkar and Dr. PG Dikshit, both Professors.& Heads, Dept. of Forensic Medicine at Grant Medical College, Mumbai and Government Medical College, Nagpur respectively for their guidance and encouragement to complete this task.

Finally, I would like to thank all the women who, as victims of sexual assaults, came to our hospital for help & whose medico-legal reports & the judgments that were delivered in their cases became part of my research work on quality of medico-legal care of sexual assault cases all over the country and which motivated me to get involved in this task.

These formats and manual is an effort to address the issue of Forensic Medical care of women survivors of sexual assault when they approach health settings.

Sincerely,

Dr. Indrajit Khandekar

FORENSIC MEDICAL CARE FOR VICTIMS OF SEXUAL ASSAULT - A Tool Kit for Health Care Workers

INTRODUCTION:

Sexual assault on women and children are some of the most heinous crimes against mankind. These crimes are such a menace that no age is exempted and they comprise of various natural and unnatural sexual offences. It has been estimated that there were 24923 reported cases of Rape in 2012 in India as compared to 20737 in 2007 (statistics published by the National Crime Records Bureau). The cases show a constantly rising pattern even today. In addition to this, the issue of trafficking of women & children for commercial sexual exploitation emerged in India after landmark decision of Hon'ble Supreme Court in the cases of Vishal Jeet (1990) & Gaurav Jain (1997). In these cases, the Supreme Court issued directions to the Union & State governments to study the problem & prepare a National plan. Accordingly, in 1998, the government of India formulated the National Plan of Action to Combat Trafficking and Sexual Exploitation of women & children.

However many cases of such assault remain unreported as a result of lack of awareness; social stigma attached to it and also in many cases accused being a family member. Victims of such assault are not willing to lodge a complaint also to avoid traumatizing experience during investigation. Therefore, whenever a complaint of sexual assault is lodged, the investigating team – which includes police, doctor, and Forensic scientist - should deliver their best, to help administration of justice.

Sexual assault, like any other form of violence, results in physical and psychological consequences. Thus, health care providers have a dual responsibility vis-à-vis victims of sexual assault. The first is to provide the victim/ patient with the required medical and psychological treatment care, while the second is to assist the victims in their medico-legal proceedings by collecting evidence and performing good quality and thorough forensic medical examination and documentation.

As per recent amendment i.e., 357 C Criminal Procedure Code (CrPC) all hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall have to immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code, and shall have to immediately inform the police of such incident. Those who will contravene the provisions of section 357C of the Code of Criminal Procedure shall be punished with imprisonment for a term, which may extend to one year or with fine or with both (166 B IPC).

The problem of sexual violence against women and female children is very serious and vast in nature. Due to the complexities related to commission of crime, criminal investigation and varied nature of various criminal acts it is not possible to describe every related aspect in depth. This manual, therefore is aimed at highlighting the important aspects of investigation of such cases in precisely brief manner and more so in a practical way. The contents of this tool kit are mainly related to Forensic medical examination of victim, and cases of age determination.

The victims have faith and respect for the medical practitioners, who should be responded by humanly, empathetic, approach without ignoring technical procedure related to legal provisions of the case. Precise scientific approach by doctors is a necessity to counteract violation of human rights in such cases.

To deal with such victims, this manual is prepared for doctor to guide step-by-step approach while treating, examining, and collecting important evidence, documenting and forming opinion.

No standard operating protocol / manual / formats can be designed with presumption or prejudice for either of the party involved in the cases of sexual assault. This is necessary for helping the process of crime investigation in a just manner. This will also insure that the members of the agencies involved in this process perform their role in a scientific manner to effectively aid the administration of justice. This manual desires the same and is aimed at insuring natural justice to be delivered to the deserving party.

Despite extensive peer review and strenuous efforts to formulate these guidelines we recognize that there is always room for improvement when developing guidelines of this nature. It is needless to say that this manual and formats may require timely review in view of scientific advancement, problems observed, amendments in the related laws and Hon'ble Court judgments.

It is recommended that two to three day training programme be designed and implemented for the doctors and paramedics/ nursing staff involved in the process of Forensic Medical examination of cases of sexual assault. This is quite necessary in view of scientific advancement, large number of loopholes in such examination, amendments in the related laws and Hon'ble Court judgments.

SCOPE OF THE FORMATS AND MANUAL:

It is recognized that at this point there are no organized forensic medical services for sexual assault in most hospitals and health settings. This toolkit, hence, is designed in way that any health professional can follow and use the basic tenets of forensic & medical care when a survivor of sexual assault approaches the health services for help or brought by the police etc for forensic examination, treatment etc.

This toolkit focuses mainly on the forensic medical care of the victims/patients of sexual assault. Manual have also given checklist for the basic treatment that has to be provided when victim/ patient of sexual assault reports to the health facility. This manual will be useful guide for doctors dealing with the cases of sexual assault, for proper examination, collection of evidence and opinion formation. At the outset, it is clarified that this toolkit deals with important practical issues faced by doctors and it will not serve as text explaining various aspects of sexual assault in detail. A list of informative manuals and textbooks is provided in Annexure, which can be referred to if the examiner wishes.

Section 164-A Criminal Procedure Code which deals with Medical examination of the victim of rape says that medical examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf.

It must be understood by doctors that Forensic Medical examination of victim is a "medico-legal emergency" as per Supreme Court directives issued in the year 2000. Hence, such cases must be examined without delay. No such case should be refused for examination for the reasons of non-availability of lady medical officer, because as per 164 A Criminal Procedure Code (CrPC), any registered medical practitioner (allopathic) can examine victim in presence of other woman with the consent of the patient or guardian.

In hospitals, where services of specialists from Forensic Medicine and Gynecology are available (for example medical colleges/ institutes), this examination should be jointly conducted by them. The doctor from the forensic department must take the responsibility of all medico- legal part (i.e., forensic medical examination, sample/ forensic evidence collection, medico-legal report preparation etc) and the doctor from the gynecology department must take the responsibility of treatment or medical management part. The doctors from the forensic department should remain on call 24 X 7 for this purpose. Head of each institute or medical college/ hospital shall make rules in this regard. The Forensic medicine expert and gynaecologist will

be individually responsible for their respective role in examination, reporting and treatment. In general the court calls will be attended by the Forensic doctor.

This draft tool kit contains:

1. A manual for forensic medical care (explains how to examine the case and fill the relevant formats).

2. Proforma for Forensic Medical Examination of sexual assault Victim.

3. Proforma for obtaining informed consent

4. Proforma to be used while sending the forensic evidence to Forensic Science Laboratory (FSL)

5. Proforma for providing basic treatment (checklist)

6. Body diagrams that may be used while documenting the findings/injuries.

7. Proforma for giving final opinion

8. Proforma for Forensic Age Estimation

The term 'survivor', 'victim', 'patient: In this document all these terms are used synonymously. The term survivor means a living person against whom an assault is perpetrated. If person comes on her own for medical treatment then the term 'patient' may be used. If a person is brought by the police then the term 'victim' may be used.

DEFINITION OF SEXUAL ASSAULT:

The World Health Organisation (WHO) defines Sexual Violence as: "any sexual act, attempt to obtain a sexual act, unwanted sexual comments/ advances and acts to traffic, or otherwise directed against a person's sexuality, using coercion, threats of harm, or physical force, by any person regardless of relationship to the victim on any setting, including but not limited to home and work.

The definition of rape (Section 375 IPC) as per the recent amendment (The Criminal Law (Amendment) Bill, 2013 as Passed By Lok Sabha On 19 March, 2013) apart from peno-vaginal sexual intercourse includes other forms of sexual assault like oral penetration, urethral/ anal penetration, fingering, use of objects (other than penis) for vaginal, urethral and anal penetration.

It also includes manipulation of any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any other part of body and application of mouth to the vagina, anus, urethra of woman and regards it as a 'rape' under the various circumstances explained in the law (for details please see Section of Relevant Laws).

Section 354 IPC deals with "criminal assault on a woman with intent to outrage her modesty" and Section 377 IPC deals with "carnal intercourse against the order of nature". Immoral traffic prevention act deals with human trafficking.

HEALTH CONSEQUENCES OF SEXUAL ASSAULT:

In addition to violation of human rights, sexual assault may lead to several direct and indirect health consequences. In absence of history of sexual assault, these signs and symptoms may prompt one to suspect the possibility of sexual abuse/assault.

Physical Health Consequences

- Abdominal pain
- Burning micturation
- Sexual dysfunction
- Dyspareunia
- Urinary tract infection
- Unwanted pregnancy
- Miscarriage of existing fetus
- STD (Sexually transmitted diseases/ Infections)
- PID (Pelvic Inflammatory Disease)
- Unsafe abortion

Psychological Health Consequences

Short term psychological effects

- Fear and shock
- Physical and emotional pain
- Worthlessness
- Intense self disgust and powerlessness
- Apathy
- Denial
- Numbness
- Withdrawal
- Inability to function normally in their daily lives

Long term psychological effects

- Depression and chronic anxiety
- Feeling of vulnerability
- Loss of control
- Emotional distress
- Impaired sense of self
- Nightmare
- Self blame
- Mistrust
- Avoidance and post traumatic stress disorder
- Chronic mental disorder
- Suicidal tendencies

RAPE TRAUMA SYNDROME: Many victims of sexual violence experiences rape trauma syndrome (RTS). This is defined as "the stress response pattern of a person who has experienced sexual violence". It consists of two phases:

- **Phase 1 – acute phase / phase of disorganization:**

  Victim feels shock and disbelief regarding rape. They may initially react in two ways – a) in the expressed style in which patient display anger, anxiety, fear and often cries. b) in the controlled style in which patient remains calm and controlled and displays little outward emotion. This phase can last from 6 weeks to few months. Some individuals may show feelings of shock and numbness; others nay mask their feelings and act as though everything is fine.

- **Phase 2 – The long-term phase/ The reorganization phase:**

  This phase ordinarily, begins approximately 2-3 weeks after the event. At this time, the person starts to reorganize their life style; this reorganization may be either adaptive or maladaptive. Reactions during this phase vary markedly from person to person, depending on the age of the survivor, their life situations, the circumstances surrounding the rape, specific personality traits, the response of support persons.

DUTIES OF HEALTH CARE PROVIDERS:

- Providing necessary medical support to the victim of sexual assault and appropriate referrals as per the need.
- Obtaining informed consent from the victim/ patient.
- Detail Forensic medical examination and documentation.
- Collection, preservation and handing over different samples by maintaining proper chain of custody.
- Information to police.
- Forming valid, justifiable and reasonable opinion depending strictly on the facts observed.
- Providing copies of documentation and the medical examination to the victim/ patient.

OBJECTIVES OF MEDICAL AND FORENSIC MEDICAL EXAMINATION:

- Providing treatment and appropriate referrals for the patient.
- Ascertaining whether sexual act has been attempted / completed or not.
- Ascertaining whether such a sexual act is recent.
- Ascertaining whether such act was forcible. The evidence of struggle and presence of injuries may help to give opinion on this aspect. However, it must be noted that absence of signs of struggle does not imply consent.
- Collection of samples for FSL examination.
- Ascertaining whether there is e/o non penetrative sexual assault (i.e. indecent assault)
- Verification of age and analysis of poisons, intoxicants, drugs etc is must if validity of consent is questionable.
- To look for evidence of Sexually Transmitted Diseases.

NOTE: *Absence of injuries over body and/or genitals of the victim of sexual assault does not rule out commission of said offence. Injuries are seen only in 1/3rd of cases and are not the determining factor for sexual assault, in many cases. Few reasons for the absence of injuries are: victim may have been threatened with bodily harm, physically restrained or afraid to/unable to resist for other reasons or intoxication etc.*

REQUIRED USE OF STANDARD FORENSIC MEDICAL FORM:

- This format is intended to document forensic medical findings.
- These instructions contain the recommended methods for meeting the minimum standards requirements for performing forensic medical examination.

NOTE:

- This information is confidential. Every effort must be made to protect the privacy and safety of the patient.
- The victim must be given appropriate treatment and counseling as per the need. Victim must not be refused treatment and/ or examination for want of police papers.

- Exposure to sexual violence is associated with a range of health consequences for the victim. Comprehensive care must address the following issues: physical injuries; pregnancy; STIs, HIV and hepatitis B; counseling and social support, follow-up consultations and appropriate referral.
- The examination should be conducted in private but the patient should be allowed to choose to have a support person (e.g. family member or counselor) to be present. If the patient does not request the presence of a support person, the patient should be informed that she may have a female nurse or other suitable chaperone present during the examination.

Registration of case of sexual assault victim & Preliminary information:-

- Whenever cases of sexual assault comes on her own to the hospital or are brought by the police, it shall be registered as MLC (medico-legal case).

Guidelines for Forensic Medical Examination of Victim of Sexual Assault & Instructions for filling the Forensic Medical Form:

Complete this report in its entirety. Use N/A (not applicable) when appropriate to show that the examiner attended to the question.

Use of this form:

- Each hospital can use already printed version of this form or can generate the same form through software.
- Write or type the name of the Department/ hospital/ Unit including place where the examination was conducted.

{I}: GENERAL INFORMATION AND CONSENT:

1. Enter the OPD number/ IPD Number or other registration number of the patient, as applicable, if any. Enter the MLC number in the place provided.

2. Enter the full name of the patient/ victim.

3. Enter the age/ sex of the patient. Also enter the marital status of the patient i.e., whether single, married, divorced etc.

4. Enter the patients address with contact number if any.

5. Enter the date and time of arrival of the patient or victim at the hospital.

6. Brought by:

a. If the patient is accompanied by a police or law enforcement officer, enter the officer's name, buckle/ identification number (if applicable) and police station of accompanying police with letter no/date etc wherever such information is available.

b. If the patient comes on her own then enter the name of the person (if any) with relation (if any) who accompanied the patient.

NOTE:

a. In the past rape survivor examination was only done after receiving police requisition. Now the police requisition is not mandatory for a rape survivor to seek medical examination and care. The doctor

should examine such cases if the survivor reports to the hospital first without FIR. He should then inform the police accordingly.

7. Consent:

- Obtain consent on consent form. This consent form should be kept in hospital file attached to hospital copy of Forensic Medical Report.
- The doctor is required to give the patient a structured explanation of what the examination comprises and how the various procedures may be carried out. All this should be explained in the manner and language which the patient can understand. Then ask the patient (or the patients guardian, if the patient cannot legally consent) to read the items and initial.
- As per Section 164 A CrPC for medical examination consent of the woman or of the person competent, to give such consent on her behalf should be obtained. Consent must be taken from the guardian/parent if the survivor is under the age of 12 years or if the survivor is unable to give his/ her consent due to mental disability/ unsoundness of mind or intoxication etc.
- Consent is most important as no one including Court or police can force alleged victim of sexual assault to undergo examination. There are many benefits of informed consent. It gives full information regarding concerned procedure to the patient. It also gives an idea regarding problems arising out of denial. It offers various options to the patient. The informed consent also serves as a good legal safeguard for the doctor conducting such procedure.
- The provision of the parents consent is not applicable when the health professional reasonably believes the parent(s) or guardian committed the sexual assault on the patient even if the patient would not ordinarily be considered competent to give consent herself/ himself. In such cases, consent of Superintendent or RMO may be taken.
- The ingredients of this informed consent should be as follows. (Mark that applies)

  Medical examination, sample collection for investigations and treatment.

  Forensic Medical examination of genitals (including anus), other body parts and also examination of other secondary sexual characters.

  Collection of samples for Forensic laboratory examination.

  ** I have also been informed that I can refuse the whole or part of the examination at any stage (**Not applicable in case of accused.). In this event I have been informed the possible Medico Legal implications/consequences of loss of evidence and documentation. I have also been informed the benefits of full examination. I have been further informed that this refusal will not have any impact on the quality of treatment provided. All this has been explained to me in the manner and language which I can understand.
- Please note that the patient or guardian as the case may be may refuse to give consent for any part of the examination as well as giving information to police. In this case, the doctor should explain the importance of examination and evidence collection. It should also be explained to that refusal for such examination would not affect/compromise treatment

and the doctor must ensure that the quality of treatment is not affected by such consent or lack thereof. Such informed refusal shall be obtained in writing and documented.

- Patient and her relative/ guardian should be explained that at any stage during examination and evidence collection the patient or guardian as the case may be may ask the doctor to stop and that it will not have any effect on the quality of her treatment.
- If female patient is to be examined by a male doctor then such examination shall be made in presence of a female person i.e., nurse/ attendant/etc with the consent of the patient. In such circumstances, the name and signature of the female person in whose presence the examination is conducted shall be obtained against this column. If female patient is being examined by female doctor then "not applicable' must be written against this column.
- Thumb impression of the victim (Right in case of females and left in case of male) may be obtained on consent form.

8. Doctor should take all reasonable efforts to note down at least two marks of identification provided that the doctor shall not be unduly intrusive in order to fulfill this requirement. Identification marks must be in the form of moles, scars, tattoos, preferably from the exposed parts of the body. While describing identification mark emphasis should be on size, site, surface, shape, colour, fixity to underlying structures.

{II} HISTORY/DETAILS OF ALLEGED SEXUAL ASSAULT:

a) As far as possible history shall be obtained from the victim in his/ her own words. If it is not possible to collect the history from the victim because of medical reasons then the name of the person with relation if any who provided the history must be documented. If patient himself/ herself provides the history then 'not applicable' must be written as appropriate. While recording the history of assault, keep following points in mind:

- Doctors should keep in mind that sexual assault is a social stigma and is a traumatizing experience. Hence, one must be very sensitive and compassionate while eliciting the history. Talk with the patient in a non threatening environment and do not be judgmental, and do not interrupt the patient while eliciting the history.
- Physical and mental comfort to the victim helps to elicit proper history. This can be achieved by providing privacy and empathetic approach by the team. History should be in her own language.
- While taking history, no third person/ police is allowed unless the patient specifically requests for or consents to the same, and all such requests by the patient shall be honored. If she refused to answer, the question should not be repeated unnecessarily or in a manner which causes her distress. Importance of history for treatment purposes as well as its legal implications can be explained.
- When interviewing the patient about the assault, ask her to tell you in her own words what happened to her. Document her account without interruption as far as possible; if you need to clarify any details, ask questions after your patient has completed her account.

  Examination will be guided by the history. Some of the important points to be elicited in the history of sexual assault if possible are as follows.

- Date, time and place of assault.
- Details of assailant/s like their number, name (known/unknown) and features if known.
- Record the details of the act or acts alleged.
- Information regarding experience of any pain at the time of incident or subsequently should be recorded.
- Description of the type of surface on which the assault occurred.
- Record the details of the nature of the physical contacts.
- Threat including verbal threats (describe type of threat) / use of force, blows, grasping, grabbing, holding etc, weapons used and injuries caused. This is to identify pattern of injury and patterns of injury which may correlate with the alleged weapon and with the part of the body used and to identify the parts of the body which may show injuries consistent with method used. Threats of harm if present may explain the lack of physical injury.
- Use of physical restraints (describe types used). This is to identify pattern of injury which may correlate with the type of restraint used and to alert the police to search the crime scene for the type of physical restraint described.
- Oral contact of offender's mouth with victim's face, body or genito-anal area, biting (describe where). This is to identify the sites on the body where swabs should be taken for the detection of saliva from the assailant.
- Was there attempted or complete sucking, licking, kissing, and fondling? This is to identify need for swabbing of victim's concerned body parts for saliva of assailant.
- Injuries inflicted on assailant (if any).
- Loss of consciousness if any which the patient is aware of. This is to investigate the possibility of drug-facilitated rape, to clinically explain any loss of memory or any incomplete recall concerning the event and to investigate the patient to exclude an underlying head injury.
- Is there history of last consensual sexual activity with any person within one week prior to the assault or at any time after the assault? What was the nature? (This information should be recorded only if there has been any consensual intercourse within past week, because detection of sperm or semen of the consensual relationship, if any has to be ruled out as against the detection of sperm or semen of the accused. Also, this needs to be done on a case-to-case basis, when such information would contribute to identifying the assailant.)
- Any history of sexually transmitted diseases/ infections prior to assault (if relevant to the exam/ assault).

b) Details regarding penetration, emission of semen, use of condom (if any) etc: Whether penetration was attempted/ complete, whether oral, vaginal and/or anal and whether by penis / fingers /objects should be properly recorded along with information about emission of semen. This is to look for evidence of injury by penis, a finger or a specified foreign object. Information regarding ejaculation/ emission of semen in vagina, anus, mouth, on breast or on other body parts or on clothing, bedding or other places should be documented. This is to note the presence or absence of semen in stated site and to identify need for swabbing victim's respective orifices, clothing, other object and relevant body parts for semen of assailant. Information regarding use

and status of condom (torn/ untorn etc) during the assault is relevant because in such cases, vaginal swabs and smears would be negative for sperm/ semen. Information regarding use of foam or jelly or lubricant may be obtained. This is to explain the condition of the semen (e.g. foams or jelly may have spermicidal activity) and may explain the paucity of injuries where a lubricant is used.

c) Activities undertaken by the survivor after the assault like bathing, urinating, douching, defecating etc: Any subsequent activities by the patient that may alter evidences, for example, vomiting, defecation, bathing or showering, genital wiping or washing douching, urination, removing or inserting tampons/ the use of tampons/ sponges or diaphragms, eating or drinking; brushing teeth; oral gargling; and changing of clothing etc, should also be documented. These post-assault activities, hygiene and delay in examination will have an impact on the presence of physical injuries and the value of special investigations. For example, many of the minor injuries would heal and the swab for semen/saliva may be negative if the evidence is lost because of these activities or person is examined more than 72 hours after the assault.

d) History of drug / alcohol being given to the victim before or during the assault. This is to be entered if relevant. It must be noted that some perpetrators use drugs or alcohol in order to facilitate sexual assault. The presence of alcohol or drugs in the blood or urine may have clinical and legal implications. The assailants may have used drugs to subdue the patient and the patient may have lost the ability to make rational decisions or may have lost consciousness.

e) Enter the details whether the patient was menstruating at the time of assault. Keep in mind that some amount of evidence is lost because of menstruation.

{III} MEDICAL, OBSTETRICAL AND SURGICAL HISTORY:

a) Enter the relevant details regarding menarche / menopause. Enter the date of LMP (Last Menstrual Period).

b) Enter the patient's menstrual status at the time of examination i.e. menstruating or not if relevant. Otherwise note- 'not applicable'.

c) Enter the obstetric details of the patient if relevant to the assault from forensic point of view. Note about pregnancies, deliveries, live births, abortions and deaths (G/P/L/A/D). Otherwise note- 'not applicable'.

d) Enter the details of contraception used if relevant to the assault from forensic point of view. i.e., Yes/No. If yes, method used.

e) If patient/ victim is pregnant at the time of assault, then details like length of gestation must be included. Otherwise note- 'not applicable'.

f) Enter past medical/surgical history if relevant from forensic point of view. Otherwise note- 'not applicable'.

{IV} GENERAL PHYSICAL EXAMINATION: This examination is aimed at knowing the important parameters pertaining to overall health status of the person so that prioritization of medical and forensic examination can be done. Collect all relevant forensic & medical samples as per the instructions given in this manual before touching the concerned body parts so as not to destroy the evidence.

a) General Mental condition including orientation as regards to time, place & person: In order to comment on the general mental condition the examining doctors is advised to refer 'the rape trauma syndrome' detailed in manual. The observations to be done in relation to this may include whether she was agitated, restless, numb, anxious, able to respond to questions asked by the doctor. It is advised that the doctor record her feelings in her own words for ensuring accuracy. Cases of sexual assault are underreported due to the attached social stigma. Hence, it is pertinent that such reporting be interpreted as an act of courage. The victims may respond in different ways in such traumatic events. To comment on emotional / mental status use terms like distressed, agitated, shocked, hopelessness, despair, powerlessness and loss of control, flashbacks, disturbed sleep, denial, guilt and self blame, shame, fear, numbness, mood swings, anger, anxiety, helplessness, fear of another assault etc. It must be noted that some victims may mask their feelings and act as though everything is fine.

b) BP (Blood Pressure), Pulse, Respirations (RR): Take the vital signs, i.e., blood pressure, pulse, respiration.

c) Signs of intoxication by drugs and / or alcohol: If the patient reports ingestion of drugs, describe symptoms, or shows signs of drug ingestion, then collection of samples for drug analysis is recommended. Sexual assault of people under the influence of alcohol or drugs is not new. It is also not new to slip something into somebody's drink to incapacitate them. However, it was not until the mid 1990s that law enforcement agents began to see a pattern of women being surreptitiously drugged for the purpose of rape, particularly through use of odorless, tasteless incapacitating drugs that produce anterograde amnesia. These Date Rape Drugs or Predator Drug are used to assist in the execution of Drug Facilitated Sexual Assault (DFSA) and because of the effects of these drugs, victims may be physically helpless, unable to refuse sex, and unable to remember what happened. These drugs often have no color, odor or taste and are easily added to flavored drinks without the victim's knowledge. GHB (Gamma Hydroxibutyric Acid), Ketamine and Benzodiazepines (Flumtrazepam, Rohypnol or Roofies, Rope and Roaches) are the most common date rape drugs. It is a known fact that detection of these drugs (Date Rape Drugs) is a difficult issue and unless a victim of DFSA seeks medical care within 72 hours of the assault, it is less likely that tests would successfully detect the presence of these drugs, since most of them become metabolized and eliminated from the body, resulting into negative report[1].

Various symptoms &/ signs suggestive of drug and/or alcohol ingestion: e.g., lapses of consciousness, memory loss, impaired memory, abnormal vital signs, confusion, vomiting, nystagmus, specific smell, talkativeness, drowsiness, mood changes, dizziness, changes in visual capacity, slurred speech, apathy, poor coordination and balance, inability to stand or walk etc.

d) Examination of clothes (if same as those worn at the time of assault). Examine for evidence of tears, loss of parts, stains, turned inside out, condition/loss of buttons, and other damage sustained as a result of the assault, foreign materials including fibres, twigs, hair, grass, soil or debris from the suspect or the crime scene, blood or seminal stains, etc. If not wearing the same clothing, then it should be documented. This information should then be given to the investigating officer so that arrangements can be made to retrieve the clothing before any potential evidence is destroyed.

e) Stains / foreign materials on body: Document any stain or foreign material on body. Collect the stain material by a cotton swab moistened with distilled water. Also collect the foreign material and preserve it after air drying. Skin soiling must be noted with special reference to the hands,

1 Communication from Laldingliani Sailo, Memebr Delhi Commission for Women.

the back of the legs and the buttocks, the abdomen and the top of the thighs, etc. Any soiled area must be swabbed with plain cotton swabs, moistened with sterile water. Skin may be examined by an ultraviolet light for areas of fluorescence. Document positive areas & collect swabs from skin.

f) Finger nails examination: Examined for length and the presence of ragged or broken nails and of chipping of nail varnish, any foreign material under nails etc.

g) Gait of victim: The gait of the victim should be carefully observed, with emphasis for pain in any specific posture.

h) Abdominal Examination with Special Reference to pregnancy: If applicable this may be done.

i) Any other: In this column, any other relevant findings may be noted which is not covered in the above section. Sometimes victim may sustain head injury and present to the hospital with impaired consciousness. In such circumstances pupillary size, reaction to light & Glasgow coma score (GCS) may be used to assess the depth and duration of coma and impaired consciousness (if any). It is the most widely used scoring system used in quantifying the level of consciousness following traumatic brain injury. Eight is considered a critical score with 90 percent of patients in a coma at this level or below.

{V} INJURY EXAMINATION: INJURIES ON BODY (IF ANY)-

- Without accurate documentation and proper interpretation of injuries, any conclusions drawn about how injuries occurred might be seriously flawed. This will have profound consequences for both the victim and accused. Injury interpretation is entirely dependent on the accuracy and completeness of the recorded observations of wounds.
- Body charts may be used for recording the injuries. If there is history of buccal / anal penetration & bite marks, appropriate swabs should be taken as indicated. If necessary use separate sheet.
- Always use standard, universally accepted descriptive terms for classifying injuries. Use of a standard terminology not only assists in identifying the mechanism by which the injury was sustained but also contributes to a better understanding of the circumstances in which the injuries may have been sustained. When used correctly, a standardized system of wound classification and description may allow deductions about the weapon or object that caused the injury.
- Wounds are generally classified as abrasions, bruises/ contusion, lacerations, incised wound, stab wounds etc. Do not use short forms while describing the injury like CLW as it creates confusion.
- While describing the injury always note the name/type of injury, its site, dimensions, margins, color, directions (if applicable), evidence of any foreign body etc.
- It is important to keep in mind that injuries might not always be seen. There may be circumstances in which the survivor may have been threatened with bodily harm, physically restrained, or afraid to resist for other reasons, thus explaining absence of injuries. In fact, only one-third of cases of sexual assault have visible injuries. In absence of injuries, also cases have been proved.
- In dark skinned people bruising can be difficult to see, and thus tenderness and swelling if present is of great significance.
- Follow-up examination for injuries: If there is deep bruise or contusions, signs of injury will usually show after 48 hours. Therefore, it is mandatory to repeat the examination of the survivor

for recording the appearance of bruise unless the patient refuses. Bite marks may not be obvious immediately following an assault, but may become more apparent with time. Patient should be advised or requested to come for a follow-up. A recommendation should be made to the law enforcement agency to arrange for follow-up inspection within one to two days with the consent of the patient.

- Examine all the parts of the body for injury/s. Special attentions may be given to following areas. Head, neck, face, breasts, upper limbs, buttocks, inner aspect of thighs, other areas if any.
- Examine and note the areas where the patient complains of ***tenderness or discomfort*** and further confirm the appearance of bruising (if any) at this site at a later ***follow-up*** up examination.

{VI} LOCAL EXAMINATION OF GENITALS, ANUS & ORAL CAVITY: General instructions:

- Before embarking on a detailed examination of the genitor-anal area, it is important to try to make the patient feel as comfortable and as relaxed as possible. Ask the patient to tell if anything feels tender. A careful observation of the perineum is made for evidence of injury, seminal stains and stray pubic hairs etc. If the patient is menstruating at the time of examination then the process of examination and sample collection of other areas be done. The patient can be requested to come back for re-examination immediately after the period is over. While describing injuries it is necessary to note down their site, size, color for age, direction, margins, depth, associated tenderness, and evidence of any foreign material etc.
- **Note:** A swab of the external genitalia should be taken before any digital exploration or speculum examination is attempted (See section Forensic Specimen Collection)
- Per vaginal and per speculum examination is not a must in case of a child or when there is no history of penetration or when the patient or guardian (as the case) may refuse it.

Type of positions for ano-genital examination in an adult	
Position	**Purpose**
Lithotomy • supine with legs in stirrups • supine with feet on footrests with elevated back • buttocks should extend to just beyond the edge of the table	• Visualisation of vagina and anus • Table does not interfere with insertion of the speculum
Lateral recumbent (lying on side with knees slightly bent)	Visualisation of vagina and anus when patient is uncomfortable or unable to assume other positions

Following examination shall be carried out as per the need:

a) Pubic hairs: Examined for matting, any loose hairs, and foreign material. If the hairs are matted together, a portion must be cut off and preserved (see forensic specimen collection). Combing the pubic hair for specimens of free foreign hair and clippings of a few of the patient's pubic hairs for comparison may be done at this point of examination.

b) Labia Majora:

c) Labia Minora:

d) Clitoris:

} Examine for evidence of redness, swelling, tenderness, bleeding and type of injury. The injuries commonly seen in this area are abrasions, contusions & lacerations.

e) Fourchette & Introitus / Vagina: Look for bruises, abrasion, redness, bleeding, and tears, which may even extend into the perineum, especially in the case of girl children. A gentle stretch at the posterior fourchette area may reveal abrasions that are otherwise difficult to see, particularly if they are hidden within slight swelling or within the folds of the mucosal tissue. Asking the patient to bear down may assist the visualizing of the introitus. In case injuries are not visible but suspected; 1% Toluidine blue dye test may be done (See section J- Specific Examination). If there is vaginal discharge, comment on the type i.e., texture, colour, odour etc.

Finger Test of sexual assault victims: In cases of sexual assault doctors, insert fingers into the vagina to see whether it admits one finger or two fingers etc. Based on test results they are giving opinion whether victim is habituated to sexual intercourse or not. *The procedure is degrading and medically and scientifically irrelevant*. This procedure should not be performed in cases of sexual assault, as information about past sexual conduct has been considered irrelevant to the case in several judgments. Based on test results or on any other basis doctors should not identify that the victim is habituated to sexual intercourse or not.

f) Hymen (if relevant): Evidence of disruption of the hymenal ring, such as reddening, laceration or tear, bleeding, edema, position of tears & its age should be documented. Gentle pulling the labia (towards the examiner) will improve visualization of the hymen. Only those findings shall be documented that are relevant to the assault. It must be noted that absence of injury to hymen does not rule out vaginal penetration.

g) Perineal Tear if any: Examine for swelling, bleeding and degree of tear.

h) Urethra: Look for redness, swelling/edema, discharge, injuries, bleeding etc. Comment on the type i.e., texture, colour, odour etc of the discharge and relevant swabs from these sites should be collected as detailed in sample collection column.

i) PS (persepculum) examination: Findings relevant to the assault should be noted.

j) Anus: Bleeding/ swelling/ injuries/ discharge/ stains/ warts around the anus and anal orifice must be documented. Examine the anal sphincter and document the findings. Per-rectal examination to detect injuries/ stains/ fissures/ hemorrhoids in the anal canal must be carried out and relevant swabs from these sites should be collected. Respectful covering of the thighs and vulva with a gown or sheet during this procedure can help prevent a feeling of exposure. The buttock needs to be lifted to view the anus. This should be explained. The patient can hold the buttock up herself, if she is comfortable and able to do so. Gentle pressure at the anal verge may reveal bruises, lacerations and abrasions. Digital rectal examinations are recommended if there is a reason to suspect that a foreign object has been inserted in the anal canal, and should be performed prior to a proctoscopy or anoscopy.

k) Oral cavity: It should be inspected carefully, checking for bruising, abrasions and lacerations of buccal mucosa, petechiae on the hard/soft palate, torn frenulum & broken teeth. Collect an oral swab, if indicated.

l) Any other findings: Any other important and relevant finding which not covered above must be entered.

Note: Look for various signs suggestive of Sexually transmitted Infections (STIs) like HIV, syphilis, gonorrhea etc & document as whether discharge, ulcers, warts etc were appreciated or not. If patients tested negative at the time of the medical forensic exam and chose not to receive prophylaxis, follow-up testing should be conducted with the consent of patient/ guardians as the case may be. At the initial medical forensic exam, infectious agents acquired through the assault may not produced sufficient

concentrations of organisms to result in positive test results. For non-sexually active patients, a baseline negative test followed by an STI could be used as evidence; if the suspect also had STI. The CDC recommends that in this case the follow up exam be done within a week.

If signs appreciated, then note down the sign and collect samples for medical/hospital laboratory (not for forensic lab) as detailed below. If possible, give provisional diagnosis or differential diagnosis at the time of examination and give final opinion after receipt of lab result.

- **Sexually Transmitted Diseases:** Incubation period of common infection:

Infection	Incubation period	Infection	Incubation period
Gonorrhea	3-4 days	Warts	several months
Trichomonas	1-4 weeks	Herpes	2-14 days
Chlamydia	7-14 days	Herpes Vaginosis	2-14 days
Syphilis	3 months	---------	------

{VII} SPECIFIC EXAMINATIONS: (These examinations shall only be done wherever facilities exist and if indicated).

a. Wet Mount Slide Test: Inspection of the Wet mount slide of the vaginal swab under the light-staining microscope (for sperms):

- Wet mount slides are used by the medical examiner to determine the presence or absence of motile or nonmotile human spermatozoa in the vagina of the patient
- The presence of motile sperm in the vaginal pool is the best indication of recent ejaculation. The absence of motile sperm, however, does not negate the possibility of recent ejaculation as sperm may become non-motile within hours of entering the vaginal environment.
- Because sperm motility decreases quickly with time, wet-mount evaluation during the examination can provide the only opportunity to see sperm motility. In most cases, sperm becomes nonmotile in the vagina within 10 to 12 hours after ejaculation. Both motile and nonmotile sperm may be found for longer periods of time after the assault in the cervix than in the vagina. Sperm may not be found after an assault for many reasons.
- Since sperm motility can only be observed on an unstained wet mount slide, the motility examination must be performed under a microscope as a part of the forensic medical examination of the patient. The chance of observing motile sperm can be improved by using a phase contrast or other "optically staining" microscope, and by prompt examination.
- The wet mount slide has evidentiary value and must be retained and submitted along with other evidence collected from the patient. Even when sperm are not observed initially in the wet mount slide examination, they may be detected during subsequent examination of the dried and stained smear by the crime laboratory.

Prepare and observe a Wet mount slide as described below:

- Label a slide as "wet mount" and include the patient's name.
- The vaginal secretion from posterior fornices or cervical secretion, obtained by introducing plain sterile cotton wool swab (or 1ml pipette) and the material obtained must immediately

be transferred to a glass slide and spread in the form of thin film, to visualize motile spermatozoa under microscope.

- In case if the material so collected on swab shows partial drying it is necessary to put a drop of normal saline on the slide to preserve the motility of the sperms (a buffered nutrient medium may also be used if available).
- Examine the wet mount slide within 5 to 10 minutes using a biological microscope at 400 power, or by using a phase contrast or other "optically staining" microscope to determine whether or not motile or non-motile sperm are present. Presence of motile spermatozoa is a positive sign of recent sexual intercourse. Examiners rather than hospital lab personnel should view these slides. Otherwise, delays between preparation of slides in the exam room and analysis in the hospital lab could cause a negative result (e.g., sperm present, but not motile).
- For visualization of non-motile (dead) spermatozoa: In case of dry stain it is necessary to transfer the material in the watch glass and soaked in sterile water for 10 mins. It is then picked up with foreceps and smears are prepared on microscopic slide. The slides are dried and stained. Commonly employed staining method includes Gram's, H & E and Pap. The stained slide should be microscopically examined for the presence of human spermatozoa, which is a positive sign of recent sexual intercourse.
- After examining the slide for motile spermatozoa, the same slide must be air dried and sent to Forensic science laboratory in addition to other slides. Label the swab used to make the wet mount slide so that the FSL knows it was used for this purpose.

Result of Examination: Comment on whether motile or non-motile sperm are present or not. Sometimes examiner may not be able to properly interpret the results or identify the sperms. In such instances doctor should document the same. It must be noted that absence of spermatozoa does not rule out sexual intercourse.

b. **Toluidine blue dye test:** Toluidine blue dye is used to assist in the identification of recent genital and perianal injuries. After the initial examination of the posterior fourchette and fossa navicularis and the collection of swabs, apply 1% aqueous solution of Toluidine blue dye to the posterior fourchette and fossa navicularis. After allowing a minute for the dye uptake, remove the excess with lubricant, such as K-Y jelly or 10% acetic acid. Dye uptake is considered positive and affirms injury when there is residual blue coloring of the laceration or its border after the excess dye has been removed. It should be done before Per Speculum examination, but after collection of vaginal samples, as spraying of the dye and washing away the excess can cause loss of evidence.

Indication: To visualize subtle injuries (when injuries are not appreciated by naked eye examination).

c. **Anoscopic/ Colposcopic examination:** Anoscopic examination should only be done in cases of anal bleeding or severe anal pain or injury suspected or if the presence of a foreign body in the rectum is suspected. **Colposcopic examination** (Only when facility available) is required to be done when injuries are not appreciated by naked eye examination & when collection of photographic evidence required. Minor skin and/or mucosal surface trauma such as abrasions, lacerations, petechiae, focal edema, hymenal tears, and anal fissures are more easily seen with

magnification, and photographs can be taken for documentation. Video cameras can be attached to colposcopes to record images.

d. UV light exam of clothes and skin: The seminal, blood and salivary stains (dried or moist), fluorescent fibres and subtle injuries, exhibits characteristic appearance when subjected to visual examination by using long wave UV light. These lights are used to scan the body for evidence such as:

- dried or moist secretions;
- fluorescent fibers not readily visible in room light; and
- subtle injury.

Areas to examine: Use these lights in a darkened room to examine the patient's entire body. Take care to protect the patient's eyes when using ultraviolet light. Specifically examine these areas of the body:

- head, face, hair, lips, perioral region, and nares;
- chest and breasts;
- external genitalia, perineal area, inner thighs, and pubic hair;
- buttocks, skin, and anal folds; and,
- any area indicated by the patient's history.

Detecting semen:

- Dried semen stains have a characteristic shiny appearance and tend to flake off the skin.
- Semen may exhibit an off-white fluorescence under ultraviolet light.
- Fluorescent areas may appear as smears, streaks, or splash marks.
- Moist or freshly dried semen may not fluoresce.

Note: The appearance of fluorescent areas does not confirm the presence of semen, as other substances such as urine or body lotions may also fluoresce. Independent confirmation of these findings by the FSL is required. Shall only be used to visualize the stain and for collection of swab from that area.

{VIII} SAMPLE COLLECTION FOR HOSPITAL/ CLINICAL LABORATORY:

Where appropriate tests and laboratory facilities exist, the following tests for Sexually Transmitted Infections (STI) should be offered:

- Cultures for Neisseria gonorrhoeae and Chlamydia trachomatis.
- Wet mount/ microcopy and culture for Trichomonas vaginalis;
- Blood samples for syphilis, HIV, and hepatitis B testing.

If the sexual assault was recent, any cultures will most likely be negative unless the victim already has a STI. Follow-up tests with the consent of the patient, at a suitable interval to account for each respective infection, are therefore recommended in the case of negative test results.

Samples for the evidence of sexually transmitted infections can be taken according to requirement of a case. Advice investigations/ test according to case presentations & signs. In place of sterile cotton swab,

Charcoal coated/ Dacron coated swabs are preferred over cotton swabs. Stuart's or Amies Transport medium may be used for transport of this swab to laboratory. Samples must reach the laboratory as soon as possible for better results. Swabs from urethra/ulcer/chancre for bacteriological examination must be sent if indicated. All these samples must be forwarded for serological/microbiological examination to the microbiology department of nearest government medical college hospitals using requisition formats available in Hospital. Ideally, these samples should be collected after collection of samples for FSL. Various samples that can be preserved are:

1. High vaginal/ Cervical Swab (Sterile Cotton) for microscopy and culture in plain sterile bulb.

After the speculum is in place remove any mucus with cotton or gauze. Insert the swab and collect the specimen with a gentle side-to-side motion. Allow a few seconds for the organism to adsorb onto the swab surface. Sample any cervical discharge present.

2. Urethral Swab (Sterile Cotton) for microscopy and culture in plain sterile bulb.

3. Swab (Sterile Cotton) from discharge for microscopy and culture in plain sterile bulb.

4. Blood for Serology (for syphilis, HIV & Hepatitis B) in plain sterile bulb.

5. Urine (midstream) for microscopy and culture in plain sterile bulb.

6. Swab (Sterile Cotton) from rectum for microscopy and culture in plain sterile bulb may be taken in required cases. Insert the swab 4-5 cm into the anal canal and gently move it from side to side to sample the anal crypts. Allow a few seconds for the organism to adsorb onto the swab, and gently rotate the swab during withdrawal. If heavy fecal contamination is observed on the swab, collect another specimen with a fresh swab.

Pregnancy Test: Possibility of pregnancy resulting from the assault should be discussed and female patients should be assessed for the possibility of pregnancy. When available, pregnancy-testing kits can be offered. However, most of the testing kits commonly available will not detect a pregnancy before expected menses. Patient should be advised to return for pregnancy testing if she misses her next period. Parent or guardian may come to know about the sexual assault when the victim becomes pregnant. In such circumstances, proper assessment of gestational age of fetus may become important from therapeutic and legal point of view. If pregnancy test is positive, then advise USG for confirmation and to calculate gestational age of fetus.

{IX} COLLECTION OF FORENSIC EVIDENCE/ MATERIAL/ SAMPLES:-

- For sending, the samples to Forensic Science Laboratory (FSL) use a separate format, which is annexed herewith as a part of requisition to FSL for relevant examination. Here it must be remembered that specific mention in words as to which samples are collected & which are not collected is very necessary.
- If no samples collected, then it should be specifically documented under 'note' column of the report along with the reason for non-collection viz not indicated by history/ no evidence of contact etc.
- The list of samples so collected under different headings is included in the forwarding letter (requisition) to the Forensic Science Laboratory. This is an annexure to the examination format and the same is mentioned so in the format.

- If any advice is given to the police official regarding sample collection then it should also be documented in note column.

General information for collection of forensic evidence:

Collection of Evidence-Time Frame Guidelines:

- Please make an assessment of the case and determine what evidence needs to be collected before you begin. This procedure cannot be done mechanically and will require some analysis. The nature of forensic evidence collected will be determined by three main factors - history of assault, physical findings and time lapsed between assault and examination. This screening will also help in avoiding unnecessary sample collection. Ideally, if there is no specific indication then there is no need to collect the samples for semen analysis if patient reports to the hospital after around three weeks of incidence. In such cases, reference samples can be collected if requested by police.
- *If a woman reports within 96 hours of the assault, all evidence including swabs must be collected with her consent, without fail, in keeping with the history of assault.*
- *Please keep in mind that spermatozoa can be identified only for 72 hours after assault. So if a survivor has suffered the assault more than three days ago, please refrain from taking swabs for spermatozoa (wet mount slide). In such cases swabs should only be sent to FSL for tests for identifying semen.*
- *Evidence on the outside of the body and on materials such as clothing can be collected even after 96 hours (if relevant).*
- An exception must be made in peculiar cases. For example, if the survivor has not washed or bathed at all, between the assault and examination, no matter how much time has lapsed, it is still advantageous to take relevant swabs.

Key components of proper evidence collection & handling are:

- Collect carefully, avoiding contamination
- Collect specimens as early as possible; 72 hours after the assault the value of evidentiary material decreases dramatically
- All appropriate evidences including cloths, swabs, and slides must be air dried prior to packaging: The general impression of the Forensic Science Scientist is that the vaginal swabs are full of fungus (common) and/or cloths of victim are not dried properly (less common). Sometimes water drips from the parcels of cloths. It must be kept in mind that improper collection, preservation and packaging of the exhibits often leads to degradation of crucial biological evidence. Therefore, proper collection and drying/ preservation of exhibits are of utmost importance[2].
- Placing items in appropriate evidence containers
- Storing evidence in a secure area and
- Maintaining the chain of custody.

The following general procedures apply to the use of swabs for the collection of various materials for forensic analysis:

- Use only sterile, cotton swabs.

2 Communication with Anil Kumar Sharma Deputy Director (Biology); Central Forensic Science Laboratory, Directorate of Forensic Science Services, Ministry of Home Affairs, govt. of India. Kolkata.

- Place swabs collected from a site in glass test tube. Use different test tubes for the swabs collected from different sites. Then put glass test tubes in paper envelope or boxes.
- Do not place the swabs in medium as this will result in bacterial overgrowth and destruction of the material collected by the swab. Swabs placed in medium can only be used for the collection of bacteriological specimens.
- Moisten swabs with sterile water/distilled water when collecting material from dry surfaces (e.g. skin, anus). Distilled water is prefereed to saline for moistening the swabs, because saline can crystallize and confound the findings.
- If microscopy is going to be performed (e.g. to check for the presence of spermatozoa), a microscope slide should be prepared. Label slide and after collecting the swab, rotate the tip of the swab on the slide. Both swab and slide should be sent to the laboratory for analysis.
- All swabs, slides should be dried before sealing.

Labeling & Sealing Evidence Containers or envelopes:

- All items of evidence must be clearly labeled to enable the person who collected the evidence to identify it in court later and to ensure that the chain of custody is maintained.
- **Label the envelopes or containers with the following information:** Sample number, Full name of patient, date of collection, MLC No, Name of the sample, signature of the doctor.
- **Sealing:**
  - Proper sealing of containers ensures that contents cannot escape and that nothing can be added or altered.
  - **Proper sealing of evidence containers can be accomplished by:** Securely taping the container (do not lick the adhesive seal); and Signing and dating the seal by writing over the tape onto the evidence container.
  - **Note:** Stapling is not considered a secure seal.

FOLLOWING TYPES OF EVIDENCE IS GENERALLY COLLECTED AS PER THE NEED and documented in relevant papers.

GENERAL EVIDENCE:

1. **Debris with collection paper** (on which survivor is undressed): This is collected for evidence of any foreign material, its nature, source etc.

   Ask the victim to stand on the major brown/white paper to collect loose foreign bodies from cloth and body surface, which is folded and kept in a paper envelope. This procedure only done if victim has not changed her clothes, and or taken bath.

2. **Clothing** (each garment should be properly labeled and placed separately in paper bag **after drying**): Cloths are tested for evidence biological stains such as blood, semen, and saliva from the assailant, (if present) its nature, blood group and DNA profiling and for evidence of any foreign materials such as grass, soil, fibres or debris from the suspect or from the crime scene, its nature, source etc. The purpose is for Identification of assailant from semen, blood or saliva stains or hair on clothing; to show corroborative evidence of force having being used e.g. torn clothing and to identify place where the crime was committed.

- **o** Request the victim to undress herself behind the curtain stand and provide her with necessary hospital linen (dress).
- **o** Note the presence of stains – semen, blood, saliva, foreign body etc.
- **o** Note if there are any tears or marks on clothes.
- **o** Allow clothes to air dry and ensure that they are folded in such a manner that the stained parts are not in contact with unstained part of the clothing.
- **o** Preserve clothes in paper bags, seal and label them. **Do not use plastic bags.** Plastic retains moisture which can result in mould and deterioration of biological evidence.
- **o** In case if the victim has changed the cloth, then there is no need to collect the present cloths unless there is specific indication for it. This fact shall be documented in report. However police should be instructed to collect the clothes worn at the time of offence.

3. **Any sanitary napkins, panty liner, diapers or tampons** (worn by the patient for the period of up to 24 hours after the assault): Collected for evidence of stains/semen, its nature, group and DNA profiling. Other specimens may be encountered during an examination, for example: tissues, diaphragms, and condoms. These should be collected, dried and sealed in paper envelope separately.

TOXICOLGY SAMPLES:

Note: In addition to clinical implications, the presence of alcohol and/or drugs in the patient's blood or urine or vomited matter may have legal significance. The assailant may have used drugs to subdue the victim (**drug-facilitated sexual assault**). The victim may have lost the ability to make rational decisions, or may have affected ability to offer resistance, lost consciousness, or may have no recollection of events. There may not be any physical or genital injuries in a given case. Drugs and/or metabolites of drugs such as marijuana, cocaine, methamphetamine, benzodiazepines [including diazepam (Valium) and flunitrazepam (Rohypnol)], and gammahydroxybutyrate (GHB) can be detected through testing blood and urine samples.

Collect toxicology samples (indications) if the patient:

- **o** is unconscious
- **o** exhibits abnormal vital signs
- **o** reports/ gives history of ingestion of drugs or alcohol
- **o** exhibits signs of memory loss, dizziness, confusion, drowsiness, impaired judgment, light-headedness, decrease blood pressure
- **o** shows signs of impaired motor skills
- **o** describes loss of consciousness, altered sensorium, memory impairment or memory loss; and/ or
- **o** reports nausea, vomiting, diarrhea etc.

Note:

- Collect toxicology samples as soon as possible Alcohol metabolizes rapidly. Many drugs are also quickly eliminated from the body.

4. **Blood in vial:** If ingestion of drugs and /or alcohol is used to facilitate sexual assault may have occurred within 24 hours prior to the examination, a blood sample of at least 5 milliliters should be collected for alcohol and or drug analysis in gray-top tube (contains the preservatives sodium fluoride and potassium oxalate). Be sure to cleanse the arm with a non- alcoholic solution if collection is to be done for alcohol analysis.

5. **Urine in vial:** Collect for alcohol or drug analysis in fluoride glass bulb/ vacutainer. If ingestion of drugs is suspected within 96 hours of the examination, collect the first available urine specimen (approximately 50 ml). This may help to confirm the presence of certain drugs or their metabolites which may not be detectable in the blood because of short half- life. The number of times that patients urinated prior to collection of the sample should be documented.

BODY EVIDENCE (OTHER THAN PERINEAL REGION):

6. **Swabs from cheek & gum area:** Collect for evidence of semen, blood group and DNA profiling. Semen is rapidly lost from the mouth by dilution with saliva, swallowing, eating, and drinking. If less than 12 hours have passed since the incident, collect two swabs by swabbing firmly around the gums, frenulums, and in the fold of the cheek. Prepare one dry mount slide from one of the swabs.

   Indication: If there has been any allegation of oro-penile contact within 12 hours prior to examination.

   Preparation of a dry mount slide:

   - Select one of the swabs collected from the oral cavity. Roll the swab in a rotating motion to make a thin smear on the slide.
   - Label, air dry, package, and seal.
   - Label the swab used to make the dry mount slide so that the crime laboratory knows it was used for this purpose.

7. **Foreign material on body:** Collect to identify it, its nature and source. Types of foreign materials that may be present are fibers, soil, hairs sand, paint glass, grass or other vegetation, other debris. All materials first should be collected in plain white paper and then paper should be folded in such a way that the contents cannot escape. Then this folded paper should be placed in paper envelope.

8. **Semen-like stains on body:** Collect for its nature, grouping & DNA. Also specify site from where the swab collected.

9. **Swabs from suspected or alleged bite marks & from the places that have been licked & kissed along with control sample:** Collect for evidence of saliva, its grouping & DNA. Also specify site from where the swab collected. If the patient history indicates a bite and there are no visible findings, swab the indicated area.

10. **Combing of the patient's head hair:** For collection of loose hairs and to compare with the reference sample of hairs of the victim. Hairs those found to be foreign to the patient can then be compared to reference hairs obtained from potential suspects (if shows comparison then forensic laboratory should be instructed to confirm it with the DNA profiling).

11. & 13 **Fingernail scrapings of both hands separately:** Collect for identification of any foreign trace materials, such as skin, blood, hairs, soil, fibers from the assailant; if human tissue, its blood group, and DNA. Nail scrapping is done with sterile toothpick. Nail clippings are taken with nail cutter. Both are

collected separately for right and left hand. Both these materials are collected in plain paper, folded, and then put in paper envelope.

Indication: If there is a history of the victim scratching the assailant. If patient not able to recollect or not able to tell properly, then collect invariably.

GENITO-ANAL EVIDENCE

14. **Matted pubic hairs:** Collect matted pubic hairs (if present) for identification of human semen, its group and DNA. The dried patch of approximately 10 to 15 hairs to be cut with scissor. Collected in paper, folded and kept in envelope.

15. **Combing of Pubic hair:** For collection of loose hairs and to compare with the reference sample of hairs of the victim. Hairs those found to be foreign to the patient can then be compared to reference hairs obtained from potential suspects (if shows comparison then forensic laboratory should be instructed to confirm it with the DNA profiling). Document if shaved. Approximately 10 to 15 loose combed pubic hairs are to be collected in a clean paper underneath. These collected hairs along with the comb used are kept in same paper, folded and kept in envelope. This is useful for comparison with those of assailant

16. **Vulval (labia majora) Swabs:** Collect at least two vulval swabs for identification of semen/saliva of the assailant, its nature, group and DNA analysis. The genital area must be swabed to collect possible saliva or semen regardless of Wood's Lamp findings.

17. **Vestibular (labia minora) swabs:** As above.

18. **Vaginal swabs:** One vaginal swab on a sterile swab with air drying to be put in an envelope for identification of semen of the assailant, its nature, group and DNA analysis. Other one should be used for wet mount slide preparation.

19. **Cervical Swab:** One cervical swab on a sterile swab, air-dried, to be put in an envelope for identification of semen of the assailant, its nature, group and DNA analysis. Other one should be used for wet mount slide preparation if necessary in case if vaginal swab does not yield result.

20. **Vaginal Smear (2)**- One vaginal smear on a glass slide, air dried, to be put in an envelope for identification of semen of the assailant, its nature, group and DNA analysis.

21. **Perianal, anal, rectal swabs & smear:** (if applicable). One swab from anal/rectal region each with smear (if applicable) on a sterile swab and a glass slide respectively, air dried to be put in an envelope for identification of semen of the assailant, its nature, group and DNA analysis. **Indication:** Collected when there is history or evidence of anal contact or penetration.

REFERENCE SAMPLE:

Reference samples are used by the crime laboratory to determine whether or not specimens of evidence collected are foreign to the patient. Blood, buccal (inner cheek) swabbings, or saliva should be collected from the patients for DNA analysis to distinguish their DNA from that of suspects.

Following reference samples may be collected as per the need.

22. Blood on clean white cotton cloth: Collected for grouping & DNA analysis. This is more suitable procedure than collection of blood in vial. Air dry before putting into paper envelope.

23. Blood in plain bulb/ vaccutainers for grouping – 2 ml. (if not taken on clean white cotton cloth/filter paper)

24. Blood in EDTA bulb/vaccutainers for DNA analysis – 2 ml. (if not taken on clean white cotton cloth/ filter paper).

25. Hairs (scalp and pubic) 10-20 strands (cut with scissor) to be collected and packed separately for comparison with the loose hairs found from the body of the victim herself and from the scene.

CONTROL SWABS:

26. Control swabs from the unstained area adjacent to the skin; collected to interpret the results from the test swabs of evidence.

OTHER:

27. **Other samples:** Collect any other sample, which the doctor feels important to be collected or requested by the investigating police officer but not covered in the above listed items.

NOTE:-

- **"INSTRUCTIONS OF FSL (Forensic Science Laboratory) FOR SENDING GENITAL & ANAL SAMPLES"**

  1. Vaginal Swab:-

  Use dry sterile cotton swab, use minimum quantity of double distilled or glass distilled water to make the swab wet. Swab victim's genitals carefully. Use two to three swabs only. Do not prepare separate swab for each part of genitals (vagina), instead concentrate all the biological material on two to three swabs and term it as vaginal swab. Preparing separate swabs may lead to loss of valuable evidence material. After collection air-dry the swabs properly. Do not pack wet swabs to avoid bacterial degradation of evidence material. Place the dried swabs in clean sterile test tube or glass vial and forward to FSL as early as possible. No preservative should be added.

  2. Vaginal Smear:-

  While preparing vaginal swabs also prepare the smear on two clean sterile glass slides. Air- dry the smear. Do not pack wet or semi wet slides. Place the slides in clean paper packet and forward as early as possible to FSL.

  3. Pubic Hair:-

  For detection of body fluids, i.e. semen or vaginal fluid bunch of pubic hair can be sent. If fresh body fluid is observed on pubic hair of victim or accused cut the specific bunch of hair, air-dry it and pack.

  1. If the pubic hair is to be forwarded for transfer of hair from accused to victim and vice versa then careful combing should be done to detect any foreign hair.

  2. In case of minor victim if the pubic hair of accused is detected near genitals of the victim then only it is advisable to forward the reference sample and control sample of accused. Otherwise forwarding only control pubic hair sample does not make any sense.

  3. Forwarding scalp hair samples in sexual assault case does not make any sense. So avoid sending scalp hair samples routinely. It is advisable to send the scalp hair only if the foreign

scalp hair is detected on person of victim. DNA test of pubic hair is only possible if the questioned pubic hair is with root.

4. Place the pubic hair sample in clean dry and sterile glass container. Avoid packing wet hair sample in paper or any absorptive packaging material as the body fluid in question may get transferred onto packaging material. Forward the sample as early as possible to FSL.

Control blood:-

Forward the control blood samples for DNA only in KIT provided by FSL and as per the instructions of FSL. Accompany the samples with IDENTIFICATION FORM (ID Form)/ "BIOLOGICAL SAMPLE AUTHENTICATION FORM" provided by FSL. Duly feel the entries in ID form. No columns should be left empty. Never forward the control blood samples in any other containers, as they are unsuitable for DNA analysis. Paternity dispute blood samples are also to be forwarded in above mentioned way. Collection of reference blood sample can also be done on FTA Card.

The number/ nature of samples collected for forensic science examination should be decided on the basis of history of assault (to a limited extent) and scientific observations pertaining to the examination of clothing and body and time elapsed between the assault and examination. Collection of too many samples can be avoided.

- As per DNA samples are concerned, routinely, only blood, hair, nail debris, swab from labia minora and swab from vagina must be sent. Other samples must be sent, only if specifically asked by the investigating officer or if found necessary.

DNA Examination of Sexual Assault Evidence

Research in the last few years has revealed new options for identification in criminal investigations. The analysis of cellular biological materials for DNA (Deoxyribonucleic Acid) has greatly enhanced identification possibilities of criminals. DNA (chromosomal material) contains the genetic code of an individual and if sufficient quantity of DNA exist in a given sample that individual may be identified by DNA comparisons (i.e. comparing blood from a suspect with blood left at a crime scene, etc.). This is especially significant in cases where no witnesses were available to make eyewitness identifications.

DNA is found in biological materials containing a cell nucleus; therefore, spermatozoa can be readily used for identification of an individual provided sufficient sample is available. This technique of identification can be helpful in a sexual assault investigation where the patient cannot identify her/his assailant. DNA can also be identified in blood, saliva, hair (containing hair root with root sheath), tissue and bone marrow.

Semen, blood, vaginal secretions, saliva, vaginal epithelial cells, and other biological evidence may be identified and genetically typed by a crime lab. The information derived from the analysis can often help determine whether sexual contact occurred, provide information regarding the circumstances of the incident, and be compared to reference samples collected from patients and suspects. A primary method used by crime labs for testing biological evidence is DNA (deoxyribonucleic acid) analysis.[3] The most common form of DNA analysis used in crime labs for identification is called polymerase chain reaction (PCR). PCR allows the analysis of evidence samples of limited quality and quantity by making millions of copies of very small

3 DNA determines each person's individual characteristics. An individual's DNA is unique except in identical twins. DNA in the cell nucleus is genetic material inherited from biological parents. (Drawn from Arkansas' Sexual Assault: A Hospital/Community Protocol for Forensic and Medical Examination, 2001.)

amounts of DNA. Using an advanced form of PCR testing called "short tandem repeats" (STR), the laboratory is able to generate a DNA profile, which can be compared to DNA from a suspect or a crime scene.[4]

Distinguish patients' DNA from suspects' DNA.

Blood, buccal (inner cheek) swabbings, or saliva should be collected from patients for DNA analysis to distinguish their DNA from that of suspects.[5] (Procedures for collecting these samples are provided under sample collection part.) Criminal justice agency policies should be in place and followed for the secure storage of biological samples and appropriate disposal of these samples and DNA profiles.

Note: Specimen copy of report of DNA from forensic science laboratory in case of alleged gang rape case is attached with this manual for ready reference.

X): Provisional Opinion:

Key Points:

- Opinion must be evidence based. It is mandatory that doctor's forensic medical report shall state precisely the reasons for each conclusion arrived at.
- Rape is not a medical diagnosis, it is a legal definition. Hence, word "Rape" should not be used while forwarding the opinion and no doctor should opine in medical reports on whether rape occurred or not. Even he should not depose in court on the same issue.
- It has been observed that the most of the examining physicians write opinion in their medico-legal reports to the effect that "she is habituated to sexual intercourse", on the basis of findings of 'finger test'. Do not identify the victim/patient as 'habituated to sexual intercourse' on any basis as identifying the woman as "habituated to sexual intercourse", is unlawful interference with her privacy and unlawful attacks on her honour & reputation and is violation of her human rights and has no medical/ scientific significance. In a prosecution of sexual assault, where the question of consent is in issue, evidence of character of the victim or of her previous sexual experience with any person is not relevant on the issue of such consent or quality of consent.
- Always keep in mind:

  Normal examination findings neither refute nor confirm the forceful sexual intercourse.

  Reasons for normal examination findings despite history and or positive circumstantial and or other evidence:

  Forceful sexual intercourse is possible without leaving any medical evidence. Absence of injury occurs in consensual as well as forced sexual intercourse. Less than half of all complainants of sexual assault have injuries to the genital and anal areas.

- ***The reasons for absence of general injuries in alleged victims of serious sexual assault include:***
  - *Submission of the victim may be achieved by emotional manipulation, fear of violence or death or by verbal threats.*
  - *The force used, or the resistance offered, is insufficient to produce injury.*
  - *Bruises may not become apparent for 48 hours following assault.*

4 There is a concern that if DNA evidence is found, prosecutors may not utilize other evidence, especially when labs have limited resources. But because persons known to victims commit the vast majority of sexual assaults, DNA findings must be used in conjunction with other forensic evidence recovered, particularly when issues of consent arise. Law enforcement investigators and prosecutors should receive training on maximizing the use of all forensic evidence collected.

5 L. Ledray, SANE Development and Operation Guide, 1998, p. 65.

- *A delay in reporting the incident will allow minor injuries to fade or heal.*
- *Survivor being unconscious, under the effect of alcohol/drugs*

- ***Reasons for the absence of ano-genital injuries in alleged victims of serious sexual assault include:***
  - *The alleged sexual act (such as rubbing, touching) was unlikely to result in injuries.*
  - *Delay in reporting the incidence*
  - *The victim is sexually active.*
  - *The natural elasticity of the postpubertal female genitalia, including the hymen.*
  - *The natural elasticity of the anus.*
  - *The use of lubricants.*
  - *Survivor being unconscious, under the effect of alcohol/drugs*

PROVISIONAL OPINION: Enter the approximate time in hours or days after which the examination is performed after the alleged incident. This is important as it may influence the appearance of findings and or/ outcome of chemical analysis reports. Opinion can be divided under following heads:

1) *Medico-legal diagnosis and/or Evidence of penetrative or Non-penetrative sexual assault:* Under this head, medical examiner has to give opinion regarding evidence of penetrative (sexual intercourse) and non-penetrative sexual assault. Following opinions may be drawn as per the available findings (It must be noted that this list of opinions is not exhaustive and doctors are advised to from opinions based on the examples given below):

a. If there are recent genital and/or physical injuries (fresh injuries) with wet vaginal/anal smear detecting spermatozoa, the opinion could be stated as *'There is evidence suggestive of recent forceful vaginal/anal intercourse."*

b. If there are genital and/or physical injuries but no evidence of spermatozoa in the wet smear, it does not rule out forced penetrative sex. So the opinion should be stated as *"There are signs of use of force/forceful penetration of vagina/anus, however the opinion regarding penetrative intercourse is reserved pending till availability of FSL reports."*

c. If there are only physical injuries and no genital injuries, and no evidence of spermatozoa in the wet smear, it does not rule out forced penetrative sexual act. So the opinion should be stated as *"There are signs of use of force, however the opinion regarding penetrative intercourse is reserved pending till the availability of FSL reports."*

d. If there are only genital injuries but no physical injuries, and no evidence of spermatozoa in the wet smear, it does not rule out forced penetrative sexual act. So the opinion should be stated as *"There are signs of use of force/forceful penetration of vagina and/ or anus; however the opinion regarding penetrative intercourse is reserved pending till availability of FSL reports".*

e. If there is evidence of spermatozoa in the wet smear of vagina, but no physical and genital injuries then the opinion could be stated as, *"There is signs of recent sexual intercourse. However opinion regarding forceful sexual intercourse will be given after the follow –up examination"*. If injuries are absent then appropriate reasons for absence of injuries (detailed above) must be explained in report for example delay in reporting to hospital, minimal application of

force, use of lubricants, natural elasticity of the prepubartal female genitalia, victim being unconscious/ under the influence of alcohol/ drugs etc.

f. If there are normal exam findings i.e., there are no physical and genital injuries, no evidence of spermatozoa in the wet smear, the opinion could be stated as *"On examination the findings are within normal limit which neither refute nor confirm the forceful sexual intercourse". However, final opinion regarding penetrating intercourse is reserved pending till availability of FSL reports and opinion regarding application of force will be given after follow up examination".*

g. If there are normal exam findings i.e., there are no physical and genital injuries, no evidence of spermatozoa in the wet smear, no samples are collected (if collection not indicated), and no follow-up examination is arranged/ planned (if not indicated) and if no opinion/s are kept pending (in such instances opinion/s given after first examination shall become the final opinion and not provisional) then the opinion could be stated as *"On examination the findings are within normal limit which neither refute nor confirm the forceful sexual intercourse/ assault. Samples are not collected in this case as its collection is not indicated".* Appropriate reasons for absence of physical/ genital injuries and negative wet smear (for example delay in reporting to hospital, minimal application of force, use of lubricants, natural elasticity of the prepubartal female genitalia, victim being unconscious/ under the influence of alcohol/ drugs etc) must be explained while giving opinion.

Note:

- Opinion on whether the sexual intercourse/ penetration was recent or not should be given on the basis of age of injuries.
- Reasons for negative wet smear and absence of physical and genital injuries should always be kept in mind and also be explained while framing the opinion and giving the evidence in the court of law.

h. **Evidence of non-penetrative assault:** Non-penetrative sexual assault may include fondling, sucking, forced masturbation etc. These acts may result into injuries (like bite marks, sucking marks, bruises/contusions, fingernail marks) which must be documented in opinion column as "there are signs suggestive of bite marks/ sucking marks that are consistent with non-penetrative sexual assault". If evidence of forceful kissing and/or masturbation is found on the body of the victim and swab from such sites is collected for FSL then opinion could be stated as "There are signs suggestive of forceful kissing and/ or masturbation on body; however, final opinion kept pending till receipt of FSL reports'. Forceful kissing/ licking may leave salivary stains that can be detected in swabs taken from such sites by FSL. Hence, opinion on this aspect may be framed after the receipt of analysis reports. This evidence may not be available if victim have had a bath or washed herself/ body parts. If no signs present then opinion could be stated, as "opinion regarding application of force will be given after follow up examination". If injuries are absent then in relevant cases appropriate reasons for absence of injuries (detailed above) must be explained in the report while framing the opinion.

2) *Evidence suggestive of application of force/ restrained:* Generally injuries because of application of force or restrain may be present on the various body parts like, forearm, inner parts of thighs, legs, neck, facial, intraoral, shoulder and arms. Injuries may also be present on genitals. Therefore,

medical examiner should always look for such injuries carefully. If injury/ injuries are present, then opinion could be framed as *"The evidence of injury/ injuries is consistent with application of force or restrain"*. If no injuries are appreciated & patient is examined within 24 hours of the assault then opinion could be framed as *"At present there is no medical evidence suggestive of application of force or restrain. However final opinion will be given after follow up examination"*. If injuries are absent then appropriate reasons for absence of evidence suggestive of application of force (detailed above) must be explained in this column for example, delay in reporting to hospital, minimal application of force, submission of the victim is achieved by threats, victim being unconscious/ under the influence of alcohol/ drugs etc.

3) O*pinion as to age of injuries & nature of injuries (if applicable):*

Opinion as to the age of injuries is given on the basis of color and nature of healing of injury that is documented in the medical reports. Therefore, doctors should mention the color of each injury in injury column while describing the injuries. Following information may be used as a reference for giving opinion on the age of injuries on the basis of color changes.

Age determination of various types of injuries on the basis of color changes:-

ABRASION

Fresh	Bright Red
12 to 24 hours	Reddish scab
2 to 3 days	Reddish brown scab
4 to 7 days	Brownish black scab
After 7 days	Scab dries, shrinks and falls off from periphery leaving an underlying pink granulation tissue.

CONTUSION

Fresh	Red
Few hours to 3 days	Blue
4th day	Bluish black to brown (Haemosiderin)
5 to 6 days	Greenish (Haematoidin)
7 to 12 days	Yellow (Bilirubin)
2 weeks	Normal

If there is deep bruise or contusion, signs of injury will usually show after 48 hours. In case signs of injury are seen on the follow up, please record them and attached the documentation to MLC papers.

LACERATION

It becomes difficult to estimate exactly the time since injury based on the size and contamination. However, a rough estimate can be done based on signs of healing.

INCISED INJURY

Fresh	Hematoma formation
12 hours	Edges- red, swollen
24 hours	Scab of dried clot covering the entire area.
After this rough estimate can be based on signs of healing.	

Note: The tables given are only approximation and be used as reference information only. This can vary as many external and internal factors contribute in the color changes and healing of injuries.

Opinion as to nature of injuries: It must be kept in mind that while committing sexual assault the assailant may cause grievous bodily harm or maims or disfigure or endangers the life of the victim or causes the victim to be in a persistent vegetative state. This has important legal bearing as in such instances harsher punishment is prescribed. Therefore, doctors should take utmost precautions to identify the nature of injuries properly. On the basis of clinical examination, it may be mentioned whether the injury is simple, grievous or dangerous to life. Sometimes it may not be possible to identify the nature of injury by external examination and palpation, so relevant investigation should be advised to ascertain the same (if needed). In such cases final opinion regarding nature of injury may be kept pending till relevant radiological investigation reports (like X-ray, CT, MRI, USG etc) is made available. In some cases, follow up examination is required to give opinion on this aspect so; opinion in such cases may be given after follow up examination.

Note: If injuries are already sutured at some other centers by another doctor in emergency situation, and patient being immediately referred to other centre for further management, then police officer shall be asked to consult the first doctor for details of injuries (like name/type, dimensions, site, color, age of injury etc). In such circumstances, the opinion would be framed as *"As injury number (put number of relevant injuries which has been sutured or already altered here) is already sutured, I am not in a position to comment on its type/name, other details of injury like color, dimensions, age of injury etc. Hence, the police official is requested to collect the said details from the concerned treating doctor who have sutured/ altered the injuries".*

4) *Results of wet mount slide examination for evidence of spermatozoa:* In this column, it is expected to mention whether unstained/ stained preparations show evidence of motile / non- motile spermatozoa. It must be noted that absence of spermatozoa does not rule out sexual intercourse. Therefore, while giving opinion the doctor must also mention the appropriate reason/s (as detailed below) for its absence, for example the delay in analysis, washing of genitalia, sexual intercourse without ejaculation or ejaculation outside vagina etc.

- ***Reasons for negative wet smear in alleged victims of sexual assault:***
  - *This could be because, there was use of condom or the assailant may have a vasectomy or disease of the vas.*
  - *Delay in the analysis*
  - *Washing of the genitals,*
  - *If the survivor was menstruating,*

- *Sexual intercourse without ejaculation or*
- *Sexual intercourse with ejaculation outside the genitalia.*

5) *Evidence as to consumption/ being under the influence of drugs and/ or alcohol:* Some perpetrators use drugs or alcohol in order to facilitate sexual assault. A victim who has been piled with drugs/ alcohol is easier to control, to the extent that physical force is not necessary, as the drugs will render the victim submissive and incapacitated and, in some cases, unconscious (Date rape drugs). Following opinions can be framed:

- If patient/ victim gives history of drug/alcohol ingestion and shows signs suggestive of inebriation by drugs and/or by alcohol, like smell of alcohol, congestion of conjunctivae, dilatation of pupils with normal reaction to light and normal muscular coordination, then opinion could be stated as *"There are signs suggestive of ingestion of drug and/or alcohol but the patient is not under the influence of it. However, final opinion is kept pending till receipt of FSL reports."*
- If patient gives history of drug/alcohol ingestion and shows signs suggestive of inebriation by drugs and/or by alcohol, like smell of alcohol, congestion of conjunctivae, dilatation of pupils with sluggishly reacting to light, slurred incoherent speech, staggering gait, impaired conscious state, some memory loss and other signs of muscular in- coordination, then opinion could be stated as *"There are signs suggestive of ingestion of drug and/or alcohol and the patient is under the influence of it. However, final opinion is kept pending till receipt of FSL reports."*
- If there is history of drugs and/ alcohol ingestion but there are no signs suggestive of inebriation by drugs and/or by alcohol, then opinion could be stated as, *"At the time of examination, there is no signs suggestive of ingestion of drug and/or alcohol. However final opinion will be given after the receipt of FSL reports"*.
- If there is no history as well as no signs suggestive of inebriation by drugs and/or by alcohol, then opinion could be stated as *"There is no history and no signs suggestive of ingestion of drug and/or alcohol. Hence, samples for analysis are not preserved". In such cases if samples are preserved for analysis at the request of investigation police officer then it should be stated as, "However, samples are preserved for toxicological analysis as per the request of investigating police officer"*.

Note:

- It is mandatory that doctor's forensic medical report shall state precisely the reasons for each conclusion arrived at. The important findings on which doctor's opinion is based must find place in forensic medical report because bald opinions not supported by the reasons are not acceptable.
- If final opinion is kept pending, then it should be given in a separate format of final opinion after receipt of relevant reports.
- In cases where no sample is collected (if collection not indicated) and no follow up examination is arranged (if not indicated) and if no opinion/s are kept pending, then opinion/s given after first examination shall become the final opinion (and not provisional).

- Patient/ victim shall be provided appropriate treatment as per the need and shall enter the details in format of treatment. This shall be attached to the hospital papers and not to forensic medical report.
- If age estimation of the victim or patient is requested by the police, then use format of Forensic Medical Examination for Age Estimation.
- Date & time: Enter the date & time of the beginning of examination.
- Enter the signature, Name, & Department-designation of the examining doctor on right side and seal/ stamp of the examining doctor/ hospital should be given in the box.
- Enter the total number of pages of the report including any extra attached sheet of paper. It is ideal, if the doctor puts a signature and date along with MLC number on each page of paper.

FRAMING OF FINAL OPINION:

- Final Opinion must be evidence based as per physical findings of first examination, follow up examination (if done) and results of Forensic Science Laboratory examination. History or information supplied by police or others should not influence your opinion.
- Only those opinions which were kept pending or not finalized initially shall be given in final report to avoid repetition. If some opinions are already finalized in initial forensic medical report and were not kept pending for receipt of any reports/ material, then in final report it must be noted that 'please see initial forensic medical report' against particular opinion column.
- The final opinion may be in the form of one or multiple factors together. The opinion must be reason based.
- **It must be remembered that sexual intercourse cannot be ruled out even in the absence of one or all parameters mentioned above.**

The manual includes the format of final opinion to be issued which includes:

1. Name of the victim and Age/Sex

2. MLC No. Enter CR No & Police station if applicable.

3. Findings of follow up examination (date wise- if any): Findings of follow up examination shall be entered here. If there are multiple follow up examination, then findings must be entered date wise.

4. Results of laboratory tests (if any): Enter here the Report no, date of issue of report and important positive and negative findings. Use additional sheets if required.

5. Other (if any): Any other important medico-legal aspect, which is not covered under above headings, shall be entered here.

Framing of Final Opinion: Shall be framed after taking into consideration the findings mentioned in first Forensic Medical examination report, findings of Follow up examination and above mentioned laboratory reports.

Reasons for negative FSL report for semen in the samples collected from genitalia etc in alleged victims of sexual assault:

- This could be because, there was use of condom or the assailant may have a disease of the vas.
- Delay in the collection of sample/s
- Washing of the genitals
- Sexual intercourse without ejaculation or
- Sexual intercourse with ejaculation outside the genitalia etc.

Note: *Doctors while framing the opinion and or giving evidence in the court of law must keep in mind the various reasons (which are already explained above) for absence of physical and genital injuries in forceful sexual intercourse, negative wet smear, and negative FSL report.*

Various opinions that can be framed are as follows (It must be noted that this list of opinions is not exhaustive and doctors are advised to form opinions based on the examples given below).

1) *Medico-legal diagnosis and/or Evidence of penetrative or Non-penetrative sexual assault:*

a) If there are genital injuries and presence or absence of physical injuries with negative wet vaginal/anal smear for spermatozoa and FSL report positive for presence of semen, then the opinion could be stated as *'There were evidence suggestive of forceful vaginal/anal intercourse."*

b) If there are absence of genital injuries and presence of physical injuries with negative wet vaginal/anal smear for spermatozoa and FSL report positive for presence of semen, then the opinion could be stated as *'There were evidence suggestive of forceful vaginal/anal intercourse."* If genital injuries are absent then appropriate reasons for absence of injuries (detailed above) must be explained in this column while framing opinion.

c) If there are absence of genital and physical injuries with negative wet vaginal/anal smear for spermatozoa and FSL report positive for presence of semen, then the opinion could be stated as *'There were evidence suggestive of vaginal/anal intercourse."* Appropriate reasons for absence of injuries (detailed above) must be explained in this column while framing opinion.

d) If FSL reports are negative for semen and wet smear are negative for presence of spermatozoa but there are physical injuries and presence or absence of genital injuries then the opinion would be *"there are no evidence suggestive of vaginal/anal intercourse but there is evidence of assault"*. Appropriate reasons for absence of injuries and negative FSL report (detailed above) must be explained in this column while framing opinion.

e) If FSL reports are negative for semen and wet smear are negative for presence of spermatozoa and there are genital injuries only then the opinion would be *"there is no evidence suggestive of vaginal/anal intercourse but there is evidence of genital assault"*.

f) If FSL reports are negative for semen and wet smear are negative for presence of spermatozoa and there are no physical and genital injuries then the opinion would be *"there is no evidence suggestive of forceful vaginal/anal intercourse which neither refute nor confirm the forceful sexual intercourse/ assault"*. Appropriate reasons for absence

genital/ body injuries, negative wet smear and FSL reports (for example; delay in reporting to hospital, minimal application of force, submission of the victim is achieved by threats, victim being unconscious/ under the influence of alcohol/ drugs etc., delay in analysis, washing of genitalia, sexual intercourse without ejaculation or ejaculation outside vagina, use of condom etc) must be explained while giving opinion. In this connection, it must be remembered that sexual intercourse cannot be ruled out even in the absence of one or more parameters mentioned above.

g) If FSL reports are negative for semen but positive for presence of lubricant only, wet smear are negative for presence of spermatozoa, there are no physical and genital injuries then, the opinion would be *"there is possibility of vaginal/anal penetration by lubricated object"*.

Note: Whenever FSL reports are negative, appropriate reasons for negative FSL reports (detailed above) must be explained while framing the opinion.

2) *Evidence suggestive of application of force/ restrained:* If injuries gets appreciated after the follow up examination, then opinion can be framed accordingly by taking into consideration the various opinions framed under provisional opinion column. If no injuries appreciated after follow up examination then, opinion may be framed as "No medical evidence suggestive of application of force or restrain is appreciated". Appropriate reasons for absence of injuries (as detailed in provisional opinion) must be explained in this column.

3) *Opinion as to age of injuries, and nature of injuries (if applicable):* In most of the cases these opinions are possible to be framed at the first instance only. In those cases where opinion as to nature of injuries was kept pending till receipt of radiological investigation reports then, this opinion can be framed after receipt of the said reports accordingly.

4) Evidence/Opinion of Sexually Transmitted Infections: During follow up examination, if the signs suggestive of sexually transmitted diseases are appreciated then, opinion could be stated as "evidence suggestive of Sexually Transmitted Infections appreciated after such and such period". If it is possible to identify the nature of infections from the report, then opinion shall be framed accordingly. During follow up examination, if signs suggestive of sexually transmitted diseases does not gets appreciated, then opinion could be stated as, "no evidence suggestive of Sexually Transmitted Infections is appreciated".

5) *Evidence/Opinion as to under the influence of drug/s and/or alcohol:* If the FSL report is positive for drugs/alcohol then opinion could be stated as, *"evidence is present which suggest that at the time of examination & collection of sample, there was presence of drugs and/ or alcohol in the patient's body and was or was not under the influence of it"*

6) *Any other opinion/ general impression:* If it is not possible to cover, any opinion in the above columns, then that opinion may be entered in this column. Overall, general impression by taking into consideration all the above opinions may also be stated in this column. In this connection, it must be remembered that sexual intercourse cannot be ruled out even in the absence of one or more parameters mentioned above.

- Enter the Date of preparation of the report.
- Enter the signature, name, dept/ designation of the examining doctor on right side.

- Enter the total number of pages of the report including any extra attached sheet of paper. It is ideal if the doctor puts a signature and date along with MLC number on each page of paper.

Note:

- Only those opinions which were kept pending or not finalized initially shall be given in final report to avoid repetition.
- The final opinion may be in the form of one or multiple factors together. The opinion must be reason based.
- It must be remembered that sexual intercourse cannot be ruled out even in the absence of one or all parameters mentioned above.

TREATMENT AND FOLLOW-UP CARE:

- For ensuring relevant important preventive and curative measures taken by the health care provider, a checklist is given in a separate format for Medical Management/Treatment. It mainly consists of following points.
  - Name/Age/Sex of the patient/ survivor. Enter MLC no.
  - Investigations advised (if any)
  - Treatment given: Yes/No
  - Emergency Contraceptive: Yes/No. If yes then details
  - Prophylaxis and/or treatment for sexually transmitted infections: Yes/No. If yes then details.
  - Injection tetanus toxoid (TT): Yes/ No
  - Treatment for injuries: Yes/ No
  - Counseling: Yes/ No
  - Referral for further management and/or counseling: Yes/No. If yes then details:
  - Pregnancy test: Yes/no. If pregnancy is suspected advise USG for confirmation.
  - Follow up on (if any).
  - Other (if any):
- Use this form provided with this protocol as a checklist for giving basic treatment/management.
- This form should be kept in hospital file attached to second copy of FMR/ OPD/IPD papers. Other relevant details of management shall be entered on routine medical papers.
- This form should be filled by the doctor who is entrusted with the responsibility of treating the patient. It is to be noted that this is just a checklist. If treatment provider is the different one from the doctor who is doing forensic medical examination, then treating doctor should come to the place (as early as possible) where the forensic medical examination is being done or vice versa to avoid unnecessary referrals and shunting of patient from one place to other.

- Exposure to sexual violence is associated with a range of health consequences for the victim. Comprehensive care must address the following issues: physical injuries; pregnancy; STIs, HIV and hepatitis B; counselling and social support and follow-up consultations.
- The possibility of pregnancy resulting from the assault should be discussed. If the woman is first seen up to 5 days after the assault took place, emergency contraception should be offered. If she is first seen more than 5 days after the assault, she should be advised to return for pregnancy testing if she misses her next period.
- In the event of a confirmed pregnancy because of sexual violence, patients should be informed of their rights and briefed as to their options. If woman wishes to terminate her pregnancy, she should be referred to legal, safe Medical Termination of Pregnancy (MTP).
- When appropriate, patients should be offered testing for chlamydia, gonorrhoea, trichomoniasis, syphilis, HIV and hepatitis B; this may vary according to existing local protocols. Doctors are advised to follow standard protocols for STI testing diagnosing and treatment.
- The decision to offer STI prophylaxis should be made on a case-by-case basis. Routine prophylactic treatment of all patients is not generally recommended.
- Health workers must discuss thoroughly the risks and benefits of HIV post-exposure prophylaxis so that they can help their patients reach an informed decision about what is best for them.
- Social support and counselling are important for recovery. Patients should receive information about the range of normal physical and behavioural responses they can expect, and they should be offered emotional and social support. If necessary referral to social worker or related organization on working group on the issue of violence against women must be made in order to unable the survivor to cope with the trauma related to sexual assault.
- All patients should be offered access to follow-up services, including a medical review at 2 weeks, 3 months and 6 months post assault, and referrals for counselling and other support services.
- Teach patients how to properly care for any injuries they have sustained.
- Explain how injuries heal and describe the signs and symptoms of wound infection.
- Discuss with the patient the signs and symptoms of STIs, including HIV, and the need to return for treatment if any signs and symptoms should occur.
- Explain the importance of completing the course of any medications given.
- Discuss the side effects of any medications given with the patient.
- Explain the need to refrain from sexual intercourse until all treatments or prophylaxis for STIs have been completed and until her sexual partner has been treated for STIs, if necessary.
- Explain rape trauma syndrome (RTS) and the range of normal physical, psychological and behavioural responses that the patient can expect to experience to both the patient and (with the patient's permission) family members and/or significant others. Encourage the patient to confide in and seek emotional support from a trusted friend or family member.
- Give patients written documentation regarding:
  - **any treatments received;**
  - **tests performed;**

- **date and time to call for test results;**
- **meaning of test results;**
- **date and time of follow-up appointments;**

- Stress the importance of follow-up examinations at two weeks and three and six months.
- The amount and length of social support and/or psychological counselling required by victims of violence varies enormously, depending on the degree of psychological trauma suffered and the victim's own coping skills and abilities. The level of social support post assault is therefore best determined on a case-by-case basis.
- Referrals: The types of referrals given will vary depending on the patient's individual needs and circumstances, and also on the availability of facilities and resources. Health care providers should be familiar with the full range of formal and informal resources that are available locally for victims of sexual violence.

  Note: For Psychological Support for Women Survivors of Sexual Assault kindly refer to A Draft Tool Kit developed for Health Settings.

HANDING OVER OF FORENSIC MEDICAL REPORTS, FORENSIC EVIDENCE ETC TO POLICE:

- Original report should along with forensic evidence (if collected) and properly filled FSL requisition form be handed over to police under due acknowledgement. Enter the name of the police to whom the samples are handed over along with his or her name, buckle number, designation, police station & district and shall obtain the signature (as a receipt) along with date on second copy of the report or on a handover register specially meant for this purpose.
- If, it is not possible to immediately handover the samples to the police after examination or if, police is not available to collect the evidence, then such evidence shall be kept in the safe custody of assigned person in the health facility. The details of all handing over from one 'custodian' to the other must be documented and continuity must be maintained.
- Samples for microbiological studies which include swabs, smears for STDs and blood for HIV test, VDRL is to be sent to Microbiology department (and not Forensic Science Laboratory) of nearest Government hospital/ Medical College along with requisition for the same.

PRE-REQUISITES OF THE HEALTH FACILITY ALONG WITH MATERIAL AND INFRASTRUCTURAL REQUIREMENT:

1) Allopathic medical officers, nurses should be available for round O clock services. One counselor may be made available at every centre.

2) Examination room – must have privacy, appropriate lighting, adequate space and furniture.

3) Stationery: MLC & other registers, manual, reference books, examination formats, requisition forms, labels, pens, pencils, sealing material, paper envelopes etc.

4) Equipments: torch, height measuring scale, inch tape, speculum, (colposcope at referral centres) Proctoscope, anoscope, refrigerator, Wood's lamp, microscope, Computer with printer, digital camera, two separate cupboards (one for equipment and other for stationery and formats) etc.

5) Kit for collection and preservation of samples:

Brown paper/sheet; Paper envelopes/bags; Plastic specimen bags Swabs; (sterile cotton swab, Charcoal coated/ Dacron coated swabs (for collection of swab for STI), Stuart's or Amies Transport medium (for transporting the swabs collected for STI to Hospital lab), Test tubes with lids, Comb, Nail cutter, Toothpick, scissor. Eosin–nigrosin reagents for staining slide for spermatozoa.

Disposable syringes; Scissors; Bulbs–plain, EDTA, Fluoride/ Vaccutainers, Distilled water/normal saline, Gloves, Glass slides, Cover slip, Magnifying lens, Lignocaine jelly; Urine specimen container, Pregnancy test kit, STI kit.

6) Linen:

Sheets and blankets, Towels, Clothing, Patient gown Sanitary items (e.g. Pads, tampons)

7) Treatment items:

Analgesics; Emergency contraception; Suture materials; Tetanus and Hepatitis prophylaxis / vaccination; STI prophylaxis.

DO'S AND DON'TS FOR MEDICAL OFFICERS:

Sr. No.	DO'S	DON'TS
1.	Provide a comfortable and relaxed private atmosphere to the victim to seek his/her cooperation for the medical examination.	Do not use ambiguous words, those having more than one meaning, or which can be interpreted wrongly by either side.
2.	Build "trust and confidence" with the victim.	Do not try to become an investigator. Remain a person of science.
3.	Maintain objectivity and avoid subjectivity.	Don't concur with traffickers, who may pressurize you to give false age determination report.
4.	Documents the findings chronologically and with consistency.	Don't ally with any individual involved in investigation.
5.	Make sure that even minute detail of the examination is recorded in the medico- legal reports.	Do not write a lengthy and irrational history in the report. Do not venture a premature opinion.
6.	Write the report clearly and precisely in scientific manner.	Do not disclose the identity of the victim and findings to any unauthorized persons.
7.	Conduct the age determination test whether requested or not by the investigating agency in case of minors as per ITPA act. However, in other cases it should be done when requested by police.	Trial of the case has to be done by court not by you.
8.	Give appropriate treatment and counseling to the victim as per the need of the patient like emergency contraception, treatment of injuries/ other conditions, prevention and treatment/assessment of sexually transmitted diseases etc as per the accepted norms.	Do not forget to give basic treatment, counseling & psychological support at the time of Forensic Medical Examination.

RELEVANT LAWS:

Few provisions (Sections 357 CrPC, 166 B, 375, 376 A, 376 B, 367 C, 376 D, 354, 354 A, 354 B, 354 C, 354 D, 370 (1), 370 A of IPC) related to rape, trafficking and medical profession from THE CRIMINAL LAW (AMENDMENT) BILL, 2013 AS PASSED BY LOK SABHA ON 19 MARCH, 2013 are included in this manual.

- **357CrPC.** All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code, and shall immediately inform the police of such incident.".
- **166 B IPC.** Whoever, being in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of section 357C of the Code of Criminal Procedure, 1973, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.".
- **375 IPC:** A man is said to commit "rape" if he-

  a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

  b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

  c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

  d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

  First.—Against her will.

  Secondly.—Without her consent.

  Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

  Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

  Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

  Sixthly.—With or without her consent, when she is under eighteen years of age. Seventhly.—When she is unable to communicate consent.

  Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

- **Section 376 (1) of IPC:** Punishment for rape. Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,—

a) being a police officer, commits rape—

i. within the limits of the police station to which such police officer is appointed; or

ii. in the premises of any station house; or

iii. on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

g) commits rape during communal or sectarian violence; or

h) commits rape on a woman knowing her to be pregnant; or

i) commits rape on a woman when she is under sixteen years of age; or

j) commits rape, on a woman incapable of giving consent; or

k) being in a position of control or dominance over a woman, commits rape on such woman; or

l) commits rape on a woman suffering from mental or physical disability; or

m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.—For the purposes of this sub-section,—

a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861;

d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children

- **Section 376A IPC:** Punishment for causing death or resulting in persistent vegetative state of victim.
- **Section 376 C IPC:** Prescribes punishment for Sexual intercourse by a person in authority.
- **Section 376 D IPC:** Deals with gang rape.
- **Section 354 of IPC:** Assault or use of criminal force to outrage a modesty of woman.
- **Section 354 A IPC:** Deals with Sexual harassment and punishment for sexual harassment
- **Section 354 B IPC:** Assault or use of criminal force to woman with intent to disrobe.
- **Section 354 C IPC:** Voyeurism.
- **Section 354 D IPC:** Stalking
- **Section 377 of IPC:** Voluntary sexual intercourse against the order of nature with any man, or woman, or animal is an unnatural sexual offence.
- **Section 370 (1) IPC:** Trafficking of person.
- **Section 370 (A) IPC:** Exploitation of a trafficked person.
- **Section 89 of IPC:** Consent of parent/guardian is necessary for anyone under the age of 12 years.
- **Section 39 of CrPC:** Public to give information of certain offences under sections

  (i) 121 to 126 of IPC and section 130 of IPC

  (ii) Sections 143,144,145,147 and 148 of IPC

  (iii) Sections 161 to 165- A of IPC

(iv) Sections 272 to 278 of IPC

(v) Sections 302,303 and 304 of IPC (vi)Section 364-A

(vii) Section 382

(viii) Sections 392 to 399 (ix)Section 409

(x) Sections 431 to 439

(xi) Sections 449 and 450

(xii) Sections 456 to 460

(xiii) Sections 489-A to 489-E

- **Section 53 of CrPC :** Examination of accused by medical practitioner at the request of police officer - (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

  (2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

- **Section 53 A of CrPC :** Examination of person accused of rape by medical practioner – 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 a Government or by a local authority and in the absence of such a practitioner within the radius of 16 kms from the place where 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 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 accused,

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

  v. other medical particular in reasonable detail.

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

  4) 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.

- **Section 372 IPC :** Selling minor for purposes of prostitution, etc

  Whoever sells, lets to hire, or otherwise disposes of any 164 [person under the age of 18 years with intent that such person shall at any age be employed or used for the purpose of prostitution or elicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall be liable to fine.

- **Section 373 IPC:-** Buying minor for purposes of prostitution, etc

  Whoever buys, hires or otherwise obtains possessions of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or any unlawful and immoral purpose, of knowing it to be likely that such person will at any age be employed or used for any purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

- **Section 164 A of CrPC** (Inserted by Code of Criminal Procedure (Amendment) Act, 2005): Medical examination of the victim of rape.- (1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

  (2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:--

  (i) the name and address of the woman and of the person by whom she was brought; (ii) the age of the woman;

  (iii) the description of material taken from the person of the woman for DNA profiling;

  (iv) marks of injury, if any, on the person of the woman;

  (v) general mental condition of the woman; and

  (vi) other material particulars in reasonable detail,

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

  (4) The report shall specifically record that the consent of the woman or of the person competent, to give such consent on her behalf to such examination had been obtained.

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

(6) The registered medical practitioner shall, without delay forward the report to 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.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

Explanation.--For the purposes of this section, "examination" and "registered medical practitioner" shall have the same meanings as in section 53.].

- **Section 114 A of IEA:** Presumption as to absence of consent in certain prosecution for rape.
- **Section 146** of the Evidence Act, for the proviso, the following proviso is substituted, namely:—

  "Provided that in a prosecution for an offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.".
- **Section 154 CrPC:-**Information in cognizable cases.-

  (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf

  (2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant

  (3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.
- **Section 202 IPC :-** Intentional omission to give information of offence by person bound to inform

  Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

REFERENCES:-

1. Guidelines for medico-legal care for victims of sexual violence. Geneva, World Health Organization (WHO), 2003

2. Draft manual submitted by Dr Indrajit Khandekar, Assistant Professor, Dept of Forensic Medicine, Mahatma Gandhi Institute of Medical Sciences (MGIMS), Sevagram to Bombay High Court Nagpur

Bench under PIL filed on his extensive study report. (WP) no. 1/2010 (Dr Ranjana Paradhi & Adv Vijay Patait Vs Union of India & others).

3. Manual for Medical examination of sexual assault by CEHAT 2010.

4. The comprehensive health sector response to sexual assault. CEHAT working paper no.1, 2010

5. Manual for medical officers dealing with medico-legal cases of victims of trafficking for commercial sexual exploitation and child sexual abuse. Department of Women and Child Development, Government of India.

6. California Medical Protocol for Examination of Sexual Assault and Child Sexual Abuse Victims; Governor's Office of Emergency Services: July 2001).

7. A national protocol for sexual assault medical forensic examinations: adults/adolescents. Washington, DC, Office on Violence Against Women, United States Department of Justice, 2004 (NCJ 206554).

8. Modi's Medical Jurispridence and Toxicology, 23rd Ed.

9. Dr. K. S. Narayan Reddy's, The Essential of Forensic medicine and Toxicology, 29th Ed.

10. J.B.Mukherjee's Forensic medicine and Toxicology, 3rd Ed.

11. Dr. Umadethan's Principles and Practice of Forensic medicine, 1st Ed.

12. Krishan Vij Textbook of Forensic medicine and Toxicology, 4th Edt.

13. Criminal Manual by Justice M.R.Mallick 2008

14. The Criminal Law (Amendment) Bill, 2013 As Passed By Lok Sabha On 19 March, 2013

15. Koneman's Color Atlas and Textbook of Diagnostic Microbiology. Washington C. Winn, Elmer W Koneman, Stephen D. Allen, Gary W Procop, Paul CS, William MJ, Gail LW. Lippincott Williams & Wilkins. 6th Ed

16. Indian Penal Code (IPC)

17. Indian Evidence Act (IEA)

18. Criminal Procedure Code (CrpC)

❑❑❑

GUIDELINES ON INTERVIEWING A CHILD: FORENSIC INTERVIEW PROTOCOL

There are two distinct aspects to the gathering of information from the child (or attending adults) in cases of alleged child sexual abuse: (a) the medical history and (b) the interview. The interview stage of the assessment goes beyond the medical history in that it seeks to obtain information directly related to the alleged sexual abuse, for example, details of the assault, including the time and place, frequency, description of clothing worn and so on. Interviewing of children is a specialized skill and, if possible, should be conducted by a trained professional.

In the context of the POCSO Act, 2012 interviews may need to be conducted by a variety of professionals, including police or investigative agencies. These are forensic rather than therapeutic interviews, with the objective being to obtain a statement from the child in a manner that is developmentally-sensitive, unbiased, and truth-seeking, that will support accurate and fair decision-making in the criminal justice and child welfare systems. Information obtained from an investigative or forensic interview may be useful for making treatment decisions, but the interview is not part of a treatment process.

The following are some basic guidelines that should be kept in mind while conducting the forensic interview to ensure that the interview process does not become traumatic for the child. Regardless of who is responsible for the medical history and interview, the two aspects of information gathering should be conducted in a coordinated manner so that the child is not further traumatized by unnecessary repetition of questioning and information is not lost or distorted.

1. Reasons for interviewing the child

i) To get a picture of the child's physical and emotional state;

ii) To establish whether the child needs urgent medical attention;

iii) To hear the child's version of the circumstances leading to the concern;

iv) To get a picture of the child's relationship with their parents or family;

v) To support the child to participate in decisions affecting them according to their age and maturity;

vi) To find out who the child trusts;

vii) To inform the child of any further steps to be taken in the enquiry;

viii) To assure the child that he/she is now safe and would be cared for, looked after, protected;

ix) To identify areas that would / might need counselling / psychiatric intervention.

1.1 Interview setting

Code of Criminal Procedure, 1973 or any other law for the time being in force, and in the absence of such fund or scheme, by the State Government.

The more comfortable a child is, the more information he is likely to share. Also, children may be too embarrassed to share intimate details when they believe that others can overhear what they are saying. As far as possible, interviews should be conducted in a safe, neutral and child-friendly environment.

The interviewer can incorporate elements to make a room appear child-friendly, such as toys, art material or other props. Distractions like ringing phones, other people's voices and elaborate play material should be removed as far as possible.

1.2 Things to be kept in mind while interviewing a child

i) All children should be approached with extreme sensitivity and their vulnerability recognized and understood.

ii) Try to establish a neutral environment and rapport with the child before beginning the interview. For example, if the interview must be conducted in the child's home, select a private location away from parents or siblings that appears to be the most neutral spot.

iii) Try to select locations that are away from traffic, noise, or other disruptions. Items such as telephones, cell phones, televisions, and other potential distractions should be temporarily turned off.

iv) The interview location should be as simple and uncluttered as possible, containing a table and chairs. Avoid playrooms or other locations with visible toys and books that will distract children.

v) Always identify yourself as a helping person and try to build a rapport with the child.

vi) Make the child comfortable with the interview setting. Gather preliminary information about the child's verbal skills and cognitive maturity. Convey that the goal of the interview is for the child to talk and ask questions that invite the child to talk (e.g., "tell me about your family").

vii) Ask the child if he/she knows why they have come to see you. Children are often confused about the purpose of the interview or worried that they are in trouble.

viii) Convey and maintain a relaxed, friendly atmosphere. Do not express surprise, disgust, disbelief, or other emotional reactions to descriptions of the abuse.

ix) Avoid touching the child and respect the child's personal space. Do not stare at the child or sit uncomfortably close.

x) Do not suggest feelings or responses to the child. For example, do not say, "I know how difficult this must be for you."

xi) Do not make false promises. For example, do not say, "Everything will be okay" or "You will never have to talk about this again."

xii) Establish ground rules for the interview, including permission for the child to say he/she doesn't know and permission to correct the interviewer.

xiii) Ask the child to describe what happened, or is happening, to them in their own words. The interviewer should, as far as possible, follow the child's lead; however, he may have to delicately introduce the topics of the abuse.

xiv) Always begin with open-ended questions. Avoid asking the child a direct question, such as "Did somebody touch your privates last week?". Instead, try "I understand something has been bothering you. Tell me about it."

xv) After initially starting like this, move on to allow the child to use free narrative. For example, you can say, "I want to understand everything about [refer back to child's statement]. Start with the

first thing that happened and tell me everything you can, even things you don't think are very important."

xvi) Avoid the use of leading questions that imply an answer or assume facts that might be in dispute and use direct questioning only when open-ended questioning/free narrative has been exhausted.

xvii) The interviewer should clarify the following:

- **a)** Descriptions of events.
- **b)** The identity of the perpetrator(s).
- **c)** Whether allegations involve a single event or multiple events.
- **d)** The presence and identities of other witnesses.
- **e)** Whether similar events have happened to other children.
- **f)** Whether the child told anyone about the event(s).
- **g)** The time frame and location/venue.
- **h)** Alternative explanations for the allegations.

xviii) However, interviewers should avoid probing for unnecessary details. For example, it may not be essential to get a detailed description of an alleged perpetrator if he/ she is someone who is familiar to the child (e.g., a relative or teacher). Although it is useful if the child can recall when and where each event occurred, children may have difficulty specifying this information if they are young, if the event happened a long time ago, or if there has been ongoing abuse over a period of time

xix) The child may get exhausted frequently and easily; in such an event, it is advisable not to prolong the inquiry, but rather to divert the child's mind and come back to the sexual abuse when the child is refreshed.

xx) Regularly check if the child is hungry or thirsty, tired or sleepy, and address these needs immediately.

xxi) Let the child do the talking and answer any questions the child may have in a direct manner.

xxii) Avoid questioning the child as to why he behaved in a particular way (e.g., "Why didn't you tell your mother that night?"). Young children have difficulty answering such questions and may feel that you are blaming them for the situation.

xxiii) Avoid correcting the child's behaviour unnecessarily during the interview. It can be helpful to direct the child's attention with meaningful explanations (e.g., "I have a little trouble hearing, so it helps me a lot if you look at me when you are talking so that I can hear you") but avoid correcting nervous behaviour that may be slowing the pace of the interview or even preventing it from proceeding.

xxiv) When two professionals will be present, it is best to appoint one as the primary interviewer, with the second professional taking notes or suggesting additional questions when the interview is drawing to a close.

xxv) Interviewers should not discuss the case in front of the child.

xxvi) Individuals who might be accused of influencing children to discuss abuse, such as parents involved in custody disputes or therapists, should not be allowed to sit with children during interviews.

xxvii) In some cases, the interviewer may consider it appropriate to allow a support person to sit in on the interview; but in these situations, such a person be instructed that only the child is allowed to talk unless a question is directed to the support person. Also, the support person should be seated out of the child's line of vision to avoid allegations that the child was reacting to nonverbal signals from a trusted adult.

xxviii) When planning investigative strategies, consider other children (boys as well as girls) that may have had contact with the alleged perpetrator. For example, there may be an indication to examine the child's siblings. Also consider interviewing the parent or guardian or other family member of the child, without the child present.

xxix) The interviewer should convey to all parties that no assumptions have been made about whether abuse has occurred.

xxx) The interviewer should take the time necessary to perform a complete evaluation and should avoid any coercive quality to the interview.

xxxi) Interview procedures may be modified in cases involving very young, minimally verbal children or children with special needs (e.g., developmentally delayed, electively mute, non-native speakers).

xxxii) Try to establish the child's developmental level in order to understand any limitations as well as appropriate interactions. It is important to realize that young children have little or no concept of numbers or time, and that they have limited vocabulary and may use terminology differently to adults, making interpretation of questions and answers a sensitive matter.

xxxiii) A variety of non-verbal tools may be used to assist young children in communication, including drawings, toys, dollhouses, dolls, puppets, etc. Since such materials have the potential to be distracting or misleading they should be used with care. They are discretionary for older children.

xxxiv) Storybooks, colouring books or videos that contain explicit descriptions of abuse situations are potentially suggestive and are primary teaching tools. They are typically not appropriate for information-gathering purposes.

In certain situations, the interviewer may consider it appropriate to interview the child victim together with his/her parent or guardian or other person in whom the child has trust and confidence. In such cases, the following guidance may be useful:

i) When possible, interviewing the primary caregiver and reviewing other collateral data first to gather background information may facilitate the evaluation process.

ii) The child should be seen individually, except when the child refuses to separate from a parent/guardian. Discussion of possible abuse with the child in the presence of the caregiver during evaluation interviews should be avoided except when necessary to elicit information from the child. In such cases, the interview setting should be structured to reduce the possibility of improper influence by the caregiver on the child's behaviour or statements.

iii) In some cases, joint sessions with the child and the non-accused caregiver or accused or suspected individual might be helpful to obtain information regarding the overall quality of the relationships. Such joint sessions should not be conducted for the purpose of determining whether abuse occurred based on the child's reactions to the participating adult. Joint sessions should not be conducted if they will cause significant distress for the child.

2. Children with special needs

i) It is important to understand that children may have special physical or mental needs, or a combination of both.

ii) Be aware that the risk of criminal victimization (including sexual assault) for children with special needs appears to be much higher than for those without such needs. Children with special needs are often victimized repeatedly by the same offender. Caretakers, family members, or friends may be responsible for the sexual abuse.

iii) Respect the child's wishes to have or not have caretakers, family members, or friends present during the interview. Although these persons may be accustomed to speaking on behalf of the child, it is critical that they not influence the statements of the child. If professional assistance is required (e.g., from a language interpreter or mental health professional) this should be arranged.

iv) Ideally those providing assistance should not be associated with the child. Thus as far as possible, avoid using a relative or friend of the child as an interpreter.

v) When preparing for the interview, consult with the adults in the child's world who understand the nature of his/her disability and are familiar with how the child communicates. Teachers and other professionals or paraprofessionals who have had experience in communicating with the child can be an invaluable resource to the interview team. This may include speech/language pathologists, educational psychologists, counsellors, teachers, clinical psychologists, social workers, nurses, child and adolescent psychiatrists, paediatricians, etc.

vi) Speak directly to a child with special needs, even when interpreters, intermediaries, or guardians are present. Assess the child's level of ability and need for assistance during the interview process.

vii) Note that not all children who are deaf or hard-of-hearing understand sign language or can read lips. Not all blind persons can read Braille. Be aware that a child with sensory disabilities may prefer communicating through an intermediary who is familiar with his/her patterns of speech. Ideally, this would be someone not associated with the child, but in some cases this may be necessary.

viii) The child may experience difficulty with the concept of time, such as the concept of before and after, and being able to sequence events. The child may not be able to accurately define when something happened. It may be helpful to link events with major activities in the child's life, school events, or routines such as mealtimes.

ix) Allow extra time for the interpreter to transfer the complete message to the child and for the child to form answers.

x) Recognize that the child may have also some degree of cognitive disability: mental retardation, mental illness, developmental disabilities, traumatic brain injury, etc. Note however that not all developmental disabilities affect cognitive ability (e.g., cerebral palsy may result in physical rather than mental impairment). Be aware that a child with cognitive disabilities may be easily

distracted and have difficulty focusing. Speak to the child in a clear, calm voice and ask very specific, concrete questions. Be exact when explaining what will happen during the medical examination process and why.

xi) Keep in mind that children with special needs may be reluctant to report the crime or consent to the examination for fear of losing their independence. For example, they may have to enter a long-term care facility if their caretakers assaulted them or may need extended hospitalization to treat and allow injuries to heal.

xii) While a child's special need may have resulted in him being more vulnerable to abuse, it is important to listen to his/her concerns about the assault and what the experience was like for them, and not focus on the role of his/her special need.

xiii) Assure the child that it is not his/her fault that he was sexually assaulted. If needed, encourage discussion in a counselling/advocacy setting if he/she is concerned about their safety in the future.

3. Procedures when interviewing parents/caregivers:

i) Inform parents/caregivers in an open and honest way of existing concerns and reports about their child or children;

ii) Explain how information about the case has been, and will be, obtained;

iii) Identify the professionals who have been contacted so far;

iv) Invite the parents/caregivers to give an explanation of their view of the concern;

v) Show a willingness to consider different interpretations of the concern;

vi) Ensure that the parents/caregivers are fully aware of the way that information is going to be assessed and evaluated, and what expectations are held of them about the way they care for and protect their children;

vii) Explain the legal context in which the concern is being investigated;

viii) If the concern arose from an incident perpetrated by one of the child's parents/ caregivers, the worker should try to gain the support and cooperation of the other parent/caregiver to facilitate ongoing protection of the child;

ix) A child should never be asked to discuss the possible abuse in front of an accused or suspected parent.

If it is considered necessary by CWC to remove a child from his/her parents/caregivers or their homes, then the following must be considered:[1]

i) In the first instance, all possible efforts should be made to place the child in a situation that is familiar, preferably with family or friends

ii) As far as possible, the timing of the move should be sensitively handled.

iii) The child's parents/caregivers should be informed of the action proposed, unless doing so would endanger the child or jeopardise the placement process.

1 Rule 4(5) and (6) of POCSO Rules, 2012 state that prior to making a determination as to whether the child needs to be taken out of the custody of his/her family or shared household, the inquiry should be conducted in a manner that does not unnecessarily expose the child to injury or inconvenience. Hence, these considerations would help ascertain the same.

iv) The child should be informed of the proposed action if he or she has not been involved in the decision.

v) The child's parents/caregivers should be informed of the child's location, unless otherwise directed by the Court.

vi) The child's parents/caregivers should be advised about and assisted in obtaining legal advice.

4. Best practice principles for the use of interpreters

Interpreters may be needed during both the investigation and trial of cases of child sexual abuse. They may be needed for witnesses and for parties who speak a language different from that of the Court in that State, or for witnesses and parties who have speech or hearing impairments or other communication difficulties.

The police or SJPU may contact the District Child Protection Unit (DCPU), whose responsibility it is under the POCSO Act and Rules, 2012 to provide interpreters, translators, etc. Where an interpreter is not available, a non-professional may be asked to interpret for the child; however, in these cases, it must be ensured that there is no conflict of interest. For example, where there is an allegation of child sexual abuse against the child's father, the mother should not be asked to interpret.

i) Promote access to interpreter services in order to facilitate the best possible communication with the child, to ensure everything is fully explained and that there is no room for misinterpretation.

ii) Be clear with the interpreter about roles and responsibilities in the process of engagement with the family. Interpreters need to understand that their role is to translate direct communications between the police or support person etc. and the family members, not to talk on either party's behalf or act as the family's representative.

iii) Services must be planned ahead where possible to meet the child's needs.

iv) Interpreter should declare that there is no prior acquaintance or relationship with the victim/ witness

v) Maintain high quality, timely, precise records along with supporting documents; as far as possible, this should be a verbatim record of the communication.

vi) There should be a record of a child's interpreter needs, including language and dialect, and whether the interpreter is required for oral and written communication. Where an interpreter is offered but declined by the child, this should also be recorded.

vii) Promote qualified interpreters who can work in partnership in the best interests of the child.

viii) Interpreters should be subject to references and background checks and must sign a written agreement regarding confidentiality.

Medical and Health Professionals (Doctors and supporting medical staff)

1. Relevant Legal Provisions in the Act and Rules and related laws:

Section 27 – Medical Examination:

27.(1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been

registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973.

(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

Rule 5 - Emergency medical care:

(1) Where an officer of the SJPU, or the local police receives information under section 19 of the Act that an offence under the Act has been committed, and is satisfied that the child against whom an offence has been committed is in need of urgent medical care and protection, he shall, as soon as possible, but not later than 24 hours of receiving such information, arrange to take such child to the nearest hospital or medical care facility centre for emergency medical care:

Provided that where an offence has been committed under sections 3, 5, 7 or 9 of the Act, the victim shall be referred to emergency medical care.

(2) Emergency medical care shall be rendered in such a manner as to protect the privacy of the child, and in the presence of the parent or guardian or any other person in whom the child has trust and confidence.

(3) No medical practitioner, hospital or other medical facility centre rendering emergency medical care to a child shall demand any legal or magisterial requisition or other documentation as a pre-requisite to rendering such care.

(4) The registered medical practitioner rendering emergency medical care shall attend to the needs of the child, including --

(i) treatment for cuts, bruises, and other injuries including genital injuries, if any;

(ii) treatment for exposure to sexually transmitted diseases (STDs) including prophylaxis for identified STDs;

(iii) treatment for exposure to Human Immunodeficiency Virus (HIV), including prophylaxis for HIV after necessary consultation with infectious disease experts;

(iv) possible pregnancy and emergency contraceptives should be discussed with the pubertal child and her parent or any other person in whom the child has trust and confidence; and,

(v) wherever necessary, a referral or consultation for mental or psychological health or other counselling should be made.

(5) Any forensic evidence collected in the course of rendering emergency medical care must be collected in accordance with section 27 of the Act.

Thus, doctors and support medical staff are involved both at the time of rendering emergency medical care as well as at the time of medical examination.

2. Emergency Medical care:

The child may be brought to the hospital for emergency medical care as soon as the police receive a report of the commission of an offence against the child. In such cases, the rules under the POCSO Act, 2012 prescribe that the child is to be taken to the nearest hospital or medical care facility. This may be a government facility or a private one.

This is reiterated by Section 23 of the Criminal Law Amendment Act, which inserts Section 357C into the Code of Criminal Procedure, 1973. This section provides that all hospitals are required to provide first-aid or medical treatment, free of cost, to the victims of a sexual offence.

2.1 Medical Examination:

Medical examination is to be conducted as per the provisions of Section 27 of the POCSO Act, 2012 and Section 164A of the CrPC, 1973 which states:

(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of a such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her and prepare a report of her examination giving the following particulars, namely:-

(I) the name and address of the woman and of the person by whom she was brought;

(II) the age of the woman;

(III) the description of material taken from the person of the woman for DNA profiling;

(IV) marks of injury, if any, on the person of the woman;

(V) general mental condition of the woman; and

(VI) other material particulars in reasonable detail.

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

(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

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

(6) The registered medical practitioner shall, without delay forward the report to the investigation 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.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

In the above legal provision, the term "woman" may be substituted by the term "child", and applied in the context of the POCSO Act, 2012.

2.2 Compensation for medical expenses:

Section 33(8) provides:

"In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child."

Rule 7 provides further details in relation to the payment of this compensation. It specifies that the Special Court may order that the compensation be paid not only at the end of the trial, but also on an interim basis, to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report [Rule 7(1)]. This could include any immediate medical needs that the child may have. Further, Rule 7(3) provides that the criteria to be taken into account while fixing the amount of compensation to be paid include the severity of the mental or physical harm or injury suffered by the child; the expenditure incurred or likely to be incurred on his/ her medical treatment for physical and/or mental health; and any disability suffered by the child as a result of the offence. Hence, the child may recover the expenses incurred on his/her treatment in this way.

3. Modalities of Medical Examination of Children

3.1 Role of Medical Professionals in the context of the POCSO Act, 2012

Doctors have a dual role to play in terms of the POCSO Act 2012. They are in a position to detect that a child has been or is being abused (for example, if they come across a child with an STD); they are also often the first point of reference in confirming that a child has indeed been the victim of sexual abuse.

The role of the doctor may include:

i) Having an in-depth understanding of sexual victimization

ii) Obtaining a medical history of the child's experience in a facilitating, non- judgmental and empathetic manner

iii) Meticulously documenting historical details

iv) Conducting a detailed examination to diagnose acute and chronic residual trauma and STDs, and to collect forensic evidence

v) Considering a differential diagnosis of behavioural complaints and physical signs that may mimic sexual abuse

vi) Obtaining photographic/video documentation of all diagnostic findings that appear to be residual to abuse

vii) Formulating a complete and thorough medical report with diagnosis and recommendations for treatment

viii) Testifying in court when required

There are at least three different circumstances when there is no direct allegation but when the doctor may consider the diagnosis of sexual abuse and have to ask questions of the parent and child. These include but are not limited to:

(i) when a child has a complaint that might be directly related to the possibility of sexual abuse, such as a girl with a vaginal discharge;

(ii) when a child has a complaint that is not directly related to the possibility of sexual abuse, such as abdominal pain or encopresis (soiling);

(iii) when a child has no complaint but an incidental finding, such as an enlarged hymenal ring, makes the doctor suspicious.

3.2 Mandatory Reporting: When a doctor has reason to suspect that a child has been or is being sexually abused, he/she is required to report this to the appropriate authorities (i.e. the police or the relevant person within his/her organization who will then have to report it to the police). Failure to do this would result in imprisonment of up to six months, with or without fine.[2]

3.3 Medical or health history: The purpose of this is to find out why the child is being brought for health care at the present time and to obtain information about the child's physical or emotional symptoms. It also provides the basis for developing a medical diagnostic impression before a physical examination is conducted. The medical history may involve information about the alleged abuse, but only in so far as it relates to health problems or symptoms that have resulted there from, such as bleeding at the time of the assault, or constipation or insomnia since that time.

Where a child is brought to a doctor for a medical examination to confirm sexual abuse, the doctor must:

i) Take the written consent of the child. The three main elements of consent are information, comprehension and voluntariness. The child and his/her family should be given information about the medical examination process and what is involved therein, so that they can choose whether or not to participate. Secondly, they should be allowed enough time to understand the information and to ask questions so that they can clarify their doubts. Lastly, the child and/or his or her parent/guardian should agree to the examination voluntarily, without feeling pressurised to do so. In some situations it may be appropriate to spend time with the child/adolescent alone, without the parent/guardian present. This may make it easier for the child to ask questions and not feel coerced by a parent/guardian.

ii) Where the child is too young or otherwise incapable of giving consent, consent should be obtained from the child's parent, guardian or other person in whom the child has trust and confidence.

iii) The right to informed consent implies the right to informed refusal.

iv) To be able to give informed consent, the child and his/ her parents/guardian need to understand that health care professionals may have a legal obligation to report the case and to disclose information received during the course of the consultation to the authorities even in the absence of consent.

v) Document who was present during the conversation with the child.

vi) Document questions asked and child's answers in the child's own words.

vii) Conduct the examination in a sensitive manner. It is important that the exam is never painful. The exam should be done in a manner that is least disturbing to the child.

2 Section 21, Protection of Children from Sexual Offences Act, 2012.

viii) Focus on asking simply worded, open-ended, non-leading questions, such as the "what, when, where, and how" questions, which are important to the medical evaluation of suspected child sexual abuse.

ix) Reliance should be placed as far as possible on such questioning as "tell me more" followed by "and then what happened?"

x) Do not ask uncomfortable questions related to details of the abuse, but try to find out more about the medical and family history of the child

xi) Using the child's words for body parts may make the child more comfortable with difficult conversations about sexual activities.

xii) Using drawings may also help children describe where they may have been touched and with what they were touched.

xiii) Ensure that the child has adequate privacy while the examination is being conducted

xiv) Do not conduct the examination in a labour room or other place that may cause additional trauma to the child

xv) Always ensure patient privacy. Be sensitive to the child's feelings of vulnerability and embarrassment and stop the examination if the child indicates discomfort or withdraws permission to continue.

xvi) Always prepare the child by explaining the examination and showing equipment; this has been shown to diminish fears and anxiety. Encourage the child to ask questions about the examination.

xvii) If the child is old enough, and it is deemed appropriate, ask whom they would like in the room for support during the examination. Some older children may choose a trusted adult to be present. Sexual abuse of children is usually not physically violent. In the large majority of children the physical exam is normal. A normal or non-specific exam does not rule out sexual abuse.

xviii) As a minimum, the medical history should cover any known health problems (including allergies), immunization status and medications. In terms of obtaining information about the child's general health status, useful questions to ask would be:

- **a)** Tell me about your general health.
- **b)** Have you seen a nurse or doctor lately?
- **c)** Have you been diagnosed with any illnesses?
- **d)** Have you had any operations?
- **e)** Do you suffer from any infectious diseases?

xix) Carefully collect and preserve forensic evidence

xx) Clothing collection is critical when evidence is collected. Clothing, especially underwear, is the most likely positive site for evidentiary DNA.

xxi) Scene investigation, including collection of linens and clothing should be done early. Evidence from clothing and other objects is more likely to be positive than evidence from the patient's body.

xxii) Children often report weeks or months after the abuse event, and physical injuries to the genital or anal regions usually heal within a few days. This is why the medical provider should always consider differential diagnosis and alternative explanations for physical signs and symptoms.

xxiii) In the case of a child with special needs, ensure that the procedures are explained to the child in a manner which he/she understands and that he/she is asked what help he/she requires, if any (e.g., a child with physical disabilities may need help to get on and off the medical examination table or to assume positions necessary for the examination). However, do not assume that the child will need special aid. Also, ask for permission before proceeding to help the child.

xxiv) Recognize that it may be the first time the child is having an internal examination. The child may have very limited knowledge of reproductive health issues and not be able to describe what happened to them. He/she may not know how he/she feels about the incident or even identify that a crime was committed against him/ her.

xxv) Wherever necessary, refer the child for counselling

xxvi) Wherever applicable, refer the child for testing for HIV and other Sexually Transmitted Diseases

3.4 If the child resists the examination

i) If a child of any age refuses the genital-anal examination, it is a clinical judgment of how to proceed. A rule of thumb is that the physical exam should not cause any trauma to the child. It may be wise to defer the examination under these circumstances.

ii) It may be possible to address some of the child's fears and anxieties (e.g. a fear of needles) or potential sources of unease (e.g. the sex of the examining health worker). Further, utmost comfort and care for the child should be provided e.g., examining very small children while on their mother's (or caregiver's) lap or lying with her on a couch.

iii) If the child still refuses, the examination may need to be deferred or even abandoned. Never force the examination, especially if there are no reported symptoms or injuries, because findings will be minimal and this coercion may represent yet another assault to the child.

iv) The child should not be held down or restrained for the examination (exception for infants or very young toddlers).

3.4.1 Techniques to help the child relax

i) Offer clear age-appropriate explanations for the reasons for each procedure, and offer the child some control over the exam process.

ii) Proceed slowly, explain each step in advance.

iii) Use curtains to protect privacy, if the child wishes.

iv) Explain to parent or support person that their job is to talk to and distract the child, and the findings of the exam will be discussed with them after the exam is completed.

v) Position the parent near the child's head.

vi) Use distracters. For example, ask the parent to sing a song, or tell a familiar story, or read a book to the child. A nurse or other helper can do this if the parent is unable.

vii) Use TV, cell phone game, or other visual distraction.

viii) Do not forcibly restrain the child for the examination

3.5 Sedation for Medical Treatment

i) Sedation is rarely needed if the child is informed about what will happen and there is adequate parental support for the child.

ii) Consider sedation or a general anesthetic only if the child refuses the examination and conditions requiring medical attention, such as bleeding or a foreign body, are suspected.

iii) If it is known that the abuse was drug-assisted, the child needs to be told that he/ she will be given a sedative or be put to sleep, that this may feel similar to what he/ she has experienced in the past.

iv) Reassure the child about what will take place during the time under sedation and that he/she will be informed of the finding.

v) However, conscious sedation is an option if examination and evidence collection is required, and the child is not able to cooperate.

vi) Speculum exam on a pre-pubertal girl should be done under anaesthesia, not conscious sedation.

3.6 The following pieces of information are essential to the medical history:

i) Last occurrence of alleged abuse (younger children may be unable to answer this precisely). When do you say this happened?

ii) First time the alleged abuse occurred. When is the first time you remember this happening?

iii) Threats that were made.

iv) Nature of the assault, e.g. anal, vaginal and/or oral penetration. What area of your body did you say was touched or hurt? (The child may not know the site of penetration but may be able to indicate by pointing. This is an indication to examine both genital and anal regions in all cases.)

v) Whether or not the child noticed any injuries or complained of pain.

vi) Vaginal or anal pain, bleeding and/or discharge following the event. Do you have any pain in your bottom or genital area? Is there any blood in your panties or in the toilet? (Use whatever term is culturally acceptable or commonly used for these parts of the anatomy.)

vii) Any difficulty or pain with voiding or defecating. Does it hurt when you go to the bathroom? (indication to examine both genital and anal regions in all cases.)

viii) Any urinary or faecal incontinence.

ix) Whether or not the child noticed any injuries or complained of pain.

x) In case of children, illustrative books, body charts or a doll can be used if available, to elicit the history of the assault. When it is difficult to elicit history from a child, please call an expert.

3.7 When performing the head-to-toe examination of children, the following points are particularly noteworthy:

i) Record the height and weight of the child (neglect may co-exist with sexual abuse). Note any bruises, burns, scars or rashes on the skin. Carefully describe the size, location, pattern and colour of any such injuries.

ii) Check for any signs that force and/or restraints were used, particularly around the neck and in the extremities.

iii) Record the child's sexual development stage and check the breasts for signs of injury.

iv) If the survivor is menstruating at the time of examination then a second examination is required on a later date in order to record the injuries clearly.

v) Some amount of evidence is lost because of menstruation. Hence it is important to record whether the survivor was menstruating at the time of assault/examination.

vi) The same applies to bathing, douching, defecating, urinating and use of spermicide after the assault.

3.8 Role of Medical Professionals as Expert Witnesses

Deciding cases of child sexual abuse would be much easier if it left clear-cut physical evidence. Unfortunately, child sexual abuse often leaves no such evidence. Child sexual abuse is often exceedingly difficult to prove. It usually occurs in secret, often over a prolonged period of time, and does not always leave physical marks; in addition to this, the child is usually the only eyewitness. While many children are capable witnesses, some cannot give conclusive testimony, and consequently, children's testimony is sometimes ineffective. In such cases, the testimony of an expert medical witness can be useful. Physicians can provide opinion testimony that is based upon the child's history, statements, and medical examination, even if the physician's examination of the child reveals no concrete physical evidence supportive of the child's allegations.

i) Courts in India in their judgments described an expert as a person who has acquired special knowledge, skill or experience in any art, trade or profession. Experts have knowledge, skill, experience, or training concerning a particular subject matter may have been obtained by practice, observation or careful study. The expert thus operates in a field beyond the range of common knowledge.

ii) Expert evidence is covered under Ss.45-51 of Indian Evidence Act. The subjects of expert testimony mentioned by the section are foreign law, science, art and the identity of handwriting or finger impressions.

iii) In general, whether or not the testimony of an expert will be useful in any given case is almost always left to the discretion of the trial judge before whom the testimony is proffered. However, even where the Court has some degree of knowledge or familiarity with the subject, an expert's testimony may be valuable to add insight and depth its understanding of the matter, or to educate them as to commonly held prejudices and misconceptions which might negatively impact upon an impartial and just decision.

iv) In general, the opinions of medical professionals are admissible upon questions such as insanity, the causes of diseases, the nature of the injuries, the weapons which might have been used to cause injuries or death, medicines, poisons, the conditions of gestation, etc. In the case of questions pertaining to age determination, positive evidence furnished by birth register, by members of the family, with regard to the age, will have preference over the opinion of the doctor: but, if the

evidence is wholly unsatisfactory, and if the ossification test in the case is complete, such a test can be accepted as a surer ground for determination of age.

v) In their testimony regarding a forensic examination, medical professionals typically describe the process of examining the victim, the physical findings that were observed, and their interpretation. It is important to remember that the medical professional cannot be asked to testify to "diagnose" sexual abuse. The doctor cannot make any definitive conclusions regarding the degree of force used by the abuser or whether the victim consented to any sexual activity. What he/she can appropriately conclude is whether there is evidence of sexual contact and/or recent trauma. He/she can state whether the medical history and examination are consistent with sexual abuse.

vi) In many child abuse cases, experts have firsthand knowledge of the child because the expert treated or examined the child. However, an expert may be called upon to render an opinion concerning a child without personally examining the child.

vii) However, it is important to remember that doctors are rarely expert in interviewing, and often assume the truth of what the patient tells them. The testimony is presented as if the doctor's opinion is based on physical findings when it is not. It is often largely or wholly based on statements made, a far different and less scientific basis than objective findings upon examination.

viii) In addition to this, opinions may be sought from mental health experts as to the psychological effects of child sexual abuse, such as PTSD and Child Sexual Abuse Accommodation Syndrome.

ix) It is for the legal representative who proposes the use of expert testimony to establish his/her credentials, preferably listing his/her formal qualifications.

The adequancy of the qualification of the expert and the admissibility of his/her testimony are within the discretion of the Special Court.

x) Before giving evidence the expert will usually have prepared a report, either assessing one or more parties to the case or assessing other experts' reports. His/ her report should be reliable on the basis of the following criteria:

a) It should provide a context in layman's terms from which to understand the basis of his/her opinion

b) It should be clear when the expert is stating corroborated fact and when he/ she is merely repeating what he/she has been told by the alleged offender. Assertions which are based entirely on the alleged offender's perception are likely to be misleading.

c) The expert must review the information impartially rather than ignore matters which are inconvenient to his/her conclusions.

d) The report should avoid restating incidental trivia and give preference to examining and analysing the crucial issues of the case.

e) The expert should demonstrate knowledge of the process and dynamics of child sexual abuse and help to make sense of the child's and non-abusing parent's experiences and perceptions. Victims and non-abusing partners of offenders often do not act rationally and can appear collusive with the offender, whereas their behaviour results from the control the offender exercises over them. It is useful to have this explained in the expert report.

f) All professions have their exclusive language, but it is best that the expert present the issues in language that the court, advocate and parties can understand.

g) The expert must not rely solely on quoted research to support his/her arguments, and should refer to clinical experience as well.

An expert opinion must be premised on a reasonable degree of certainty. The expert cannot speculate or guess. It is clear, however, that an expert need not be absolutely certain about a subject before offering an opinion. All that is required is reasonable clinical certainty.

It is important to remember that while an expert's testimony may be deemed relevant, necessary, reliable, and therefore admissible under the aforementioned guidelines, it is ultimately the prerogative of the judge to determine what weight should be afforded the testimony. No matter how qualified the expert, the court is not bound by an expert's conclusions and can exercise its discretion in this regard, keeping in mind all the other evidence presented to it.

4. FAQs on Medical Examination

Doctors may be faced with some of these questions from children as well as parents and caregivers:

i) Why is the medical examination necessary?

The medical exam is a very important tool in evaluating sexual abuse. The physical examination can identify both new and old injuries, detect sexually transmitted diseases and provide evidence of sexual contact. If done in a sensitive manner, the examination can answer any questions or concerns the child may have and reassure the child about their well-being and that their body is private. The exam also has evidentiary value in a court of law.

ii) The last time my child was touched in a sexually inappropriate manner was over a year ago. Is the medical exam still necessary?

Yes. Most children reveal their experience of abuse after a long time has passed, for example, when they are older or feel that they are no longer in danger of being abused again. Some even reveal it accidentally. In such cases, the medical examination can reassure the child about their well-being and address any worried the child may have about the injuries they suffered due to the abuse. Some children may have injuries that healed a long time ago but can be seen with the help of special equipment.

iii) Is the examination uncomfortable for the child?

No. the examination itself is rarely physically uncomfortable for the child; however, what may cause discomfort is the attitude of the person conducting the examination. For this reason, it is important that all medical health care professionals be trained in conducting medical examinations of children in a sensitive manner. The doctor is expected to explain the procedure to the child and his/ her parents and obtain their consent prior to conducting the examination, as well as answer any questions they may have.

iv) Can the parent(s) be present while the examination is being conducted?

Yes. Section 27 of the new POCSO Act, 2012 specifically requires that the examination be conducted in the presence of the child's parents/ guardian or other person in whom the child has trust and confidence.

v) Is the medical examination of the child conducted in the same manner as an adult female gynaecological examination?

vi) Will the doctor/ nurse be able to tell if there was penetration?

vii) How is the examination of a boy different from that of a girl?

viii) Why can't a family doctor or another doctor known to the child do the examination?

ix) Will the child be tested for HIV/ STDs?

x) Will the doctor/nurse give evidence in court if needed?

xi) Will the child have to be sedated for the examination?

xii) Where will the medical examination be conducted?

xiii) Who will conduct follow-up examinations, in case the child needs treatment for STDs or HIV?

xiv) What happens after the medical exam, will the child and his/her parents be allowed to see the report?

xv) What about the child's mental health needs?

Psychologists and Mental Health Experts

1. Relevant Legal Provisions in the Act and Rules and related laws:

Rule 4(2)(e): *Where an SJPU or the local police receives any information under sub-section (1) of section 19 of the Act, they must inform the child and his/her parent or guardian or other person in whom the child has trust and confidence of the availability of support services including counselling, and assist them in contacting the persons who are responsible for providing these services and relief*

Rule 5 (4) (v): *Wherever necessary, a referral or consultation for mental or psychological health or other counselling should be made by the medical professional rendering emergency medical care to the child.*

Thus, the rules made under the POCSO Act, 2012 provide that the child may be referred for counselling either by the police or by a doctor.

2. Counsellors

2.1 Role of Counsellors

The counsellor's duties will include:

i) To understand the child's physical and emotional state

ii) To resolve trauma and foster healing and growth

iii) To hear the child's version of the circumstances leading to the concern

iv) To respond appropriately to the child when in crisis

v) To provide counselling, support, and group-based programs to children referred to them

vi) To improve and enhance the child's overall personal and social development, and his/her health and wellbeing

vii) To facilitate the reintegration of the child into his/her family/ community

2.2 Who may be appointed as a Counsellor?

Counselling for children and families at risk is an integral component of the ICPS. The ICPS envisages the development of a cadre of counsellors to provide professional counselling services under various components of the scheme. Counselling may be provided under ICPS by any of the following:

i) CHILDLINE Service

ii) Counsellors appointed by the District Child Protection Society, who will report to the Legal-cum-Probation Officer and will be responsible for providing counselling support to all children and families coming in contact with the DCPS

iii) NGOs and other voluntary sector organisations

In all cases of penetrative sexual assault and all aggravated cases, arrangements should be made as far as possible to ensure that the child is provided counselling support. Where a counsellor is not available within the existing ICPS framework, the State Government may secure the engagement of external counsellors on contract basis.

2.3 Criteria for engagement as Counsellor

In order to enable the engagement of counsellors from outside the ICPS, including senior counsellors for the more aggravated cases, the DCPU in each district shall maintain a list of persons who may be appointed as counsellors to assist the child. These could include mental health professionals employed by Government or private hospitals and institutions, as well as NGOs and private practitioners outside the ICPS mechanism, chosen on the basis of objective criteria.

As indicative criteria, for any counsellor engaged to provide services to a sexually abused child, a graduate degree, preferably in Sociology/ Psychology (Child Psychology)/ Social Work is a must. In addition to this, at least 2 to 3 years of work experience related to providing counselling services to children in need of care and protection as well as their parents and families and training on handling cases of child sexual abuse is essential in order to ensure that the child receives counselling from those qualified for and experienced in providing it.

2.4 Counselling Services under the Integrated Child Protection Scheme: Training of personnel

Counselling can be difficult for children because of the nature of being a child and the difficulty in relating to an adult, especially an adult that they don't know. Counselling for abused children therefore requires that the counsellor is trained in the subject and understands how children communicate. The ICPS therefore provides that only trained professionals provide services (including counselling) to children.

If untrained persons are holding these posts, the State Government or the Officer- in-charge should provide for in-service training to them. The State Government may take the help of NIPPCD, National Institute of Social Defence (NISD), NIMHANS and recognized schools/institutes of social work or expert bodies/institutions specialized in child related issues for organizing specialized training programmes for different categories of personnel. The training programmes should include issues relating to child rights, child psychology, handling children sensitively, counselling, life skills training, dealing with problem behaviour, child sexual abuse and its impact, child development, trauma, neurobiology, handling disclosure and basic counselling skills. These training programmes could be arranged as:

i) Orientation and training for newly-recruited staff and in-service training for existing staff.

ii) Refresher training courses for every staff member at least once in every two years.

iii) Participation in periodic staff conferences, seminars and workshops with the various other stakeholders or functionaries of the Juvenile Justice System and the State Government at various levels.

2.5 Payment to Counsellors

Counsellors employed by the DCPU are entitled to receive their monthly salaries at the predetermined rates. They will be performing their duties in relation to the POCSO Act, 2012 in the scope of their work and will not receive additional remuneration for this work, except reimbursement of local travel costs and other miscellaneous expenditure.

Counsellors engaged externally may be remunerated from the Fund constituted by the State Government under Section 61 of the JJ Act, or under any other Fund set up by the State Government for this purpose. The rates for payment shall be as fixed by the DCPU.

2.6 Basic Principles of Counselling Young Children

Sexually abused children are traumatised and vulnerable. They may show certain identifiable behavioural signs of abuse, but often, these are not immediately obvious and will reveal themselves only over a period of time. As a counsellor, one must be aware of the signs of sexual abuse. Children often find it very difficult to disclose sexual abuse, due to the following reasons:

3. Why a child may not disclose abuse Reasons include but are not limited to:

i) He/she is embarrassed

ii) He/ she does not know if what is happening to them is normal or not

iii) He/ she does not have the words to speak out

iv) The abuser is a known person and the child does not want to get them in trouble

v) The abuser told the child to keep it a secret

vi) The child is afraid that no one will believe him/ her

vii) The abuser bribes or threatens the child

viii) He/ she thinks you already know

Being aware of these signs would alert the counsellor to the possibility of sexual abuse.

4. Indicators

4.1 Behavioural Indicators:

i) Abrupt changes in behaviour such as self harm, talks of suicide or attempt to suicide, poor impulse control etc.

ii) Reluctance to go home.

iii) Sexualised behaviour or acting out sexually.

iv) Low self-esteem.

v) Wearing many layers of clothing regardless of the weather.

vi) Recurrent nightmares or disturbed sleep patterns and fear of the dark.

vii) Regression to more infantile behaviour like bed-wetting, thumb-sucking or excessive crying.

viii) Poor peer relationships.

ix) Eating disturbances.

x) Negative coping skills, such as substance abuse and/or self-harm.

xi) An increase in irritability or temper tantrums.

xii) Fears of a particular person or object.

xiii) Aggression towards others.

xiv) Poor school performance.

xv) Knowing more about sexual behaviour than is expected of a child of that age:

a) child may hate own genitals or demand privacy in an aggressive manner.

b) child may think of all relationships in a sexual manner.

c) child may dislike being his/her own gender.

d) child may use inappropriate language continuously in his or her vocabulary or may use socially unacceptable slang.

e) child may carry out sexualised play (simulating sex with other children).

f) Unwarranted curiosity towards sexual act like visiting adult sites or watching adult images or content.

4.2 Physical Indicators:

i) Sexually transmitted diseases,

ii) Pregnancy,

iii) Complaints of pain or itching in the genital area,

iv) Difficulty in walking or sitting,

v) Repeated unusual injuries,

vi) Pain during elimination, and

vii) Frequent yeast infections.

7. Effects of child sexual abuse

Counsellors have a very important role to play in limiting the short-term and long term effect of child sexual abuse. These are as below:

i) Feeling of powerlessness;

ii) Anger;

iii) Anxiety;

iv) Fear;

v) Phobias;

vi) Nightmares;

vii) Difficulty concentrating;

viii) Flashbacks of the events;

ix) Fear of confronting the offender

x) Loss of self esteem and confidence

xi) Feelings of guilt

If childhood sexual abuse is not treated, long-term symptoms can go on through adulthood. These may include:

i) PTSD and anxiety

ii) Depression and thoughts of suicide

iii) Sexual anxiety and disorders, including having too many or unsafe sexual partners

iv) Difficulty setting safe limits with others (e.g., saying no to people) and relationship problems

v) Poor body image and low self-esteem

vi) Unhealthy behaviours, such as alcohol, drugs, self-harm, or eating problems. These behaviours are often used to try to hide painful emotions related to the abuse

vii) Issues in maintaining relationships

8. The language of the child

i) The first step in counselling a sexually abused child is to establish a trusting relationship with the child, so that the child can communicate freely with the counsellor. Thus, the counsellor would need to speak to the child in its own language, taking into account his or her age, maturity and emotional state.

ii) It is important to explain the purpose of counselling to the child and to explain that it will include discussion about the abuse suffered by the child. This will help the child to be prepared for the discussion, and prevent him or her from withdrawing when an uncomfortable topic comes up.

iii) Allow for free flow of talk without too many intensive questions. Don't begin questioning the child immediately about his/her problem.

iv) Try not to be intimidating authoritarian or too patronizing. Don't control the child's conversation – follow the child's lead.

v) Children often lack the vocabulary to discuss sexual acts, and it is important for the counsellor to be aware of the child's sensitivities and difficulties before talking about sexual issues with him or her. To gain this insight, all relevant legal, medical and family history of the case should be collected from the Probation Officer or parents/guardian.

vi) While the police or other investigative agency may have already obtained a disclosure from the child about the main incident of abuse, the child's sessions with the counsellor may reveal new incidents. It is thus advisable to get the counsellor involved as early as possible into the pre-trial process.

9. How to respond if the child discloses abuse

i) Believe him or her. The most important thing is to believe the child. Children rarely lie about abuse; what is more common is a child denying that abuse happened when it did. Tell the child you believe him/her.

ii) Don't be emotionally overwhelmed and try to remain composed while talking to the child.

iii) Do not interrogate the child. It can be traumatic for the child to repeat his/her story numerous times. Leave the questioning to the legal and police personnel.

iv) Reassure the child that the abuse is not their fault. The child's greatest fear is that he or she is responsible for the abuse. Be sure to make it clear that what happened is not a result of anything he/she did or did not do. This is particularly important when the accused person is a member of the child's family, such as his or her father, and the child feels guilty at having put that person to trouble. Reassure them that prompt and adequate steps will be taken to stop the abuse.

v) Do not make promises you can't keep. Do not make promises such as the child will never have to see the abuser again, that nothing will change, or other such promises.

vi) Believing and supporting the child are two of the best actions to start the healing process. Appropriate and helpful responses to disclosures are as follows:

a) "I am glad you told me, thank you for trusting me."

b) "You are very brave and did the right thing."

c) "It wasn't your fault."

The counsellor should be aware that the effects of child sexual abuse are long-term and can change the world view and the course of life of the child. The first step in the healing process is for the child to talk about the abuse, and it is the counsellor's duty to facilitate this; however, the process of recovery may be long and the child will have other needs that the counsellor can attend to. These include:

i) Rapport Building,

ii) working on the feelings of the child,

iii) Psychological Education on safe and unsafe touches, feelings, thoughts and behaviour, safer coping techniques

iv) Helping the child to understand the abuse was not their fault;

v) Helping the child to develop of or regain their self-confidence;

vi) Provide sex education;

vii) Encourage appropriate social behaviour;

viii) Help the child to identify people who can form a supportive social environment around him or her.

The counsellor is therefore a very important tool for the child in rebuilding his or her life after he has been sexually abused.

8. Counselling for families

Having to cope with the abuse of their own child may be the most difficult challenge of a parent's life. If the parent(s) can get counselling for themselves through this difficult period, it will also help the child with his/her counselling.

8.1 Experience of parents after a child sexual abuse disclosure

When parents first find out about their children being sexually abused, they will experience a wide range of feelings. They may experience denial, anger, betrayal, confusion and disbelief. Parents often tend to blame themselves for not paying attention to their child's behaviours or complaints earlier on. They may feel that they have failed as parents and they didn't protect their children. For some parents they may wonder why their children didn't disclose to them directly but to others. Some parents also become angry at themselves or at their spouses for not supporting the family. In addition to a wide range of emotional experiences, parents may also experience insomnia, change of appetite or other physical complaints.

Some parents also feel conflicting emotions, especially if the accused perpetrator is someone they have trusted, a close friend or a family member. There may be feelings of loyalty and love towards the offending person as well as towards the victim. Family members may choose sides with some believing it happened and others refusing to believe it could have. Parents may disagree about how to handle the situation.

If the offender is the spouse or partner of the parent, what the relationship is like can strongly influence the parent's actions once he/she learns of the abuse. If feelings toward the offending spouse/partner are positive or mixed, decisions about staying together, or to divorce or separate will be more difficult to sort through.

Parents may be faced with making decisions about whether to continue the relationship with the offender, how to deal with contact between the offender and the child, and re-establishing trust and communication in the family.

The feelings a parent has toward the offender may affect a parents' ability to believe in and support the child. When offenders deny or minimize the abuse or blame the child the situation gets very complicated. If a parent doesn't believe a child who has been abused and supports the offender, there can be severe damage to the child. The child will feel betrayed by the parent as well as the offender. What every child victim needs is to be believed and to know that he or she is not at fault.

When the parent is able to support and stand up for the child, the child has an excellent chance of recovering from the effects of sexual abuse. It is very important to get help and support for their feelings because parents' reactions make a big difference in children's recovery. Families are children's most important resource for recovery.

8.2 Coping after the child's sexual abuse disclosure:

i) The parents should be advised to try not to completely immerse themselves in supporting or worrying about their child. No matter how much they love and care about their family, they also need to consciously set aside time for their own needs.

ii) As they are dealing with the police investigation, social workers' interview or other professionals regarding their child's sexual abuse disclosure, it is especially important for them to take care of themselves physically and emotionally.

iii) Their child needs their care and their attention during this time of confusion and overwhelming circumstances. If they are experiencing insomnia or depression, they may need to talk to their doctor about treatment or seek professional counselling.

iv) They should be advised to find diversions that will lighten their emotional load and recharge their ability to give support. If they have a spouse, partner or other children, they should spend time with them. They should demonstrate to their child that there is life beyond what has happened. This will also aid the child's recovery process and help the child go on with his or her own life.

v) They may find that they feel over-protective towards their child and do not want to let them out of their sight. However, it is important not to restrict the child's play for their own peace of mind – the child will feel they are punishing him/her by not letting him/her play with friends. Playing is also a kind of therapy.

vi) The parents should allow the child, as far as possible, to carry on with his/ her normal activities and encourage the child to participate in any activities available either at school or in the community. This will divert the child's attention and help him/ her to understand that things will eventually get better.

vii) As they try to deal with the sexual abuse of their child, they may start to piece together many clues and indicators of the child abuse that went unnoticed earlier. This information will help them to understand what their child has gone through and the impact on him or her.

viii) However, it may also increase their sense of guilt and they may blame themselves for not acting earlier. It is important for such a parent to be told that no parent/caregiver can be everywhere all the time. Instead of tormenting themselves, they should share with an understanding family member or friend about their feelings and emotions; this will help them to move on.

ix) Where the abuser is not a parent, it is crucial for both parents to support each other during this critical and painful time. Blaming each other for not protecting their child will not help solve the problem. Open or secret blaming on one of the parents will further impact their child's sense of safety and sense of security. Their child has already been violated and has experienced lack of safety. Therefore, it is critical for both parents to focus on supporting the child as a team. A crisis like this may put a strain on their relationship, especially a relationship that has already been shaky or difficult.

x) They naturally want to comfort, heal and protect their child in the aftermath of a traumatic experience, but their own physical and emotional energy isn't limitless. If they try to give too much of themselves throughout the recovery process, they may find themselves resenting or withdrawing just when their child needs they most. No one person -- not even a parent -- can give a child all the support they need, so they should help their child to spend „quality time' with other people who care about them and can support in their recovery.

xi) Seeking professional counselling is important especially if their child's or their behavioural & emotional reactions do not subside. Seeking professional help earlier on can be very helpful. Talk to a counsellor or a therapist for a few sessions to debrief and process their emotions regarding the child's sexual abuse incident as well as their confusion. A trained professional will be able to facilitate a healing and closure for them. It is important for them to be able to find strengths to support and reassure their child after these traumatic experiences.

8.3 Protecting the Child from Further Harm

Here are some ways to help protect their child from further abuse and minimize the emotional trauma their child may experience:

i) Prevent contact between their child and the offender until an investigation has taken place. Explain to their child that he/she should tell them immediately if the offender attempts to touch or bother them again in any way.

ii) Do not talk to the offender in front of the child.

iii) Continue to believe their child and do not blame him/her for what happened. Give their child support and reassurance that he/she is okay and safe.

iv) Respond to concerns or feelings their child expresses about sexual abuse calmly. Listen to their child but do not ask a lot of questions.

v) Respect their child's privacy by not telling a lot of people, and make sure that other people who know, don't bring the subject up to their child. Listen to their child, but don't ask for information on personal safety or details about the abuse. Let the professionals do the interviewing to find out the details. A legal case can be negatively affected if the child has been questioned by non-professionals.

vi) Try to follow the regular routine around the home; maintain the usual bedtimes, chores and rules.

vii) Let the child's brothers and sisters know that something has happened to the child and that he or she is safe now and will be protected. Make sure that all children in the family are given enough information on personal safety so to be able to protect themselves from the offender without discussing the details of the incident.

viii) Talk about their feelings with someone they trust – a friend, relative, or counsellor. It is best not to discuss their worries in front of, or with, their children.

Social Workers and Support Persons

1. Social Worker: Inquiry

As per Section 19(6) of the POCSO Act, 2012 where an F.I.R. has been registered before the Special Juvenile Police Unit (SJPU) or local police station in respect of any offence committed against a child under the said Act, the case should be reported by the SJPU or the local police to the Child Welfare Committee (CWC) within 24 hours.

Additionally, as per Rule 4(3), a child is to be produced before the CWC in the following three situations:

i) There is a reasonable apprehension that the offence has been committed or attempted or is likely to be committed by a person living in the same or shared household with the child, or

ii) The child is living in a child care institution and is without parental support, or iii) The child is found to be without any home and parental support.

Where a child is produced before the CWC in the three situations described above, the relevant CWC must proceed, in accordance with its powers under sub-section (1) of section 31 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act), to make a determination within three days,

either on its own or with the assistance of a Social Worker /Probation Officer/Non-Governmental Organization (NGO)/any other person found fit by the CWC, as to whether the child needs to be taken out of the physical custody of his/her family or shared household and placed in a Children's Home or a Shelter Home.

As per Rule 4(5) of the POCSO Rules, 2012, the CWC should take into account any preference or opinion expressed by the child on the matter together with best interest of the child. Also, prior to making such determination, an inquiry should be conducted in such a way that the child is not unnecessarily exposed to injury or inconvenience.

This inquiry may therefore be conducted either by the CWC itself or with the assistance of a Social Worker/Probation Officer/Non-Governmental Organization (NGO)/any other person found fit by the CWC to be appointed for this purpose. Where a support person has been appointed for the child, the same person may be engaged to conduct the inquiry under Rule 4(5) to assist the CWC in its inquiry.

❑❑❑

LILLU @ RAJESH & ANR VS STATE OF HARYANA

Bench: B.S. Chauhan, Fakkir Mohamed Kalifulla

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Decided on 11 April, 2013

CRIMINAL APPEAL NO. 1226 OF 2011

Lillu @ Rajesh & Anr. Appellants
Versus
State of Haryana Respondent

The rape survivor are entitled to medical procedures conducted in a manner that respects their right to consent – medical procedure should not be carried out in a manner that constitutes cruel, inhuman or degrading treatment and health should be paramount consideration while dealing with gender based valuations- two finger test and its interpretation violates the rights to rape survivors to privacy, physical and mental integrity and dignity; therefore is deprecated.

ORDER

1. This criminal appeal has been preferred against the impugned judgment and order dated 20.9.2010 passed by the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 243-DB of 2002, by way of which the High Court has affirmed the judgment and order dated 4.3.2002 passed by the Additional Sessions Judge, Jind in Sessions Case No. 37 of 2001, by way of which the appellant no. 1 has been convicted under Section 376 of the Indian Penal Code, 1860 (hereinafter referred to as `IPC') and awarded the sentence of seven years rigorous imprisonment with a fine of Rs. 5,000/- and in default of making payment, to further undergo imprisonment for two years. Further he has been convicted under Section 506 IPC and awarded the sentence of two years rigorous imprisonment. Both the sentences have been directed to run concurrently. The other co-accused, namely, Manoj, Satish @ Sitta and Kuldeep have been convicted separately under sections 376, 506, 366 and 363 IPC. Kuldeep Singh alone has been found guilty under Section 376 (2) (g) IPC, and has been awarded sentence of life imprisonment. Out of these four convicts, Kuldeep Singh and Manoj did not prefer any appeal against the High Court's judgment, while appellant nos.1 and 2 preferred the present appeal. Appellant no.2 had died during the pendency of this appeal in jail, therefore, we are concerned only with the case of appellant no.1 i. e. Lillu @ Rajesh.

2. Mr. J.P. Singh, learned counsel for the appellant, submitted that the prosecution has failed to prove the date of birth of the prosecutrix and that she was about 17-18 years of age on the date of incident. Thus, it was a clear cut case of consent. The statement of Raj Bala, prosecutrix has not been corroborated by any of the witnesses and has not got corroborated by the medical evidence. Dr. Malti Gupta (PW-1), who had examined Raj Bala, prosecutrix medically had deposed that there was no external mark of injury on any part of her body. The possibility of prosecutrix being habitual to sexual intercourse could not be ruled out. There was no bleeding. Thus, in such a fact-situation, the statement of the prosecutrix that she was unmarried and had never indulged in sexual activity with any person, or was below 16 years, could not be relied upon.

3. On the other hand, the State of Haryana, as usual, remained unrepresented as the government counsel duly appointed by the State considered it their privilege not to appear in court and become the burden on public exchequer. So, the court has to examine the case more consciously going through the record and examine the correctness of the findings recorded by the courts below.

4. The trial court has examined the issue on age and after examining the school certificate (Ext. P-N), which stood duly proved by Lakhi Ram (PW-11), Science teacher, Government High Court, Badhana and Gajraj Singh, teacher, Govt. Primary School, Badhana, came to the conclusion that her date of birth as per the school register was 4.6.1987. So on the date of incident i.e. 7.3.2001, she was 13 years 9 month and 2 days old. She was a student of 6th standard. To refute the same, no evidence worth the name has been led by the accused- appellant. The said finding stood affirmed by the High Court and in view thereof, it remains totally immaterial whether the prosecutrix was a consenting party or not.

5. So far as the medical evidence is concerned, Dr. Malti Gupta (PW-1), Medical Officer, Civil Hospital, Jind, has deposed that Raj Bala, prosecutrix was habitual in sexual activities and such a statement was made in view of the medical examination. Relevant part thereof reads as under:

"Bilateral breast were moderately developed, There was no external mark of injury seen any where on the body. Axillary heir was not developed. Public hair were partially developed.

On local examination labia majora and labia minora were moderately developed.

There was no bleeding P/V. Whitish discharge was present. Hymen was completely torn.

Vagina admitted two fingers cervix was normal, uterus was of null parous by lateral FF were normal.

….Two swabs were taken from cervix vagina. Public hair were taken and sent for examination. Salwar worn by Raj Bala was taken and sealed following were handed over to the police. ….It is correct that I have given my opinion that hymen was completely torn.

….It is also correct that the marginas were completely heeled. I cannot give the exact time.

….I cannot say whether it was torn one year back 2 years back or 10 days back.

….I cannot say whether there was any sign of semen on the swabs taken by me." She further deposed:

"…. Since there was no matting of hair so I did not opine whether there was any semen on the public hair.

….I do not remember whether I enquired from Raj Bala whether she came to me for medico legal examination after washing clothes and taking bath or not. However, the salwar worn by her was taken into custody. I cannot say from how many days Raj Bala was having sexual activities. The possibility of Raj Bala of habitual sexual intercourse cannot be ruled out."

6. In fact, much has been argued by Mr. J.P. Singh on two fingers test. Admitting very fairly that in case she was a minor, the question as to whether she had been habitual to sexual activities or not, is immaterial to determine the issue of consent.

7. So far as the two finger test is concerned, it requires a serious consideration by the court as there is a demand for sound standard of conducting and interpreting forensic examination of rape survivors.

8. In Narayanamma (Kum) v. State of Karnataka & Ors., (1994) 5 SCC 728, this Court held that fact of admission of two fingers and the hymen rupture does not give a clear indication that prosecutrix is habitual to sexual intercourse. The doctor has to opine as to whether the hymen stood ruptured much

earlier or carried an old tear. The factum of admission of two fingers could not be held adverse to the prosecutrix, as it would also depend upon the size of the fingers inserted. The doctor must give his clear opinion as to whether it was painful and bleeding on touch, for the reason that such conditions obviously relate to the hymen.

9. In State of U.P. v. Pappu @ Yunus & Anr., AIR 2005 SC 1248, the Court held that a prosecutrix complaining of having been a victim of an offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars, for the reason, that she stands on a much higher pedestal than an injured witness.

This Court while dealing with the issue in State of Uttar Pradesh v. Munshi, AIR 2009 SC 370, has expressed its anguish and held that even if the victim of rape was previously accustomed to sexual intercourse, it cannot be the determinative question. On the contrary, the question still remains as to whether the accused committed rape on the victim on the occasion complained of. Even if the victim had lost her virginity earlier, it can certainly not give a licence to any person to rape her. It is the accused who was on trial and not the victim. So as to whether the victim is of a promiscuous character is totally an irrelevant issue altogether in a case of rape. Even a woman of easy virtue has a right to refuse to submit herself to sexual intercourse to anyone and everyone, because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. A prosecutrix stands on a higher pedestal than an injured witness for the reason that an injured witness gets the injury on the physical form, while the prosecutrix suffers psychologically and emotionally.

10. In Narender Kumar v. State (NCT of Delhi), AIR 2012 SC 2281, this Court dealt with a case where the allegation was that the victim of rape herself was an unchaste woman, and a woman of easy virtue. The court held that so far as the prosecutrix is concerned, mere statement of prosecutrix herself is enough to record a conviction, when her evidence is read in its totality and found to be worth reliance. The incident in itself causes a great distress and humiliation to the victim though, undoubtedly a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The Court further held as under:

"Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of "easy virtues" or a women of "loose moral character" can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. (Vide: State of Maharashtra & Anr. v. Madhukar Narayan Mardikar, AIR 1991 SC 207; State of Punjab v. Gurmit Singh & Ors., AIR 1996 SC 1393; and State of U.P. v. Pappu @ Yunus & Anr., AIR 2005 SC 1248).

In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all".

11. In State of Punjab v. Ramdev Singh, AIR 2004 SC 1290, this court dealt with the issue and held that rape is violative of victim's fundamental right under Article 21 of the Constitution. So, the courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not

only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against basic human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution.

12. In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.

13. Thus, in view of the above, undoubtedly, the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent.

14. In view of the above, the facts and circumstances of the case do not present special features warranting any interference by this Court. The appeal lacks merit and is accordingly dismissed.

……. ……..J.

(Dr. B.S. CHAUHAN)

……. ……..J.

(FAKKIR MOHAMED IBRAHIM KALIFULLA)

NEW DELHI;

April 09, 2013.

❑❑❑

UMESH SINGH VS STATE OF BIHAR

Bench: Chandramauli Kr. Prasad, V. Gopala Gowda

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

on 22 March, 2013

CRIMINAL APPEAL NO. 43 OF 2010

Umesh Singh … Appellant
Vs.
State of Bihar … Respondent

Where there is contradiction between medical evidence and ocular evidence, it can be crystallized to the effect that though the ocular testimony of the witness has greater evidenciery value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the value of the evidence. However where the medical evidence goes so far that it completely rules out all possibility of ocular evidence being true, may be disbelieved.

JUDGMENT

V. Gopala Gowda, J.

This appeal is filed by the appellant aggrieved by the common judgment dated 22nd May, 2003 passed in Crl.A.Nos. 241, 247, 271 and 318 of 1998 in affirming the conviction and sentence of the appellant for the offence punishable under Section 302 read with Section 34 I.P.C. and Section 27 of the Arms Act urging various facts and legal contentions. The appellant herein was the appellant in Crl.A.No.318 of 1998 before the High Court. The impugned judgment passed in the said case is under challenge in this appeal.

2. The brief facts in relation to the prosecution case are stated hereunder to appreciate the rival legal contentions that are urged on behalf of the parties with a view to find out as to whether this Court is required to interfere with the concurrent finding of fact recorded in affirming the conviction and sentence imposed against the appellant.

3. The deceased Shailendra Kumar was murdered on 16.07.1996 at about 3.30 p.m. by the appellant Umesh Singh and other persons, namely, Awadhesh Singh, Sudhir Singh, Jaddu Singh, Nawal Singh, Binda Singh @ Bindeshwari Singh by shooting him with a revolver and rifle with a criminal intention for unlawful purpose in furtherance of common intention along with other accused and to have in their possession of fire arms with an intention to use it for an unlawful purpose to commit murder of Shailendra Kumar along with accused nos.5 & 6 and another accused Moti Singh who is dead. They were charged under Section 302 read with Section 34, IPC. The case of the prosecution is that the deceased along with his cousin brother Arvind Kumar- PW2 were going to Tungi for catching a bus for Kothar on 16.7.96 at about 3.30 p.m. When they proceeded at a distance ahead of Tungi High School near Latawar Payeen, the accused persons named above surrounded them. The deceased accused Moti Singh is alleged to have exhorted his other associates to shoot the deceased Shailendra Kumar upon which the appellant herein took out a country made revolver and pumped its bullets in the temple of the deceased and accused no.2 who was having a rifle in his hand fired in the abdomen of the deceased.

Accused no.4 also shot a fire causing injury in the leg of the deceased while accused no.3 also fired from his rifle. Accused no.5 was also having a rifle and he threw the dead body of the deceased in the Payeen. It is also the case of the prosecution that during the course of the occurrence of the incident the informant PW2 Arvind Kumar was kept over-powered by the deceased accused Moti Singh and Jaddu Singh and after accomplishing the target, they left. Further, the witnesses whose names were found in the fardbeyan claimed to have seen the occurrence of the incident. The fardbeyan was recorded by ASI RS Singh at about 7.00 p.m. on the same date at Tungi High School hostel, Latawar Payeen and the inquest report of the dead body was also prepared at the place of occurrence itself at 7.10 p.m. Seizure list of certain incriminating items including empty fired cartridges which were recovered from the spot was also prepared. Formal FIR was recorded and investigation was taken up by the police. On concluding the investigation, the police submitted the charge sheet before the learned Chief Judicial Magistrate on the basis of which cognizance was taken by him and the case was committed to the Court of Sessions. The learned Sessions Judge on his turn transferred the case to the file of Second Additional Sessions Judge, Nawadah and the charges were framed for the offence under Section 302 read with Section 34, IPC and Section 27 of the Arms Act. The accused pleaded not guilty. The case went for trial and the prosecution has examined the witnesses PW1 to PW9 and two witnesses were examined in support of the defence. The learned Additional Sessions Judge on appraisal of the evidence and record passed the judgment dated 04.04.1998 imposing the conviction and sentence against the accused persons under Section 302 read with Section 34, IPC and under Section 27 of the Arms Act and awarded sentence of imprisonment for life under Section 302 read with Section 34, IPC. The sentence awarded regarding the conviction under different heads of charges ordered were to run concurrently. The conviction and sentence passed by the Additional Sessions Judge was challenged by the accused in the appeals referred to supra before the High Court of Patna. The High Court after hearing all the accused/appellants passed the common judgment affirming the conviction and sentence in relation to the present appellant and set aside the conviction and sentence in so far as Awadhesh Singh, Jaddu Singh and Nawal Singh who were held to be not found guilty of the charges under Section 302 read with section 34, IPC, i.e. in the appeal nos.241/98 and 247/98. However, as far as the present appellant and others are concerned, the judgment passed by the learned Additional Sessions Judge was affirmed. During pendency of the appeals the accused by name, Moti Singh died and his appeal got abated.

4. The appellant has questioned the correctness of the findings recorded in the impugned judgment by the High Court in affirming the conviction and sentence awarded against him along with others. Mr. Amarendra Sharan, learned senior counsel appearing for the appellant contends that the High Court has failed to notice the discrepancies in the evidence of the prosecution witnesses, it could have disbelieved the same but it has affirmed the conviction and sentence on this appellant. Further, even according to its own findings there were no eye-witnesses to the occurrence of the incident as the PWs arrived at the scene of occurrence 15-20 minutes after the incident and the informant who was present at the spot has given different version in the evidence and the FIR regarding the role of the appellant. The statement of PW2 Arvind Kumar who is the cousin brother of the deceased is the basis on which the FIR was registered and the Investigation of the case was made by the Investigating Officer. The PW2 was present at the time of occurrence and on the basis of his statement, the accused persons have been falsely implicated in treating his statement as FIR, the same is belated FIR which is not admissible in law and also hit by Section 162, Cr.P.C. In support of this contention he has placed reliance upon the judgment of this Court in State of A.P. v. Punati Ramulu.[1] The relevant paragraphs read as under:

"3. In our opinion, the reasons recorded by the High Court for recording acquittal of the respondents is based on proper appreciation of evidence. The findings are not only supported by proper appreciation of the evidence but are also reasonable and sound. Thanks to the tainted investigation, the murder of Krishna Rao goes unpunished. But we must hasten to add that since the defence has been able to successfully challenge the bona fides of the police investigation, it has detracted materially from the reliability of the other evidence led by the prosecution also.

5. Once we find that the investigating officer has deliberately failed to record the first information report on receipt of the information of a cognizable offence of the nature, as in this case, and had prepared the first information report after reaching the spot after due deliberations, consultations and discussion, the conclusion becomes inescapable that the investigation is tainted and it would, therefore, be unsafe to rely upon such a tainted investigation, as one would not know where the police officer would have stopped to fabricate evidence and create false clues. Though we agree that mere relationship of the witnesses PW 3 and PW 4, the children of the deceased or of PW 1 and PW 2 who are also related to the deceased, by itself is not enough to discard their testimony and that the relationship or the partisan nature of the evidence only puts the Court on its guard to scrutinise the evidence more carefully, we find that in this case when the bona fides of the investigation has been successfully assailed, it would not be safe to rely upon the testimony of these witnesses either in the absence of strong corroborative evidence of a clinching nature, which is found wanting in this case."

5. It was further contended by the learned senior counsel that the earlier information given by PW4 to the police was suppressed and by that time PW9- I.O. had reached the scene of occurrence, the other police officer and S.P. of the District were very much present there. They were not examined in the case to prove the prosecution case against the accused. Non-examination of the above persons as prosecution witnesses who are material witnesses to prove the prosecution case is fatal to the case as has been held by this Court in the case reported inMussauddin Ahmed v. State of Assam[2]. The relevant paragraph of the abovementioned case reads as under:

"11. It is the duty of the party to lead the best evidence in its possession which could throw light on the issue in controversy and in case such material evidence is withheld, the court may draw adverse inference under Section 114 Illustration (g) of the Evidence Act, 1872 notwithstanding that the onus of proof did not lie on such party and it was not called upon to produce the said evidence (vide Gopal Krishnaji Ketkar v. Mohd. Haji Latif)."

6. The learned senior counsel for the appellant further contended that not recording the information furnished by PW4 to the police as FIR but treating PW2 information as FIR in the case though it is hit by Section 162, Cr.P.C. creates doubt in the prosecution case and therefore benefit of doubt must be given to the accused by the trial court and the High Court. In support of the same, the learned senior counsel has placed reliance upon the judgment of this Court reported in T.T. Antony v. State of Kerala[3]. The relevant paragraphs are extracted hereunder:

"18. An information given under sub-section (1) of Section 154 CrPC is commonly known as first information report (FIR) though this term is not used in the Code. It is a very important document. And as its nickname suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law in motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 CrPC, as the case may be, and forwarding of a police report under Section 173 CrPC. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a

police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 CrPC. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the first information report — FIR postulated by Section 154 CrPC. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 CrPC. No such information/statement can properly be treated as an FIR and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of CrPC. Take a case where an FIR mentions cognizable offence under Section 307 or 326 IPC and the investigating agency learns during the investigation or receives fresh information that the victim died, no fresh FIR under Section 302 IPC need be registered which will be irregular; in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which H having killed W, his wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against H — the real offender — who can be arraigned in the report under Section 173(2) or 173(8) CrPC, as the case may be. It is of course permissible for the investigating officer to send up a report to the Magistrate concerned even earlier that investigation is being directed against the person suspected to be the accused.

19. The scheme of CrPC is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 CrPC on the basis of entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 CrPC, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) CrPC. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 CrPC.

20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC." Also, the Patna High Court, in the case of Deo Pujan Thakur v. State of Bihar[4], opined as hereunder:

"18. Considering the entire evidence on record and the circumstances which has been brought by the defence in course of argument it transpires that the prosecution with held the first information and

did not produce it before the Court for the reasons best known to it. It did not examined independent witness though some of these names have been mentioned in the evidence of the prosecution witnesses and some of them even then were charge- sheet witness only family members and interested witnesses who are inimical have been examined. The fardbeyan on the basis of which formal FIR was drawn is hit by Section 162, Cr PC. The post-mortem report as well as the evidence of PW 11 has corroborated the defence version of the case that the deceased was killed at a lonely place when he was coming after attending the call of nature. In the circumstances of the case the prosecution version is not reliable. The evidence which has been brought by the prosecution has failed to prove its case beyond all reasonable doubt. The judgment and order of conviction passed by the trial Court is not fit to be maintained."

7. It was further contended by the learned senior counsel that the other PWs who were highly interested were examined in the case. The independent witnesses were available but were not examined in the case by the prosecution. Therefore, the prosecution case is fatal for non examination of the independent witnesses to prove the charge against the accused. Hence, the concurrent finding recorded by the High Court on the charge under Section 302 read with Section 34 against the appellant is erroneous in law. The High Court has failed to take into consideration the evidence of PW2 who, according to the prosecution, is an informant. In his evidence he has stated that the dead body was recovered thereafter the statement of PW2 was recorded and he along with the other witnesses remained at the place of occurrence and none of them went to Police Station to inform the police. PW3 Damodar Singh in his evidence has stated that no body went to inform the police but PW4 Ashok Kumar has admitted in his evidence that his statement was recorded by a Judicial Magistrate where he had stated that he sent information to the police. PW9-I.O. has admitted in his evidence that on the information of Ashok Singh-PW4 he along with Officer-in-charge of the police station and several officers had gone to the place of occurrence before the fardbeyan was recorded and the case was registered. He has further stated that the fardbeyan was `sent to police station and then he was made as I.O. Further the High Court has failed to take into consideration the relevant aspect of the matter mentioned in the FIR under Column No.I fardbeyan was recorded at 7.00 p.m. and FIR was registered at 10.00 p.m. on 16.07.1996. The distance of the place of occurrence and the police station is about 16 kms. According to PW9, the I.O. on 16.07.1996 after 10 p.m. he was changed, therefore, learned senior counsel submits that on the basis of the evidence of PW4 Ashok Kumar and PW9 and in the light of the principles decided by this Court in the decisions referred to supra registering the FIR on the basis of statement of PW2 is not admissible in law as the same is hit by Section 162, Cr.P.C. In view of the aforesaid facts and legal evidence regarding registration of the FIR by the police the learned Additional Sessions Judge and the High Court should have drawn judicial inference that registering the FIR on the basis of statement of PW2, which is hit by Section 162, Cr.P.C. is the result of manipulation of the case against the accused at the instance of the witnesses of this case and not registering the first information given by PW4 to the police station for the reason that it was hearsay. This vital important aspect of the matter has been omitted by the Additional Sessions Judge and the High Court. Therefore, the finding recorded in the impugned judgment on the charge leveled against the appellant and others is erroneous in law and the same is liable to be set aside. Further, the courts below have failed to appreciate the fact that there was no motive for the appellant to murder the deceased Shailendra Kumar but there is motive for false implication of the accused by the witnesses in this case. The learned senior counsel placed reliance upon PW4 Ashok Kumar's evidence wherein he has stated that Awadh Singh is the brother of accused Binda Singh who had brought a case against him and accused Umesh Singh and Bhuneshwar Singh, father of Nawal were witness and PW5 Balram Singh who is full brother of deceased Shailendra Kumar

has admitted in his evidence that there was no enmity with accused and himself and also with his two brothers, including the deceased.

8. Further the learned senior counsel contended that the High Court has failed to consider the medical evidence, which does not support the prosecution case. According to the prosecution, the occurrence of incident is said to have taken place on 16.07.1996 at 3.30 p.m. when the deceased was going to join his duty from his village home. On the basis of the post mortem report on record, in Column Nos.21 to 23, PW8, the doctor clearly stated that not only stomach of the deceased but both bladders were empty and the time elapsed since death was 30 to 36 hours. Thereby the occurrence of the incident must have taken place in the early hours of 16.07.1996 as the deceased must have empty stomach. Further, in the evidence of PW8, the description of the injuries in the post mortem report are also not in accordance with the allegations made by the witnesses. PW8 the doctor, has categorically admitted in his evidence that the deceased must have died before 30 hours from the time of the post mortem examination. It means that no occurrence of the incident took place at 3.30 p.m. on 16.07.1996 as alleged by the prosecution and the deceased was dead before the alleged time of occurrence. Therefore, the medical evidence is not in conformity with the prosecution case rather it supports the defence version making the entire prosecution case false. In this regard he has placed strong reliance upon the proposition of law laid by this Court to the effect that once the time of death as claimed by the prosecution is drastically different from the one as per the medical evidence, the case of the prosecution becomes doubtful and the benefit of doubt must be given to the appellant. He has placed reliance upon the following decisions of this Court, namely, Thangavelu v. State of TN[5], Moti v. State of U.P.[6], Kunju Mohd. v. State of Kerala[7], Virendra v. State of U.P.[8] and Baso Prasad v. State of Bihar.[9]

9. Therefore, the learned senior counsel submits that the concurrent finding of fact on the charge recorded by the High Court against this appellant is erroneous and vitiated in law which is liable to be set aside and he may be acquitted of the charges leveled against him and he may be set at liberty by allowing this appeal.

10. On the other hand, Mr.Chandan Kumar, the learned counsel appearing on behalf of the State sought to justify the finding and reasons recorded in the impugned judgment, inter alia, contending that the High Court in exercise of its appellate jurisdiction has examined the correctness of the findings and reasons recorded by the learned Sessions Judge on the charges framed against the appellant and on proper appraisal of the same, it has affirmed the conviction and sentence imposed against the appellant which is based on proper re-appreciation of evidence on record. The same is supported with valid and cogent reasons. Learned counsel further sought to justify registration of FIR on the basis of the information furnished by PW2 which is in conformity with the decision of this Court in Binay Kumar v. State of Bihar[10] relevant paragraph of which reads as under:

"9. But we do not find any error on the part of the police in not treating Ext. 10/3 as the first information statement for the purpose of preparing the FIR in this case. It is evidently a cryptic information and is hardly sufficient for discerning the commission of any cognizable offence therefrom. Under Section 154 of the Code the information must unmistakably relate to the commission of a cognizable offence and it shall be reduced to writing (if given orally) and shall be signed by its maker. The next requirement is that the substance thereof shall be entered in a book kept in the police station in such form as the State Government has prescribed. First information report (FIR) has to be prepared and it shall be forwarded to the magistrate who is empowered to take cognizance of such offence upon such report. The officer in charge of a police station is not obliged to prepare FIR on any nebulous information received from somebody who does not disclose any authentic knowledge about commission of the

cognizable offence. It is open to the officer-in-charge to collect more information containing details about the occurrence, if available, so that he can consider whether a cognizable offence has been committed warranting investigation."

11. Further, the correctness of the same is sought to be justified by placing reliance upon the I.O.'s evidence. The counsel for the state has placed reliance upon the decision of this Court in Dinesh Kumar v. State of Rajasthan[11]. The relevant paragraphs are extracted hereunder:

"11. It is to be noted that PWs 7 and 13 were the injured witnesses and PW 10 was another eyewitness and was the informant. Law is fairly well settled that even if acquittal is recorded in respect of the co- accused on the ground that there were exaggerations and embellishments, yet conviction can be recorded if the evidence is found cogent, credible and truthful in respect of another accused. The mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence.

12. In law, testimony of an injured witness is given importance. When the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence."

12. The learned counsel further submits that the dispute regarding the place of incident as contended by the learned counsel for the appellant is factually not correct. In view of the concurrent finding of the High Court regarding the place of occurrence is very much certain as it is said to be at Tungi. PW4 Ashok Kumar Singh in his evidence has categorically stated that he is not an eye-witness but on the basis of hearsay he has informed the police. The I.O. has further stated in his evidence that PW4 is a hearsay witness and therefore his information could not have been treated as FIR. Hence he has requested this Court that there is no merit in this appeal, particularly, having regard to the concurrent finding on the charge by the High Court on proper appreciation of legal evidence and record and affirming the conviction and sentence for charge under Section 302 read with Section 34, IPC. Hence, the learned senior counsel has requested this Court not to interfere with the same in exercise of its jurisdiction.

13. In the backdrop of the rival legal contentions urged on behalf of the parties this Court has reasonably considered the same to answer the point which is formulated above in this judgment and answer the same against the appellant for the following reasons.

14. PW2 Arvind Kumar, who is the cousin brother of the deceased, accompanied him on the date of occurrence of the incident. At that point of time the appellant, along with other accused, surrounded them and it is stated that the appellant shot at the Kanpatti with revolver and other accused persons Binda Singh with the rifle in the stomach of the deceased and Sudhir Singh with rifle in the left thigh. PW7 has stated in his evidence that the aforesaid accused persons fled away at that time Ashok Singh, Damodar Singh, Balram Singh and Shyam Sunder Singh were going to the bazaar who have witnessed the incident. His evidence is supported by the evidence of the other witness namely PW3, who has stated that he has seen Moti Singh and Jaddu Singh catching both hands of the deceased and Moti Singh ordered him to fire and the said witness also spoken about the firings by Awadhesh Singh and Nawal Singh as stated by the PW2. Further, he has supported his evidence that Awadhesh Singh pushed the dead body in the Payeen and also stated that Moti Singh and Jaddu Singh had caught hold of the

informant also. PW5 also claimed to have seen Jaddu Singh and Moti Singh catching hands of the deceased and further he has stated that Umesh Singh, the appellant herein, had fired at the temple region of the deceased. Further, he has given categorical statement stating that Binda, Sudhir, Awadhesh and Nawal also had fired at the deceased with their rifles. Therefore, the evidence of PW2 has been supported by PW3, PW5 and PW7. In so far as PW6 is concerned he has given a general statement that he has seen the several persons surrounding the deceased and killing the deceased with rifle and revolver. Therefore, the trial court was right in recording the finding on the charge against the appellant on proper appraisal of the evidence of the eye-witness PW2 supported by PW3 and PW5. The said finding of fact on the charge of Sections 302 read with section 34, IPC against this appellant and others was seriously examined by the High Court and concurred with the same and in view of the evidence of PW2 and PW9 the informant who was eye-witness and the I.O.'s evidence regarding his evidence treating the statement of PW2 as FIR is perfectly legal and valid. Therefore, reliance placed upon the decisions of this Court referred to supra by the learned Senior Counsel in the course of his submission are not tenable in law as they are misplaced.

15. In so far as the medical evidence of the Doctor-PW8 read with the post mortem report upon which strong reliance is placed by the learned senior counsel for the appellant that death must have taken place prior to 30 to 36 hours as opined by the doctor that means it relates back to the early hours of 16.07.1996 but not at 3.30 p.m. as mentioned in the FIR. Once the time of death is drastically different from the one claimed by the prosecution its case is vitiated in law. In support of the above-said contention strong reliance placed upon the decisions of this Court on aforesaid cases are all misplaced as the same are contrary to the law laid down by this Court in Abdul Sayeed v State of Madhya Pradesh[12]. The relevant paragraphs are extracted hereunder:

"33. In State of Haryana v. Bhagirath it was held as follows: (SCC p. 101, para 15) "15. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject."

34. Drawing on Bhagirath case, this Court has held that where the medical evidence is at variance with ocular evidence, "it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant' ".

35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

"21. … The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the 'credit' of the witnesses; their performance in the witness box; their power of

observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

36. In Solanki Chimanbhai Ukabhai v. State of Gujarat this Court observed: (SCC p. 180, para 13) "13. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."

16. The learned State counsel has rightly urged that if the medical and ocular evidence is contrary then the ocular evidence must prevail. This aspect of the matter has been elaborately discussed and the principle is laid down by this Court in the aforesaid decision. The findings and decision recorded and rendered by the learned Additional Sessions Judge after thorough discussion and on proper appreciation of evidence on record held that the doctor has opined that rigor mortis starts within 1 to 3 hours and vanishes after 36 hours. The said opinion of the medical officer PW8 regarding complete vanishing of rigor mortis from the dead body after 36 hours is medically not correct and this may be lack of his knowledge on the subject and he was liberal to the cross-examination by the defence lawyer. Further the learned Additional Sessions Judge has rightly referred to Medical Jurisprudence Digest written by B.L. Bansal Advocate, (1996 Edition at page 422), which clearly mentions that the rigor mortis persists from 12 to 24 hours and then passes off but it means that the faster the rigor mortis appears, the shorter time it persists. Further, rightly the learned Additional Sessions Judge has referred to the case decided by this Court in Boolin Hulder v. State[13] wherein it has been held that at the same climate of India, rigor mortis may commence in an hour to two and begin to disappear within 18 to 24 hours. Therefore, the learned Additional Sessions Judge has held that broadly speaking the faster the rigor mortis appears, the shorter the time it persists and further has rightly made observation that rigor mortis will be present in some parts of legs of the dead body. According to the medical officer PW8 there is no question of the time of death of the deceased. It must have preceded more than 24 hours which is the maximum limit for disappearance of rigor mortis. The said view of the medical officer PW8 was found fault with by the learned Additional Sessions Judge and held that he has not correctly deposed in his cross- examination regarding the time lapse of a dead person. He has extended the time for rigor mortis to be 30 to 36 hours and further rightly held that PW8 the medical officer, has deposed in his evidence contrary to the rule of medical jurisprudence. Therefore, the learned Additional Session Judge has rightly held in the impugned judgment the same cannot be the basis for the defence to acquit the accused. The claim by the appellant that the deceased has been killed in the early morning of 16.07.1996 and the allegation that the accused has been falsely implicated in the case has been rightly rejected by the learned Additional Sessions Judge and the same has been concurred with by the High Court by assigning the valid and cogent reasons in the impugned judgment. Rightly, the learned counsel appearing on behalf of the State

has placed reliance upon the judgment of this Court referred to supra that between medical and ocular evidence the ocular evidence must be preferred to hold the charge proved. This is the correct legal position as held by both the learned Additional Sessions Judge as well as the High Court after placing reliance upon the statement of evidence of PW2, PW3, PW5 and PW7. Therefore, we do not find any erroneous reasoning on this aspect of the matter. There is no substance in submissions of the learned senior counsel on the above aspect of the matter with reference to judgments of this Court referred to supra which decisions have absolutely no application to the facts situation of the case on hand.

17. In view of the concurrent findings by the High Court as well as the learned Additional Sessions Judge and an order of conviction and sentence imposed against the appellant herein is on the basis of legal evidence on record and on proper appreciation of the same. Therefore, the same is not erroneous in law as the finding is supported with valid and cogent reasons. For the foregoing reasons the impugned judgment and order cannot be interfered with by this Court. Hence, the appeal is devoid of merit and accordingly it is dismissed.

....J.
[**CHANDRAMAULI KR. PRASAD**]

....J.
[**V. GOPALA GOWDA**]

New Delhi,

March 22, 2013

[**1**] (1994) Suppl.1 SCC 590

[**2**] (2009) 14 SCC 541

[**3**] (2001) 6 SCC 181

[**4**] (2005) Crl.L.J. Patna 1263

[**5**] (2002) 6 SCC 498

[**6**] (2003) 9 SCC 444

[**7**] (2004) 9 SCC 193

[**8**] (2008) 16 SCC 582

[**9**] (2006) 13 SCC 65

[**10**] (1997) 1 SCC 283

[**11**] (2008) 8 SCC 270

[**12**] (2010) 10 SCC 259

[**13**] 1996 Crl.L.J. 513

❑❑❑

DAYAL SINGH & ORS VS STATE OF UTTARANCHAL

Bench: Swatanter Kumar, Fakkir Mohamed Kalifulla

Supreme Court of India

Decided on 3 August, 2012

CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL NO. 529 OF 2010

Dayal Singh & Ors. Appellants
Versus
State of Uttaranchal Respondent

The Hon'bel Supreme Court having approved the finding of learned Trial Court and High Court has directed

A) The Director Generals, Health Services of UP/Uttarakhand are hereby issued notice under the provisions of the Contempt of Courts Act, 1971 as to why appropriate action be not initiated against them for not complying with the directions contained in the judgment of the Trial Court dated 29th June, 1990.

B) The above-said officials are hereby directed to take disciplinary action against Dr. C.N. Tewari, PW3, whether he is in service or has since retired, for deliberate dereliction of duty, preparing a report which ex facie was incorrect and was in conflict with the inquest report and statement of PW6.

C) Director Generals of Police UP/Uttarakhand are hereby directed to initiate, and expeditiously complete, disciplinary proceedings against PW6, SI Kartar Singh, whether he is in service or has since retired, for the acts of omission and commission, deliberate dereliction of duty in not mentioning reasons for non-disclosure of cause of death as explained by the doctor, not sending the viscera to the FSL and for conducting the investigation of this case in a most callous and irresponsible manner.

D) Declare and direct that it shall be appropriate exercise of jurisdiction as well as ensuring just and fair investigation and trial that courts return a specific finding in such cases, upon recording of reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to the case of the prosecution, in breach of professional standards and investigative requirements of law, during the course of the investigation by the investigating agency, expert witnesses and even the witnesses cited by the prosecution.

JUDGMENT

Swatanter Kumar, J.

1. Settled canons of criminal jurisprudence when applied in their correct perspective, give rise to the following questions for consideration of the Court in the present appeal:

a) Where acts of omission and commission, deliberate or otherwise, are committed by the investigating agency or other significant witnesses instrumental in proving the offence, what approach, in appreciation of evidence, should be adopted?

b) Depending upon the answer to the above, what directions should be issued by the courts of competent jurisdiction?

c) Whenever there is some conflict in the eye-witness version of events and the medical evidence, what effect will it have on the case of the prosecution and what would be the manner in which the Court should appreciate such evidence?

2. The facts giving rise to the questions in the present appeal are that the fields of Gurumukh Singh and Dayal Singh were adjoining in the village Salwati within the limits of Police Station Sittarganj, district Udham Singh Nagar. These fields were separated by a mend (boundary mound). On 8th December, 1985, Gurumukh Singh, the complainant, who was examined as PW2, along with his father Pyara Singh, had gone to their fields. At about 12 noon, Smt. Balwant Kaur, PW4, wife of Pyara Singh came to the fields to give meals to Pyara Singh and their son Gurumukh Singh. At about 12.45 p.m, the accused persons, namely, Dayal Singh, Budh Singh & Resham Singh (both sons of Dayal Singh) and Pahalwan Singh came to the fields wielding lathis and started hurling abuses. They asked Pyara Singh and Gurumukh Singh as to why they were placing earth on their mend, upon which they answered that mend was a joint property belonging to both the parties. Without any provocation, all the accused persons started attacking Pyara Singh with lathis. Gurumukh Singh, PW2, at that time, was at a little distance from his father and Smt. Balwant Kaur, PW4, was nearby. On seeing the occurrence, they raised an alarm and went to rescue Pyara Singh. The accused, however, inflicted lathi injuries on both PW2 and PW4. In the meanwhile, Satnam Singh, who was ploughing his fields, which were quite close to the fields of the parties and Uttam Singh (PW5) who was coming to his village from another village, saw the occurrence. These two persons even challenged the accused persons upon which the accused persons ran away from the place of occurrence. Pyara Singh, who had been attacked by all the accused persons with lathis fell down and succumbed to his injuries on the spot. Few villagers also came to the spot. According to the prosecution, pagri (Ex.1) of one of the accused, Budh Singh, had fallen on the spot which was subsequently taken into custody by the Police. Gurumukh Singh, PW2, left the dead body of his deceased father in the custody of the villagers and went to the police station where he got the report, Exhibit Ka-3, scribed by Kashmir Singh in relation to the occurrence. The report was lodged at about 2.15 p.m. on 8th December, 1985 by PW2 in presence of SI Kartar Singh, PW6. FIR (Exhibit Ka-4A) was registered and the investigating machinery was put into motion. The two injured witnesses, namely, PW2 and PW4 were examined by Dr. P.C. Pande, PW1, the medical officer at the Public Health Centre, Sittarganj on the date of occurrence. At 4.00 p.m., the doctor examined PW2 and noticed the following injuries on the person of the injured witness vide Injury Report, Ex. Ka-1.

PW-2 1. Lacerated wound of 5 cm X 1 cm and 1 cm in depth. Margins were lacerated. Red fresh blood was present over wound. Wound was caused by hard and blunt object. Wound was at the junction of left parietal and occipital bone 7 cm from upper part of left ear caused by blunt object. Advised X- ray. Skull A.P. and lateral and the injury was kept under observation.

2. Contusion of 6 cm X 2.5 cm on left side of body 3 cm above the left ilic crest. Simple in nature caused by hard and blunt object. According to the Doctor, the injuries were caused by hard and blunt object and they were fresh in duration. On 8.12.1985 at 7.30 p.m. Dr. P.C. Pande (PW1) examined the injuries of Smt. Balwant Kaur PW4 and found the following injuries on her person vide injury report Ex.Ka.2:

PW-4

1. Contusion 6 cm X 3 cm on left shoulder caused by hard and blunt object.

2. Contusion of 5 cm X 2 cm on lateral side of middle of left upper arm. Bluish red in colour caused by hard and blunt object.

3. Contusion of 4 cm X 2 cm on left parietal bone 6 cm from left ear caused by hard and blunt object.

According to Dr. Pande, these injuries were caused by hard and blunt object and the duration was within 12 hours and the nature of the injuries was simple. According to Dr. Pande the injuries of both these injured persons could have been received on 8.12.1985 at 12.45 p.m. by lathi.

3. As noted above, according to Dr. Pande, the injuries were caused by a hard and blunt object and duration was within 12 hours. Thereafter, SI Kartar Singh, PW6, proceeded to the place of occurrence in village Salwati. He found the dead body of Pyara Singh lying in the fields. In the presence of panchas, including Balwant Singh, PW8, he noticed that there were three injuries on the person of the deceased, Pyara Singh and prepared Inquest Report vide Ex. Ka-6 recording his opinion that the deceased died on account of the injuries found on his body. After preparing the site plan, Ext. Ka-10, he also wrote a letter to the Superintendent, Civil Hospital, Haldwani for post mortem, being Exhibit Ka-9. The dead body was taken to the said hospital by Constable Chandrapal Singh, PW7. Dr. C.N. Tewari, PW3, medical officer in the Civil Hospital, Haldwani, performed the post mortem upon the body of the deceased and did not find any ante-mortem or post-mortem injuries on the dead body. On internal examination, he did not find any injuries and could not ascertain the cause of death. Further, he preserved the viscera and gave the post-mortem report, Exhibit Ka-4. After noticing that there was no injury or abnormality found upon external and internal examination of the dead body, the doctor in his report recorded as under:

Viscera in sealed jars handed over to the accompanying Constables. Jar No.1 sample preservative saline water.

Jar No.2 Pieces of stomach Jar No.3 Pieces of liver, spleen and kidney. Death occurred about one day back.

Cause of death could not be ascertained. Hence, viscera preserved.

4. It appears from the record that the deceaseds viscera, which allegedly was handed over by doctor to the police, was either never sent to the Forensic Science Laboratory (for short, the FSL) for chemical examination, or if sent, the report thereof was neither called for nor proved before the Court. In fact, this has been left to the imagination of the Court.

5. The accused persons, at about 5.45 p.m. on the same day, lodged a written report at the same Police Station, which was received by Head Constable Inder Singh, who prepared the check report Exhibit C-1 and made appropriate entry. The case was registered under Section 307 of the Indian Penal Code, 1860 (IPC) against PW2, Gurumukh Singh. Dayal Singh was arrested in furtherance of the FIR, Exhibit Ka-4A. He was also sent for medical examination and was examined by Dr. K.P.S. Chauhan, CW2. After examining the said accused at about 7.45 p.m., the doctor found two injuries on his person and prepared the report (Exhibit C-4). According to Dr. Chauhan, the injuries on the person of the accused could have been received by a firearm object and injuries were fresh within six hours.

6. The investigating officer completed the investigation and filed charge sheet (Exhibit Ka-11) against the accused persons on 15th January, 1986. It may be noticed that in furtherance to Exhibit C-2, neither any case was registered nor any charge-sheet was presented before the Court of competent jurisdiction. The accused also took no steps to prove that report in Court. They also did not file any private complaint.

7. Considering the ocular and other evidence produced by the prosecution, the learned Trial Court vide its judgment of conviction and order of sentence, both dated 29th June, 1990, found the accused persons

guilty of offences under Section 302 read with Section 34 IPC as well as under Section 323 read with Section 34 IPC. The Trial Court, while dealing with the arguments of the accused for application of Section 34, as well as the submission that the witnesses had not attributed specific role to the respective accused persons, held as under:

The attack was premeditated and the accused had come fully prepared to do the overt act. The injury was caused on the head of the deceased which is a vital part of the body at which it was aimed by employing lathi, it was clear that the accused persons had intended to cause death by giving blow on vital part of the body of the deceased. After receiving the injuries, the deceased fell down and even thereafter he was attacked by the accused persons and he died on the spot immediately. This all goes to show that the accused persons who all were armed with lathis and had attacked in furtherance of their common intention by surrounding Sri Pyara Singh. At that juncture when the occurrence took place suddenly and the witnesses were at some distance it was quite natural for the witnesses not to have noted as to whose lathi blow caused the injuries on Sri Pyara Singh and also on the injured persons. It was thus quite natural in such circumstances for the witnesses not to have noted the minute details of the incident. The Honble Supreme Court has held in 1971 Cri.L.J. 1135 Har Prasad vs. State of Madhya Pradesh that in view of the large number of accused involved in the occurrence it is quite natural for the prosecution witnesses to get a bit confused. In fact, no cross- examination was made on this respect of the case which has been discussed by me above. The fact that the accused persons had gone to the place of occurrence fully armed with lathis and immediately on the basis of mend started attacking the deceased Sri Pyara Singh indicates that they had gone there with premeditation and prior concert. All the four accused were physically present at the time of the commission of offence. The criminal act was done by the accused persons and they all had shared the common intention by engaging in that criminal enterprise for which they had come fully prepared. The prosecution has succeeded in showing the existence of common purpose or design. All the accused persons were confederates in the commission of the offence and they had participated in that common intention. Each of the accused person is liable for the fact done in pursuance of that common purpose of design. The acts done by the accused persons are similar as they all had come prepared armed with lathis and lathi blows were struck on the deceased Sri Pyara Singh by the accused persons in furtherance of their common intention. Each of them is liable for the blows struck with lathi on the deceased and also on the injured persons. It is proved beyond all reasonable doubt that lathi blow was struck on the head of Sri Pyara Singh which was a vital part and he died on the spot due to injuries. Whoever may have struck that lathi blow, each of the accused person is liable for the lathi blows struck on the vital part of the deceased. Since the ladhi blow was struck on the head of the deceased which is a vital part, the offence amounts to murder (See 1972 SCC (Cri) 438 Gudar Dusadh Vs. State of Bihar). The death of Sri Pyara Singh was caused in the occurrence and it is proved to the hilt and beyond all reasonable doubt that he died on the spot on account of lathi blows inflicted on him. It is nobodys case that he died natural death. The accused persons have committed offence punishable under Section 302/34 I.P.C. for committed offence punishable under Section 323/34 I.P.C. for causing voluntary hurt to Sri Gurumukh Singh and Smt. Balwant Kaur.

8. The above judgment of the Trial Court was assailed by the accused persons in appeal before the High Court. The High Court, vide its judgment dated 17th March, 2008, dismissed the appeal and affirmed the judgment of conviction and order of sentence passed by learned Trial Court giving rise to the present appeal.

9. From the narration of the above facts, brought on record by the prosecution and proved in accordance with law, it is clear that there are three eye-witnesses to the occurrence. Out of them, two are injured witnesses, namely PW2 and PW4. PW2 is the son of the deceased and PW4 is the wife. Presence of

these two witnesses at the place of occurrence is normal and natural. According to PW4, she had gone to the place of occurrence to give food to her husband and son around 12 noon, which is the normal hour for lunch in the villages. The son of the deceased had come to the field with his father to work. They were putting earth on the mend which was objected to by the accused persons who had come there with lathis and with a premeditated mind of causing harm to the deceased. Upon enquiry, the deceased informed the accused persons that the mend was a joint property of the parties. Without provocation, the accused persons thereupon started hurling abuses upon Pyara Singh and his son, and assaulted the deceased with lathis. PW2 and PW4 intervened to protect their father and husband respectively, but to no consequence and in the process, they suffered injuries. In the meanwhile, when the accused persons were challenged by PW5 and Satnam Singh, who were close to the place of occurrence, they ran away. The presence of PW2, PW4 and PW5 cannot be doubted. The statement made by them in the Court is natural, reliable and does not suffer from any serious contradictions. Once the presence of eye-witnesses cannot be doubted and it has been established that their statement is reliable, there is no reason for the Court to not rely upon the statement of such eye witnesses in accepting the case of the prosecution. The accused persons had come with pre-meditated mind, together with common intention, to assault the deceased and all of them kept on assaulting the deceased till the time he fell on the ground and became breathless.

10. This Court has repeatedly held that an eye-witness version cannot be discarded by the Court merely on the ground that such eye-witness happened to be a relation or friend of the deceased. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, and statement of the witness is unworthy of credence that the Court would examine the possibility of discarding such statements. But where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the Court to discard the statements of such related or friendly witness. The Court in the case of Dharnidhar v. State of Uttar Pradesh [(2010) 7 SCC 759] took the following view :

12. There is no hard-and-fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the court. It will always depend upon the facts and circumstances of a given case. In Jayabalan v. UT of Pondicherry (2010) 1 SCC 199, this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under: (SCC p. 213, paras 23-24) 23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.

24. From a perusal of the record, we find that the evidence of PWs 1 to 4 is clear and categorical in reference to the frequent quarrels between the deceased and the appellant. They have clearly and consistently supported the prosecution version with regard to the beating and the ill- treatment meted out to the deceased by the appellant on several occasions which compelled the deceased to leave the appellant's house and take shelter in her parental house with an intention to live there permanently.

PWs 1 to 4 have unequivocally stated that the deceased feared threat to her life from the appellant. The aforesaid version narrated by the prosecution witnesses viz. PWs 1 to 4 also finds corroboration from the facts stated in the complaint.

13. Similar view was taken by this Court in Ram Bharosey v. State of U.P. AIR 1954 SC 704, where the Court stated the dictum of law that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown overboard, but has to be examined carefully before accepting the same.

11. Similar view was taken by this Court in the cases of Mano Dutt & Anr. v. State of UP [(2012 (3) SCALE 219] and Satbir Singh & Ors. v. State of Uttar Pradesh [(2009) 13 SCC 790].

12. With some vehemence, it has then been contended on behalf of the appellant that the post mortem report and the statement of PW3, Dr. C.N Tewari, specifically state that no external or internal injuries were found on the body of the deceased. In other words, no injury was either inflicted by the accused or suffered by the deceased. In face of this expert medical evidence, the statement of the eye-witnesses cannot be believed. The expert evidence should be given precedence and the accused persons are entitled to acquittal. This argument is liable to be rejected at the very outset despite the fact that it sounds attractive at first blush. No doubt the post mortem report (Exhibit Ka-4) and the statement of PW3 Dr. C.N. Tewari, does show/ reflect that he had not noticed any injuries upon the person of the deceased externally or even after opening him up internally. But the fact of the matter is that Pyara Singh died. How he suffered death is explained by three witnesses, PW2, PW4 and PW5, respectively. Besides this, the statement of the investigating officer, PW6, also clearly shows that the body of the deceased contained three apparent injuries. He recorded in his investigative proceedings that the accused had died of these injuries and was found lying dead at the place of occurrence. It is not only the statement of PW-6, but also the Panchas in whose presence the body was recovered, who have endorsed this fact. The course of events as recorded in the investigation points more towards the correctness of the case of the prosecution than otherwise. Strangely, Dayal Singh and other accused persons not only took the stand of complete denial in their statement under Section 313 of the Code of Criminal Procedure, 1973 (CrPC) but even went to the extent of stating that they had no knowledge (pata nahin) when they were asked whether Pyara Singh had died as a result of injuries.

13. We have already discussed above that the presence of PW2, PW4 and PW5 at the place of occurrence was in the normal course of business and cannot be doubted. Their statements are reliable, cogent and consistent with the story of the prosecution. Merely because PW3 and PW6 have failed to perform their duties in accordance with the requirements of law, and there has been some defect in the investigation, it will not be to the benefit of the accused persons to the extent that they would be entitled to an order of acquittal on this ground. Reference in this regard can usefully be made to the case of C. Muniappan v. State of Tamil Nadu {AIR 2010 SC 3718 : (2010) 9 SCC 567}.

14. Now, we will deal with the question of defective or improper investigation resulting from the acts of omission and/or commission, deliberate or otherwise, of the Investigating Officer or other material witnesses, who are obliged to perform certain duties in discharge of their functions and then to examine its effects. In order to examine this aspect in conformity with the rule of law and keeping in mind the basic principles of criminal jurisprudence, and the questions framed by us at the very outset of this judgment, the following points need consideration:

i) Whether there have been acts of omission and commission which have resulted in improper or defective investigation.

ii) Whether such default and/or acts of omission and commission have adversely affected the case of the prosecution.

iii) Whether such default and acts were deliberate, unintentional or resulted from unavoidable circumstances of a given case.

iv) If the dereliction of duty and omission to perform was deliberate, then is it obligatory upon the court to pass appropriate directions including directions in regard to taking of penal or other civil action against such officer/witness.

15. In order to answer these determinative parameters, the Courts would have to examine the prosecution evidence in its entirety, especially when a specific reference to the defective or irresponsible investigation is noticed in light of the facts and circumstances of a given case.

16. The Investigating Officer, as well as the doctor who are dealing with the investigation of a criminal case, are obliged to act in accordance with the police manual and the known canons of medical practice, respectively. They are both obliged to be diligent, truthful and fair in their approach and investigation. A default or breach of duty, intentionally or otherwise, can sometimes prove fatal to the case of the prosecution. An Investigating Officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. Where the default and omission is so flagrant that it speaks volumes of a deliberate act or such irresponsible attitude of investigation, no court can afford to overlook it, whether it did or did not cause prejudice to the case of the prosecution. It is possible that despite such default/omission, the prosecution may still prove its case beyond reasonable doubt and the court can so return its finding. But, at the same time, the default and omission would have a reasonable chance of defeating the case of the prosecution in some events and the guilty could go scot-free. We may illustrate such kind of investigation with an example where a huge recovery of opium or poppy husk is made from a vehicle and the Investigating Officer does not even investigate or make an attempt to find out as to who is the registered owner of the vehicle and whether such owner was involved in the commission of the crime or not. Instead, he merely apprehends a cleaner and projects him as the principal offender without even reference to the registered owner. Apparently, it would prima facie be difficult to believe that a cleaner of a truck would have the capacity to buy and be the owner, in possession of such a huge quantity, i.e., hundreds of bags, of poppy husk. The investigation projects the poor cleaner as the principal offender in the case without even reference to the registered owner.

17. Even the present case is a glaring example of irresponsible investigation. It, in fact, smacks of intentional mischief to misdirect the investigation as well as to withhold material evidence from the Court. It cannot be considered a case of bona fide or unintentional omission or commission. It is not a case of faulty investigation simplicitor but is an investigation coloured with motivation or an attempt to ensure that the suspect can go scot free. This can safely be gathered from the following:

a) The entire investigation, including the statement of the investigating officer, does not show as to what happened to the viscera which was, as per the statement of PW3, handed over to the Constable, PW7, who, in turn, stated that the viscera had been deposited in the Police Station Malkhana. In the entire statement of the Investigating Officer, there is no reference to viscera, its collection from the hospital, its deposit in the Malkhana and whether it was sent to the FSL at all or not. If sent, what was the result and, if not, why?

b) Conduct of the Investigating Officer is more than doubtful in the present case. In his statement, he had stated that he noticed three injuries on the body of the deceased. He also admitted that in the post mortem report, no internal or external injuries were shown on the body of the deceased. According to him, he had asked PW3 in that regard but the reply of the doctor was received late and the explanation rendered was satisfactory. Firstly, this reply or explanation does not find place on record. There is no document to that effect and secondly, even in his oral evidence, he does not say as to what the explanation was.

c) In his statement, PW3, Dr. C.N. Tewari, stated that he did not find any external or internal injuries even after performing the post mortem on the body of the deceased. This remark on the post mortem report apparently is falsified both by the eye-witnesses as well as the Investigating Officer. It will be beyond apprehension as to how a healthy person could die, if there were no injuries on his body and when, admittedly, it was not a case of cardiac arrest or death by poison etc., more so, when he was alleged to have been assaulted with dandas (lathi) by four persons simultaneously. In any case, the doctor gave no cause for death of the deceased and prepared a post mortem report which ex facie was incorrect and tantamount to abrogation of duty. The Trial Court while giving the judgment of conviction, noticed that medico-legal post mortem examination is a very important part of the prosecution evidence and, therefore, it is necessary that it be conducted by a doctor fully competent and experienced. The Court also commented adversely upon the professional capabilities and/or misconduct of Dr. C.N. Tewari, as follows:

Whatever may have been the reasons but it is quite evident that Dr. C.N. Tewari failed in his professional duty and he did not perform post mortem examination properly after considering the inquest report and the police papers sent to him. If his finding deferred from the finding of the Panchas he should have informed his superior officers in that regard so that another opinion could have been obtained before the disposal of the dead body. The evidence leaves no room for doubt that Sri Pyara Singh was attacked with lathis as alleged by the prosecution and he received three injuries already referred to above which were mentioned in the inquest report (Ex.Ka-6).

The case of the prosecution cannot be thrown on account of the gross negligence and apathy of the Medical Officer Dr. C.N. Tewari who had performed autopsy on the dead body of Sri Pyara Singh. Since the Medical Officer Dr. C.N. Tewari had conducted in a manner not befitting the medical profession and prepared post mortem report against facts for reasons best known to him and was negligent in his duty in ascertaining the injuries on the body of the deceased, hence it is just and proper that the Director General, Medical health U.P. be informed in this regard for taking necessary action and for eradicating such practices in future. (Emphasis supplied)

18. From the record, it is evident that the learned counsel appearing for the State was also not aware if any action had been taken against Dr. C.N. Tewari. On the contrary, Mr. Ratnakar Dash, learned senior counsel appearing for Dr. C.N. Tewari, informed us that no action was called for against Dr. C.N. Tewari as he had authored the post mortem report and given his evidence truthfully and without any dereliction of duty. He also informed us that since Dr. C.N. Tewari is now retired and is not well, this Court need not pass any further directions.

19. We are not impressed with this contention at all. We have already noticed that PW3, Dr. C.N. Tewari, certainly did not act with the requisite professionalism. He even failed to truthfully record the post mortem report, Exhibit Ka-4. At the cost of repetition, we may notice that his report is contradictory to the evidence of the three eye-witnesses who stood the test of cross-examination and gave the eye-

version of the occurrence. It is also in conflict with the statement of PW6 as well as the inquest report (Exhibit Ka-6) prepared by him where he had noticed that there were three injuries on the body of the deceased. It is clear that the post mortem report is silent and PW3 did not even notice the cause of death. If he was not able to record a finding with regard to the cause of death, he was expected to record some reason in support thereof, particularly when it is conceded before us by the learned counsel for the parties, including the counsel for Dr. C.N. Tewari that it was not a case of death by administering poison.

20. Similarly, the Investigating Officer has also failed in performing his duty in accordance with law. Firstly, for not recording the reasons given by Dr. C.N. Tewari for non-mentioning of injuries on the post mortem report, Exhibit Ka-4, which had appeared satisfactory to him. Secondly, for not sending to the FSL the viscera and other samples collected from the body of the deceased by Dr. C.N. Tewari, who allegedly handed over the same to the police, and their disappearance. There is clear callousness and irresponsibility on their part and deliberate attempt to misdirect the investigation to favour the accused.

21. This results in shifting of avoidable burden and exercise of higher degree of caution and care on the courts. Dereliction of duty or carelessness is an abuse of discretion under a definite law and misconduct is a violation of indefinite law. Misconduct is a forbidden act whereas dereliction of duty is the forbidden quality of an act and is necessarily indefinite. One is a transgression of some established and definite rule of action, with least element of discretion, while the other is primarily an abuse of discretion. This Court in the case of State of Punjab & Ors. v. Ram Singh Ex. Constable [(1992) 4 SCC 54] stated that the ambit of these expressions had to be construed with reference to the subject matter and the context where the term occurs, regard being given to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires maintenance of strict discipline. The consequences of these defaults should normally be attributable to negligence. Police officers and doctors, by their profession, are required to maintain duty decorum of high standards. The standards of investigation and the prestige of the profession are dependent upon the action of such specialized persons. The police manual and even the provisions of the CrPC require the investigation to be conducted in a particular manner and method which, in our opinion, stands clearly violated in the present case. Dr. C.N. Tewari, not only breached the requirement of adherence to professional standards but also became instrumental in preparing a document which, ex facie, was incorrect and stood falsified by the unimpeachable evidence of eye witnesses placed by the prosecution on record. Also, in the same case, the Court, while referring to the decision in Ram Bihari Yadav and Others v. State of Bihar & Ors. [(1995) 6 SCC 31] noticed that if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcement agency but also in the administration of justice.

22. Now, we may advert to the duty of the Court in such cases. In the case of Sathi Prasad v. The State of U.P. [(1972) 3 SCC 613], this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the Court to see if the evidence given in Court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in the case of Dhanaj Singh @ Shera & Ors. v. State of Punjab [(2004) 3 SCC 654], held, in the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.

23. Dealing with the cases of omission and commission, the Court in the case of Paras Yadav v. State of Bihar [AIR 1999 SC 644], enunciated the principle, in conformity with the previous judgments, that if the lapse

or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party. In the case of Zahira Habibullah Sheikh & Anr. Vs. State of Gujarat & Ors. [(2006) 3 SCC 374], the Court noticed the importance of the role of witnesses in a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of Bentham, who states that witnesses are the eyes and ears of justice. The Court issued a caution that in such situations, there is a greater responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation. The Court held that legislative measures to emphasize prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in proper administration of justice must be given as much importance if not more, as the interest of the individual accused. The courts have a vital role to play. (Emphasis supplied)

24. With the passage of time, the law also developed and the dictum of the Court emphasized that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.

25. Reiterating the above principle, this Court in the case of National Human Rights Commission v. State of Gujarat [(2009) 6 SCC 767], held as under:

The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justiceoften referred to as the duty to vindicate and uphold the majesty of the law. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

26. In the case of State of Karnataka v. K. Yarappa Reddy [2000 SCC (Crl.) 61], this Court occasioned to consider the similar question of defective investigation as to whether any manipulation in the station house diary by the Investigating Officer could be put against the prosecution case. This Court, in Paragraph 19, held as follows:

19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable,

should the Court be influenced by the machinations demonstrated by the Investigating Officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the Court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by the investigation officers. Criminal Justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case.

27. In Ram Bali v. State of Uttar Pradesh [(2004) 10 SCC 598], the judgment in Karnel Singh v. State of M.P. [(1995) 5 SCC 518] was reiterated and this Court had observed that in case of defective investigation the court has to be circumspect while evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective.

28. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. For truly attaining this object of a fair trial, the Court should leave no stone unturned to do justice and protect the interest of the society as well.

29. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In Kamaljit Singh v. State of Punjab [2004 Cri.LJ 28], the Court, while dealing with discrepancies between ocular and medical evidence, held, It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out.

30. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the experts opinion,

because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court. {Plz. See Madan Gopal Kakad v. Naval Dubey & Anr. [(1992) 2 SCR 921 : (1992) 3 SCC 204]}.

31. Profitably, reference to the value of an expert in the eye of law can be assimilated as follows: The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. The court is not to surrender its own judgment to that of the expert or delegate its authority to a third party, but should assess his evidence like any other evidence. If the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use. It is required of an expert whether a government expert or private, if he expects, his opinion to be accepted to put before the court the material which induces him to come to his conclusion so that the court though not an expert, may form its own judgment on that material. If the expert in his evidence as a witness does not place the whole lot of similarities or dissimilarities, etc., which influence his mind to lead him to a particular conclusion which he states in the court then he fails in his duty to take the court into confidence. The court is not to believe the ipse dixit of an expert. Indeed the value of the expert evidence consists mainly on the ability of the witness by reason of his special training and experience to point out the court such important facts as it otherwise might fail to observe and in so doing the court is enabled to exercise its own view or judgment respecting the cogency of reasons and the consequent value of the conclusions formed thereon. The opinion is required to be presented in a convenient manner and the reasons for a conclusion based on certain visible evidence, properly placed before the Court. In other words the value of expert evidence depends largely on the cogency of reasons on which it is based. [See: Forensic Science in Criminal Investigation & Trial (Fourth Edition) by B.R. Sharma]

32. The purpose of expert testimony is to provide the trier of fact with useful, relevant information. The overwhelming majority rule in the United States, is that an expert need not be a member of a learned profession. Rather, experts in the United States have a wide range of credentials and testify regarding a tremendous variety of subjects based on their skills, training, education or experience. The role of the expert is to apply or supply specialized, valuable knowledge that lay jurors would not be expected to possess. An expert may present the information in a manner that would be unacceptable with an ordinary witness. The common law tried to strike a balance between the benefits and dangers of expert testimony by allowing expert testimony to be admitted only if the testimony were particularly important to aiding the trier of fact. Even in United States, if the helpfulness of expert testimony is substantially outweighed by the risk of unfair prejudice, confusion or waste of time, then the testimony should be excluded under the relevant Rules, and State equally balanced. Expert testimony on any issue of fact and significance of its application has been doubted by the scholars in the United States. Even under the law prevalent in that country, the opinion of an expert has to be scientific, specific and experience based. Conflict in expert opinions is a well prevalent practice there. While referring to such incidence David H. Kaye and other authors in The New Wigmore A Treatise on Evidence Expert Evidence (2004 Edition) opined as under :

The district court opinion reveals that one pharmacologist asserted that Danocrine more probably than not caused plaintiffs death from pulmonary hypertension, but it describes the reasoning behind this opinion in the vaguest of terms, referring only to extensive education and training in pharmacology and an unspecified scientific technique that relied upon epidemiological, clinical and animal studies, as well as plaintiffs medical records and medical history The nature of these studies and their relationship to the patients records is left unstated. The district court incanted the same mantra to justify admitting the remaining testimony. It asserted that the other experts similarly base their testimony upon a careful review of medical literature concerning Danocrine and pulmonary hypertension, and plaintiffs medical

records and medical history. The court of appeals elaborated on the testimony of two of the experts. The physician was confident to a reasonable medical certainty that the Danocrine caused Mrs. Zuchowiczs PPH because of the temporal relationship between the overdose and the start of the disease and the differential etiology method of excluding other possible causes. Yet the differential etiology here was barely more than a differential diagnosis of PPH. The causes of PPH are generally unknown and it appears that the only other putative alternative causes considered were drugs other than Danocrine. It is not at all clear that such a differential etiology is adequate to support a conclusion of causation to any kind of a medical certainty. The pharmacologist, not being a medical doctor, testified to a reasonable degree of scientific certainty . . . [that] the overdose of Danocrine, more likely than not, caused PPH. . . . He postulated a mechanism by which this might have occurred: I) a decrease in estrogen; 2) hyperinsulinemia, in which abnormally high levels of insulin circulate in the body; and 3) increase in free testosterone and progesterone . . . that . .. taken together, likely caused a dysfunction of the endothelium leading to PPH. In sum, plaintiffs experts did not know what else might have caused the hypertension, and they offered a conjecture as to a causal chain leading from the drug to the hypertension. This logic would be more than enough to justify certain clinical recommendationsthe advice to Mrs. Zuchowicz to discontinue the medication, for example. But is it enough to allow an expert not merely to testify to a reasonable diagnosis of PPH, or unexplained pulmonary hypertension, as the condition also is known, but also be able to propound a novel explanation that has yet to be verified, even in an animal model?

33. The Indian law on Expert Evidence does not proceed on any significantly different footing. The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convincing. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the Court, it has to be well authored and convincing. Dr. C.N. Tewari was expected to prepare the post mortem report with appropriate reasoning and not leave everything to the imagination of the Court. He created a serious doubt as to the very cause of death of the deceased. His report apparently shows an absence of skill and experience and was, in fact, a deliberate attempt to disguise the investigation.

34. We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the Court in arriving at a final conclusion. Such report is not binding upon the Court. The Court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such case, the Court has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the Court. The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if such eye-witnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye version given by the eye-witnesses, the Court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the Court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise.

35. Reverting to the case in hand, the Trial Court has rightly ignored the deliberate lapses of the investigating officer as well as the post mortem report prepared by Dr. C.N. Tewari. The consistent statement of the

eye-witnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW3 and PW6 are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eye-witness which was reliable and worthy of credence has justifiably been relied upon by the court.

36. Despite clear observations of the Trial Court, no action has been taken by the Director General, Medical Health, Uttar Pradesh. We do not see any justification for these lapses on the part of the higher authority. Thus, it is a fit case where this Court should issue notice to show cause why action in accordance with the provisions of the Contempt of Courts Act, 1971 be not initiated against him and he be not directed to conduct an enquiry personally and pass appropriate orders involving Dr. C.N. Tewari and if found guilty, to impose punishment upon him including deduction of pension. Admittedly, this direction was passed when Dr. C.N. Tewari was in service. His retirement, therefore, will be inconsequential to the imposing of punishment and the limitation of period indicated in the service regulations would not apply in face of the order of this Court.

37. Similarly, the Director General of Police UP/Uttarakhand also be issued notice to take appropriate action in accordance with the service rules against PW6, SI Kartar Singh, irrespective of the fact whether he is in service or has since retired. If retired, then authorities should take action for withdrawal or partial deduction in the pension, and in accordance with law.

38. Lastly, the learned counsel for the appellant had, of course, with some vehemence, argued that the offence even if committed by the appellant, would not attract the provisions of Section 302 IPC and would squarely fall within the ambit of Part II of Section 304 IPC. In other words, he prays for alteration of the offence to an offence punishable under Part II of Section 304 IPC. We are concerned with a case where four persons armed with lathis had gone to the fields of the deceased. They first hurled abuses at him and without any provocation started assaulting him with the dang (lathi) that they were carrying. Despite efforts to stop them by the the wife and son of the deceased, PW4 and PW2, they did not stop assaulting him and assaulted both these witnesses also. Thereupon, they kept on assaulting the deceased until he fell down dead on the ground. Three injuries were noticed by the Police on the body of the deceased including a protuberant injury on the head, which the Court is only left to presume has resulted in his death. In the absence of an authentic and correct post- mortem report (Exhibit Ka-4), the truthfulness of the prosecution eye- witnesses cannot be doubted. In addition thereto, the stand taken by the accused that they had suffered injuries was a false defence. Firstly, according to the doctor, CW2, it was injuries of a firearm, while even according to the defence, the deceased or his son were not carrying any gun at the time of occurrence. Secondly, they did not choose to pursue their report with the police at the time of investigation or even when the trial was on before the Trial Court. The accused persons had gone together armed with lathis with a common intention to kill the deceased and they brought their intention into effect by simultaneously assaulting the deceased. They had no provocation. Thus, the intention to kill is apparent. It is not a case which would squarely fall under Part II of Section 304 IPC. Thus, the cumulative effect of appreciation of evidence, as afore- discussed, is that we find no merit in the present appeal.

39. Having analyzed and discussed in some elaboration various aspects of this case, we pass the following orders:

A) The appeal is dismissed both on merits and on quantum of sentence.

B) The Director Generals, Health Services of UP/Uttarakhand are hereby issued notice under the provisions of the Contempt of Courts Act, 1971 as to why appropriate action be not initiated against them for not complying with the directions contained in the judgment of the Trial Court dated 29th June, 1990.

C) The above-said officials are hereby directed to take disciplinary action against Dr. C.N. Tewari, PW3, whether he is in service or has since retired, for deliberate dereliction of duty, preparing a report which ex facie was incorrect and was in conflict with the inquest report (Exhibits Ka-6 and Ka-7) and statement of PW6. The bar on limitation, if any, under the Rules will not come into play because they were directed by the order dated 29th June, 1990 of the Court to do so. The action even for stoppage/ reduction in pension can appropriately be taken by the said authorities against Dr. C.N. Tewari.

D) Director Generals of Police UP/Uttarakhand are hereby directed to initiate, and expeditiously complete, disciplinary proceedings against PW6, SI Kartar Singh, whether he is in service or has since retired, for the acts of omission and commission, deliberate dereliction of duty in not mentioning reasons for non-disclosure of cause of death as explained by the doctor, not sending the viscera to the FSL and for conducting the investigation of this case in a most callous and irresponsible manner. The question of limitation, if any, under the Rules, would not apply as it is by direction of the Court that such enquiry shall be conducted.

E) We hold, declare and direct that it shall be appropriate exercise of jurisdiction as well as ensuring just and fair investigation and trial that courts return a specific finding in such cases, upon recording of reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to the case of the prosecution, in breach of professional standards and investigative requirements of law, during the course of the investigation by the investigating agency, expert witnesses and even the witnesses cited by the prosecution. Further, the Courts would be fully justified in directing the disciplinary authorities to take appropriate disciplinary or other action in accordance with law, whether such officer, expert or employee witness, is in service or has since retired.

40. The appeal is accordingly dismissed.

.....J. (Swatanter Kumar)

.....J. (Fakkir Mohamed Ibrahim Kalifulla)

New Delhi, August 3, 2012

REPORTABLE IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL NO.529 OF 2010 Dayal Singh & Ors. Appellants Versus State of Uttaranchal Respondent O R D E R Today, by a separate judgment, we have directed that action be taken against PW 3 Dr. C.N. Tewari and PW 6 SI Kartar Singh. The Director General of Police and Director General, Health of State of Uttar Pradesh and/or Uttarakhand whoever is the appropriate authority, to take action within three months from today and report the matter to this Court. List for limited purpose on 15th October, 2012.

.....J. (Swatanter Kumar)

.....J. (Fakkir Mohamed Ibrahim Kalifulla)

New Delhi, August 3, 2012

❑❑❑

TRILOKI NATH & ORS VS STATE OF U.P

Bench: S.B. Sinha, R.V. Raveendran

Decided on 28 October, 2005

Appeal (crl.) 1150 of 2004

PETITIONER: Triloki Nath & Ors. Versus
RESPONDENT: State of U.P.

JUDGMENT:

J U D G M E N T WITH CRIMINAL APPEAL NOs. 1171, 1172 and 1173 OF 2004 S.B. SINHA, J :

These appeals arising out of a common judgment and order dated 22nd April, 2004 passed by the High Court of Judicature at Allahabad in Crl. Appeal No. 660 of 1981 and Crl. Appeal No.668 of 1981 were taken up for hearing together and are being disposed of by this common judgment. Criminal Appeal No.1150 of 2004 is by Triloki Nath, Krishna Chandra Singh, Shashi Kant and Sahdev (Accused Nos.6, 5, 7 and 8 respectively). Criminal Appeal Nos.1173, 1172 and 1173 of 2004 are respectively by Kunwar Prahald Singh (Accused No.1), Jitendra alias Mister (Accused No.2) and Gopal (Accused No.3). One of the eight accused namely, Chhanga has not filed any appeal.

BACKGROUND FACT:

The residents of village Devanand Pur had been performing "Holika Dehan" for a long time on Plot No. 399, which is said to be a banjar land. Kunwar Prahlad Singh became the owner of the said plot. He tried to enclose the said plot by a 'Mend'(Fence). An objection thereto was raised by the villagers including Laxmi Shankar Srivastava (PW-3); a complaint wherefor was made pursuant whereto an intervention was made by the police.

FIRs RELATING TO INCIDENT:

On the Basant Panchami day, the villagers allegedly fixed 'Dhah' as a symbol of Holi on the said plot and started collecting fuel wood thereupon. On the said day at about 12 noon, Khuddey, PW-4 while going to the flour mill found the Appellants herein removing the wood. The accused Jitendra armed with a gun and the remaining accused armed with lathis were present. Khuddey, PW-4, servant of Laxmi Shankar Srivastava, allegedly forbade them from doing so whereupon he was chased. Near the Hata of Pran, Laxmi Shankar Srivastava (PW-3), Sahjadey Jeevanlal (PW-2) Shabbir and other persons of the village arrived. Laxmi Shankar Srivastava allegedly had asked the accused as to why they have been chasing his servant. Triloki Nath exhorted his companions saying 'Maro Sale Ko' whereupon Gopal hurled a lathi blow on PW-3's head. Shashi Kant accused gave the second lathi blow on his wrist. Kunwar Prahlad Singh and Sahdev also assaulted him with lathis. Chhanga and Krishna assaulted Sahjadey. Khuddey (PW- 4) is said to have hurled lathi blow in defence of Laxmi Shankar Srivastava (PW-3). He thereafter raised hue and cry which attracted Nanhe (the deceased), and others. Nanhe raised alarm saying that Lala (thereby meaning Laxmi Shankar Srivastava) was being killed whereupon Triloki Nath exhorted Jitendra asking him to kill him as he professes himself to be a great helper of Laxmi Shankar. Responding thereto Jitendra fired a shot at Nanhe. He fell down and died.

A First Information Report was lodged by Dinesh Kumar Srivastava (PW-1) at about 2 p.m. on the same day.

A First Information Report was also lodged by Kunwar Prahlad Singh Srivastava (Accused No.1) at about 4.30 p.m. against Shahjadey, Bansidhar, Khuddey Chamar, Nanhe Chamar, Hira Passy, Shabbir and Laxmi Shankar purported to be for commission of an offence under Section 147/323/352 of the Indian Penal Code alleging that Dinesh Kumar under the pretext of performing Holika Dahan placed some waste wood at Plot No. 399 and kept on adding thereto. He went to the said plot along with his sons Mister alias Jitendra and Gopal at about 11 a.m. and removed the said waste wood from his land. When they were returning, Dinesh Kumar came on his motorcycle with a child. He allegedly stopped his motorcycle and called his servant as also Shahjaddey and Bansi Brahman and exhorted "Jane na paye, mar pit low" whereupon they ran towards their house. On the way, Khuddey Chamar, Nanhe Chamar, Hira Passi, Shabbir, etc. came from the side of the east and south and surrounded him. The accused persons attacked Triloki. Sahdev and other persons ran towards him for his rescue and when they had been running to save their lives, they heard a sound of gun-fire from behind.

INJURIES ON THE ACCUSED:

Injuries suffered by Triloki Nath in the said incident are as under:

"**(1)** Lacerated wound, 6 cm x = cm x scalp deep on the left side of scalp, 6 cm above ear.

(2) Abraded contusion, 6 cm x 3 cm on the back of right shoulder."

Injuries suffered by Sahdev are as under:

"**(1)** Lacerated wound, 2.5 cm x = cm x scalp deep, 3 cm behind left ear.

(2) Abrasion, 1 cm x 1.5 cm on the front of left knee."

Before we advert to the submissions made by the learned counsel for the parties, we may notice some of the findings of the Trial Court and the High Court respectively.

FINDINGS OF TRIAL COURT :

(i) "Kunwar Prahlad Singh accused had enough cause of grievance against Laxmi Shanker Srivastava P.W.3 and Dinesh Kumar Srivastava P.W.1. Undisputedly Kunwar Prahlad Singh accused had his possession over plot No. 399 in dispute and the same had also been proved by the Khasra entries for the period preceding the date of occurrence, and such khasra entries show the crop also of Kunwar Prahlad Singh accused in the plot in dispute."

(ii) "Thus, the defence case that the accused Triloki and Sahdeo had also received injuries in the same occurrence is also proved beyond doubt."

(iii) "As such, I find that the cause of grievance lay with the accused and not with the prosecution and it is quite probable that the accused Kunwar Prahlad Singh might have collected at the land in dispute fully armed with a view to effectively remove the fuel wood of Holi on the plot in dispute and to meet all resistance against it."

FINDINGS OF HIGH COURT :

(i) "From the very inception the only logical inference is that those accused had gone well prepared with lathies and fire arm to deal with the other side who were resisting removal of holika woods and they knew well that the consequences may be of death merely because other accused did not have deadly weapon and except lathi, which is also one of the deadly weapon and is capable of causing death, it is none other was caused death merely a chance or incident..."

(ii) "It was found that the plot No. 399 was in possession of Kunwar Prahlad Singh on the preceding day of occurrence and he had grudge against these people who were acting against his interest by keeping Holika. According to prosecution witnesses P.W.1 to P.W.4 it is evident that fuel woods for Holi had been stocked on the said plot. There cannot be any grievance of P.W.1 D.K. Srivastava regarding this as neither P.W.1 nor P.W.3 claimed this land adversely against their personal rights. Their only role was that P.W.1 D.K. Srivastava and P.W.3 L.S. Srivastava were playing leading role in burning of Holi. Therefore, it was the land-holder who had felt aggrieved. There is also no suggestion that the woods were stocked at the time of incident nor there is any case that Laxmi Shankar Srivastava, P.W. 3 and his associates had collected arms to resist such removal of Holi. There is probability that the defence side had collected arms to take revenue (sic) or with a view of removal of fuel wood of Holi and to meet the resistance against it."

(iii) "Learned trial court has held that if Nanhe was killed in the occurrence and the same was in the light of private defence, such contention of the learned counsel for the accused is absolutely false firstly because there is no case that the occurrence took place on or near the land in dispute to take possession over it place of Holi or Nanhey had gone near the land to take possession. Secondly, the fight had taken place not at the plot in dispute but at a place the distance of which has been stated by Khuddey, P.W.4 by an uncontroverted testimony, at 300 paces away from the disputed land. Thirdly, it comes out from the evidence that Kunwar Prahlad Singh accused had already thrown away fuel woods from the plot in dispute before the occurrence took place and according to his defence version he was proceeding from that place to his house and, therefore, finding of the trial court has sufficient reasons that the accused have not acted in their self-defence."

Upon completion of the trial, Jitnedra with other seven accused were found guilty of commission of the offence under Section 302/149 for commission of murder of Nanhe, under Section 307/149for causing injury to Laxmi Shankar Srivastava and under Section 147 of the Indian Penal Code for rioting The Trial judge by an order dated 17.9.1981 convicted and sentenced the accused to imprisonment for life for the offence of murder. The said judgment has been upheld by the High Court.

SUBMISSIONS:

Mr. S.R. Bajawa, learned senior counsel appearing on behalf of the Appellants at the outset drew our attention to the fact that the injuries received by Laxmi Shankar Srivastava and Sahjadey are more or less similar to those received by Triloki Nath and Sahdev. Such injuries received by the said Appellants, it was contended, must have given rise to an apprehension in their minds that one of them may be killed and as such the accused had rightly exercised their right of private defence. Exercise of such right of private defence could not have been denied to the accused persons on the reasonings of the High Court, it was submitted, in view of the fact that although the place of occurrence was 300 paces away from the plot in question, both the incidents of removal of trespass from Plot No. 399 as also the occurrence in question took place as a part of the same transaction.

The learned counsel furthermore drew our attention to the post- mortem report and submitted on the basis thereof that as blackening and tattooing and scorching were found, the same could not have been caused from a double barrel muzzle loaded gun which is said to be the weapon of offence.

Mr. Bajawa would submit that the impugned judgments of conviction of sentence are unsustainable as:

(i) Witnesses have come up with half truth.

(ii) The actual reason for putting the woods on the plot in question was not disclosed. The land was not lying fallow as wheat crop was grown thereon and, thus, the accused could not have been dispossessed therefrom.

(iii) The complainants sent Khuddey to tease the accused and they had been waiting at some distance.

(iv) The accused had a right to remove the wood piled on their land.

(v) They had no animus against Nanhe, deceased and, thus, they could not have been convicted under Section 302/149 of the Indian Penal Code.

(vi) There was no triggering point for firing at Nanhe except his so-called shouting that the accused persons would kill Lala meaning thereby Laxmi Shankar Srivastava, which cannot be relied upon.

(vii) Only one shot was fired from the gun as of necessity, as two of the accused persons were seriously injured.

(viii) PW-2, the only independent witness, is not at all reliable.

(ix) Admittedly, Khudday had also come with a lathi which established that the complainant party was the aggressor.

(x) Khudday did not suffer any injury which shows that the accused persons were not the aggressors.

(xi) Unless Khudday was assaulted, no unlawful assembly could have been caused.

(xii) In any view of the matter, the entire incident took place at the spur of the moment.

Mr. R.K. Kapoor, learned counsel appearing on behalf of the Appellant in Criminal Appeal Nos. 1171 and 1172 of 2004 supplemented the submissions of Mr. Bajawa urging:

(i) The accused persons were not having any grudge against the deceased.

(ii) There was no motive for killing.

(iii) The complainants were only chased from the land, which by itself did not constitute an offence.

(iv) Kunwar Prahlad Singh and Gopal did not give any exhortation for the death of Nanhe and as such their conviction under Section 302/149 is wholly unsustainable.

(v) The occurrence took place because of the interference with possession of the Appellants in plot in question by Khuddey. As the entire incident took place within 2-3 minutes, there was hardly any occasion to form an unlawful assembly and a common object on the spot.

(vi) There was no intention to kill Nanhe and as such for his death, others are not liable.

Mr. Vijay Singh, learned counsel appearing on behalf of Shashikant in Criminal Appeal No. 1150 of 2004 drew our attention to the fact that he allegedly gave a lathi blow on the left wrist of Laxmi Shankar Srivastava whereas in his cross-examination he stated that such injury was caused by Gopal and submitted that in that view of the matter he could not have been held guilty. He further submitted that sufficient material had been brought on records to show that an election dispute was going on between the parties.

Mr. N.S. Gahlout, learned counsel appearing in behalf of the State, on the other hand, submitted that :

(i) having regard to the statements made in First Information Reports lodged by both the parties, the time of occurrence as well as the place of occurrence must be held to have been admitted;

(ii) the death of Nanhe and the injuries suffered by Laxmi Shankar Srivastava and Sahjaddey being not denied and disputed, it was for the Appellants to show that the defence version was probable;

(iii) in view of the fact that both Khuddey and Laxmi Kant Srivastava were injured witnesses, their presence at the place of occurrence cannot be disputed and in that view of the matter there is no reason as to why their testimonies should not be relied upon; and

(iv) that from the First Information Report lodged by Kunwar Prahlad Singh, it would appear that the firing from a gun was admitted which being wholly unnatural would lead to an inference that the Appellants were the aggressors. Our attention in this behalf has also been drawn to setting up of another story by the Appellants in paragraph 9 of the S.L.P. which reads as under:

"As an altercation ensued, Khuddey attacked petitioner No. 1 and 4. Petitioner No. 1 and 4 wielded lathi in their defence and a free fight ensued. Prahlad Singh tried to escape by running away from the scene of occurrence but from one side, Dinesh Kumar aimed his gun at Prahlad Singh and from the other side, the brother of Khuddey namely Nanhe confronted him. Prahlad Singh sat down to avoid the bullet fearing a shot from the gun of Dinesh Kumar and the bullet fired by Dinesh Kumar hit Nanhe and Nanhe died on the spot."

It was submitted on the aforementioned premise that the Appellants have raised defences which are mutually destructive.

Drawing our attention to the findings of the learned Trial Judge as also the High Court, it was argued that it is apparent that the accused persons were the aggressors and in that view of the matter they cannot claim any right of private defence and in particular having regard to the fact that :

(i) from the plot in question, wood had already been removed.

(ii) place of occurrence is not the land in question but 300 paces away therefrom.

(iii) If the version of the accused persons is to be accepted that somebody has fired from behind, it cannot be said that they have done so in self- defence.

(iv) Such statements being vague no positive case of self-defence has been made out.

It was submitted that in villages normally the servants carry a lathi and in that view of the matter it cannot be said that the accused persons came heavily armed. Drawing our attention to the statements of Khuddey, PW-4 wherein he categorically admitted that Triloki and Sahdev received injuries from the lathi which he used in defence, it was submitted that in that view of the matter it could be said that the prosecution did not come out with the truth.

As regard, formation of common object, the learned counsel would submit that the same can be formed on the spot.

ADMITTED FACTS:

The admitted facts are:

(i) That the plot in dispute was in possession of accused Kunwar Prahlad Singh.

(ii) There are two factions in the village.

(iii) The complainants were piling up wood on the occasion of Holi which was removed by the accused persons.

(iv) Two persons on the side of the accused, viz., Triloki Nath, Sahdev suffered lacerated wound on their heads.The said injuries were simple ones.

(v) Nanhe died out of a gun shot injury. Laxmi Shankar Srivastava and Sahjadey also suffered lacerated wounds on their heads.

(vi) The complainant and others who were accused in the counter FIR have been acquitted and the judgment of acquittal has been affirmed upto this Court.

ANALYSIS:

The submissions of the learned counsel for the parties are required to be considered in the backdrop of the aforementioned admitted facts.

The Appellants at no stage disputed the correctness or otherwise of the autopsy report in respect of the deceased Nanhe and injuries sustained by Laxmi Shankar Srivastava and Sahjadey.. The relevant portion of the autopsy report reads as under:

" *** *** *** (1) Multiple fire arm wounds of entry, in an area of 10 cm x 7 cm on the front of neck and upper part of chest in middle, smallest being 2/10 cm x 2/10 cm and biggest being > cm x > cm. Blackening and tattooing present searching (sic) present.

*** *** ***

(c) Laryex, Trachea and Broachi Trachea and larvex ruptured at places 4 pallets recovered.

(d) Right Lung Ruptured at apex & contains haematones 3 pallets recovered

(e) Left Lung Ruptured atapex & contains haematomes 3 pallets recovered.

*** *** ***

(h) Large vessels Injuries on both sides ruptured in neck.

Jugular weni on (L) side ruptured 5 pellets recovered."

Laxmi Shankar Srivastava at the time of incident was about 74-75 years old. From the medico-legal evidence, it appears that he received a lacerated wound 6 cm x = cm x bone deep on the top of skull, 12.5 cm above nasion and he had a fracture on the outer side of forearm 2 cm above wrist joint and abrasion on the front of left leg 10 cm above ankle.

Having regard to the nature of injuries suffered by Laxmi Shankar Srivastava, a concurrent finding of fact has been arrived at that the Appellants had an intention to murder him. There is no reason to differ therewith.

Injuries said to have been suffered by Sahjadey, as would appear from the medical report proved by PW-5 are as under:

"(1) Lacerated wound 5 cm x 1 cm x Bone deep on the right side, 7 cm. above ear.

(2) Contusion, 8 cm x 1.5 cm over right lip."

Both PWs-3 and 4 were eye-witnesses. Both of them, even according to the Appellants, were present at the time of occurrence. Laxmi Shankar Srivastava (PW-3) was also an injured witness. Even in the first information report lodged by Kunwar Prahlad Singh both of them had been named. Their presence at the place of occurrence, therefore, cannot be disbelieved. The said witnesses have fully supported the prosecution case.

Apart from some minor discrepancies like that at one place he stated "May be that the lathi used by Khuddey hit Triloki" and immediately thereafter he stated "I did not see Khuddey using lathi on Triloki. At

the time of occurrence I did not see Triloki and Sahdev getting injured or bleeding. I did not see any lathi blow having been made on Sahdev", nothing else has been pointed out to reject the testimony of PW-3. We would notice hereafter the statements of PW-4 as regards the role played by him. We do not find any infirmity in his evidence to discard the same. Both of them are natural witnesses.

PW2 is also one of the named eye-witnesses. He is an independent witness. His presence at the time of occurrence cannot be doubted as he was cited at one of the witnesses in the First Information Report which was recorded within one and half hour from the time of occurrence.

It may be true that there appears to be some contradictions in his evidence as regard carrying of Laxmi Shankar on his back inasmuch as in cross-examination he had stated Ram Shankar carried Laxmi Shankar on his back, but that by itself may not be a ground to discard his evidence in totality.

'Falsus in uno, Falsus in ombibus' is not a rule of evidence in criminal trial and it is the duty of the court to disengage the truth from falsehood, to sift the grain from the chaff.

The said First Information Report was lodged without any delay whatsoever; particularly having regard to the fact that after the incident the injured persons were required to be looked after and the distance of the Police Station from the place of occurrence was about three kilometers.

SELF-DEFENCE The law relating to self defence in view of a catena of decisions of this Court is now well-settled. A plea of right of private defence may be in respect of property or a person.Section 99 of the Indian Penal Code, however, mandates that the right of private defence, in no case, extends to inflicting of more harm than necessary. Section 100 of the Code provides that the right of private defence of the body extends under the restrictions mentioned in Section 99 to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be of any of the descriptions enumerated therein. It is essential for an accused to show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him, burden wherefor lies on him.

It is true that while exercising the right of private defence a person is not expected to weigh in golden scales on the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailant who is armed with weapons; but it is also true that the right of private defence cannot be exceeded so as to cause more harm than necessary. Circumstances, thus, are required to be viewed with pragmatism. It is also well-settled that a right of private defnece is unavailable to the aggressor. The need to act must not have been created by the conduct of the accused in the immediate context of the incident which was likely or intended to give rise to that need.

It is not necessary to dilate on the matter any further as in Bishna @ Bhiswadeb Mahato & Ors. vs. State of West Bengal [Criminal Appeal Nos.1430-1431 of 2003], the issue has been discussed at some length.

The case at hand has to be considered having regard to the principles of law, as noticed hereinbefore. We have seen that in what circumstances and to what extent the right of private defence can be exercise would depend upon the fact situation obtaining in each case.

The Appellants being in possession of the disputed land, were entitled to protect it but having regard to the past practice of performing Holika Dahan on the land in question on the eve of Holi which takes place once in a year, the complainants party evidently did not want to dispossess the accused persons permanently. In law, however, the accused persons could resist trespass. Even a trespass has been committed, in certain situations, right of private defence can be used to eject the trespassers.

In this case, however, the incident took place 300 paces away from the land in question. Laxmi Shankar Srivastava had gone to chakk. At the time of occurrence he was coming back from his chakk. It is, therefore, not correct to contend that he had sent the servant to the plot in question with a view to tease the Appellants and was waiting at some distance with others. He, therefore, could not have known any part of the occurrence which took place till then.

According to the Appellants, they were attacked upon exhortation of Laxmi Shankar Srivastava. As would be noticed from the discussions made hereinafter that the said stand of the Appellants cannot be said to be correct. It has not been shown that apart from Khuddey any other person was carrying any weapon. On the other hand, all the Appellants were armed with lathis except Jitendra who was carrying a gun. There is no material on records to show that there had been any overt act on the part of the complainant. In the above circumstances, it is unlikely that the complainant would ask others to assault the Appellants.

Both the learned Sessions Judge and the High Court came to a concurrent finding of fact that the incident took place after Khuddey was chased. It is possible that as regard the right of the villagers to perform Holika Dahan or because of old enmity, the incident occurred but it is clearly not a case of free-fight amongst two groups of people, both being armed with deadly weapons. Thus, no case of self-defence has been made out.

PW-4 categorically stated in his examination-in-chief that he used lathi in defence only after Gopal and Shashikant assaulted Laxmi Shankar Srivastava and Sahjaddey. In cross-examination, the said witness accepted that Triloki and Sahjaddey received injuries from the lathi which he had used in defence, stating :

"I was shielding against the attack of the accused on my lathi and was also making the attacks.

Approximately, I shielded against 2-4 blows of lathi. In defence I had attacked Triloki. I had given one lathi blow. I had made one attack with my lathi on Sahdev also..."

He further categorically stated that none other than him and the accused had lathi/danda in their hands. We find no reason to disbelieve his testimony.

The Trial Court and the High Court have found that the nature of injuries on the person of Triloki Nath and Sahdev were too trivial. No case has also been made out, as suggested, that Dinesh Kumar (PW-1) was armed with a gun. He was in fact not present at the time of incident. No such suggestion was given to him that he was present at the time of incident with a gun. Such a suggestion had not been given also to any other witness. Non-sustenance of any injury by Khuddey is also not of much significance. He in his evidence, as noticed hereinbefore, has clearly stated as to why he had to wield lathi and how he had been defending himself and had been able to hit blows on Sahdev and Triloki Nath.

In the First Information Report lodged by Kunwar Prahlad Singh, it is alleged that they had run away when a sound of gun fire was heard. It is interesting to note that as regard the said incident, Dinesh Kumar was also said to have lodged a First Information Report but the same was not brought on record.

We have noticed hereinbefore that even in the First Information Report it has been admitted that the accused persons had also received injuries as a lathi was wielded. PW-3 although stated that he had not seen at the time of occurrence Triloki or Sahdev getting injured but he accepted that "May be that the lathi used by Khuddey hit Triloki". Merely a suggestion was given to PW-3 on behalf of the Appellants that Triloki Nath and Sahdev tried to mediate between the two groups and after they started beating Triloki Nath and Sahdev with lathi and in the melee Triloki Nath and Sahdev in turn assaulted others, but the same was denied.

ANALYSIS OF EVIDENCE The prosecution has fully established that Khuddey while going to the floor mill found the Appellants herein removing the wood, and asked them not to do so. He was, of course, armed with a lathi. Khuddey at that time, thus, was not causing any trespass. He did not physically prevent the Appellants from removing the trees. He even did not prevent them from reentering or otherwise obstructing them physically from possessing the land. He was chased away. He came near the Hata of Pran which is about 300 paces away from Plot No.399. At that point of time in all probabilities Laxmi Shankar Srivastava (PW-3) and Sahjadey, (PW-2), Shabbir and other persons arrived there. Laxmi Shankar Srivastava had only asked the Appellants as to why they had been chasing his servant, whereupon Triloki Nath exhorted his companions to assault him resulting in the incident. If Khoddey's evidence is believed, he had used his lathi to prevent assault on his master. He had used his lathi both by way of defnece as well as assaulting two of the accused parties. The right of private defence in the aforementioned situation could not have been exercised for preventing trespass into the property or for evicting the trespassers. By the time Khuddey reached near the land, the Appellants were already in possession of the land as they had removed the wood, which had been placed on the land by the complainant party.

The Appellants, therefore, were aggressors. The right of private defence cannot, thus, be claimed by them. [See Munney Khan vs. State of Madhya Pradesh (1971) 1 SCR 943] In A.C.Gangadhar vs. State of Karnataka [AIR 1998 SC 2381], the Appellant was said to have caused an injury with an axe on the head of PW- 5 when they protested against the accused from cutting the tree. The right of private defence claimed by the accused was denied opining :

"3. The learned counsel for the appellant, however, submitted that even if it is believed that A-1 had caused grievous hurt, he could not have been held guilty either under Section 326 or for any other offence as the said injury was caused by him in exercise of the right of private defence. Both the courts have come to the conclusion that the accused and his companions were the aggressors and had started the assault on the deceased and his children and that too, because they protested against the accused cutting the tree. Therefore, there was no scope for giving any benefit of right of private defence to the appellant. We, therefore, see no reason to interfere with the order passed by the High Court"

In Rajesh Kumar vs. Dharamvir and Others [(1997) 4 SCC 496], it is stated :

"20. Section 96 of the Indian Penal Code provides that nothing is an offence which is done in the exercise of the right of private defence and the fascicle of Sections 97 to 106 thereof lays down the extent and limitation of such right. From a plain reading of the above sections it is manifest that such a right can be exercised only to repel unlawful aggression and not to retaliate. To put it differently, the right is one of defence and not of requital or reprisal. Such being the nature of right, the High Court could not have exonerated the accused persons of the charges levelled against them by bestowing on them the right to retaliate and attack the complainant party."

Therein, the prosecution case was as under :

"3. According to the prosecution case on the same day at or about 4.30 p.m. the five accused and Lachhi Ram started demolishing the inner boundary wall of the shop in order to make it a part of their own house. On hearing the sound of pounding on the wall Yogesh went to the lane in front of their house and asked the accused not to demolish the wall. Immediately thereafter accused Dharamvir, armed with a lathi, and the other four accused and Lachhi Ram came out of the shop with knives and started inflicting blows on Yogesh with their respective weapons. On hearing the alarms raised by him when Rajesh (PW 13), his father Dinesh Chander, and his grandfather Suraj Bhan came forward to his rescue, Subhash, Lachhi Ram and Suresh, assaulted Rajesh with their knives. All the five accused persons and Lachhi Ram also assaulted

Dinesh Chander and Suraj Bhan causing injuries on their person. At that stage, Dinesh Chander fired a shot from his licensed gun, which hit Lachhi Ram. In the meantime Krishna Devi (PW 14), mother of Rajesh, had also reached the spot. Thereafter the five accused persons ran away with their weapons. Though Yogesh had succumbed to his injuries there, his body was taken to the Local Primary Health Centre, where the injured Dinesh Chander, Suraj Bhan and Lachhi Ram were removed for treatment. The injured Rajesh however first went to Samalkha Police Station to lodge the FIR."

The Trial Court recorded a finding relying upon the evidence of Rajesh Kumar (PW-13) and his mother Krishna Devi (PW-14) that the entire occurrence took place in the lane itself. The said finding was upset by the High Court accepting the plea of right of private defence of person and property raised by the accused persons in the manner as noticed supra.

This Court held :

"21. We reach the same conclusion through a different route even if we proceed on the assumption that the finding of the High Court that the accused party came out in the lane and attacked the complainant party after the latter had damaged the outer door of their house is a proper one. The offence that was committed by the complainant party by causing such damage would amount to "mischief" within the meaning of Section 425 of the Indian Penal Code and, therefore, in view of Section 105 of the Indian Penal Code the accused would have been entitled to exercise their right of private defence of property so long as the complainant party continued in the commission of the mischief. In other words, after the damage was done, the accused had no right of private defence of property, which necessarily means that when they attacked the complainant party in the lane they were the aggressors. Consequently, it was the complainant party and not the accused who was entitled to exercise the right of private defence of their persons; and their act of gunning down Lachhi after four of them were assaulted by the accused party with deadly weapons would not be an offence in view of Sections 96 and 100 of the Indian Penal Code"

In Mannu and others Vs. State of Uttar Pradesh [AIR 1979 SC 1230], this Court held that when PW-1 and the deceased therein were going to the market they had been waylaid and attacked by the Appellants, they cannot claim the right of private defence. These decisions apply in all fours to the facts of this case.

We may now consider some of the decisions relied upon by Mr. Bajawa.

In Harish Kumar and Another Vs. State of M.P. [(1996) 9 SCC 667] a finding of fact has been arrived at that the court had been deprived of a truthful account of the first of the two occurrences which had taken place and figuratively there was a first occurrence which led to the second one. It was furthermore found as of fact that some unpleasantness had occurred earlier wherefor some of the members of the complainant party had kept being there and others had started assembling in the lane in which the house of the appellants lay. In the aforementioned factual scenario, it was held:

"19As members of a faction, it is difficult to believe that they would have come there unarmed and less in number and be there for no cause, all the more knowing fully well that amongst the appellants were 2 licensed weapon-holders. It is alleged by the prosecution that it was Harish Kumar, accompanied by his companions, who first stepped forward towards the complainant party, present near the stone gate. Here then was direct confrontation. In the circumstances therefore, the possibility cannot be ruled out that Harish Kumar, becoming apprehensive of danger to himself and his family members chose to be defensive in becoming offensive, because of the first incident; without having the requisite intention to cause the murder of any particular person. He therefore fired but only once and the fire was not repeated. There was no indiscriminate

firing. His act would therefore, be termed as one in exercise of the right of private defence of person entitling him to acquittal..."

In Yogendra Morarji Vs. State of Gujarat [(1980) 2 SCC 218] the fact situation obtaining was absolutely different. The accused appellant, a businessman, had purchased land in a nearby village and employed the deceased and a few others to dig a well thereupon. A dispute regarding payments due to the workers culminated in their collectively approaching the accused when he visited the village and was staying in his Manager's house. During course of their discussion, a heated altercation took place which was resented by the workers. They collectively were standing on a road and lingered near a field for about an hour. The accused started on his return journey at about 9 p.m. and when his station-wagon reached near that field, the deceased and his companions raised their hands signaling him to stop the vehicle whereupon the accused slowed down the vehicle and fired three rounds in quick succession from his revolver without aiming at any particular person. He went to the police station and surrendered his revolver. He was acquitted by the Trial Court but convicted by the High Court for commission of an offence under Section 304 of the Indian Penal Code. On appeal, this Court held that having regard to the fact that he had fired three rounds, he must be held to have exceeded his right of private defence.

In Moti Singh Vs. State of Maharashtra [(2002) 9 SCC 494], this Court merely held that the right of private defence cannot be denied merely because the accused adopted a different line of defence particularly when the evidence adduced by the prosecution would indicate that they were put under a situation where they could reasonably have apprehended grievous hurt even to one of them.

In Mahabir Choudhary Vs. State of Bihar [(1996) 5 SCC 107], the law has been laid down in the following terms:

"11. The emerging position is, you have the first degree of right of private defence even if the wrong committed or attempted to be committed against you is theft or mischief or criminal trespass simpliciter. This right of private defence cannot be used to kill the wrongdoer unless you have reasonable cause to fear that otherwise death or grievous hurt might ensue in which case you have the full measure of right of private defence."

There cannot be any dispute as regard aforementioned proposition of law.

In State of U.P. Vs. Ram Niranjan Singh [(1972) 3 SCC 66], this Court in the facts and circumstances obtaining therein was of the opinion that two incidents which have taken place on 7th December, 1965 were integrated ones and, thus, the same right of private defence the Respondent had for causing the death of the deceased No. 1 was available to him in respect of the deceased No. 2. The said decision has no application in the present case.

In Subramani and Others Vs. State of T.N. [(2002) 7 SCC 210] again a positive case of exercise of right of private defence was made out. Therein the question was as to whether the accused had exceeded their right of private defence. They were held to have initially acted in exercise of their right of private defence of property and in exercise of the right of private defence of person later and in that factual backdrop, it was held:

"21In the instant case we are inclined to hold that the appellants had initially acted in exercise of their right of private defence of property, and later in exercise of the right of private defence of person. It has been found that three of the appellants were also injured in the same incident. Two of the appellants, namely, Appellants 2 and 3 had injuries on their head, a vital part of the body. Luckily the injuries did not prove to be fatal because if inflicted with more force, it may have resulted in the fracture of the skull and proved fatal. What is, however, apparent is the fact that the assault on them was not directed on non-vital parts of the body, but

directed on a vital part of the body such as the head. In these circumstances, it is reasonable to infer that the appellants entertained a reasonable apprehension that death or grievous injury may be the consequence of such assault. Their right of private defence, therefore, extended to the voluntarily causing of the death of the assailants."

The claim of right of private defence was, thus, not available to the Appellants as : (1) occurrence had taken place 300 paces away from Plot No.399 of Village Devanand Pur; (ii) The Appellants were aggressors; and (iii) All of them were armed and in particular Jitendra was having a gun.

In fact Nanhe exercised and could in the facts and circumstances of the case his right of private defence in assaulting Triloki Nath and Sahdev. INJURIES ON THE ACCUSED:

Although the injuries suffered by Triloki Nath and Sahdev may be at the same place on their persons as of Laxmi Shankar Srivastava and Sahjadey but they are not similar. The injuries suffered by Triloki Nath and Sahdev are simple in nature. Even in the first information report also Section 323 was mentioned. The injuries suffered by Laxmi Shankar Srivastava and Sahjadey, on the other hand, were grievous in nature. The Appellants were not only charged under Section 326 of the Indian Penal Code but also under Section 307 thereof. They have been found guilty of commission of the said offences by both the courts.

It is not the law that prosecution case shall fail only because injuries on the person of the accused have not be explained. There is a plethora of decisions to show that to show that in certain situation it is not necessary to explain the injuries on the person of the accused.

In Laxman Singh vs. Poonam Singh & Ors. [(2004) 10 SCC 94] , it was observed:

"7But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. (See Lakshmi Singh v. State of Bihar 6.) A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting"

Yet again in Chacko alias Aniyan Kunju and Others Vs. State of Kerala [(2004) 12 SCC 269], "7Undisputedly, there were injuries found on the body of the accused persons on medical evidence. That per se cannot be a ground to totally discard the prosecution version. This is a factor which has to be weighed along with other materials to see whether the prosecution version is reliable, cogent and trustworthy. When the case of the prosecution is supported by an eyewitness who is found to be truthful as well, mere non-explanation of the injuries on the accused persons cannot be a foundation for discarding the prosecution version. Additionally, the dying declaration was found to be acceptable."

In Kashiram and Others Vs. State of M.P. [(2002) 1 SCC 71],whereupon Mr. Bajawa relied upon, a 3-Judge Bench of this Court was satisfied that a case of private defence has been made out by the Appellants therein. The High Court in that case did not record any specific finding. The Court referred to its earlier decision in Dev Raj Vs. State of H.P. [1994 Supp (2) SCC 552] wherein it was held that where the accused received injuries during the same occurrence in which the complainants were injured and when they have taken the plea that they acted in self-defence, that cannot be lightly ignored particularly in the absence of any explanation of their injuries by the prosecution.

Vajrapu Sambayya Naidu and Others Vs. State of A.P. and Others [(2004) 10 SCC 152] is distinguishable on facts. Therein a finding of fact was arrived at that not only the complainant's decree for eviction was obtained against the informant, actual delivery of possession was also effected and accused No. 13 came in a possession of land in question. In that context, this Court observed that the complexion of the entire case changes because in such an event the Appellants cannot be held to be aggressors.

No decision relied upon by the Appellants lays down a law in absolute terms that in all situations injuries on the persons of the accused have to be explained. Each case depends upon the fact situation obtaining therein.

Detailed discussions on this question have again been made in Bishna @ Bhiswadeb Mahato (supra) and in that view of the matter, it is not necessary to dilate thereover.

We are of the considered opinion that the injuries on the accused have sufficiently been explained and, thus, it was not necessary for the prosecution to adduce any further evidence. [See Takhaji Hiraji vs. Thakore Kubersing Chamansing and Others (2001) 6 SCC 145] COMMON OBJECT A concurrent finding of fact has been arrived at by both the courts. Nothing has been pointed out to show as to why this Court should take a different view. When a large number of persons assembled with a gun and other weapons having in mind the dispute over the land in question, they must be held to have found common knowledge that by reason of their act, somebody may at least be grievously injured.

For the purpose of attracting Section 149 of the IPC, it is not necessary that there should be a pre-concert by way of a meeting of the persons of the unlawful assembly as to the common object. If a common object is adopted by all the persons and shared by them, it would serve the purpose.

In Mizaji and another Vs. The State of U.P. [(1959) Supp. 1 SCR 940], it was observed:

"Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all"

In Masalti Vs. State of U.P. [(1964) 8 SCR 133], a contention on the basis of a decision of this Court in Baladin Vs. State of Uttar Pradesh [AIR 1956 SC 181] stating that it is well-settled that mere presence in an assembly does not make a person, who is present, a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, that an overt act was mandatory, was repelled by this Court stating that such observation was made in the peculiar fact of the case. Explaining the scope and purport of Section 149 of the IPC, it was held:

"What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained long with the other members of the assembly the common object as defined by Section 141 IPC Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common object specified by the five clauses of Section 141, is an unlawful

assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly"

It was further observed:

"In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

Yet again in Bhajan Singh and Others Vs. State of Uttar Pradesh [(1974) 4 SCC 568], it was held:

"13. Section 149 IPC constitutes, per se, a substantive offence although the punishment is under the section to which it is tagged being committed by the principal offender in the unlawful assembly, known or unknown. Even assuming that the unlawful assembly was formed originally only to beat, it is clearly established in the evidence that the said object is well-knit with what followed as the dangerous finale of, call it, the beating. This is not a case where something foreign or unknown to the object has taken place all of a sudden. It is the execution of the same common object which assumed the fearful character implicit in the illegal action undertaken by the five accused."

In Shri Gopal & Anr. Vs. Subhash & Ors. [JT 2004 (2) SC 158], it was stated:

"15. The essence of the offence under Section 149 of the Indian Penal Code would be common object of the persons forming the assembly. It is necessary for constitution of the offence that the object should be common to the persons who compose the assembly, that is, that they should all be aware of it and concur in it. Furthermore, there must be some present and immediate purpose of carrying into effect the common object. A common object is different from a common intention insofar as in the former no prior consent is required, nor a prior meeting of minds before the attack would be required whereas an unlawful object can develop after the people get there and there need not be a prior meeting of minds."

In Ram Tahal and Others Vs. The State of U.P. [(1972) 1 SCC 136], a Division Bench of this Court noticed:

"A 5-Judge Bench of this Court in Mohan Singh v. State of Punjab has further reiterated this principle where it was pointed out that like Section 149 of the IPC Section 34 of that Code also deals with cases of constructive liability but the essential constituent of the vicarious criminal liability under Section 34 is the existence of a common intention, but being similar in some ways the two sections in some cases may overlap. Nevertheless common intention, which Section 34has its basis, is different from the common object of unlawful assembly. It was pointed out that common intention denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character but must be actuated by the same common intention which is different from same intention or similar intention..."

Recently, this Court in Vaijayanti Vs. State of Maharashtra, Criminal Appeal No. 1100 of 2004 disposed of on 22nd September, 2005 as regard formation of common intention opined:

"Section 34 of the Indian Penal Code envisages that "when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons, is liable for that act, in the same manner as if it were done by him alone". The underlying principle behind the said provision is joint liability of persons in doing of a criminal act which must have found in the existence of common intention of enmity in the acts in committing the criminal act in furtherance thereof. The law in this behalf is no longer res integra. There need not be a positive overt act on the part of the person concerned. Even an omission on his part to do something may attract the said provision. But it is beyond any cavil of doubt that the question must be answered having regard to the fact situation obtaining in each case."

CONCLUSION The upshot of our aforementioned discussions is that the Appellants were not entitled to raise the plea of self-defence both in respect of the property as also the person being themselves aggressors. The fact that the prosecution in the counter-case lodged by Kunwar Prahlad Singh has resulted in acquittal of the complainant party would also have some bearing in the matter. We have also found hereinbefore that injuries on the person of Triloki Nath and Sahdev had sufficiently been explained. The injuries on the person of the said Appellants, therefore, loses all significance. We, therefore, do not agree with the submissions of the learned counsel for the Appellants that the prosecution has come out only with a half truth.

For the purpose of arriving at a finding of guilt of the Appellants, the number of shots fired by Jitendra would not be decisive. Carrying of a lathi by Khuddey who was responsible for causing injury on Trilokinath and Sahdev has sufficiently been explained by the learned Sessions Judge as also the High Court and we do not find any reason to differ therefrom. Similarly, non-sufferance of any injury by Khuddey is also not of much significance so as to tilt the balance in favour of the Appellants. It is equally incorrect to contend that no unlawful assembly could have been caused unless Khuddey was assaulted. Such a plea, in our opinion, is wholly misconceived.

We are furthermore of the opinion that non-examination of Sahdev is not fatal.

Mr. Bajawa, the learned Senior Counsel appearing on behalf of the Appellants laid emphasis on the fact that blackening, tattooing and scorching were found, the same could not have been caused from a double barrel muzzle loaded gun which was said to the weapon of offence. The said contention had not been raised before the Trial Court or before the High Court. Even the attention of the doctor (PW-5) was not drawn to this aspect of the matter. Had the doctor been confronted with such a plea, as has been raised before us, he might have explained the same.

In this case having regard to the peculiar facts and circumstances of this case, we are of the opinion that the Appellants and the other accused cannot be said to have formed a common object to kill any person, or to make an attempt in that behalf in view of the manner in which the occurrence took place. Their common object appears to be to teach Laxmi Shankar Srivastava and others, a lesson for making attempts to burn Holika by causing grievous injuries to them The prosecution has been able to establish that on mere asking of Laxmi Shankar Srivastava as to why the other accused had been chasing his servant, Triloki exhorted his companions saying 'Maro Sale Ko', whereupon Gopal hurled a lathi blow on PW-3's head. Shashi Kant gave the second lathi blow on his wrist. Kunwar Prahlad Singh and Sahdev also assaulted him with lathis, whereas Chhanga and Krishna assaulted Sahjadey. Thus, their common object to cause grievous hurt to some persons on the side of the complainant party is established. We are, therefore, of the opinion that all the accused persons including Jitendra are to be found guilty under Section 326/149 IPC.

In the aforementioned premise, a significant aspect of the matter cannot be lost sight of. Only Triloki exhorted Jitendra to kill Nanhe who came to the spot accidentlly. The exhortation of Triloki was to Jitendra @ Mister, who was having a gun. On his exhortation only Jitendra fired from his gun as a result whereof, he

died. We, therefore, are of the opinion that Triloki along with Jitendra developed a common intention in that behalf on the spot. Both are, therefore, liable to be convicted under Section 302/34 IPC.

The sentence imposed by the High Court on Jitendra is, therefore, maintained. The conviction of other appellants is altered to one under Section 326/149 IPC. They are sentenced to undergo seven years' R.I. and also to pay a fine of Rs.1000/- each, and in default to further undergo a simple imprisonment of three months. No separate sentence, however, is being passed for commission of an offence under Section 326/149 IPC as against Jitendra.

Triloki Nath is said to have expired during the pendency of the appeal. His appeal is, therefore, dismissed having been abated.

These appeals are dismissed subject to the alteration in the conviction and sentence, as mentioned hereinbefore.

❑❑❑

VIRSA SINGH VS THE STATE OF PUNJAB

Bench: Bose, Vivian

Supreme Court of India

1958 AIR 465, 1958 SCR 1495

Petitioner: Virsa Singh.
Vs.
Respondent: The State of Punjab

Date Judgment: 11/03/1958

CITATION: 1958 AIR 465 1958 SCR 1495

ACT: Criminal Trial--Culpable homicide amounting to murder-- Prosecution to Prove-Presence and Nature of Injury-Intention to cause that Particular Injury, which was not accidental or unintentional and was sufficient to cause death in the ordinary (course of nature--Indian Penal Code (Act XLII of 1860), s. 300, 3rdly.

HEADNOTE: The accused thrust a spear into the abdomen of ,he deceased. This injury caused his death. In the opinion of the doctor the injury was sufficient to cause death in the ordinary course of nature. It was found by the Sessions judge that the accused intended to cause grievous hurt only. In his opinion however the third clause Of S. 300 Indian Penal Code applied. He accordingly convicted and sentenced the accused under S. 302 India, Penal Code. The High Court upheld the conviction, It was argued that the third clause Of s. 300 Indian Penal Code did not apply as it was not proved that the accused intended to inflict a 1496 bodily injury that was sufficient to cause death in the ordinary course of nature as s. 300 Indian Penal Code third clause states, " If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death

Held, that the prosecution must prove the following before it can bring a case under s. 300 Indian Penal Code third clause.

(1) It must establish, quite objectively, that a bodily injury is present.

(2) The nature of the injury must be proved; these are purely objective investigations.

(3) It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

(4) It must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

The third clause of S. 300 Indian Penal Code consists of two parts. Under the first part it must be proved that there was an intention to inflict the injury that is found to be present and under the second part it must be proved that the injury was sufficient in the ordinary course of nature to cause death. The words " and the bodily injury intended to be inflicted " are merely descriptive. All this means is, that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature ; it must in addition be shown that the injury found to be present was the injury intended to be inflicted. Whether it was

sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention.

The Following condition were laid down to be proved to bring a case under section 300 IPC 3rd clause

(1) Objectively establish presence of bodily injury

(2) nature of injury must be proved by objective investigation

(3) intention to commit the particular injury must be proved i.e. it was neither unintentional nor accidental

(4) The injury/injuries was sufficient to cause death in ordinary course of nature. In addition, it must also be shown when the injury found to be present and has been opined to be sufficient to cause death in ordinary course of nature was, in fact, the injury intended to be committed.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 90 of 1957.

Appeal by special leave from the judgment and order dated November 21, 1956, of the Punjab High Court in Criminal Appeal No. 326 of 1956 arising out of the judgment and order dated June 26, 1956, of the Court of the Sessions Judge at Ferozepore in Sessions Case No. 8 of 1956. Jai Gopal Sethi and R. L. Kohli, for the appellant. N. S. Bindra and T. M. Sen, for the respondent.

1958. March 11. The Judgment of the Court was delivered by BOSE J.-The appellant Virsa Singh has been sentenced to imprisonment for life under s. 302 of the Indian Penal Code for the murder of one Khem Singh. He was granted special leave to appeal by this Court but the leave is limited to " the question that on the finding accepted by the Punjab High Court what offence is made out as having been committed by the petitioner."

The appellant was tried with five others under sss. 302/49, 324/149 and 323/149 Indian Penal Code. He was also charged individually under s. 302.

The other, were acquitted of the murder charge by the first Court but were convicted under ss. 326, 324 and 323 read with s. 149, Indian Penal Code. On appeal to the High Court they were all acquitted.

The appellant was convicted by the first Court under s. 302 and his conviction and sentence were upheld by the High Court.

There was only one injury on Khem Singh and both Courts are agreed that the appellant caused it. It was caused as the result of a spear thrust and the doctor who examined Khem Singh, while he was still alive, said that it was " a punctured wound 2" x 1/2" transverse in direction on the left side of the abdominal wall in the lower part of the iliac region just above the inguinal canal. He also said that " Three coils of intestines were coming out of the wound." The incident occurred about 8 p. m. on July 13, 1955. Khem Singh died about 5 p. m. the following day. The doctor who conducted the postmortem described the injury as-

" an oblique incised stitched wound 21/2" on the lower part of left side of belly, 13" above the left inguinal ligament. The injury was through the whole thickness of the abdominal wall. Peritonitis was present and there was digested food in that cavity. Flakes of pus were sticking round the small intestines and there were six cuts..... at various places, and digested food was flowing out from three cuts." The doctor said that the injury was sufficient to cause death in the ordinary course of nature.

The learned Sessions Judge found that the appellant was 21 or 22 years old and said-

" When the common object of the assembly seems to have been to cause grievous hurts only, I do not suppose Virsa Singh actually had the intention to cause the death of Khem Singh, but by a rash and silly act he gave a rather forceful blow, which ultimately caused his death. Peritonitis also supervened and that hastened the death of Khem Singh. But for that Khem Singh may perhaps not have died or may have lived a little longer."

Basing on those facts, he said that the case fell under s. 300, 3rdly and so he convicted under s. 302, Indian Penal Code.

The learned High Court Judges considered that the whole affair was sudden and occurred on a chance meeting ". But they accepted the finding that the appellant inflicted the injury on Khem Singh and accepted the medical testimony that the blow was a fatal one.

It was argued with much circumlocution that the facts set out above do not disclose an offence of murder because the prosecution has not proved that there was an intention to inflict a bodily injury that was sufficient to cause death in the ordinary course of nature. Section 300, 3rdly was quoted:

" If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

It was said that the intention that the section requires must be related, not only to the bodily injury inflicted, but also to the clause, "and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

This is a favourite argument in this kind of case but is fallacious. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, the "thirdly " would be unnecessary because the act would fall under the first part of the section, namely- " If the act by which the death is caused is done with the intention of causing death."

In our opinion, the two clauses are disjunctive and separate. The first is subjective to the offender: "If it is done with the intention of causing bodily injury to any person."

It must, of course, first be found that bodily injury was caused and the nature of the injury must be established, that is to say, whether the injury is on the leg or the arm or the stomach, how deep it penetrated, whether any vital organs were cut and so forth. These are purely objective facts and leave no room for inference or deduction: to that extent the enquiry is objective; but when it comes to the question of intention, that is subjective to the offender and it must be proved that he had an intention to cause the bodily injury that is found to be present. Once that is found, the enquiry shifts to the next clause- " and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death." The first part of this is descriptive of the earlier part of the section, namely, the infliction of bodily injury with the intention to inflict it, that is to say, if the circumstances justify an inference that a man's intention was only to inflict a blow on the lower part of the leg, or some lesser blow, and it can be shown that the blow landed in the region of the heart by accident, then, though all injury to the heart is shown to be present, the intention to inflict ail injury in that region, or of that nature, is not proved. In that case, the first part of the clause does not come into play. But once it is proved that there was an intention to inflict the injury that is found to be present, then the earlier part of the clause we are now examining " and the bodily injury intended to be inflicted " is merely descriptive. All it means is that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature; it must in addition be shown that the injury is of the kind that falls within the earlier clause, namely, that the injury found to be present was the injury that was intended to be inflicted. Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction

from the proved facts about the nature of the injury and has nothing to do with the question of intention. In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarly proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, be cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broadbased and simple and based on common sense: the kind of enquiry that " twelve good men and true could readily appreciate and understand.

To put it shortly, the prosecution must prove the following facts before it can bring a case under s. 300, 3rdly " ; First, it must establish, quite objectively, that a bodily injury is present ; Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and, Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s. 300, 3rdly. It does not matter that there was no intention to cause death. It does not matter that there was Do intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional. We were referred to a decision of Lord Goddard in R v. Steane (1) where the learned Chief Justice says that where a particular intent must be laid and charged, that particular intent must be proved. Of course it must, and of course it must be proved by the prosecution. The only question here is, what is the extent and nature of the intent that s. 300 3rdly requires, and how is it to be proved ? The learned counsel for the appellant next relied on a passage where the learned Chief Justice says that: (1) [1947] 1 All E. R. 813, 816.

"if, on the totality of the evidence, there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted."

We agree that that is also the law in India. But so is this. We quote a few sentences earlier from the same learned judgment:

"No doubt, if the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged."

That is exactly the position here. No evidence or explanation is given about why the appellant thrust a spear into the abdomen of the deceased with such force that it penetrated the bowels and three coils of the intestines came out of the wound and that digested food oozed out from cuts in three places. In the absence of evidence, or reasonable explanation, that the prisoner did not intend to stab in the stomach with a degree of force sufficient to penetrate that far into the body, or to indicate that his act was a regrettable accident and that he intended otherwise, it would be perverse to conclude that he did not intend to inflict the injury that he did. Once that intent is established (and no other conclusion is reasonably possible in this case, and in any case it is a question of fact), the rest is a matter for objective determination from the medical and other evidence about the nature and seriousness of the injury.

The learned counsel for the appellant referred us to Emperor v. Sardarkhan Jaridkhan (1) where Beaman J. says that- " where death is caused by a single blow, it is always much more difficult to be absolutely certain what degree of bodily injury the offender intended."

With due respect to the learned Judge he has linked (1) (1917) I. L. R. 41 Bom. 27,29. up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes overlap. The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If be can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion.- But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not One of law but one of fact; and whether the conclusion should be one way or the other is a matter of proof, where necessary, by calling in aid all reasonable inferences of fact in the absence of direct testimony. It is not one for guess-work and fanciful conjecture. The appeal is dismissed.

Appeal dismissed.

❑❑❑

RAMJEE SAH VS STATE OF JHARKHAND

Jharkhand High Court

Cr. Appeal (DB) No. 218 of 2005

(Against the judgment of conviction dated and order of sentence both dated 31st January, 2005 delivered by 5th Additional Sessions Judge, Fast Track Court No.2, Godda in Sessions Case No.76 of 2003)

Ramjee Sah ... Appellant
Versus
The State of Jharkhand ... Respondent

For the Appellant: M/s. Ritu Kumar, Vikash Kumar

For the Respondent: Mr. M.B. Lal, A.P.P.

PRESENT: HON'BLE MR. JUSTICE D. N. PATEL

HON'BLE MR. JUSTICE AMITAV K. GUPTA

Dated, the 8th day of May, 2014

Deprecating the practice of getting official documents proved by non-competent witnesses mostly introducing them as advocates clerk. Hon'ble Court has given the following directions :

i) Secretary, Home Department, Government of Jharkhand, shall issue circular for the benefit of Additional Public Prosecutors/Assistant Public Prosecutors of the trial Courts so as to bring to an end the examination of such universal and omnipresent witnesses who are Advocates' peons.

v) All the Superintendents of Police of the districts within the State of Jharkhand, should have given a proper guidance to the Investigating Officers as well as Additional/Assistant Public Prosecutors not to examine peon of the Advocates as a prosecution witnesses, who have no knowledge of the incident of the case at all and they are proving F.I.R., Inquest Panchnama, etc.

Per D.N. Patel, J.

1) The present appeal has been preferred by this appellant, who is original accused No.4 in the Sessions Case, against the judgment of conviction and order of sentence both dated 31st January, 2005 delivered by the 5th Additional Sessions Judge, Fast Track Court No.2, Godda in Sessions Case No.76 of 2003 whereby this appellant has been convicted for an offence under Section 302 to be read with Section 34 of the Indian Penal Code for life imprisonment and a fine of Rs.5000/-, and in default of fine, to further undergo simple imprisonment for six months. This appellant has also been convicted under Section 120-B of the Indian Penal Code and sentenced for life imprisonment. This appellant has also been convicted for an offence under Section 201 of the Indian Penal Code and sentenced to undergo rigourous imprisonment for five years with fine of Rs.1000/- and in default of Fine, to further undergo 3 months' simple imprisonment. However, the sentences have been ordered to run concurrently and rest of the accused i.e. accused Nos.1, 2 and 3, have been acquitted. Against this judgment of conviction and order of sentence, the present appeal has been preferred.

2) It is the case of the prosecution that PW.8 informed the police on 13th February, 2003 at 8.00 p.m. at Boarijor Police Station, District Godda, that on previous day i.e. on 12th February, 2003 at about

6.00 o'clock, when she and her husband (deceased Amik Yadav) were returning from Godda Court, Pramod Yadav, Kailash Yadav, Dilip Das, Ramjee Sah, 2 Cr. Appeal (DB) No.218 of 2005 Gopal Das, Jawahar Sah, Kailu Das, Vijay Sah and Temha Yadav surrounded her husband and they were having cleaver and other weapons in their hands and they started beating her husband. Pramod Yasdav chased her also and that is why she had to run away. Thereafter, she went to her house and informed PW.4 and thereafter, PW.4, PW.5 and PW.6 along with the informant came at the place of occurrence and there were bloodstains, but, the dead body could not be found out by them. The incident had taken place in the evening hours of 6.00 p.m. in the month of February, 2003. Again the informant as well as PW.4, PW.5 and PW.6 came at the place of occurrence, but, at that time, the police had found out the dead body from nearby railway track. PW.8 identified the dead body and she gave fardbeyan to the police of Boarijore Police Station which was reduced in writing which is Ext.2. On the basis of this fardbeyan, F.I.R. was lodged, investigation was carried out, statement of several witnesses were recorded and charge-sheet was filed and the case was committed to the Court of Sessions being Sessions Case No.76 of 2003. The learned Trial Court on the basis of the evidences given by PW.1 to PW.9 as well as on the basis of the documentary evidence on record, convicted the appellant for an offence under Section 302 to be read with Section 34 of the Indian Penal Code for life imprisonment and a fine of Rs.5000/-, and in default of fine, to further undergo simple imprisonment for six months. This appellant has also been punished under Section 120-B of the Indian Penal Code and sentenced for life imprisonment. This appellant has also been convicted for an offence under Section 201 of the Indian Penal Code and sentenced to undergo 5 years' rigorous imprisonment with fine to the tune of Rs.1000/- and in default of fine, to further undergo 3 months' simple imprisonment. However, the sentences were ordered to run concurrently. The judgment of conviction and order of sentence passed by 5th Additional Sessions Judge, Godda in Sessions Case No.76 of 2003 is dated 31st January, 2005. Against this judgment of conviction and order of sentence, the present appeal has been preferred.

3) We have heard the learned counsel for the appellant who has mainly submitted that there are major omissions, contradictions and improvements in the deposition of prosecution witnesses. This aspect of the matter has not been properly appreciated by the learned trial 3 Cr. Appeal (DB) No.218 of 2005 Court and, hence, the judgment of conviction and sentence passed by the 5th Additional Sessions Judge, Godda deserves to be quashed and set aside. It is further submitted by the learned counsel for the appellant that the so-called sole eyewitness, as alleged by the prosecution, is PW.8, but, looking to her fardbeyan given to Boarijore Police Station, District - Godda and looking to her deposition as PW.8, there are major omissions and contradictions in her deposition. Several persons, who were named accused in the F.I.R., have been omitted in her deposition and they are;

i) Kailash Das
ii) Dilip Das
iii) Gopal Das
iv) Kailu Das

The aforesaid four persons' names have been omitted in her deposition, whereas, these names were given in the fardbeyan by the same witness. This is a major omission as per Explanation to Section 162 of the Cr.P.C. It is further submitted by the counsel for the appellant that not only there is major omission, but, there is also major improvement in the deposition given by so-called sole eyewitness PW.8. This witness has added names of four accused persons in her deposition which were never given to the police in her fardbeyan and they are;

i) Arbind

ii) Rajkumar

iii) Indu Yadav

iv) Kamleshwari Yadav

Thus, these four names have been added in the deposition as accused, whereas these names were never mentioned in the fardbeyan by the same witness. Because she is the informant, this tantamounts to major improvements in her deposition. This affects the very root of the prosecution case. This also tantamounts to contradiction as per Explanation to Section 162 Cr.P.C.

4) It is further submitted by the counsel for the appellant that in paragraph 1 of her deposition it is stated by this witness PW.8 that she is not knowing Ramjee Sah who is the present appellant. Thus, it is submitted by the counsel for the appellant that there are major 4 Cr. Appeal (DB) No.218 of 2005 omissions, contradictions and improvements in the deposition of the so-called sole eyewitness PW.8. Even this appellant is not known to this so-called eyewitness. It has also been stated by this witness in her deposition in paragraph 1 that she had run away from the place of occurrence and informed PW.4 the whole incident. This PW.4 in his deposition has never referred any role played by this appellant, nor even PW.4 has mentioned the name of this appellant in his deposition in causing murder of the deceased. Thus, before PW.4 the name of this appellant was never given by so-called eyewitness. This aspect of the matter has also not been properly appreciated by the learned trial Court. Moreover, PW.4 is a hearsay witness. This PW.4 was informed by PW.8. There are also several defects in the information given by PW.8 to PW.4 about the name of the so-called assailants. Looking to paragraph 1 of the deposition of PW.4, there are several accused persons referred by PW.4 in his deposition as murderers of the deceased, but, these names were never mentioned in the F.I.R. at all by the eyewitness PW.8. Moreover, looking to cross-examination of this PW.4, especially paragraph 3 it has been mentioned that the so-called eyewitness PW.8, who is referring herself as a wife of the deceased, but, this close relative of the deceased, PW.4, is referring somebody else as wife of the deceased. Thus, PW.8 is even not a wife of the deceased, but somebody Most. Devi who has been referred in paragraph 3 of the deposition of PW.4, as the wife of the deceased. Thus, it is submitted by the counsel for the appellant that PW.8 is not an eyewitness at all and whatever she has narrated before PW.4 is also not tallying with the F.I.R. which is written and signed by this PW.8. Similarly, PW.4 is also a close relative before whom PW.8 had narrated the incident immediately after the incident had taken place. PW.5 is narrating altogether another story of the incident and as per PW.5 Arbind Yadav had caused injury to th deceased. This Arbind Yadav's name was given by PW.8 (informant) to the PW.5, but, this Arbind Yadav's name is not mentioned as an accused in the F.I.R. Thus, PW.8 has narrated one story in the F.I.R., another story in her deposition, 3rd story before PW.4 and 4th story before PW.5. Every witness of the prosecution is giving different versions about the murder. This aspect of the matter has also not been appreciated by the learned trial Court.

PW.6 is a hearsay witness, because he was also informed by PW.8. Thus, PW.4, PW.5 and PW.6 are the hearsay witnesses and they were informed only by PW.8. It is further submitted by the counsel for the appellant that PW.1, PW.3 and PW.7 have turned hostile. PW.9 is an universal witness. Though, he has nothing to do with the accused, though he has no connection with the victim and this bye-passer going on a road is giving deposition in the Court as PW.9 and he is peon of the Advocate. Examination of PW.9 sheer reflects non-application of mind by the trial Court. Such type of omnipresent witness ought not to have been examined by the Court. Never such witness proves anything in the Court. It is wastage of precious time of the trial Court as well as this Court. Thus, the prosecution has failed

to prove the offence committed by this appellant beyond all reasonable doubts. Three accused have been enlarged by the trial Court. If looked at the F.I.R. and the deposition given by PW.8 in, the sole eyewitness, in totality, there are more than one dozen persons who have committed murder. Some names are mentioned in the F.I.R., some names have been omitted in the deposition of PW.8 and 4-5 persons' names as an accused have been added in the deposition given by sole eyewitness PW.8. Thus, out of bundle of one dozen accused, only this appellant has been convicted by the trial Court without any evidence on record. This aspect of the matter has also not been properly appreciated by the trial Court and hence, the judgment of conviction and sentence passed by the trial Court deserves to be quashed and set aside.

5) We have also heard the learned counsel for the State-A.P.P. who has submitted that no error has been committed by the trial Court in appreciating the evidence on record. The case of prosecution is based upon evidence of eyewitness PW.8. The murder has taken place on 12th February, 2003 and immediate is the F.I.R. on 13th February, 2003. this appellant has been named in the F.I.R. The prosecution has examined several witnesses from PW.1 to PW.9 and PW.8 is the informant wife of the deceased, namely Amik Yadav. Looking to her deposition, she has clearly narrated the role played by this appellant-accused. When she was returning with her husband from the Court at Godda at about 6.00 p.m. on 12th February, 2003, this appellant along with several other accused in connivance with each other and sharing common intention 6 Cr. Appeal (DB) No.218 of 2005 with rest of the accused, committed murder of the deceased. She has further stated in her deposition that one sharp-cutting instrument as well as with other weapons including cleaver, this appellant and other accused caused serious injuries to Amik Yadav and the other accused had also chased PW.8, the informant. The informant had run away from the place of occurrence and rushed to her house. She immediately informed PW.4, who is a close relative and PW.4 along with PW.5, PW.6 and informant PW.8 returned to the place of occurrence. There were bloodstains but no dead body was found out because of late night and darkness, they were unable to find out the dead body of the deceased. They returned home and on the next day morning they again came to the place of occurrence where there was a police and the police has found out the dead body which was found near Railway Track where she gave her fardbeyan which is Ext.2, in which there are several names of the accused have been given. Four were tried in the Session Case No.76 of 2003 and others were absconding. Looking to the deposition of PW.8 to be read with PW.4, PW.5 and PW.6, the learned trial Court has rightly convicted the present appellant for causing murder of the deceased in connivance with other accused and in furtherance of their common intention with rest of the accused and they had also thrown away the dead body on railway track and thereby caused disappearance of the offence. Therefore, they have been rightly punished for an offence under Sections 302, read with Section 34 of the Indian Penal Code for life imprisonment as well as for an offence under Section 120- B of the Indian Penal Code for life imprisonment and also this appellant has rightly been punished for an offence under Section 201 of the Indian Penal Code for five years' rigorous imprisonment. Hence, this appeal may not be entertained by this Court. Moreover, the medical evidence is also corroborative to the deposition of PW.8, eyewitness, to be read with deposition given by PW.4, PW.5 and PW.6. Moreover, Clerk of the Advocate PW.9 has also proved several documents, though, he was not cited as a witness in the charge-sheet. This universal witness has proved F.I.R. and inquest report, though he has no concern with the whole case. These types of witnesses are easily available in the lower Courts and because of their easy availability and as they are very handy, they are normally examined in the trial Courts in the State of 7 Cr. Appeal (DB) No.218 of 2005 Jharkhand.

6) Having heard both sides and looking to the evidence on record, we hereby quash and set aside the judgment and order of conviction and sentence passed by the trial Court in Sessions Case No.76 of 2003 dated 31st January, 2005 mainly for the following facts, reasons and evidence on record:

i) It is the case of the prosecution that PW.8 is the informant and wife of the deceased Amik Yadav. She gave her fardbeyan before the Boarijore Police Station, District - Godda on 13th February, 2003 that on 12th February, 2003, at about 6.00 p.m. when she was returning from Godda Court with her husband, Pramod Yadav, Kailash Das, Dilip Das, Ramjee Sah (present appellant), Gopal das, Jawahar Sah, Kailu Das, Vijay Sah and Temha Yadav, they rushed and caught hold of Amik Yadav. These accused persons having several weapons including Gupti and cleaver, they started beating him. Permanand Yadav chased this informant PW.8, who is wife of Amik Yadav. Therefore, she ran way from the place of occurrence, shem came to her house and informed PW.4. Thereafter, PW.4 along with PW.5 and PW.6 as well as eyewitness informant PW.8 returned to the place of occurrence. Because of dark night hours, they could see only bloodstains, but, they were not in a position to find out the dead body. They returned home and on next day, they returned to the place of occurrence. There was a police with a dead body. This dead body was recovered from a nearby railway track. The dead body was identified by PW.8 to be her husband.

Fardbeyan was recorded by Boarijore Police of PW.8 wherein she had given names of several accused, as stated herein above. On the basis of this fardbeyan, F.I.R. was lodged, statement of several witnesses were recorded, charge-sheet was filed before the competent trial Court and the case was committed to the Court of Sessions as Session Case No.76 of 2003 and on the basis of the evidence of PW.1 to PW.9, 5th Additional Sessions Judge, Godda convicted this appellant (accused No.4 in the Sessions Case) and acquitted rest of the 8 Cr. Appeal (DB) No.218 of 2005 three accused. This appellant has been convicted for an offence under Section 302 of the Indian Penal Code for life imprisonment and fine. Further this appellant has been punished for an offence under Section 120-B of the Indian Penal Code for life imprisonment. Further, this appellant has been convicted for an offence under Section 201 of the Indian Penal Code and he has been punished for rigorous imprisonment for five years vide order dated 31st January, 2005. Against this judgment of conviction and sentence, the appellant has preferred this appeal who is original accused No.4 of Session Case No.76 of 2003, as the rest of the accused, namely accused nos.1, 2 and 3 of the same Sessions Case, have been acquitted. Other accused persons have been absconding as submitted by the A.P.P.

ii) Thus, looking to the F.I.R., PW.8 is the wife of the deceased. She was with her husband when they were returning from Godda Court. She is an informant and sole eyewitness of the incident. As she is a close relative of the deceased, we shall examine her deposition with all circumspection. Looking to her deposition from paragraph 1, there are major omissions, improvements and contradictions in her deposition. She has omitted following accused in her deposition:-

a) Kailash Das
b) Dilip Das
c) Gopal Das
d) Kailu Das

iii) These four names have been mentioned in the F.I.R. as murderers of the deceased and they were omitted in her deposition. This is a major omission and it tantamounts to contradiction as per explanation of section 162 of the Cr.P.C.

iv) Similarly, looking to her deposition as PW.8, there are major improvements in her deposition. She has added several names as an accused or as a murderer. They are as under: -

i) Arbind

ii) Rajkumar

iii) Indu Yadav

iv) Kamleshwari Yadav

v) These four witnesses were never mentioned in the fardbeyan, nor in the F.I.R. given by PW.8 and the said document is also signed by this witness as required under Section 154 of the Cr.P.C.

vi) Thus, the aforesaid names have been added in the deposition which tantamounts to major improvement and, therefore, this also tantamounts a major contradiction as explanation to Section 162 of the Cr.P.C.

vii) Moreover, this witness PW.8, sole eyewitness of the incident, in paragraph 1 of her deposition has stated that she is not knowing the present appellant. She has also stated in her cross-examination that there are several cases pending against the husband of the informant including murder case. Looking to the major omissions and improvements in her deposition and also looking to the fact that there was no light at the place of occurrence when the incident had taken place, as it was after 6.00 p.m. on 12th February, 2003, it appears that this witness is untrustworthy and unreliable. Moreover, particularly when she has narrated the whole incident before the PW.4, but, looking to the deposition given by PW.4, who is again a close relative of the deceased, he has not given name of this appellant as well as other accused at all. Moreover, PW.4 has never stated before the Court that this appellant has committed murder of the deceased. This makes PW.8 untrustworthy and unreliable. This aspect of the matter has not been properly appreciated by the trial Court.

viii) Looking to the deposition given by PW.4 it appears that he is a hearsay witness. He has been informed by PW.8 asout the whole incident on 12th February, 2003. Looking to paragraph 1 of the deposition given by PW.4, several names of the accused have been given by this witness, but, they were never mentioned in the F.I.R. by the eyewitness. Thus, several accused names have been first time mentioned in the deposition given by PW.4. Moreover, PW.4 was never informed by PW.8 that this appellant was also present at the place of occurrence and this appellant has committed murder of the deceased. In para.1 of the deposition of this PW.4, appellant's name has not been referred at all, nor the role played by this appellant has been referred at all by PW.4. Meaning thereby that the so-called eyewitness PW.8 10 Cr. Appeal (DB) No.218 of 2005 might not have stated before PW.4 about the presence of this appellant at the place of occurrence, nor, PW.8 might have stated about any role played by this appellant before PW.4. Thus, PW.4 is not useful to the prosecution for conviction to the appellant. Further, looking to paragraph 3 of the deposition of PW.4, i.e. the cross-examination, he has stated that one Most. Devi is the wife of the deceased, whereas, PW.8 is also claiming to be wife of the deceased. Nobody has mentioned in the F.I.R., nor any body deposed that there are two wives of the deceased. Thus, it is also doubtful whether PW.8 is wife or not of the deceased. This makes PW.8 untrustworthy and unreliable from this angle also.

ix) PW.1, PW.3 and PW.7 are the hostile witnesses. PW.4, PW.5 & PW.6 are hearsay witnesses. PW.5 has come out with a new story about one Shri Arbind who has been referred as an accused in paragraph 1, whereas name of this Arbind is never referred in the fardbeyan. Thus, F.I.R. gives several names of the accused. PW.8 is the informant and in her deposition she has

omitted four accused and she has given names of four more accused in her deposition. She has also stated in paragraph 1 of her deposition that she does not know who is this appellant. PW.4 is also giving names of several accused who are never mentioned in the F.I.R. PW.4 is not giving the name of this appellant in her deposition at all as an assailant. PW.5 is giving one more name of one Arbind as an accused, who is also not referred in the F.I.R. Thus, there are more than one story of the prosecution about the murder of the deceased.

x) PW.9 is a universal witness. Though, he has got no concern with the murder of the deceased, though he has nothing to do with the incident of the case, though he is not mentioned in the charge-sheet as a prosecution witness, though he is not named by any police or anyone and he is a peon of the Advocate and though he is a bye-passer on a road, he has been examined as PW.9. This has become fashion in the State of Jharkhand, especially in the subordinate judiciary to examine such type of universal witness who are easily available on roads. It ought to have been kept in mind that anyone and everyone cannot be a witness in the murder case or in any trial. This type of witness ought not to have been examined by the trial Courts. We, hereby, direct the 11 Cr. Appeal (DB) No.218 of 2005 trial Courts of the State of Jharkhand not to examine such type of universal witness or omnipresent witnesses or bye-passers on the road, may be, they are clerks of the Advocates, having no concern with the incident. Every now & then, we are coming across such type of grossest error committed by the trial Courts. Though, he is not knowing the police officer, he is proving the F.I.R. and though they are not knowing anything about the Inquest Panchanama, they are proving the Inquest Panchnama and the learned trial Courts, without any application of mind, are also giving exhibit numbers to those documents being proven by such type of universal or omnipresent witnesses. Examination of such type of witnesses reflects total non-application of mind of the trial Courts. In the case where the Investigating Officer has expired, then any other witness, who is knowing the handwriting of that police officer, should have been permitted to be examined to prove the F.I.R. or inquest panchnama, but, if the police officer is alive and, even though he is transferred or retired, as stated in our judgment, reported in (2013)4 JLJR 157 : (2013) 3 East Cr. C. 213 (State of Jharkhand Vs. Sanjay Mondal), police ought to have been called by the trial Court initially by issuing summons; thereafter if the police is not coming to the Court as a prosecution witness, then by issuing bailable warrant they shall be called; thereafter also, if he is not coming, then non- bailable warrant should also be issued against them for securing their appearance in the trial as a prosecution witness. We have also given direction in our decision, reported in (2013)4 JLJR 157 : (2013) 3 East Cr. C. 213 (State of Jharkhand Vs. Sanjay Mondal), that the learned trial Courts can also stop salary and pension of those police officers who are ont attending the trial Court, for their examination as a prosecution witness. Once their salary or pension is stopped, immediately they will come to depose in the Courts. It is one of the tactics with which the trial Court must be well known to bring official witnesses in the Court. It is high time for the subordinate judiciary to take steps for stopping salary or pension of the Government officials who are deliberately not coming to the Courts for their deposition. Unnecessary the trial Courts have developed a novice method or a novice fashion to examine peon of the Advocate to prove F.I.R. and Inquest Panchnama, etc. How this type of witnesses are examined that 12 Cr. Appeal (DB) No.218 of 2005 is not known to anyone. This type of practice must be brought to an end forthwith. Henceforth, no trial Court of the State of Jharkhand shall examine such type of alien to the cases unless they know the fact of that case or unless they are witnesses of the F.I.R., or Inquest Panchnama and if they are not witnesses of the incident, otherwise,

merely because they are easily available in the Court premises or in the corridors of the Courts, that does not mean that they should be examined as a prosecution witness. Peon of the Advocate is not better than a bye-passers on a road. This type of universal witness or omnipresent witness henceforth shall not be examined by the trial Courts in the State of Jharkhand. Examination of such type of witnesses is sheer wastage of precious time of subordinate judiciary as well as of this Court. Time & again, we have referred such instances and given directions not to examine such universal and omnipresent witnesses by the trial Courts and non-compliance of such directions reflects grossest ignorance on the part of the trial Courts of the State of Jharkhand. This ignorance must be shaded by the trial Court henceforth. It is one thing to commit such error by the trial Courts and it is altogether another thing to continue with such type of error again and again. We, therefore, direct the Registrar General of this Court to send a copy of this judgment to,

i) Judicial Commissioner of district- Ranchi so that he percolates this judgment to his subordinate judicial officers in the district of Ranchi.

ii) All Principal District Judges of the State of Jharkhand and thereafter, they will give the copies of this judgment to their subordinate judicial officers in their respective judgships.

iii) Secretary, Home Department, Government of Jharkhand, so that he shall issue circular for the benefit of Additional Public Prosecutors/Assistant Public Prosecutors of the trial Courts so as to bring to an end the examination of such universal and omnipresent witnesses who are Advocates' peons.

iv) Director General of Police, State of Jharkhand.

v) All the Superintendents of Police of the districts within the State of Jharkhand, so that they should have given a proper 13 Cr. Appeal (DB) No.218 of 2005 guidance to the Investigating Officers as well as Additional/Assistant Public Prosecutors not to examine peon of the Advocates as a prosecution witnesses, who have no knowledge of the incident of the case at all and they are proving F.I.R., Inquest Panchnama, etc. We have also come across several post mortem reports which have been proved by the peon of the Advocates. This is an error not only being committed by the Additional Public Prosecutors in the trial Courts, but this is also an overlapping error being committed by the trial Court also.

vi) The Principal, Police Training Centre, Hazaribagh, so that this aspect will be taught to police during their training about investigation and for court matters.

7) In view of the evidence given by PW.8, who is an untrustworthy and unreliable witness, the prosecution has failed to prove the offence of murder of the the deceased allegedly committed by this appellant, beyond all reasonable doubts.

8) In the facts and circumstances discussed above, this criminal appeal is allowed and the impugned judgment of conviction and order of sentence both dated 31st January, 2005 passed by the 5th Additional Sessions Judge, Fast Track Court No.2, Godda in Sessions Case No.76 of 2003 is quashed and set aside and the appellant is acquitted from the charges levelled against him. Since the appellant, namely, Ramjee Sah, is in judicial custody, he is directed to be released forthwith, if not wanted in any other case.

(D. N. Patel, J) (Amitav K. Gupta , J)

High Court of Jharkhand at Ranchi Dated, the 8th day of May, 2014

❑❑❑

BELAL ALIAS BILLO ALIAS MD BELAL VS STATE OF JHARKHAND

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Cr.Appeal (D.B.) No.465 of 2013

Belal @ Billo @ Md. Belal ... Appellant
Versus
State of Jharkhand ...Respondent

CORAM: HON'BLE MR. JUSTICE D.N. PATEL HON'BLE MR. JUSTICE P.P. BHATT

For the Appellant : M/s Ashim Kr. Sahani

For the Respondent : Mr. Hemant Kr. Shikarwar

Dated 10th February, 2014

The Secretary Home Department has been asked for taking action against investigating officer and responsibility of the investigating officer has been reiterated as follows.

(1) It is the duty of the IO to remain present before the Trial Court

(2) To Bring Prosecution witness to the Court

(3) In case the witness including IO, Doctors or other government Officers fail to attend the Court and give evidence despite issuance of summons, the Trial court can pass an order to stop the payment of their salary or pension.

1. This appeal has been admitted vide order dated 5th December, 2013 and record and proceedings of Sessions Trial No. 388 of 2006/94 of 2010 was called for from the trial court so as to appreciate the argument for suspension of sentence.

2. We have perused the record and proceedings of the sessions trial and heard the counsel for both sides at length. Looking to the evidences on record, there is prima-facie case against this appellant, who is original accused no. 4 in S.T. No. 388 of 2006/94 of 2010. Since the criminal appeal is pending, we are not much inclined to discuss the evidences on record, but suffice it to say that looking to the deposition of P.W. 4, it appears that she has clearly narrated the role played by this appellant accused in commission of the offence. This appellant accused came in a car and along with other co-accused kidnapped the prosecutrix putting a blindfold upon her eyes and covering her mouth and thereafter she was taken to various places by train and this appellant accused was also present there in the train as stated in paragraph 13 of the judgment and also in the deposition of P.W. 4. Therefore, it appears that a crucial role has been played by this appellant accused as co-conspirator. It is submitted by the counsel for the appellant that rape has not been committed by the appellant. This contention is not helpful for the appellant at this stage for suspension of sentence mainly for the following reasons:

(a) Looking to the deposition of P.W. 4, there is prima-facie case against this appellant accused.

(b) Every act of co-conspirator tantamounts to furtherance of the conspiracy.

(c) The evidences given by other prosecution witnesses, i.e. P.W. 1 and P.W. 2 also goes against the appellant accused and the evidences of the doctors (P.W. 5, P.W.6 and P.W.7) also corroborates

the fact that the prosecutrix was 16 years old at the time of occurrence. Further, it appears that deposition of P.W. 8 also corroborates the deposition of P.W. 4.

3. In this set of circumstances and evidences on record, we are not inclined to suspend the sentence awarded to this appellant accused by the Additional Sessions Judge-II, Giridih in Sessions Trial No. 388 of 2006/94 of 2010.

4. Counsel appearing for the appellant has also relied upon the decision rendered by this court on 20th September, 2013 in Criminal Appeal (S.B.) No. 419 of 2013, preferred by Original Accused No.s 1 and 2, who were convicted and sentenced to undergo 7 years for the offence punishable under section 366 (A) and 120 (B) of the I.P.C.

5. We have perused the said order. When we asked counsel for the appellant for pointing out the reasons for suspension of sentence, he is unable to read anything as to for which reason prayer for suspension of sentence made on behalf of these appellants were granted. Moreover, it appears that the role played by the appellant is remarkably different from the role played by the Original Accused No.s 1 and 2. Moreover, this appellant accused has also been punished for the offence punishable under section 376 I.P.C. read with 120 B of I.P.C. Further, while Original Accused No.s 1 and 2 have been punished for the offence u/s 366-A I.P.C. for seven years, whereas, this appellant accused has been sentenced to undergo rigorous imprisonment for ten years. Moreover, looking to the evidence of prosecution witnesses, pivotal role has been played by this appellant accused in commission of the offences, as alleged by the prosecution.

6. Therefore, taking into consideration the gravity of offence, quantum of punishment and the manner in which the appellant is involved in the offences, as alleged by the prosecution, we are not inclined to suspend the sentence awarded by the trial court to the present appellant-accused.

7. There is no substance in the prayer for suspension of sentence, which is accordingly rejected.

8. We, hereby, direct the Secretary, Home Department, Govt. of Jharkhand to take action against the Investigating Officer, who did not attend the trial court as a prosecution witness in the light of the decision rendered by the Hon'ble Supreme Court in the case of Shailendra Kumar vs. State of Bihar reported in [(2002)1 SCC 655], which reads as under:

"9. In our view, in a murder trial it is sordid and repulsive matter that without informing the police station officer-in- charge, the matters are proceeded by the court and by the APP and tried to be disposed of as if the prosecution has not led any evidence. From the facts stated above, it appears that the accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Additional Sessions Judge as well as the APP have not taken any interest in discharge of their duties. It was the duty of the Sessions Judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case.

The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on the part of any witness to remain present, it is the duty of the court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution cannot be frustrated by such methods and victims of the crime cannot be left in a lurch."(Emphasis supplied) It is a duty of the Investigating Officer of a case to remain present in the concerned trial court when trial is going on. Earlier,a circular bearing No. 3/Misc.-18(22)2011-841 dated 23rd February, 2012 was issued by Mr. J.B.Tubid, the then Secretary, Home Department, Govt. of Jharkhand that if the Investigating Officer is not going to the court as prosecution witness, departmental proceeding shall be initiated against him. It is expected from the Secretary, Home Department to take action against such

erring Investigating Officers. Further, recently a decision rendered by the Hon'ble Supreme Court in the case of State of Gujarat vs. Kishanbhai reported in 2014(1) JLJR 428 delivered on 7th January, 2014 in para 14,15,19,20, 21 also refers to take action against the erring investigating Officers. A Division Bench of this court has also decided in the case of State of Jharkhand vs. Sanjay Mondal reported in 2013 (4) JLJR Page 157 in para 11 as under:

a) it is a duty of the trial court to inform the Investigating Officer, before it starts taking evidence;

(b) It is a duty of Investigating Officer to remain present before the trial court;

(c) It is a duty of the Investigating Officer to bring prosecution witnesses, to the court;

(d) It is a duty of Sessions Judge to secure presence of witnesses and by summons if they are not remaining present, bailable and then non-bailable warrant can be issued;

(e) Disposal of appeal does not mean, disposal for statistical purposes, but, effective and real disposal to achieve the object of any trial;

(f) Even the trial court can pass an order to stop the payment of salary or pension of Investigating Officer or Doctor or other Government Officers, who are avoiding to give evidence in court, after summons are issued for their presence.

It is high time for the Judges of the trial court, to learn the art of securing the presence of crucial prosecution witnesses.

No order of acquittal shall be passed by the trial court for want of evidence of Investigating Officer or Doctor or other Government officer, if these witnesses are alive and getting salary or pension. The Court has all the power to stop the payment of salary or pension to them, if they are avoiding the court.

In view of the aforesaid decision, it was the duty of the trial court to arrive at a just decision. The criminal court is an effective instrument for dispensing the justice and the Presiding Judge must cease to be a silent spectator or a mere evidence recording machine in the trial. It was the duty of the trial court to find out the truth and administer justice and it was a duty of the Investigating Officer to remain present in the trial court and it is the duty of the Investigating Officer to keep the witnesses present before the trial court. There is failure in performance of the duty by the Investigating Officer as well as by the Public Prosecutor as also by the learned trial court in bring the evidence on record, though it is available i.e. the depositions of the aforesaid three doctors and the Investigating Officer ought to have been recorded by the learned trial court."

9. This matter is adjourned to be listed on 17th February, 2014 only for filing of an affidavit by Secretary, Home Department, Govt. of Jharkhand as to what action is proposed to be taken against the Investigating Officer of this case.

10. We also direct the Secretary, Home Department, to issue one more circular reiterating the same for strict compliance of the earlier circular issued by the Secretary, Home Department. Lenient approach by the Home Department is deprecated. It is also the duty of the Superintendent of Police of the concerned District to see that his Investigating Officers attend the court as witnesses, otherwise major or minor omissions, contradictions and improvements can not be proved in the court of law. This bare minimum requirement is also expected to be fulfilled by the A. P.P. of the concerned trial court.

11. We, therefore, direct the Registrar General of this court to supply a copy of this order to the

i) Secretary, Home Department, Govt. of Jharkhand

ii) Director General of Police of the State of Jharkhand iii) Superintendent of Police, Giridih.

iv) Mr. Upendra Kumar, Principal of Police Training Center, Hazaribagh so that he can inculcate a sense of duty among the trainee investigating officers.

12. This order will be sent by Fax initially and thereafter, by registered post. (D.N.Patel, J.) (P.P. Bhatt, J.) s.m.

❑❑❑

Letter no.-06/Nayay-03/03/2014 -1364/
Government of Jharkhand
Department of Home

From,

N.N. Pandey
Principal Secretary to the Government

To,

The Director General and the Inspector General of the Police, Jharkhand
All Deputy Commissioners, Jharkhand
All Senior superintendent of Police /Superintendent of Police, Jharkhand.
All Public Prosecutors, Jharkhand.

Ranchi, Dated 07/03/2014

Subject: - Regarding timely examination of witnesses in trial court for the conduct of effective and qualitative prosecution.

Sir,

As directed, it is to say on the above noted subject that despite giving detailed direction vide departmental letter no.-841 dated-23.02.2012, letter no. -2479, dated-15.06.13 and letter no.-2585 dated-22.06.13 for timely examination of witnesses, it is often being seen that aforesaid direction is not being complied strictly by the concerned officers, especially evidence of the investigating officer is not being ensured. The Hon'ble High Court while expressing displeasure on this matter, passed following orders in Cr. Appeal (D.B) No. 465 of 2013 on 10.02.14--

".....It was duty of the Investigating officer to remain present in the trial court and it is the duty of the Investigation Officer to keep the witnesses present before the trial court..... We also direct the Secretary, Home Department to issue one more circular reiterating the same for strict compliance of the earlier circular issued by the Secretary, Home Department... it is also the duty of the Superintendent of Police of the concerned District to see that his Investigating Officers attend the court as witnesses, otherwise major or minor omissions, contradictions and improvements cannot be proved in the court of law. This bare minimum requirement is also expected to be fulfilled by the A.P.P of the concerned trial court....."

In the light of the above order of Hon'ble High Court, the following guidance is being issued to ensure presence of the witnesses.

1. It is the responsibility of the Superintendent of police of concerned district to cause to serve notice/ summons/bailable and non bailable warrant issued from District/Sub-divisional court. Accordingly, the Superintendent of police of each districts shall appoint a Nodal officer for this work, who will ensure for taking immediate steps for service of summon/ notice/ warrant received from the concerned District/ Sub-divisional courts/ Prosecution office of the district and Sub-division /and the Public prosecutor. The full name , their present posting and if they have been retired then their complete address for correspondence of police personnels of entire district shall be kept in computerized data base by the office of Superintendent of Police at the district level and in case of any change in it, data base shall be up dated.

2. Each Investigating Officer (From Assistant Sub-Inspector to the Deputy Superintendent of Police level) shall have a Digital Identification Number. Necessary steps in this regard shall be taken by the Director General and Inspector General of Police. The full name, present posting, Digital Identification number of Assistant Sub-Inspector, Sub-Inspector, Inspector of Police of entire state, who may be Investigation officer and in case they have retired, their complete address for correspondence shall be uploaded in the website by the office of the Director General and Inspector General of police and in case of any change, it shall be updated. In this regard, it shall be responsibility of the concerned District Superintendent of Police after taking special interest, to ensure presence of such witnesses by contacting the office of the Director General and Inspector General of Police through telephone/special messenger or other mode. The Investigating officer shall clearly mention full name and Digital Identification Number in the case Diary and Charge-sheet.

3. The competent authority, at the time of retirement of the Investigating officer, shall prepare a list of cases in which he is witness. He shall obtain permanent and correspondence address of the Investigating Officer. This information shall also be collected as to in which cases, he has adduced evidence and which case is pending.

4. It shall be the full responsibility of the District Superintendent of police to ensure appearance of witnesses related with the Police Administration and Investigating officer. It shall be his duty to ensure the appearance of such witnesses in time. If such witness has been transferred from the said District and his whereabout is not being known, then he shall immediately contact to the office of the Director General and Inspector General of Police, Ranchi.

5. The Superintendent of Police shall be responsible for the appearance of official witnesses of other departments (e.g. Doctors of health department etc.) than the police administration. If such witnesses are out of District then he shall directly contact with the concerned Department/ Secretary of office/ Head of Department. It shall be the responsibility of the concerned administrative department to cause the notice/Summon served upon such witnesses and to ensure appearance of the witnesses. Despite this, if such officer/ employee did not appear for evidence in time, then the Superintendent of Police shall, through the Deputy Commissioner, forward the recommendation for action against them to the Administrative department and its information shall be given to the Director Prosecution/Home Department.

On receipt of the information to the Director Prosecution/ Home Department, recommendation for disciplinary action, shall be made to the Administrative Department at the level of Home Department.

6. Cases in which, there are other private/independent witness, it shall be responsibility of the Superintendent of police to ensure their appearance before the court.

7. Official witnesses viz., Doctor, Investigation Officer etc. of criminal cases as mentioned in charge-sheet, are not being present as a witness before the court, in course of trial, due to which, important documentary evidence specially post-mortem report, injury report etc. are being marked as exhibit, before the court as witness, after appearing of unconnected person viz. peon of the hospital etc., whose name is not mentioned as witness in the charge-sheet, in result, the importance of such evidence is failed to win.

Therefore, evidence of the doctor should be ensured and it shall be ensured to cause to mark exhibit on record of documentary evidence viz., post-mortem report, injury report etc., through the competent witness, as per the provision, under no circumstances those documents should be caused to be marked

as exhibit through unconnected, unknown, incompetent witness viz., peon of the hospital, advocate clerk etc.

8. Due to non attendance of Investigating Officers before the trial court as witness, omission, improvements and contradictions etc., appeared in the evidence of other witnesses in course of deposition, are not being highlighted. In many cases prosecution witnesses are giving their deposition before the court as defence witness. Resultantly, prosecution side is getting debilitated. Therefore, evidence of Investigating Officers should be ensured before the court at any cost. The same shall be responsibility of the concerned Superintendent of police.

9. On being a witness named in the charge-sheet, it is responsibility of all Government employees (working or retired) to ensure their evidence within stipulated time. It is directed to the Controlling Officers that concerned officer should give its information, in case a notice for evidence is received from the court/prosecution. In case of failing to appear before the court, explanation be called for. If they failed to appear even after the reminder, their payment/pension should be held up till ensuring of evidence in pursuance to order passed in Cr. Appeal (D.B.) No.-1030712, Dilip Kumar Bhuiyan versus State Government by Hon'ble court. Also, with respect to working employees, disciplinary action should be taken after initiating departmental proceeding.

10. In course of ensuring compliance of departmental or court's order, execution of summons/warrants etc., against accused and witnesses should be done by a task force (Nodal) constituted by the Superintendent of Police. For this work, the concerned Superintendent of Police shall depute police personnel/officer.

11. By 15th day of each month, the Public Prosecutors of the districts shall do review meeting of prosecution assignments alongwith prosecution work details of last month with their sub-ordinate all Additional/ Assistant Public Prosecutors. Report related to review shall be forwarded to the Superintendent of PoWce and the Deputy Commissioner with clear notes, it shall be reviewed by the Deputy Commissioner and report shall be sent to the Home Department.

12. The Superintendent of Police shall convene meeting at least once in a month with the Public Prosecutor, Additional Public Prosecutor/Assistant Public Prosecutor chaired by the Deputy Commissioner. Effectively placing plea of the prosecution before the court, production of witnesses in the court in time, result of speedy trial etc., should be reviewed. After the review, as per the provision, act of appeal etc., should be done as per requirement. After obtaining list of pending cases from the Additional Public Prosecutor appointed from the Advocate quota of the district of the state, it shall be reviewed by the Deputy Commissioner/Public Prosecutor.

13. It is also responsibility of the Prosecutor related with the trial court to ensure evidences of the I.O., Doctor and other witnesses and take steps for this.

14. On getting information from witnesses about threat, torture etc. being given by the accused persons, the Prosecutor will submit its written information before the court, and also will ensure sending its one copy to the Superintendent of Police for further action. The S.P. while providing necessary security arrangement to those witnesses for adducing evidence in the court without any fear and if the accused is on bail, he will take necessary steps for cancellation of the bail.

The aforesaid directions must be strictly complied. Despite that action, if the appearance of witnesses in the court is not ensured, information to this should be ensured to be given to the Home Department/ Prosecution Directorate, so that necessary action may be taken for dereliction from duties after fixing resposibility.

Sd/-
(N.N. Pandey)
07.03.2014
Principal Secretary,
Home Department

Memo-06/Nyay-03/03/2014-1364 Ranchi, dated-07.03.2014

Copy forwarded to all the Principal Secretary/the Secretary/the Head of Department, Jharkhand/the Inspector General of Police of all Range/ Deputy Inspector General of Police, Jharkhand/the Registrar General/the Advocate General, Jharkhand High Court, Ranchi/AII Additional Public Prosecutor /Assistant Public Prosecutor, Jharkhand for information and necessary action.

Sd/- 07.03.2014
Principal Secretary,
Home Department

Memo-06/Nyay-03/03/2014-1364 Ranchi, dated-07.03.2014

Copy forwarded to all the District & Sessions Judge, Jharkhand for information and necessary action.

Sd/- 07.03.2014
Principal Secretary,
Home Department

पत्र संख्या-06/न्याय-03/03/2014-1364
झारखण्ड सरकार
गृह विभाग ।

प्रेषक,

एन0एन0 पाण्डेय
सरकार के प्रधान सचिव।

सेवा में,

महानिदेशक एवं पुलिस महानिरीक्षक, झारखण्ड।
सभी उपायुक्त, झारखण्ड।
सभी वरीय पुलिस अधीक्षक/पुलिस अधीक्षक, झारखण्ड।
सभी लोक अभियोजक, झारखण्ड।

राँची, दिनांक 07/03/2014 ई0

विषय :- प्रभावकारी एवं गुणवत्तापूर्ण अभियोजन संचालन हेतु विचारण न्यायालय (ट्रायल कोर्ट) में गवाहों का ससमय परीक्षण के संबंध में।

महाशय,

निदेशानुसार उपर्युक्त विषय के संबंध में कहना है कि गवाहों के ससमय परीक्षण के संबंध में विभागीय पत्रांक- 841, दिनांक 23.02.2012, पत्रांक-2479, दिनांक 15.06.2013 एवं पत्रांक-2585, दिनांक 22.06.2013 द्वारा विस्तृत दिशा निर्देश दिए जाने के बावजूद प्रायः यह देखा जा रहा है कि उक्त दिशा निर्देशों का अनुपालन संबंधित पदाधिकारियों द्वारा दृढ़ता पूर्वक नहीं किया जा रहा है, विशेषकर अनुसंधानक की गवाही सुनिश्चित नहीं किया जा रहा है। माननीय उच्च न्यायालय द्वारा इस विषय पर अप्रसन्नता व्यक्त करते हुए Cr. Appeal (D.B.) No. 465 of 2013, में दिनांक 10.02.2014 को निम्न आदेश पारित किया गया-

"..... It as duty of the Investigating officer to remain present in the trial court and it is the duty of the Investigation Officer to keep the witnesses present before the trial court..... We also direct the secretary, Home Department to issue one more circular reiterating the same for strict compliance of the earlier circular issued by the secretary, Home Department.....it is also the duty of the Superintendent of Police of the concerned District to see that his Investigating Officers attend the court as witnesses, otherwise major or minor omissions, contradictions and improvements can not be proved in the court of law. This bare minimum requirement is also expected to be fulfilled by the A.P.P. of the concrned trial court. ....."

माननीय न्यायालय के उक्त आदेश के आलोक में गवाहों की उपस्थिति सुनिश्चित कराने हेतु निम्न मार्ग निर्देश दिया जाता है -

(1) जिला/अनुमण्डल न्यायालयों से निर्गत नोटिश/सम्मन/जमानतीय अथवा गैर जमानतीय अधिपत्र का तामिला कराने की जिम्मेवारी सम्बन्धित जिला के पुलिस अधीक्षक की होती है। तद्नुसार प्रत्येक जिला के पुलिस अधीक्षक इस कार्य हेतु एक नोडल पदाधिकारी नियुक्त करेंगे जो सम्बन्धित जिला/अनुमण्डल के न्यायालयों/जिला एवं अनुमण्डल अभियोजन कार्यालय/लोक अभियोजक से प्राप्त सम्मन/नोटिश/वारंट का तामिला हेतु तत्काल कार्रवाई सुनिश्चित करेंगे। जिला स्तर

पर पुलिस अधीक्षक कार्यालय द्वारा पूरे जिला में पदस्थापित पुलिस कर्मियों का पूरा नाम, वर्तमान पदस्थापन तथा अगर सेवा निवृत्त हो गये हो तो उनके पत्राचार का पूरा पता, कम्प्युटराईज्ड डाटा बेस में रखा जाएगा एवं इसमें फेर बदल होने पर डाला अप-टू-डेट किया जाएगा।

(2) प्रत्येक अनुसंधानक पदाधिकारी (सहायक अवर निरीक्षक से लेकर पुलिस उपाधीक्षक स्तर तक) का एक Digital Identification Number होगा। इस सम्बन्ध में आवश्यक कार्रवाई महानिदेशक एवं पुलिस महानिरीक्षक द्वारा किया जाएगा। महानिदेशक एवं पुलिस महानिरीक्षक कार्यालय द्वारा पूरे राज्य के सहायक अवर निरीक्षक, अवर निरीक्षक, पुलिस निरीक्षक, पुलिस उपाधीक्षक जो अनुसंधानक हो सकते हैं उनका पूरा नाम, वर्तमान पदस्थापन, Digital Identification Number तथा अगर सेवा निवृत्त हो गये हों तो पत्राचार का पूरा पता का डाटा बेस बनाकर अपने वेबसाईड पर डालेगें एवं इसमें फेर बदल होने पर डाटा अप-टू-डेट किया जाएगा। इस संबंध में संबंधित जिला के पुलिस अधीक्षक का यह दायित्व होगा कि वे विशेष रूचि लेकर दूरभाष/विशेष दूत अथवा अन्य माध्यमों से सीधे महानिदेशक एवं पुलिस महानिरीक्षक कार्यालय से सम्पर्क कर ऐसे गवाहों की उपस्थिति सुनिश्चित करावें। अनुसंधान पदाधिकारी प्रत्येक काण्ड की काण्ड-दैनिकी एवं आरोप पत्र में अपना पूरा नाम एवं Digital Identification Number स्पष्ट रूप से अंकित करेगें।

(3) अनुसन्धानक पदाधिकारी की सेवा निवृत्ति के समय सक्षम पदाधिकारी द्वारा काण्ड की सूची तैयार की जायेगी जिसमें वे गवाह हैं। अनुसंधानक का स्थायी एवं पत्राचार पता प्राप्त कर लेगें। यह भी सूचना संकलित किया जाएगा कि किन काण्डों में उनकी गवाही हो गई है और लम्बिल है।

(4) अनुसंधानक एवं पुलिस प्रशासन से संबंधित गवाहों की उपस्थिति की पूर्ण जवाबदेही जिला के पुलिस अधीक्षक की होगी। उनका यह कर्तव्य होगा कि ससमय ऐसे गवाहों की उपस्थिति सुनिश्चित करावें। यदि ऐसे गवाह उक्त जिला से बाहर स्थानान्तरित हो गए हों या उनके विषय में पता नहीं चल रहा हो तो इसके लिए महानिदेशक एवं पुलिस महानिरीक्षक कार्यालय, राँची से अविलम्ब सम्पर्क करेगें।

(5) पुलिस प्रशासन के अतिरिक्त अन्य विभागों (यथा स्वास्थ्य विभाग के चिकित्सक आदि) के सरकारी गवाहों की उपस्थिति के लिए पुलिस अधीक्षक जिम्मेदार होंगे। यदि ऐसे गवाह जिला से बाहर हो तो वह संबंधित विभाग/कार्यालय के सचिव/विभागाध्यक्ष से सीधे सम्पर्क करेगें। संबंधित प्रशासी विभाग की जवाबदेही होगी कि ऐसे गवाहों को शीघ्र नोटिस/सम्मन तामिला करायेगें एवं गवाही सुनिश्चित करायेंगे। अगर ऐसे पदा0/कर्म0 इसके बावजूद ससयम गवाही हेतु उपस्थित नहीं होगें तो पुलिस अधीक्षक, उपायुक्त के माध्यम से इनके विरूद्ध काईवाई की अनुशंसा प्रशासी विभाग को करेगें एवं इसकी सूचना निदेशक अभियोजन/गृह विभाग को देंगे।

निदेशक अभियोजन/गृह विभाग को सूचना मिलने पर गृह विभाग के स्तर से अनुशासनिक कार्रवाई की अनुशंसा प्रशासी विभाग को की जायेगी।

(6) ऐसे मामले जिसमें अन्य प्राईवेट/स्वतंत्र गवाह है की न्यायालय के समक्ष गवाही हेतु उपस्थित कराने की जिम्मेवादी भी पुलिस अधीक्षक की होगी।

(7) आरोप पत्रित आपराधिक वादों में सरकारी गवाह (Official Witness) यथा चिकित्सक, अनुसंधान पदाधिकारी आदि वादों के विचारण के दौरान न्यायालय के समक्ष साक्षी के रूप में उपस्थित नहीं हो रहे हैं, जिसके कारण अभियोजन द्वारा महत्वपूर्ण अभिलेखीय साक्ष्य (Documentary Evidence) विशेषकर पोस्टमार्टम रिपोर्ट, जख्म प्रतिवेदन आदि की अनभिज्ञ व्यक्तियों (unconnected Person) यथा अस्पताल के पिउन आदि जिनका नाम आरोप पत्र में साक्षी के रूप में नहीं है न्यायालय के समक्ष साक्षी के रूप में उपस्थित होकर प्रदर्श अंकित कराते है फलस्वरूप साक्ष्य का कोई महत्व नहीं रह जाता है।

अतएव चिकित्सक की गवाही सुनिश्चित किया जाए एवं अभिलेखीय साक्ष्य यथा पोस्टमार्टम प्रतिवेदन, जख्म प्रतिवेदन इत्यादि का प्रावधानुसार सक्षम साक्षी के माध्यम से अभिलेख पर लाने की (प्रदर्श अंकित) कार्यवाही सुनिश्चित की जायेगी। किसी भी स्थिति में उन दस्तावेजों को अनभिज्ञ, अनजान अक्षम साक्षी यथा–अस्पताल का पिउन, अधिवक्ता का मुंशी आदि से प्रदर्श अंकित कराने की कार्रवाई नहीं किया जायेगा।

(8) अनुसंधान पदाधिकारियों का विचारण न्यायालय के समक्ष साक्षी के रूप में नहीं उपस्थित होने के कारण गवाही के दौरान अन्य गवाहों द्वारा दिए गए गवाही में हुए Omission Improvement तथा Contradictions आदि को highlight नहीं किया जा रही है कई एक मामलों में अभियोजन साक्षी को बचाव पक्ष के साक्षी के रूप में भी न्यायालय के समक्ष गवाही करवाई जा रही है। फलस्वरूप अभियोजन पक्ष कमजोर हो रहा है। अतएव अनुसंधानक की गवाही हर हाल में विचारण न्यायालय के समक्ष सुनिश्चित किया गए। एतदर्थ जिम्मेवारी संबंधित जिला के पुलिस अधीक्षक पर होगी।

(9) सभी सरकारी कर्मी (सेवारत या सेवानिवृत) का यह दायित्व है कि केस में आरोप पत्रित साक्षी होने पर निर्धारित समय सीमा के अन्दर अपनी गवाही दर्ज कराएँ। नियंत्री पदाधिकारियों को यह निदेशित किया जाता है कि न्यायालय/अभियोजन से गवाही हेतु सूचना प्राप्त होने पर सम्बन्धित पदाधिकारियों को इसकी सूचना दें। न्यायालय के समक्ष उपस्थित नहीं होने पर स्पष्टीकरण पूछा जाए। यदि वे स्मार के पश्चात् उपस्थित नहीं होते हैं तो माननीय न्यायालय द्वारा Cr. Appeal (D.B.) No. 1030/2012 दिलीप कुमार भुईया बनाम राज्य सरकार में पारित आदेश के आलोक में उनके वेतन/पेंशन भुगतान पर गवाही सुनिश्चित होने तक रोक लगाई जाए। साथ ही सेवारत कर्मिकों के सम्बन्ध में विभागीय कार्यवाही प्रारम्भ कर अनुशासनिक कार्रवाई की जाए।

(10) विभागीय एवं न्यायालीय आदेश के अनुपालन सुनिश्चित कराने के क्रम में अभियुक्त तथा साक्षी के विरूद्ध सम्मन/वारंट इत्यादि का तामिला पुलिस अधीक्षक द्वारा एक टास्क फोर्स का गठन (नोडल) कर किया जाय। इस कार्य हेतु संबंधित पुलिस अधीक्षक द्वारा पुलिस कर्मी/पदाधिकारी की प्रतिनियुक्ति की जायेगी।

(11) प्रत्येक माह के 15 तारीख तक जिलों के लोक अभियोजक द्वारा अपने अधीनस्थ सभी अपर/सहायक लोक अभियोजकों के साथ गत माह के अभियोजन कार्य विवरणी के साथ अभियोजन कार्यों की समीक्षा बैठक करेंगे। समीक्षात्मक प्रतिवेदन स्पष्ट टिप्पणी के साथ पुलिस अधीक्षक एवं उपायुक्त को प्रेषित करेंगे जिसकी समीक्षा उपायुक्त द्वारा की जायेगी एवं प्रतिवेदन गृह विभाग को भेजा जायेगा।

(12) उपायुक्त की अध्यक्षता में पुलिस अधीक्षक द्वारा लोक अभियोजक, अपर लोक अभियोजक/सहायक लोक अभियोजक के साथ माह में कम–से–कम एक बार बैठक किया जायगा। न्यायालय में अभियोजन पक्ष को प्रभावी तरीके से रखने एवं गवाहों को ससमय न्यायालय में उपस्थापन, त्वरित विचारण के फलाफल आदि की समीक्षा की जाय। समीक्षोपरांत प्रावधानान्तर्गत आवश्यकतानुसार अपील इत्यादि की कार्रवाई की जाय। राज्य के जिलों के अधिवक्ता वर्ग से नियुक्त अपर लोक अभियोजकों के पास लम्बित वादों की सूची प्राप्त कर उपायुक्त/लोक अभियोजक द्वारा समीक्षा की जाय।

(13) विचारण न्यायालय से संबंधित अभियोजक का भी यह दायित्व है कि अनुसंधानक, चिकित्सक एवं अन्य गवाहों की गवाही सुनिश्चित कराये एवं इसके लिए कार्रवाई करें।

(14) साक्षियों द्वारा अभियुक्तों की ओर से धमकी, प्रताड़ना इत्यादि की सूचना प्राप्त होने पर अभियोजक इसकी लिखित सूचना न्यायालय के समक्ष समर्पित करने के साथ ही इसकी एक प्रति अग्रेतर कर्रवाई हेतु पुलिस अधीक्षक को भेजना सुनिश्चित करेगें। पुलिस अधीक्षक उन साक्षियों के न्यायालय में भयरहित होकर साक्ष्य देने हेतु आवश्यक सुरक्षा प्रदान करते हुए अभियुक्त अगर जमानत पर है तो, जमानत रद्द करने हेतु आवश्यक कार्रवाई करेगें।

उक्त दिशा निर्देशों का शक्ति से अनुपालन किया जाए। यदि उक्त कार्रवाई के बावजूद भी न्यायालय में गवाहों की उपस्थिति सुनिश्चित नहीं होती है तो इसकी सूचना गृह विभाग/अभियोजन निदेशालय को भेजना सुनिश्चित किया जाए ताकि कर्त्तव्य में चूक के लिए दायित्वों का निर्धारण कर उनके विरूद्ध आवश्यक कार्रवाई की जा सके।

ह0
(एन0 एन0 पाण्डेय),
07.03.2014
प्रधान सचिव, गृह विभाग।

ज्ञापांक–06/न्याय–03/03/2014/1364 राँची, दिनांक 07/03/2014 ई0

प्रतिलिपि– सभी प्रधान सचिव/सचिव/विभागाध्यक्ष, झारखण्ड/सभी प्रक्षेत्रीय पुलिस महानिरीक्षक/उप महानिरीक्षक, झारखण्ड/महानिबंधक/महाधिवक्ता, झारखण्ड उच्च न्यायालय, राँची/सभी अपर लोक अभियोजक/सहायक लोक अभियोजक, झारखण्ड को सूचना एवं आवश्यक कार्रवाई हेतु प्रेषित।

ह0
07.03.2014
प्रधान सचिव
गृह विभाग।

ज्ञापांक–06/न्याय–03/03/2014/1364 राँची, दिनांक 07/03/2014 ई0

प्रतिलिप– सभी जिला एवं सत्र न्यायाधीश, झारखण्ड को सूचना एवं आवश्यक कार्रवाई हेतु प्रेषित।

ह0
07.03.2014
प्रधान सचिव
गृह विभाग।

❑❑❑

Judicial Academy Jharkhand

JUDICIAL ACADEMY JHARKHAND
Near Dhurwa Dam, Dhurwa, Ranchi-834004
Phone : 0651-2902833, 2902831, 2902834,
Fax : 0651-2902834, 2902831
Email Id : judicialacademyjharkhand@yahoo.co.in
Website : www.jajharkhand.nic.in