

(2015) 07 AHC CK 0257
In the Allahabad High Court
Case No : Criminal Appeal No. 4467 of 2012

Rajesh Jha

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 27-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 207, 216, 221, 276, 313
Dowry Prohibition Act, 1961 — Section 3, 4
Evidence Act, 1872 — Section 159, 60
Penal Code, 1860 (IPC) — Section 120B, 302, 304B, 498A

Citation : (2015) 9 ADJ 33 : (2015) 91 ALLCC 393

Hon'ble Judges : Vikram Nath and Pratyush Kumar, JJ.

Bench : Division Bench

Advocate : H.N. Singh, Arun Kumar Singh, Virendra Kumar Maurya, Ali Hasan and Brijesh Sahai, for the Appellant

Final Decision : Allowed

Judgement

1. The present Criminal Appeal has been filed by the appellant/accused against the judgment and order dated 18.10.2012 passed by Sri Mangal Prasad, Additional District and Sessions Judge (Court No. 7), Ghaziabad, in Sessions Trial No. 854 of 2009 (State v. Rajesh Jha) under Sections 498A , 304B , 120B I.P.C. and Section 3 /4 D.P. Act, P.S. Indirapuram, District Ghaziabad, whereby the appellant has been convicted under Sections 304B , 498A I.P.C. and Section 4 D.P. Act and he has been, further, sentenced to undergo life imprisonment, three years simple imprisonment and Rs. 10000/- fine and, further, one year simple imprisonment and Rs. 5000/- fine respectively with usual order to undergo imprisonment of further three months and one month for default in payment of fine. Briefly stated, the prosecution case is that on 22.3.2009 at 12:30 p.m. Krishna Madho Jha gave a written report Exhibit (Ka-1), addressed to S.O., Indirapuram, stating therein that his daughter (Anuradha) was married with Rajesh Jha on 13.6.2004. Immediately after the marriage, Rajesh Jha started to torture his daughter. He was alcoholic and took drugs. He used to, abuse his

daughter for dowry and daily after taking liquor, beat her. His daughter gave birth to two children namely, Adi aged about three years and Bony aged about two years. His daughter thrice came to his house, leaving her marital home but each time Rajesh Jha, after apologizing and promising that he would not repeat such behavior in future, took her back. Rajesh Jha informed him on phone that his daughter was no more, he reached at the spot at 11:00 a.m. and saw blood stains in one room and in the other room and dead body was lying. There were marks of hanging on her neck. He believed that Rajesh Jha had murdered his daughter. In the past Rajesh Jha used to threaten him that he would murder the first informant. Request had been made that after registering the report, legal action be taken.

2. On this report, chik F.I.R. Exhibit (Ka-2) was scribed and Case Crime No. 621/09 was registered at P.S. Indirapuram and investigation was started inquest proceedings were held Exhibit (Ka-4), spot was inspected, witnesses were examined, postmortem on the dead body was conducted Exhibit (Ka-3) and after completing the investigation charge-sheet Exhibit (Ka-11) against the present appellant was submitted. The Magistrate after taking cognizance and complying with the provisions of Section 207 Cr.P.C. committed the case to the Court of Session.

3. In the Sessions Trial the accused was charged under Sections 498A , 304B and 120B IPC and Section 4 of D.P. Act. The accused denied the charges and claimed to be tried. In support of the charges besides filing documentary evidence the prosecution had examined six witnesses namely, K.M. Jha (PW 1), Dr. Anil Prakash (PW 2) Jai Prakash Yadav (PW 3), Rahul Srivastava (PW 4), Dinesh Kumar (PW 5) and Dr. Ashok Kumar Goyal (PW 6). After close of prosecution evidence statement of the appellant under Section 313 Cr.P.C. was recorded. In the defence three witnesses were examined namely, Rajesh Jha (DW 1), Deepak Yadav (DW 2) and Dr. Nishar (DW 3).

4. K.M. Jha (PW 1), has supported the version contained in the written report Exhibit (Ka-1) he has, further, disclosed the amounts spent by him on his married daughter on account of conduct of the present appellant. He has claimed and proved one paper to be written by the appellant and some endorsement made in English language by his daughter Exhibit (Ka-2).

5. Dr. Anil Prakash (PW 2) is the Doctor who conducted post-mortem on the dead body of deceased Anuradha on 23.3.2009 at 01:00 p.m. He has proved the post-mortem report Exhibit (Ka-3) narrated the ante-mortem injuries and opined that the cause of death was smothering. The ante-mortem injuries recorded by the said witness are as under:

Abrasion 0.5 c.m. x 0.2 c.m. near right pinna.

Abrasion 0.5 c.m. x 0.5 c.m. on front surface of the (left) leg 20 c.m. below knee joint.

Contusion 2 c.m. x 2 c.m. on back surface of right leg, 8 c.m. above ankle joint.

6. Jai Prakash Yadav (PW 3) is Naib Tehsildar who conducted the inquest proceedings on 22.3.2009 on the dead body of Anuradha. He has proved the inquest report and accompanying papers Exhibits (Ka-4) to (Ka-8).

7. Rahul Srivastava (PW 4) I.O./Deputy S.P. is the Investigating Officer. In his statement he has deposed the progress of the investigation and steps taken by him. He has proved site plan prepared by him Exhibit (Ka-9), recovery memo Exhibit (Ka-10), papers and articles given him by K.M. Jha and identified them. They are exhibited as material Exhibits 1 to 24. He has further proved the charge-sheet Exhibit (Ka-11), photograph of the marriage and C.D. of marriage are exhibited as material exhibits 25 and 26 respectively.

8. Dinesh Kumar (PW 5) is the Head Moharir who has scribed the chik F.I.R. and made entries of the registration of Case Crime No. 621 of 2009 in the general diary. He has proved the chik F.I.R. as Exhibit (Ka-12) and copy of the report of G.D. Exhibit (Ka-13).

9. Dr. Ashok Kumar Goyal (PW 6) was the Emergency Medical Officer at M.M.G. Hospital, Ghaziabad, on 24.3.2009 when Constable Hari Shankar came to him with the appellant and handed over the request of the S.O. Indirapuram for appellant's medical examination. According to him at 2:30 p.m., he examined the person of the appellant and prepared the injury report Exhibit (Ka-15). According to the witness at the time of medical examination on the body of the appellant following injuries were found:

Blue contusion 6 c.m. x 4-1/2 c.m. in front of left forearm 6 c.m. above left wrist joint oval with teeth mark, 3 c.m. above and below the contusion.

Blue contusion 4 c.m. x 2 c.m. in front left forearm 7 c.m. below elbow joint.

Blue contusion 3 c.m. x 2 c.m. in front of right upper arm 2 c.m. above elbow joint.

10. According to the Doctor duration of the injuries was estimated to be three days old and their nature was simple.

11. In his statement recorded under Section 313 Cr.P.C. the appellant has denied the fact that he had tortured his wife Anuradha for dowry or any other reason. According to him K.M. Jha (PW 1) has given false statement about his marital or personal life. He has claimed that Anuradha had committed suicide, false report was lodged by the first informant. All the payments claimed to be made by the first informant were actually made by him. Postmortem report has been wrongly prepared in collusion with the first informant. He has denied that Exhibit (Ka-2) was written by him or Anuradha. He claims that F.I.R. was anti timed. His medical examination was a procured one and as the first informant wants to grab his movable and immovable property for this reason false prosecution has been launched, his wife was very ambitious and short tempered. She wanted to

pursue her career but for the welfare of small children he did not permit her to accept any low paid job as his financial condition was very good. On account of this frustration she had committed suicide.

12. Rajesh Jha also appeared as (DW 1) and elaborated his earlier statement on oath with further details about his financial condition and payments claimed to be made by him.

13. Deepak Yadav (DW 2) is the President of Resident Welfare Association where the present appellant and the deceased used to reside. According to this witness, relations between the present appellant and his deceased wife were very good. According to his knowledge the appellant never tortured or treated his wife with cruelty. On 22.3.2009 at 08:00 a.m. he was telephonically informed by the present appellant that his wife Anu had ended her life, when he reached there appellant was weeping.

14. Dr. Nishar (DW 3) is the witness of the fact that on 24.1.2005 Smt. Anuradha Jha was brought by her husband Rajesh Kumar to hospital due to her taking over dose of anti depressants. He has proved the page 1 of the treatment report as Exhibit (Kha-1). He has, further, stated that Anuradha was referred to Dr. Ramjeet Jaiswal, a Psychiatrist who endorsed his opinion as Exhibit (Kha-2), thereafter he has proved opinion of Dr. Mukesh Gupta Exhibit (Kha-3), observation note of Dr. Faiyaz Exhibit (Kha-4) of Dr. Meenakshi Seth Exhibit (Kha-5) of Dr. Ankit Gupta Exhibit (Kha-6) of Dr. Amit Gupta Exhibit (Kha-7) observation noted by Dr. Ramjeet Jaiswal Exhibit (Kha-8) and advised for discharge signed by Dr. Faiyaz Exhibit (Kha-9). He has also proved the record of the treatment as Exhibit (Kha-10) and filed it before the Court.

15. The learned Trial Judge after hearing arguments of the counsel for the parties has found the present appellant guilty of offences punishable under Sections 498A , 304B I.P.C. and Section 4 of D.P. Act. The learned Trial Judge has also recorded his finding that against the appellant in the present case, facts do not make out offence of criminal conspiracy. Thereafter he withdrew/dropped the charge of Section 120B I.P.C. The learned Trial Judge after hearing the counsel for the parties sentenced the present appellant in the manner stated hereinabove.

16. We have heard Sri Brijesh Sahai, learned counsel for the appellant and Sri Rajiv Kumar Mishra, learned A.G.A. for the State at length and perused the record.

17. We have gone through all the material documents and testimonies of the witnesses examined by the prosecution as well as defence.

18. At the very outset we would like to place on record that in this appeal we would not like to comment on the merit of the case of the appellant or of the State because in this matter we are inclined to remand the matter to the trial Court for addition of charge. Reasons impelling us to do so are as under:

19. The version of the prosecution as contained in First Information Report and

narrated by the witnesses has been recorded by us in detail, which prima facie discloses facts constituting the commission of homicidal death of Anuradha whether amounting to murder or dowry death alongwith other offences with which the appellant was charged. However, the appellant was charged by the trial Court on 22.12.2009 only under Section 4 D.P. Act and Sections 498A , 120B and 304B I.P.C. The impugned judgment and order was delivered on 18.10.2012. In the mean time, the Hon"ble Apex Court vide judgment and order dated 22.11.2010 in the case of Rajbeer @ Raju and another v. State of Haryana, had issued the following direction:

"We further direct all trial Courts in India to ordinarily add Section 302 to the charge of Section 304B , so that death sentences can be imposed in such heinous and barbaric crimes against women.

Copy of this order be sent to Registrar Generals/Registrars of all High Courts, which will circulate it to all trial Courts."

20. The above direction being procedural in nature would apply to all pending trials also. The Supreme Court in essence has not made dowry death punishable with death but it merely mandated that charge of Section 302 I.P.C. should be framed alongwith charge of Section 304B I.P.C.

This direction can lawfully be complied with under the provisions contained in Section 221 Cr.P.C. They are extracted below:

"Where it is doubtful what offence has been committed.--(1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

After satisfying ourselves that there is a direction to charge accused of dowry death alternatively with murder and there is no legal impediment in doing so, we cannot overlook such omission as has been done by the trial Court. For remedying the omission, we are forced to take recourse to Section 464 Cr.P.C. extracted as below:

"464. Effect of omission to frame, or absence of, or error in, charge.

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any mis-

joinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

21. Sub-section (1) of Section 464 enables us to overlook any omission inter alia to frame any charge provided we are of the opinion that by confirming the finding or sentence, order, no failure of justice has in fact been occasioned thereby.

22. While hearing the appeal, we have dwelt upon on this point that the appellant has been convicted and sentenced and the first informant (father) of the victim must have the satisfaction that justice has been done and the appellant had the every opportunity to defend himself. Here we can say that in the present case failure of justice only on account of non framing of charge under Section 302 I.P.C. has in fact occasioned.

23. Failure of justice has two aspects one procedural and the other is result of the trial. In the present case, we find that trial of the case has not been conducted in accordance with fact of the case and procedure regulating the same. This is a rare eventuality that the first informant had got what he wished to get and the appellant has been sentenced to life imprisonment in addition to other sentences. If we take into account procedural defect and the mandate of the Hon'ble Supreme Court quoted hereinabove, it will be crystal clear that in the present case, failure of justice in law has been occasioned. But the law requires that failure of justice in fact also must occasion. From careful examination of the defence evidence we find that during the trial the appellant tried to meet the charge of dowry death. We have satisfied our self that this is not a case where in spite of non framing of charge the accused had full notice of the offence to which he had to defend himself. Prejudice likely to be suffered by the appellant persuades us that in the present case failure of justice in fact has also occasioned and we are convinced that here recourse to the provisions of sub-section 1 of Section 464 is not called for.

24. Sub-section (2) of Section 464 gives us two options by way of Clause (a) to order the new trial after addition of charge and Clause (b) to direct after framing of charge new trial in whatever manner we think fit.

25. Since contingency contemplated in the proviso does not exist we are not required to express any opinion on this point. Suffice it to say that in the present case omission by the trial Judge to alternatively charge the appellant under Section 302 I.P.C. as commanded by the Supreme Court necessitates remand of the case to cure the procedural defect noticed as above.

26. Secondly, during arguments it has come out that appellant has himself examined on oath as (DW 1), during examination-in-chief, he has given a lengthy statement. During cross-examination, he has admitted that it was correct that on 17.1.2012 when his examination-in-chief was recorded in regard to that he had already prepared a brief note and on the basis of that he gave his statement in the Court. It is noteworthy that during the examination-in-chief neither objection was raised on behalf of State nor the Presiding Judge had taken an exception to such procedure. We have also noticed that in the impugned judgment the Trial Judge has taken note of statement of the appellant recorded under Section 313 Cr.P.C. However, he has not adverted to his statement given on oath as DW 1. From the perusal of the judgment, it transpires that the learned Trial Judge has made merely an observation that his oral evidence is not sufficient to demolish the facts established from the medical evidence.

27. Question arises whether law of evidence has been correctly followed here? The law of evidence has been divided in two parts by eminent Jurist Salmond. According to him first part consists of rules for the measurement and determination of the probative force of evidence the second consists of rules determining the modes and conditions of the production of evidence. Here we have to consider whether law of evidence has been substantially complied with in reference to the testimony of Rajesh Jha (DW 1). The second part i.e. the manner in which the evidence is produced will be first discussed by us. Testimony of Rajesh Jha (DW 1) is squarely covered within the definition of oral evidence. Section 60 of the Evidence Act provides oral evidence must in all case be direct that is to say if it refers to a fact which could be seen it must be evidence of the witness who says he saw it. Where it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it or so on. The wisdom underlying the provisions contained in Section 60 of the Evidence Act is not far to see. This Section is aimed to ensure that whatever is offered as evidence shall itself sustain the character of evidence. It must be immediate. It may not involve an intermediate agency or delivered through a medium, second hand or to use the technical expression "hearsay".

28. It is also true that word "hearsay" is a relative one and whether an evidence is direct or hearsay, it depends upon the purpose for which such evidence has been given. As for example when the purpose is merely to ascertain what the deponent had heard from the dying person in such a case the evidence adduced to prove that would not be called hearsay, but if the purpose is to inquire as to whether the dying person was murdered by A or B, such evidence will amount to "hearsay". In this way application of the provisions of Section 60 of the Evidence

Act has to be ensured, i.e. with reference to the purpose for which the oral evidence is being given.

29. Here the point is whether Rajesh Jha (DW 1), when he gave his statement on 17.1.2012 during his examination-in-chief, with the help of a brief note prepared by him for the purpose, his testimony can be treated to be testimony in accordance with the provisions contained in Section 60 of the Evidence Act. Tenor of the language used by the draftsman coupled with first proviso to Section 60 of the Evidence Act lead us to the conclusion that evidence contemplated under Section 60 of the Evidence Act envisage personal testimony based on memory of the person who has seen, heard or perceived a fact. The statement given on oath with the help of a note, prepared for the purpose appears to be contra indicated for the purpose. In this background we propose to consider whether a witness is entitled for refreshing his memory before or during his examination or not.

Section 159 of the Evidence Act, provides as under:

"159. Refreshing memory.--A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct. When witness may use copy of document to refresh memory.--Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original. An expert may refresh his memory by reference to professional treatises".

30. From the provisions quoted hereinabove, it is evident that the witness can refresh his memory inter alia by referring to any writing made by himself at the time of the transaction or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

31. In the matter in hand no such evidence has been given that the appellant regularly used to keep a personal diary making notes of incidents of his married life, nor he claims that note was prepared so soon afterwards that the incidents narrated by him were fresh in his mind. Therefore, in the present case provisions of Section 159 of the Evidence Act would have no application. When we look further for any such precedent we find that in a case of Republic of India Vs. G.A.N. Rajan and Others, , the defense witness gave his deposition with the help of a note book, which resulted his evidence was a verbatim reproduction of the contents of the notebook. Unfortunately, in that case the point in hand was not considered and adjudicated by the Orissa High Court.

32. Further, search about the refreshing of memory by a witness took us to the

judgment given by Court of Appeal in *R. v. Da Silva*, , (1990) 90 Cr. App. R. 233 , in the law of evidence by Ratan Lal and Dheeraj Lal, the observation of the Court of Appeal has been quoted as under:

"In our judgment, therefore, it should be open to the judge, in the exercise of his discretion and in the interests of justice, to permit a witness who has begun to give evidence to refresh his memory from a statement made near to the time of events in question, even though it does not come within the definition of contemporaneous, provided he is satisfied:

that the witness indicates that he cannot now recall the details of events because of the lapse of time since they took place;

that he made a statement much nearer the time of the events and that the contents of the statement represented his recollection at the time he made it;

that he had not read the statement before coming into the witness-box;

that he wished to have an opportunity to read the statement before he continued to give evidence.

We do not think that it matters whether the witness withdraws from the witness-box and reads his statement, as he would do if he had the opportunity before entering the witness-box or whether he reads it in the witness-box. What is important is that if the former course is adopted, no communication must be had with the witness, other than to see that he can read the statement in peace. Moreover, if either course is adopted, the statement must be removed from him when he comes to give his evidence and he should not be permitted to refer to it again, unlike a contemporaneous statement which may be used to refresh memory while giving evidence. (PHIPSON ON EVIDENCE, 15th Edn. (2000), pages 271-272 (para 11-51))."

Here it is noticeable that Code of Criminal Procedure, 1973 contains provisions inter alia for recording the evidence in criminal cases. Section 276 exclusively deals with the record in trial before Court of Session. Provisions contained in the said Section are quoted as below:

"(1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the presiding Judge himself or by his dictation in open Court or under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

(2) Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion take down or cause to be taken down, any part of such evidence in the form of question and answer.

(3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record."

Lastly, we would like to make a reference to Volume 28 of the Halsbury's Laws of

England, Fifth edition. Its para 562, throws light on the point of refreshing memory. Para 562 reads as under:

"A witness in criminal proceedings may be permitted to refresh his memory either in the course of his evidence or before going into the witness box. In practice, it would be almost impossible for a Court to control the extent to which witnesses refresh their memories before testifying, the testimony would become more a test of memory than of truthfulness if witnesses were deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question. Any rule purporting to deny witnesses prior access to their statements would tend to create difficulties for honest witnesses but do little to hamper dishonest witnesses.

A witness giving oral evidence in criminal proceedings about any matter may, at any stage in the course of doing so, refresh his memory of it from a document made or verified by him at an earlier time, if:

he states in his oral evidence that the document records his recollection of the matter at that earlier time, and

his recollection of the matter is likely to have been significantly better at that time than it is at the time of his oral evidence.

Similarly, where such a witness has previously given an oral account, of which a sound recording was made, and he states in that evidence that the account represented his recollection of the matter at the time, and where his recollection of the matter is likely to have been significantly better at the time of the previous account than it is at the time of his oral evidence, and where a transcript has been made of the sound recording, he may, at any stage in the course of giving his evidence, refresh his memory of the matter from that transcript.

A document used by a witness to refresh his memory need not have been made by the witness personally, provided it was verified by him while the facts were relatively fresh in his memory. Where a witness has dictated a note to, for example, a police officer, he need not verify the original by inspecting it; it is enough if the officer reads back to the witness what he has written. Documents may be used to refresh memory even if they would not otherwise be admissible if tendered in evidence, and there seems to be nothing to prevent copies of original documents being used for this purpose.

It is not necessary that the witness should have any independent recollection of the facts to which he testifies and of which he seeks to refresh his memory, apart from the document to which he refers."

33. From the footnote of Halsbury's Laws of England, Fifth edition of this para, it transpires that while enacting Section 139 of the Criminal Justice Act, 2003, the British Parliament has found it prudent that it is for the Judge to decide, having heard the witness's evidence whether or not it was likely that his recollection had been significantly proper at the time of making the statement than it was at

the time of his oral evidence, although a Judge has to have a residuary discretion to refuse an application under Section 139 even where the conditions set out in Section 139 are met as in the case of *R. v. V. McAfee*, (2006) ANNER (D) 142.

34. Before commenting upon the lapse of Trial Judge, we would like to specify under what conditions refreshing of memory by a witness under Section 159 of the Evidence Act can be permitted, briefly and illustratively stated, they are as under:

(a) when the witness indicates to the judge that he/she cannot recollect at the present moment details of event(s) due to lapse of time;

(b) that the witness discloses existence of writing or storage of data in any device wherein he/she recorded the event(s) in question, which he/she did so at the time of the happening of the event(s) or at any later point of time which proximity be considered nearer in time;

(c) that he/she wishes to have an opportunity to go through the writing or such record so as to enable him/her to give better recollection of past event(s).

35. If the Trial Judge is satisfied about the above conditions the witness may be permitted to refresh his/her memory. Satisfaction of these conditions is required to be ensured by the Trial Judge especially in reference to provisions contained in Section 60 of the Evidence Act so that rule of best evidence is observed and applied logically.

36. We would like to make it amply clear that manner of taking evidence has reasonable nexus with which it is adduced if the law of Evidence Act in reference to taking of evidence is not properly observed the result would be that the evidence adduced would lose its probative force or at least it would be reduced considerably.

37. The Trial Judge is expected to keep in mind the duty enjoined upon him/her by Section 276 Cr.P.C. quoted hereinbefore.

38. What is surprising to us is that in exceptional circumstances the accused after obtaining permission of the Court under Section 315 Cr.P.C. examines himself on oath. The Trial Judge is expected to pay particular attention while recording such statements. In the present case lapse of the Trial Judge reduces the probative force of the testimony of Rajesh Jha (DW 1). By the lapse of the Judge a litigant especially an accused should not suffer therefore in the present case we think at least statement of that appellant, in case he is willing to appear again as witness after obtaining necessary permission under Section 315 Cr.P.C., should be recorded with due care and great attention.

39. Thirdly, in the present case Section 464 Cr.P.C. provides us only two options since sub-section 1 does not apply in the present matter, therefore, we have no option but to take recourse to sub-section 2 of Section 464 Cr.P.C. Had it been a case only of non-compliance with the law of evidence in reference to mode of

taking evidence of Rajesh Jha (DW 1), we could have exercised the power under Section 391 Cr.P.C. but in the present case, there is omission to frame a charge mandated by the Supreme Court, and in absence thereof the appellant is likely to be prejudiced in his defence, therefore, we are of the considered opinion that impugned judgment and orders deserve to be set aside and matter requires to be remanded to the trial Court with the direction that in-compliance with order of the Supreme Court dated 22.11.2010 a charge under Section 302 I.P.C. also be framed against the present appellant. To obviate delay likely to occur in the fresh trial in accordance with Clause (b), sub-section 2 of Section 464 Cr.P.C. we direct the trial Court to proceed with the trial in accordance with provisions contained in Section 216 Cr.P.C.

40. Before parting, we would like to express our appreciation about the assistance rendered by Sri Brijesh Sahai, Advocate appearing for the appellant and Sri Rajiv Kumar Mishra, learned A.G.A. appearing on behalf of State especially we appreciate the assistance rendered by Brijesh Sahai, Advocate in the form of considered replies submitted by him to the queries made by this Court.

41. Accordingly, the appeal is allowed. Impugned judgment and orders dated 18.10.2012 are set aside. The Sessions Trial No. 854 of 2009 (State v. Rajesh Jha) is remanded back to the trial Court with the direction that a charge under Section 302 I.P.C. also be framed against the present appellant and thereafter the trial Court may proceed in accordance with provisions contained in Section 216 Cr.P.C. The trial Court is directed to ensure presence of the witnesses in advance and proceed with the trial on day to day basis. We expect that efforts should be made to conclude the trial as early as possible preferably within three months. We also grant liberty to the present appellant to move his bail application, if he so desires, before the Court of Session, Ghaziabad. Who shall consider it in the light of subsequent events and material available on record. Office is directed to send the record alongwith a copy of the judgment to the trial Court within thirty days.