

(2016) 01 GUJ CK 0062
In the Gujarat High Court
Case No : Criminal Appeal No. 1470 of 2006

State of Gujarat

APPELLANT

Vs

Shailesh Javerchand Malde Mahajan

RESPONDENT

Date of Decision : 11-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 293, Section 294, Section 311,
Section 378
Evidence Act, 1872 — Section 165
Penal Code, 1860 (IPC) — Section 376, Section 506(2)

Citation : (2016) 2 GCD 1069 : (2016) 2 GLR 1591

Hon'ble Judges : M.R. Shah and Z.K. Saiyed, JJ.

Bench : Division Bench

Advocate : Hardik Soni, APP, for the Appellant; Nital M. Dhruve, P.M. Lakhani, R.I. Sharma and R.P. Lakhani, Advocates, for the Respondent

Final Decision : Allowed

Judgement

M.R. Shah, J.—1.0 Feeling aggrieved and dissatisfied with the impugned judgment and order of acquittal passed by the learned Additional Sessions Judge (Fast Track Court No. 3), Jamnagar (hereinafter referred to as "the trial Court") dated 29/12/2005 in Sessions Case No. 103/2005 by which the learned trial Court has acquitted the respondent-original accused for the offences punishable under Sections 376 and 506(2) of the Indian Penal Code ("IPC" for short), the State has preferred the present Criminal Appeal under Section 378 of the Code of Criminal Procedure.

2.0 The case of the prosecution in a nutshell was that FIR, being CR. No. I 36/2005, was given by the prosecutrix at Meghpar Police Station, Taluka Lalpur, District Jamnagar against the respondent-original accused for the offences punishable under Sections 376 and 506(2) of the IPC. It was alleged in the said Complaint that the respondent-original accused was the step-father of the prosecutrix. The prosecutrix married prior to three months of the registration of the said FIR with one Nimitkumar. She was having strain relation with her in-laws

since three months and, therefore, she was staying with her mother and step-father i.e. respondent-original accused. It was alleged that about 15 days prior to registration of the FIR, her mother had gone to Bombay to visit her friend and during that period the respondent-original accused-step-father of the prosecutrix raped her and threatened her that if she discloses this to anyone she would be killed. It was alleged that the same continued for some time till her mother returned and thereafter both of them gathered some courage to file FIR and the same came to be lodged with Meghpar Police Station, Taluka Lalpur, District Jamnagar. The Investigation was carried by one Shri H.U. Shreeman, PSI, Meghpar Police Station, Jamnagar initially and thereafter by one Shri D.N. Jhala, Circle Police Inspector, Jamnagar Rural and thereafter again by Shri Barot, Circle Police Inspector, Jamnagar Rural. The Investigating Officer/Officers recorded the statement of the concerned witnesses, including the prosecutrix and the mother of the prosecutrix and even the minor brother of the prosecutrix. The Investigating Officer/Officers also gathered medical evidences, collected the semens of the prosecutrix as well as of the respondent-original accused and also recovered the clothes of the prosecutrix as well as the respondent-original accused, which were having semen stains. The Investigating Officer/Officers also collected the medical evidences. After conclusion of the Investiga, Circle Inspector, Shri Barot filed the chargesheet against the respondent-original accused before the learned Judicial Magistrate First Class for the offences punishable under Sections 376 and 506(2) of the IPC. At this stage, it is required to be noted that in the chargesheet the Investigating Officer named as many as 26 witnesses. As the case was exclusively triable by the Court of Sessions, by passing an order below Exh. 1, the learned Magistrate committed the case to the Sessions Court, Jamnagar. The respondent-original accused pleaded not guilty and, therefore, he came to be tried by the learned trial Court for the offences punishable under Sections 376 and 506(2) of the IPC. The learned trial Court framed the charge against the respondent-original accused at Exh. 4 for the offences punishable under Sections 376 and 506(2) of the IPC. The prosecution examined five witnesses only as under;

Through the aforesaid witnesses the prosecution also brought on record the following documentary evidences;

2.1 During the trial the mother and the prosecutrix herself, who were examined at Exhs. 8 and 10 turned hostile. Even one another child witness, brother of the prosecutrix, who was examined at Exh. 9 also turned hostile. From the record, it appears that summons was directed to be issued upon Dr. Priti Joshi before whom the prosecutrix gave the history that the respondent-original accused raped her, however, unfortunately thereafter neither the prosecution nor even the Court examined the said material witness. Despite the fact that the material witness, mother of the prosecution, prosecutrix herself and the child witness turned hostile, the learned Assistant Public Prosecutor submitted an application below Exh. 21 dropping all other witnesses and also submitted closing purshis at Exh. 46 and thereafter considering the deposition of the mother of the

prosecutrix, prosecutrix and the child witness, who as such turned hostile and did not support the case of the prosecution, by the impugned judgment and order the learned trial Court has acquitted the respondent-original accused for the offences punishable under Sections 376 and 506(2) of the IPC.

3.0 We have heard Shri Hardik Soni, learned APP appearing on behalf of the respondent-State and Shri Lakhani, learned advocate appearing on behalf of the respondent-original accused. We have considered the impugned judgment and order of acquittal in detail. We have gone through the entire evidence on record, both oral as well as documentary and re appreciated the entire evidence on record. However, considering the Record and Proceedings of the case it emerges that in the chargesheet as many as 26 persons/witnesses were named. It also emerges that during the trial the prosecution examined only five witnesses, namely, mother of the prosecutrix, prosecutrix herself, child witness-brother of the prosecutrix and two Investigating Officers-Devisinh Natubhai Jhala, Circle Inspector ad Husain Usmanbhai Shreeman, P.S.I.. It also emerges from the record that as such an application was submitted by the learned Assistant Public Prosecutor to issue summons upon Dr. Priti Joshi and even summons was ordered to be issued and was served upon Dr. Priti Joshi, who issued the medical certificate and before whom the prosecutrix gave the history that her step-father-respondent-original accused committed rape on her but without bothering whether the summons upon the said Dr. Priti Joshi has been served or not and despite the fact that the material witness-mother of the prosecutrix, prosecutrix and the child witness turned hostile the learned Assistant Public Prosecutor gave an application to drop the other witnesses and submitted the closing purshis. At this stage, it is also required to be noted that though the samples of semens on the clothes of the prosecutrix and the respondent-original accused were collected and were sent to FSL without even calling or waiting for the serological report to come, the learned trial Court has acquitted the respondent-original accused solely on the ground that the material witnesses, who were examined at Exhs. 8, 9 and 10 i.e. mother of the prosecutrix, prosecutrix and the child witness-brother of the prosecutrix does not support the case of the prosecution. We fail to appreciate the dropping purshis submitted by learned Assistant Public Prosecutor to drop the said witnesses and/or not to examine the other witnesses when the material witnesses turned hostile. In fact, as such, specific reasons were required to be submitted by the learned Assistant Public Prosecutor to drop the material witnesses, more particularly, when the prosecutrix herself, mother and other witness turned hostile. Even the learned Judge also did not even take proper care to find out the truth of what actually happened and as observed hereinabove he even did not observe and/or see that the material witnesses are examined, more particularly when the prosecutrix herself, mother of the prosecutrix and the child witness were won over as may be because of the fact that the respondent-original accused was the step-father of the prosecutrix and the mother was to stay and reside with the respondent-original accused. It was the duty of the learned Judge to go to the root of the matter and find out the

truth. It was the pious duty of the learned trial Court to appreciate the evidence for search of the truth. However, it appears that either may be in a hurry of disposal of the case and/or perfunctory disregard of the duty, other witnesses and evidences were dispensed with by the learned Judge. As observed hereinabove, even the learned Assistant Public Prosecutor failed to perform his duty for whatsoever reason and despite the fact that the prosecutrix herself, mother of the prosecutrix and the child witness turned hostile and the learned Assistant Public Prosecutor himself had given an application to issue summons upon Dr. Priti Joshi before whom the history was given by the prosecutrix that her step-father committed rape on her, he submitted an application to drop the remaining witnesses and also submitted the closing purshis. Thus, even the learned Assistant Public Prosecutor in the present case also has failed to perform his duty.

3.1 At this stage, it is required to be noted that Dr. A.B. Agravat, who collected the samples of semens of the prosecutrix as well as the respondent-original accused, were sent to FSL and even he prima facie opined that the semens was of the prosecutrix and respondent-original accused. Even the Investigating Officer did not even care to gather the serological report. Thus, all who are connected with the trial, who were supposed to reach to the truth, have failed to perform their duties.

3.2 Identical question came to be considered by the Division Bench of this Court in the case of State of Gujarat v. Patel Ashwinkumar Ranchhodbhai reported in , 2008(2)GLR 1748. In the case before the Division Bench all the eye witnesses turned hostile and despite the same, the Public Prosecutor gave the closure purshis and even did not examine other material witnesses like the Investigating Officer and even the FSL report etc. were also not exhibited and the learned trial Court acquitted the accused persons without examining even the Investigating Officer. In the said decision the Division Bench had an occasion to consider the role of the Public Prosecutor as well as the role of the Presiding Judge. In the said decision it is observed that crime in the society are real and concrete incident actually occurs. Crimes are not fancy or imagination, which Courts are called upon to decide. Therefore, greater responsibilities are to be shouldered by Courts while dispensation of justice. Prosecuting agency and investigation agency are also important factor in criminal justice system. It is further observed that each component must do justice to its role in doing justice to aggrieved persons. It is also observed that crimes are not affecting the individual, but influences the society as a whole, and therefore, the grave crimes are not against individual but against the society. While elaborating and considering the role of the Investigating agency, Public Prosecutor and the Presiding Judge, the Division Bench in paragraph Nos. 6 to 14 has observed and held as under;

"6. Crimes in society are real and concrete incident actually occurs. Crimes are not fancy or imagination, which courts are called upon to decide. Therefore, greater responsibilities are to be shouldered by courts while dispensation of

justice. Prosecuting agency and investigation agency are also important factor in criminal justice system. Each component must do justice to its role in doing justice to aggrieved persons. The crimes are not affecting the individual, but influences the society as a whole and, therefore, the grave crimes are not against individual but against the society. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. This could be achieved through instrumentality of criminal law. The contagion of lawlessness would undermine the social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law, which must be achieved through courts of law through the role assigned to a court. Law as a cornerstone of the edifice of order, should meet the challenges confronting the society.

7. We are at pain to observe that neither the learned Trial Judge nor the learned APP endeavored to find out the truth by probing further the case. Instead, as soon as the witnesses, who were eye witnesses, turned hostile, the Trial Court as well as the learned APP shut the doors towards their pious and prime duty to search for the truth and the trial was closed in extreme hurry. We find that the Investigating Officer, who is named in the charge sheet, could not be examined by the learned APP nor such vigilance could be shown by the Trial Court to reach at the truth. It is not the law that when eye witness turns hostile, the courts should abandon the search for the truth and learned APP should become oblivious to put forward the whole prosecution case and instead of adducing further evidence for search of truth, simply giving purshis in the case to lock the whole case in a cup board so as to ignore completely the heinous crime like murder committed under the nose of the society. The Investigating Officer could have been examined to throw light on the circumstances of the case and could have proved the case beyond reasonable doubt despite eye witnesses turned hostile. Necessary it is to mention that the Investigating Officer draw panchnamas by which iron bar seized from the house of the accused, contained bloodstains, and according to Forensic Science Laboratory, those bloodstains contained the blood group of the deceased. This is not the end but shirt and pant worn by the accused when he was arrested and seized by the Investigating Officer through a panchnama, contained bloodstains, which according to Forensic Science Laboratory report, contained the blood group of the deceased. Learned Trial Judge and prosecuting agency, however, did not bring this evidence on record and adopted "shutters down" approach. It is nowhere so defined in any criminal law of the country that evidence means the evidence of eye witnesses only. Evidence may be in any shape, and in search for the truth, this evidence must be appreciated by the courts of law as evidence in criminal trial to come to the truth. In this case, the learned Trial Judge as well as learned APP both shut their eyes to their duties to explore the truth. The worst thing which we find is that the Forensic Science Laboratory report which is produced by the prosecution requires to be exhibited without formal proof under Sections 293 or 294 of the Criminal Procedure Code, is neither exhibited by the Trial Court nor any

endeavour was made by the learned APP. Besides, we find from the record that accused himself through his Advocate preferred an Application at Exhibit 7 on 30th of October, 2004, wherein the accused prayed before the Court that in the said case, accused also got injuries and the papers relating to the injuries of the accused be called for and be placed on record as the documents were important for the defence of the accused. The learned Trial Judge passed an order dated 30th of October, 2004 that the application was kept for hearing. However, it appears that, no further orders came to be passed below such application. Perhaps, a judicial adjudication after due consideration, could have assisted the Trial Court to arrive at the truth of the matter, which is the sole purpose of the criminal trial.

8. True that criminal justice deals with complex human problems and diverse human beings. On account of relations, witnesses may turn hostile and witnesses may resile when search for the truth is vigorously undertaken through instrumentality of criminal law. In trials, therefore, it becomes the duty of the Judge presiding over a criminal trial, to appreciate the evidence from all corners, and if the evidence is not produced, though available, then, the same could be produced. The courts exist for doing justice to the persons who are affected. As aforestated, the crimes of such nature like murder are affecting the society. The court is not merely to act as a tape recorder recording the evidence, overlooking the object of trial i.e. to get at the truth. The courts cannot be oblivious to the active role to be played, for which there is not only ample scope but sufficient powers are conferred under the Code. The court has a greater duty and responsibility to render justice in a case where it appears that the role of the prosecuting agency itself is dubious. The courts are expected to perform its duties and functions effectively and true to the spirit with which the courts are sacredly entrusted the dignity and authority and an alert judge actively participating in court proceedings with a firm grip on oars enables the trial smoothly to reach at the truth. The interest of the parties in conducting the trial in such a way so as to gain success is understandable, but the obligation of the Presiding Judge to hold the proceedings as to achieve the dual objectives i.e. search for truth and delivering pure justice cannot be subdued. Wherever necessary, even courts are empowered to curb perjury. This is a fact that most of the witnesses coming in the courts despite taking oath, make false statements to suit the interest of the parties. Effective and stern action is required to be taken on such a stand, which may be taken upon the witnesses. The mere existence of penal provisions to deal with perjury would be a cruel joke with the society unless the courts stop to take evasive recourse despite proof of the commission of the offence.

9. We find to our utter shock that so far as this Appeal is concerned, the role of prosecuting agency also appears stigmatic. Witnesses are the eyes and ears of the justice. If the witnesses are incapacitated from acting as eyes and ears, the trial gets putrefied and paralysed and cannot be termed as a fair trial. The incapacitation may be due to various factors. In this case, it may be the relations

of the parties because at one hand, the accused was the cousin of the witnesses and the deceased was the father of the complainant and witnesses. It is the cardinal principle in law of evidence that the best available evidence should be brought before the court. Unfortunately, this is a case wherein other evidence besides eye witnesses was available to support the prosecution case was not brought on record by the prosecuting agency nor any attempt was made to show to the court that how the witnesses have failed to support the prosecution case. Evidence of recovery of weapon through panchnama, may not be a discovery, still is a good evidence if proved beyond doubt. Finding bloodstains of group of the deceased on the clothes of the accused as well is a good evidence to support the prosecution besides the direct evidence of eye witnesses. When accused himself files an application that in same case the accused has got injuries and the prosecution as well as court becomes, perhaps, oblivious to bring on record such relevant facts, supporting the search of truth, itself is an example of lack of awareness towards pious duties. Undoubtedly, therefore, the role attributed to learned APP in this trial has been eschewed in hurry of disposal of the trial, which has resulted in failure of justice.

10. It is known and cardinal principle of evidence that even if a major portion of evidence is found to be deficient in case residue is sufficient to prove guilt of an accused, the conviction can be maintained. It is the duty of the court to separate grain from chaff in coming to the conclusion of truth. It also becomes the duty of the court to take into consideration of relevant evidence available and courts are empowered to produce on record such evidence if the prosecution failed in their duties to produce such evidence. The conclusion of a criminal trial must be the outcome of cool deliberations and the scanning of the material by the informed mind of the Judge that leads to determination. How can a prosecuting agency or concerned Trial judge afford to be so perfunctory in dealing with the criminal trial of grave crime of murder.

11. Necessary it is therefore to refer to the decision of the Apex Court in the matter of KRISHNA MOCHI AND ORS v. STATE OF BIHAR, as reported in , AIR 2002 SC 1965. In paras 75 and 76, the Apex Court observed as under:

"75. It is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by Courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high ups in the Government or close to powers, which may be political, economic or other powers including muscle power. A witness may not stand the test of cross examination which may be sometime because he is a bucolic person and is not able to understand the question put to him by the skillful cross examiner and at times under the stress of cross examination, certain answers are snatched from

him. When a rustic or illiterate witness faces as astute lawyer, there is found to be imbalance and, therefore, minor discrepancies have to be ignored. These days it is not difficult to gain over a witness by money power or giving him any other allurence or giving out threats to his life and/or property at the instance of persons, in/or close to powers and muscle men or their associates. Such instances are also not uncommon where a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent. It is most unfortunate that expert witnesses and the investigating agencies and other agencies which have an important role to play are also not immune from decline of values in public life. Their evidence sometimes becomes doubtful because they do not act sincerely, take everything in a casual manner and are not able to devote proper attention and time.

76. Thus, in a criminal trial a prosecutor is faced with so many odds. The Court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the Court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, court should tread upon it, but if the same are boulders, court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals". I find this Court in recent times has conscientiously taken notice of these facts from time to time. In the case *Inder Singh and another v. State (Delhi Administration)*, , AIR 1978 Supreme Court 1091, Krishna Iyer, J. laid down that "Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes."

In the case of *State of U.P. v. Anil Singh* , AIR 1988 Supreme Court 1998, it was held that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform. In the case of *State of West Bengal v. Orilal Jaiswal and another* , (1994) 1 Supreme Court Cases 73, it was held that Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law. In the case of *Mohan Singh and anr. v. State of M.P.* , (1999) 1 Supreme Court Reports 276, it was held that the courts have been removing chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these

things clog the very truth. So long chaff, cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is onerous duty of the court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused.

12. In the case of ZAHIRA HABIBULLA SHEIKH AND ANR. v. STATE OF GUJARAT AND ORS., reported in , (2004) 4 SCC 158, the Hon"ble Supreme Court has occasion to deal with the role of the Public Prosecutor. It is observed by the Hon"ble Supreme Court that Public Prosecutor is not supposed to be a persecutor, yet the minimum that was required to be done, to fairly present the case of the prosecution, was not done. It is further observed that it is as much the duty of the Prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. It is further observed by the Hon"ble Supreme Court that the Prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts should not also play into the hands of such persecuting agency showing indifference or adopting an attitude of total aloofness. In the present case, the Public Prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the Court i.e. by not examining the important witnesses inclusive of the Investing Officer and by not trying to see that vital documentary evidences, such as, Panchnama and FSL report are exhibited. It appears that if Investigating Officer was examined and the documentary evidence which were already on record i.e. Panchanama of place of offence; recovery of clothes of the deceased as well as the accused and FSL report were exhibited, the result would have been different.

13. K. Lack of "robust judging" has stated in criminal courts need of the hour is "robust judging". The trial judge is the linchpin in every case, and he has also its eyes and ears. He is not merely a recorder of facts but a purveyor of all evidence, oral and circumstantial. It is said by him that a good trial judge needs to have a "third ear" i.e. hear and comprehend what is not said. When a material eye witness, whose beloved relative has been murdered and who has identified the accused in his police statement says in his/her evidence at the trial that he cannot recall the faces or names of anyone, this must obviously excite suspicion in the mind of a truth seeking judge; he (or she) must probe further and question the witness (even if the prosecutor does not do so), as to why he had so stated before the police shortly after the incident and whether he had met with anybody before giving evidence in court or had been tutored or compelled to say what had been just deposed to. No new law is required for this. Only common sense and acquaintance with the facts of life. After having found that witnesses who were already examined were family members of the deceased and also of the accused had retracted their prior statements made to the police soon

after the event, and even original complainant also retracted from his earlier statement and when they turned hostile, the learned Additional Sessions Judge ought to have seen the pattern in the case and ought to have been alerted. The learned Additional Sessions Judge ought to have, on its own exercised the powers under Section 311 of the Code of Criminal Procedure and ought to have summoned the police officers who had recorded the statement of some of the material witnesses of the incident. As stated herein above, not only the learned Additional Sessions Judge has failed to exercise powers under Section 311 of the Cr.P.C. but even has not bothered to exhibit relevant documentary evidence which were already on record, which if exhibited, would have been fatal to the evidence. Even FSL report considering the provisions of the Cr.P.C. was straightway required to be exhibited. The learned Additional Sessions Judge, ought to have appreciated that his duty was to find out truth of what actually occurred.

14. Recently in the case of HIMANSHU SINGH SABHARWAL v. STATE OF M.P. & ORS., reported in , 2008 AIR SCW 2206, in para 16 and 17, the Hon"ble Supreme Court has observed as under:

"16. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

17. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. (I) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In Mohan Lal v. Union of India (, 1991 Supp (1) SCC 271) this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, "any Court" "at any stage", or "any enquiry or trial or other proceedings" "any person" and "any such person"

clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case "essential", to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth."

It is further observed by the Hon"ble Supreme Court in the said decision that if the 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 conclusions, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves.

3.3 Thus, from the aforesaid facts narrated hereinabove, we find that the prime and the pious duty of the Judge to search the truth is abandoned and all who are connected with the justice delivery system has failed to perform their duties. The material witnesses did not support the case of the prosecution and turned hostile, may be either because the respondent-original accused won over the said witnesses or as the respondent-original accused was the stepfather of the prosecutrix and the mother of the prosecutrix and the child witness had to stay with the respondent-original accused. As observed hereinabove, in the medical certificate, which was issued by Dr. Priti Joshi, the history, which was given by the prosecutrix, has been recorded in which it is stated that she has been raped by her step-father. As observed hereinabove, initially one application was given by the Public Prosecutor to issue summons upon Dr. Priti Joshi, however, thereafter no efforts seems to have been made by the learned Assistant Public Prosecutor and/or even the learned Presiding Judge to see that the said witness is examined. There are number of other things, which ought to have been taken care of by the Public Prosecutor as well as the learned Presiding Judge. However, the learned trial Court as well as the learned Assistant Public Prosecutor shut the doors towards the pious duty of search of truth and the trial has been closed in extreme hurry. We would have given so many other reasons, however, Shri Lakhani, learned advocate appearing on behalf of the respondent-original accused has stated at the bar that he has no objection if the impugned order

passed by the learned trial Court is quashed and set aside and the matter is remanded to the learned trial Court for retrial and, therefore, he has requested not to assign any further reasons. Therefore, we refrain ourselves from making any further observations on merits while quashing and setting aside the impugned judgment and order of acquittal and remanding the matter to the learned trial Court for retrial. However, as observed hereinabove and at the cost of repetition, we feel that in the present case all concerned and connected with dispensing of justice have failed to perform their duties. The manner in which the trial has been conducted is highly deprecated. However, as observed hereinabove, as the matter is now being remanded to the learned trial Court for retrial and on request made by Shri Lakhani, learned advocate appearing on behalf of the respondent-original accused not to assign any further reasoned order as it may ultimately affect the respondent-original accused before the learned trial Court, we are not assigning any further reasoned order while quashing and setting aside the impugned judgment and order and remanding the matter to the learned trial Court for retrial.

4.0 In view of the above, the present Appeal succeeds. The impugned judgment and order of acquittal passed by the learned Additional Sessions Judge (Fast Track Court No. 3), Jamnagar in Sessions Case No. 103/2005 acquitting the respondent-original accused is hereby quashed and set aside and the matter is remanded to the learned trial Court for retrial with a direction to the learned trial Court to examine the material witnesses, named in the chargesheet and the documentary evidences, which were not brought on record, such as serology report etc.. The aforesaid exercise shall be completed by the learned trial Court within a period of one year from today. The respondent-original accused now to appear before the learned trial Court for fresh trial on 15/02/2016 and the concerned Investigating Officer, Jamnagar Police Station is hereby directed to see that the respondent-original accused remains present before the learned trial Court at the first instance on 15/02/2016.

Registry is directed to send the Record and Proceedings of the case to the learned trial Court forthwith but not later than 01/02/2016.