

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A.NO.390/2004 & CRL.M.B.NO.1471/2008

Date of pronouncement: 02 March, 2009

Mohd. Rafiq Petitioner
Through : Mr.I.B.S. Thokchom, Advocate

Versus

STATE OF NCT OF DELHI Respondent
Through : Mr.M.P. Singh, APP for the State.

CORAM:
HON'BLE MR. JUSTICE G.S. SISTANI

1. Whether reporters of local papers may be allowed to see the Judgment? **Yes**
2. To be referred to the Reporter or not? **Yes**
3. Whether the Judgment should be reported in the Digest? **Yes**

G.S. SISTANI, J.

1. This is an appeal under Section 374 of the Code of Criminal Procedure, 1973 (hereinafter referred to as, Cr.P.C.) directed against the judgment dated 27.4.2004 and order on sentence dated 27.4.2004 passed by the learned Additional Sessions Judge in Session's Case No.275/2002, FIR No.630/2001 under Sections 376/506 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC"), P.S. Sangam Vihar, Delhi. By virtue of which the appellant has been sentenced to undergo Rigorous Imprisonment for twelve (12) years and to pay a fine of Rs.10,000/- for the offence punishable under Section 376, IPC, and in default of the payment of fine to further undergo Simple Imprisonment for one year. The appellant was further sentenced to undergo Simple

Imprisonment for two years for the offence punishable under Section 506, Indian Penal Code, without further sentencing him to pay a fine for the offence punishable under Section 506 IPC. Both the sentences were ordered to run concurrently.

2. The brief facts of this case as noticed by the trial court below are that on 31.10.2001 on receipt of copy of DD No.18A of P.S. Sangam Vihar, New Delhi with respect to Kumari (name is withheld and for the sake of future reference hereinafter referred to as, 'victim'), daughter of Ramesh, having been got admitted by her father at AIIMS for her medical examination, S.I. Madan Pal alongwith Constable Shiv Kumar reached AIIMS and found the victim admitted there vide MLC No.99723/01. Her parents were also present in the hospital. Statement of the victim was recorded as Ex.PW-7/A. The victim appended her thumb impression at point 'A' which was duly attested by her father Ramesh. In her said statement, the victim leveled allegations against the appellant Rafiq for an offence punishable under Sections 376 and 506 Indian Penal Code and on the basis thereof the SI prepared '*rukka*' Ex.PW-13/A for registration of a formal FIR against the appellant for the offence punishable under Sections 376/506 IPC and thereupon a formal FIR was registered. On 01.11.2001 'Kacchi' and 'nikker', stained with blood that had come out from vagina of the victim were handed over by her father to the SI. On the same day, on information by a secret informer, appellant Mohd. Rafiq was apprehended, his personal

search was carried out and he was arrested. The appellant is also stated to have made a disclosure statement and pointed out the place of occurrence. He was also got medically examined. The exhibits handed over by the doctor were taken into possession and deposited in the Malkhana. In the opinion of the doctor the appellant was fit to have sexual intercourse. The victim was referred to the Gynae Department where she remained admitted from 31.10.2001 to 2.11.2001.

3. The prosecution has examined 13 witnesses, however, only two witnesses were examined by the defence. The statement of the appellant under section 313 Cr.P.C. was recorded, wherein he denied the circumstances existing against him.
4. Before dealing with the rival contentions of the parties, it would be appropriate to minutely scrutinize and analyse the evidence of some of the material witnesses.
5. PW-2 (Constable Shiv Kumar) in his examination-in-chief has deposed that the statement of the victim was recorded by the Investigating Officer, however, it was not recorded in his presence. He also deposed that the victim did not inform the Investigating Officer that appellant (Rafiq) committed rape upon her.
6. PW-3 (Constable Wasik Ahmed) in his examination-in-chief has deposed that on 1.11.2001, he was posted at P.S. Defence Colony and was working as the Duty Officer at AIIMS, on which date the appellant was medically examined in the hospital

and after his medical examination the doctor preserved the under garments, blood in guage, which were sealed with the seal of AIIMS and the same were seized by Investigating Officer vide seizure memo Ex.3/A, which bears his signatures at point 'A'. In his cross-examination, PW-3 has deposed that on 1.11.2001 he was on duty from 8:00 a.m. to 8:00 p.m. and on receiving the exhibits in sealed condition, he sealed the same with the seal of CMO AIIMS Hospital and handed over the same to Investigating Officer, as it was in intact condition.

7. PW-4 (Dr.Sunil Kumar Sharma, Senior Resident AIIMS hospital) in his examination-in-chief has deposed that on 1.11.2001 he had medically examined the appellant, who was brought to the hospital with alleged history of being involved in a rape case, one day back (12 noon on 31.10.2001). He also deposed that appellant was conscious, cooperative, well-oriented and there was no external injury over his body. And on the medical examination of the appellant, he was of the opinion that there was nothing to suggest that appellant could not perform sexual intercourse. He also deposed that blood in gauge and underwear of appellant were sealed and handed over to the Investigating Officer. He admitted the detailed MLC to that effect which was Ex.PW-4/A and which bears his signatures at point 'A'.
8. PW-5 (Dr.Suman, Senior Resident, AIIMS hospital) in her examination-in-chief has deposed that she had examined, victim on 31.10.2001, who was brought by her father with the alleged

history of rape by a known person. PW-5 deposed that *"she was giving history take out of under garments by that person and penetration of penis inside. After that she has blood around 100 m.l. and now she has no bleeding for one hour"*. She further deposed that *"on examination vitals stable, Pulse rate 96 per minute. Per abdomen soft, per vaginal examination local mild clot removed. Hymen torn freshly. Vaginal mucosal tear and muscle exposed. Skin 3 ml torin in midline perniem. Per rectal examination rectal mucosa intact. Tone normal"*. She also deposed that she has seen the MLC, Ex. PW-5/A and admitted that the same is in her handwriting and bears her signatures at point 'A'.

9. PW-6 (Constable Ramtek, P.S. Sangam Vihar) in his examination-in-chief has deposed that on 1.11.2001 he was posted as constable at P.S. Sangam Vihar. On that day at about 4:00 p.m., a secret informer informed the Investigating Officer S.I. Madanpal that the appellant wanted in this case is sitting at DDA flats, Tara Apartment, Delhi. He along with the Investigating Officer and secret informer reached Tara Apartment Police Booth at about 4:30 p.m. At pointing out of secret informer, appellant, was apprehended. He was taken to Police Station and was interrogated by the Investigating Officer. PW-6 also deposed that the appellant made a disclosure statement (Ex.PW-6/A), which bears his signatures at point 'A'. The appellant pointed out his house where he committed the offence. The pointing out memo

Ex.PW-6/B was prepared, which bears his signature at point 'A'. PW-6 (Ramtek) also deposed that appellant was taken back to the Police Station and thereafter he was got medically examined from AIIMS Hospital. The doctor who medically examined the appellant preserved the blood samples etc. and the same was sealed by the I.O. vide seizure memo, Ex.PW-3/A. PW-6 (Ramtek) also deposed that the prosecutrix was also present in the hospital and she was also got medically examined and after her medical examination the undergarments, one handkerchief and one half pant was seized vide memo Ex.PW-6/C, which bears his signature at point 'A'. He further deposed that at the time of arrest of the appellant, arrest memo Ex.PW-6/D was prepared and the same bears his signature at point 'A'. The personal search of appellant was conducted vide memo Ex.PW-6/E. The discharge summary of prosecutrix was taken into police possession vide memo Ex.PW-6/F. PW-6 (Ramtek) has also deposed that Investigating Officer had also seized the proof regarding date of birth of the prosecutrix vide memo Ex.PW-1/E which bears his signature at point A. The said proof is Ex.PW-1/A.

10. PW-6 (Ramtek) in his cross-examination has stated that the secret informer came to the police station and informed the Investigating Officer that the appellant of this case was sitting outside the police booth on a bench, where the police officials were sitting inside the booth. PW-6 also stated that on seeing them, the appellant did not try to run away from the said place

and the Investigating Officer had written the disclosure statement (Ex.PW-6/A) in his own hand-writing and the appellant made disclosure in his presence. PW-6, further deposed that “thereafter the appellant was taken to AIIMS for his medical examination. We came back to police station from AIIMS. The appellant was thereafter put in police lock-up at P.S. Ambedkar Nagar”. It is also stated that the statement of PW-6 was recorded by the Investigating Officer at the police station and after his routine duty, PW-6 went to his house.

11. With a view to ascertain and satisfy itself about the capability of the victim, learned trial court has put certain questions to the victim, which were answered by her and are reproduced below:

“Q. What is your name?

A., victim.

Q. What is your father name?

A. Sh.Ramesh

Q. Do you study?

A. I study in 3rd class.

Q. In which school do you read?

A. I read in a private school.
Again said a govt. school.

Q. What is your age?

A. I am 7 years old.

Q. Whether it is good to tell truth or a lie?

A. Truth is always good.

Q. How many brother and sisters are you?

A. We are 3 sisters and 1 brother.

Q. Do you know what is meaning of taking an oath?

A. This means telling truth.”

12. The trial court on examination of the victim observed that the victim appeared to be intelligent, capable and was able to give rational answers.
13. PW-7 (Baby victim) deposed that she knew Mohd. Rafiq. The appellant used to reside near her house. PW-7 stated that she did not remember the exact date, however, one day in the afternoon time, she went to the house of appellant for watching T.V. on her own. At that time there was no T.V. installed at her house. When she was watching T.V. at the house of the appellant, appellant removed her underwear and also removed his underwear. He inserted his penis into her vagina. She has testified in her own language that '**Rafiq ne meri kacchi utar di apni kachi bhi uttar di and apna peshab karne wala mere peshab karne wali jaga gusha dia**'. She has also deposed that when she cried, the appellant pressed her mouth and that she felt a great pain in her private part and started bleeding profusely and that thereafter on her cries the appellant left her and extended threat not to disclose the episode to anyone and that thereafter she came to her house and told her mother about the occurrence when her father was away on his duty. She has also deposed that her father returned in the evening and she was taken to hospital by her grandmother. She has deposed that police had recorded her statement and she put her right thumb impression at point 'A' on the said statement

which is Ex.PW-7/A and admits the same. She also deposed that she was admitted in hospital and remained there for 6/7 days.

14. During her cross-examination, she deposed that she does not know appellant present in the Court and that she has seen him for the first time in the Court. She deposed that the appellant committed rape upon her while she was watching T.V. at her house. At this stage, it was noticed by the learned trial court that the victim started weeping and deposed that the appellant had inserted his penis into her vagina.
15. PW-8 (Pushpa) (mother of the victim) in her examination-in-chief, has deposed that her daughter was 7 years old. PW-8 stated that she did not remember the exact date but near Diwali days last year at about 11:00 a.m., when she was present at her house and her husband had gone for his job, her daughter, victim, went to the house of the appellant to watch TV. At about 11.30 a.m the Bhabhi of the appellant brought the victim to her house in an unconscious condition and was bleeding from her private parts. PW-8 has deposed that the appellant came out of his house and told her that the victim had received injuries on her private parts, however, at that time she did not suspect the appellant having raped her daughter, victim. After two hours, her daughter, victim, regained consciousness and she took her to the hospital, i.e. Mamta Hospital and where the doctor asked her daughter about the occurrence and thereupon the victim started weeping and on insistence of the doctor she informed that appellant Mohd. Rafiq

had put off her underwear and had raped her. Thereupon this PW-8, Pushpa, called the mother of the appellant and told her the whole episode and that mother of the appellant requested her not to initiate any legal actions through police and that she would compensate her but she did not accept the same and reported the matter to the police. She also telephoned her husband and who thus came home. PW-8 further deposed that the victim was taken to the hospital by her sister-in-law, Kela Devi, and her husband, and that the victim told her (PW-8) about the episode in the presence of the doctor.

16. In her cross examination, this witness has stated that the date of the incident was 31.11.2001 and that her daughter, victim was playing in front of her house and after some time victim came back home weeping and there was bleeding from her vagina. This witness also deposed that it was wrong to suggest that the victim narrated to her that while she was playing, appellant, Rafiq called her in his room and offered her to watch T.V., and that no one was present at the house of Rafiq, or that appellant, Rafiq closed the door of his house or that put off the underwear of victim, laid her on bed and Rafiq penetrated his penis into the vagina of victim and when she cried, appellant pressed her mouth and threatened victim that she should not tell to anyone.
17. This witness in her cross-examination also deposed that she had no information that the appellant had taken her daughter at his house for watching T.V. and that it was sister-in-law (bhabhi) of

the appellant, who brought her daughter, victim in her lap saying that she was bleeding. PW-8 further deposed that she immediately took her daughter to Safdarjung hospital and that till examination of victim by the doctor, her daughter, victim, did not disclose to her anything as she was too afraid and that the victim was admitted in the hospital and discharged after three days. She also stated that after one or two hours in Safdarjung hospital, victim narrated the incident. She also stated that her husband reached at the hospital from office at about 5/ 5:30 p.m. and she disclosed to him about the incident as at that point of time the victim was taken inside the room by the doctor. This witness stated that her daughter, victim, told that Rafiq did the act with her and that the victim knew Rafiq as they were residing in neighbourhood. PW-8 stated that the police recorded the statement of her husband in the hospital whereas her statement was recorded in the Court premises, and that the underwear of child, victim, was taken by the police next morning and at that time nothing was done in her presence by the police official, and that statement of the victim was recorded by police at about 3 / 4 p.m. in the hospital.

18. PW-12 (Ramesh Kumar) (father of the victim), in his examination-in-chief has stated that he used to reside in House No.A-2, J.J. Camp Tigri, New Delhi and that during the period of the incident he was working as a painter with one contractor, Devi Lal. He deposed that he used to leave his house for work at about 8:30

a.m. and used to return at 6/ 6:30 p.m., however, the time to return was not fixed and he tried to come back the moment work was finished. He also stated that exact date he does not know but around 31st October, 2001 at about 6.00 p.m., he was telephonically informed by his contractor, Devi Lal, that the daughter of PW-12 was not well. The contractor had in turn received a call on his mobile from the wife of PW-12 and he along with his contractor reached the home, and on reaching home they saw that the victim was lying in a semi-conscious stage. PW-12 deposed that his daughter, victim, started weeping when he pulled her and she told him that she had gone to the appellant, Rafiq's house for watching T.V., and where the appellant put off her underwear and committed rape upon her. This witness also stated that the victim, daughter, was bleeding from her private parts and her clothes were soaked with blood, and that he along with his bhabhi, Smt.Kela Devi took the victim to the hospital, got her admitted there and where she remained in the hospital for about three days. PW-12 stated that the victim was seven years of age at the time of the incident and used to study, and that he had handed over the blood stained clothes of the victim to the Investigating Officer, and that the police seized the clothes of the victim vide seizure memo Ex.PW-6/C, which bears his thumb impression at point (b). On this witness's assurance that he can identify the clothes of the victim, parcel no.4 was produced from Malkhana and the same was ordered to

be opened and on opening it was found to contain one underwear, one nicker and a piece of cloth, all soaked with blood. This witness identified the clothes of his daughter, which were seized by the police vide seizure memo Ex.PW-6/C.

19. During the cross-examination this witness, PW-12, has stated that his sister-in-law, Kela Devi took the victim to the hospital. He stated that when he came to the house along with the contractor at about 6:30 /7 p.m., he came to know about the incident through the victim at his house, and that the victim was taken to the hospital in the same clothes in which she was lying. It is deposed by PW-12 that he took some clothes including underwear of the victim to the hospital, and that his statement was recorded by the Investigating Officer at about 8:30 p.m. in the said hospital. Thereafter the police left, and they did not record any other statement; and that the statement of his wife was recorded at home. It is also deposed that he handed undergarments and other clothes of the victim to the police, but does not remember whether he gave the clothes on the same day or after discharge of the victim. He has also stated that no case is pending against him under Section 376, IPC, in Tis Hazari Courts and stated that appellant committed rape upon his child.
20. PW-13 (Madan Pal) in his examination-in-chief has deposed that on 31.10.2001 he was posted at P.S. Sangam Vihar and on receipt of DD No.17A, he went to the AIIMS Hospital and while he was standing at the gate he received DD No.18A through

constable Shiv Kumar and on receipt of DD No.18A (Ex.PW-10/B), he went to the casualty department of the AIIMS hospital where the victim daughter of Ramesh was found admitted and after seeking permission (which is Ex.PW-13/C) from the doctor, he recorded her statement (Ex.PW-7/A) which bears the thumb impression of the victim at point 'A' and he also obtained thumb impression of her father at point 'B'. Thereafter he made an endorsement on the statement of the victim which is Ex.PW-13/A and sent the same to Police Station for registration of the FIR through constable Shiv Kumar. He deposed that thereafter he went to the spot i.e. A-2, J.J. Camp, Tigri and prepared the site plan (Ex.PW-13/B) at the instance of Pushpa, mother of the victim, with correct marginal notes. He deposed that he also received copy of the FIR, Ex.PW-10/A along with 'Asal tehri'.

21. PW-13 has further deposed that on 1.11.2001 he arrested appellant, Mohd. Rafiq, from Tara Apartments, C.R. Park at the instance of the secret informer and his arrest memo Ex.PW-6/D was prepared; the personal search of appellant was conducted vide Ex.PW-6/E; and that the clothes of the victim, prosecutrix, were seized vide seizure memo Ex.PW-6/C which were produced by Ramesh Kumar, the father of the victim and the same were sealed in a cloth parcel with the seal of M.P. The appellant was got medically examined and the duty constable produced before him the EX preserved by doctor who medically examined the appellant and the EX were seized vide seizure memo EX.PW-3/A.

He further deposed that he moved an application (Ex.PW-13/D) for medical examination of the appellant. The disclosure statement was made by the appellant (Ex.PW-6/A) and who also pointed out the place of the incident and a memo was prepared (Ex.PW-6/B). He further deposed that he collected the MLC of the victim (Ex.PW-5/A) and the MLC of the appellant (Ex.PW-4/A); and that he also seized the age proof, school certificate (Ex.PW-1/A) of the victim, vide seizure memo Ex.PW-1/B, on 24.12.2001. It is also deposed that EX were sent to FSL, Malviya Nagar and its report was obtained which is Ex.PW-13/F and 13/G. He further deposed that he investigated the case and recorded the statement of witnesses under Section 161 Cr.P.C. collectively, and on completion of the investigation, challan was prepared and the same was filed in the Court. He also deposed that the clothes of the prosecutrix were brought from Malkhana and the same were shown to the witness and the witness collectively identified the clothes as Ex.PW-12/1.

22. It is contended by learned counsel for the appellant that the appellant has been falsely implicated in this case, he is completely innocent and is not even remotely connected with the commission of the alleged offence. Learned counsel further submits that the '*rukka*' was ante-dated in view of the fact that the incident took place at 11:30 in the morning on 31.10.2001 whereas the time mentioned in the '*rukka*' is 9:00 a.m. In my opinion there is no force in the submission of learned counsel for

the appellant, in view of the fact that the mentioning of the time is a typographical error which is evident from the fact that just three lines below therein, it is mentioned case FIR No.630/01, dated 31.10.2001, under sections 376/506 IPC DD No.23-A dated 31.1.2001 at 9:45 p.m.

23. It is next contended that the victim was approximately seven years of age and her testimony is completely unreliable and no reliance can be placed on her testimony.
24. Before dealing with the submissions of learned counsel for the appellant, it would be useful to refer to a decision of the Apex Court in **Ratansinh Dalsukhbhai Nayak Vs. State of Gujarat**, reported at (2004) 1 SCC 64, wherein it has been held that a child witness if found competent to depose, their testimony can be the basis of conviction. Relevant portion of the judgment reads as under:

“6. Pivotal submission of the appellant is regarding acceptability of PW 11's evidence. The age of the witness during examination was taken to be about 10 years. The Indian Evidence Act, 1872 (in short “the Evidence Act”) does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from questions, because of tender years, extreme old age, disease – whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and given rational answers thereto. This position was concisely stated by Brewer, J. in *Wheeler v. United States*¹. The evidence of a child witness is not required to be rejected per se, but the

¹ 159 US 523: 40 LeD 244 (1895).

court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See *Suryanarayana v. State of Karnataka*)².

7. In *Dattu Ramrao Sakhare v. State of Maharashtra*³ it was held as follows: (SCC p. 343, para 5)

“A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. The precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and molded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the

² (2001) 9 SCC 129.

³ (1997) 5 SCC 341.

way of accepting the evidence of a child witness.”

25. This question was also the subject matter of a recent judgment of the Supreme Court in **Acharaparambath Pradeepan & Anr. Vs. State of Kerala**, reported at 2007 [1] JCC 828. Relevant portion of the judgment reads as under:-

“48. Section 118 of the Indian Evidence Act seeks to exclude evidence of those who may suffer from intellectual weaknesses. It reads as under:

“Who may testify. -- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.”

49. In terms of the said provision therefore, all persons shall be competent to testify unless by reason of tender years, the court considers that they are incapable of understanding the questions put to them and of giving rational answers. It is for the Judge to satisfy himself as regards fulfillment of the requirement of the said provision. The opinion of the learned Judge had been recorded and, thus, it satisfies the test laid down by this Court in **Rameshwar S/o. Kalyan Singh v. The State of Rajasthan [AIR 1952 SC 54]**.

50. It is not the case of the appellants that the court had failed to comply with the statutory obligations in this behalf. It is also not the case of the appellants that their testimonies otherwise should not have been accepted.

51. A child indisputably is competent to testify if he understands the question(s) put to him and gives rational answer thereto. None of the witnesses have been found to be suffering from any intellectual incapacity to understand the questions and give rational

answers thereto.

53. Indisputably, certain factors are required to be considered as regards reliability of the testimony of the child witnesses but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of child witnesses."

26. Keeping in view the principles laid down by the Apex Court, the testimony of the victim is to be carefully scrutinized and cannot be rejected per se and once the Court comes to the conclusion that the evidence is reliable and trustworthy, the same can be the basis of conviction. Merely because the witness is a child, his/her evidence cannot be treated as unreliable. In the case before me, the evidence of the victim is not only trustworthy and reliable, but it has been consistent and remained unshaken even in the cross-examination. The victim has clearly described the incident and identified the appellant. The relevant extract of her evidence is reproduced below:

"I know appellant Mohd. Rafiq today present in Court. Appellant use to reside near our house. Exact date I do not remember one day in the afternoon time I went to the house of appellant for watching T.V. of my own. At that time there was no T.V. installed at out house. When I was watching TV at the house of appellant, he removed my underwear and also removed his underwear. He inserted his penis into my vagina (Rafiq ne mere kachi uttar di apni kachi bhi utar di and apna pishab karne wala mere pishab wali jaga ghusa dia). When I cried appellant pressed my mouth. I felt great pain in my private part and I started bleeding profusely."

27. Even during her cross-examination the victim has clearly deposed that the appellant committed rape on her when she was

watching T.V. at his house. The evidence of the victim is corroborated by the evidence of her mother as well as her father. The medical evidence also lends support to the evidence of the victim. The evidence of PW-5 (Dr.Suman, Senior Resident, AIIMS hospital) is reproduced :

“I have examined baby Babli on 31.10.2001, who was brought by her father with the alleged history of rape by a known person. She was giving history take out of under garments by that person and penetration of penis inside. After that she has blood around 100 m.l. and now she has no bleeding for one hour.

On examination vitals stable. Pulse rate 96 per minute. Per abdomen soft, per vaginal examination local mild clot removed. Hymen torn freshly. Vaginal mucosal tear and muscle exposed. Skin 3 ml torin in midline perniem. Per rectal examination rectal mucosa intact. Tone normal. I have seen the MLC Ex. PW-5/A. The same is in my handwriting and hears my signature at point 'A'.”

28. It is worthwhile to point out that the cross-examination of the doctor (PW-5) was deferred at the request of the appellant and the doctor was recalled for the cross-examination. However, despite opportunity given, no cross-examination was carried out. The undergarments of the victim as well as the appellant were sent to the FSL and human semen was detected on the underwear of the victim as well as of the appellant and nikker of the victim. The human blood of AB group was detected on the clothes which were sent to the forensic science laboratory. The report is reproduced below:

“FORENSIC SCIENCE LABORATORY
GOVT. OF NCT OF DELHI
BIOLOGY DIVISION

Report No.FSL 2002/B-0222
28.02.2002

Bio. No.49/2002
Dated

Case FIR No.630/2001
U/s.376/506 IPC

Dated 31.10.2001

Police Station: Sangam Vihar
Sangam

Forwarding Authority :SHO, P.S.:
Vihar, South Distt,
New Delhi-110 062

Portion of exhibits as detailed in the main Biology Report have been examined using various serological techniques. The results obtained have been analysed as given below:

Exhibits	Species of Origin	ABO Group/ Remarks
<u>BLOOD STAINS</u> '1' Underwear '2' Gauze piece '4a' Handkerchief '4b' Underwear '4c' Nikkar	Human Human Human Human Human	'AB' Group 'AB' Group 'AB' Group 'AB' Group 'AB' Group
<u>SEMEN STAINS</u> '1' Underwear '4a' Underwear '4c' Nikkar	--- --- ---	'AB' Group 'AB' Group 'AB' Group

(A.K. SRIVASTAVA)

Senior Scientific Officer (Biology)
Forensic Science Laboratory, Delhi
cum-Ex Officio Chemical Examination to the
Govt. of National Capital Territory of Delhi”

29. I have also examined the MLC of the victim which clearly states that the hymen was freshly torn. Taking into consideration the evidence of the victim which is corroborated by the medical evidence i.e. report of the CFSL, it leaves no doubt whatsoever in the minds of the Court that the appellant is guilty of the barbaric, uncivilized and inhumanly act.

30. It has also been contended that there are contradictions in the statements of the mother where, she in her statement has named one Mamta Hospital, whereas the victim was admitted in All India Institute of Medical Sciences. A careful reading of the statement of the mother would show that initially the victim was taken to one Mamta Hospital and after that the victim was taken to AIIMS, thus, there is no contradiction as far as the name of the hospital is concerned.
31. It is also submitted that there is further contradiction in the statement inasmuch as that the victim has stated that she came back crying while the mother, PW-8 (Pushpa) has stated in her statement that the 'bhabhi' of the appellant had approached the victim in an unconscious condition. To my mind these contradictions are not material in nature and even despite this, there is still sufficient evidence and more so medical evidence to reach at the destination of conviction of the appellant. Hence the plea taken can be of no help to the appellant.
32. It was next contended that the trial court has failed to consider the evidence of the defence witnesses. Two defence witnesses were examined, who have stated that the victim had fallen down from the stairs and injuries were caused for this reason.
33. Looking into the nature of injuries which have been caused and taking into consideration the fact that except the injuries on private part of the victim there is no other injury on her body. The defence which is sought to be taken is completely baseless and

without any substance. The testimony of both the defence witnesses cannot be trusted or relied upon. This I further say so for the reason that the doctor (PW-5) was not cross-examined at all and no question was put to him whether the injuries caused could be as a result of the falling down from the stairs. Learned counsel has also urged before this Court that the mother of the victim has deposed that the victim was brought by the 'bhabhi' of the victim and thus the prosecution was duty bound to have examined the 'bhabhi' and has relied in the case of **Radhu Vs. State of Madhya Pradesh**, reported at 2007 (4) JCC 2603 SC in support of his plea that the prosecution has suppressed material which could have supported the case of the appellant. The aforesaid decision has no application to the facts of the present case. If the defence has chosen to examine two witnesses, who were stated to be the neighbours, it was also open to the defence to have examined the 'bhabhi', as well.

34. I have minutely examined the evidence of the witness, who is a child of seven years. I have also noticed that the trial court has put certain general questions to the child witness, which have been quoted above, and the witness had given rational answers to those questions. More so, her evidence is completely corroborated by the evidence of her parents, medical evidence and the report of the forensic science laboratory. She has given a clear description of the events and identified the appellant. In

view of this, I find no infirmity in the judgment dated 27.04.2004 convicting the appellant of the offence of rape.

35. It has also been strongly urged before this Court that the trial court has awarded disproportionate punishment to the appellant and no reasons have been given. In the case of **State of Punjab Vs. Prem Sagar & Others**, reported at (2008) 7 SCC 550, wherein a two judge Bench of the Apex Court while discussing the sentencing policy which should be observed by the Courts, opined:

“12. In a recent decision in Shailesh Jasvantbhai V. State of Gujarat⁴ this Court opined: (SCC pp.361-62, para 7)

“7. The law regulates social interest, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine 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 by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of ‘order’ should meet the challenges confronting the society. Friedman in his *Law in Changing Society* stated that: ‘State of criminal law continues to be – as it should be – a decisive reflection of social consciousness of society.’ Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should, and tempering with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the appellant, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.”

⁴ (2006) 2 SCC 359 : (2006) 1 SCC (Cri) 499.

Relying upon the decision of this Court in *Sevaka Perumal v. State of T.N.*⁵ this Court furthermore held that it was the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc.

13. It is interesting to note that this Court in some cases severely criticised the pattern adopted in the matter of passing of sentence on the appellant. (*State of M.P. V. Bala*⁶ and *State of M.P. V. Govind*⁷.)

14. Recently, in *State of Karnataka v. Raju*⁸ where the facts of the case were that the trial court imposed custodial sentence of seven years after convicting the respondent for rape of minor under Section 376 of the Penal Code, 1860; on appeal, the High Court reduced the sentence of the respondent to three-and-half years. This Court held that a normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years's rigorous imprisonment, though in exceptional cases 'for special and adequate reasons' sentence of less than 10 years' rigorous imprisonment can also be awarded. It was, thus, opined that socio-economic status, religion, race, caste or creed of the appellant or the victim are irrelevant considerations in sentencing policy. To what extent should the Judges have discretion to reduce the sentence so prescribed under the statute has remained a vexed question. However, in India, the view always has been that the punishment must be proportionate to the crime. Applicability of the said principle in all situations, however, is open to question. Judicial discretion must be exercised objectively having regard to the facts and circumstances of each case."

36. The learned trial court though has awarded rigorous imprisonment for a period of twelve (12) years and a fine of Rs.10,000/- for the offence punishable under Section 376, IPC, and in default of the payment of fine to further undergo simple imprisonment for one year; however no reasons have been

⁵ (1991) 3 SCC 471 : 1991 SCC (Cri) 724.

⁶ (2005) 8 SCC 1 : 2005 SCC (Cri) 1947.

⁷ (2005) 8 SCC 12 (3) : 2005 SCC (Cri) 1958 (2).

⁸ (2007) 11 SCC 490 : 2008 1 SCC (Cri) 787 : (2007) 11 SCALE 114.

assigned for awarding such a harsh punishment. The trial court has failed to record reasons as to why did it deem it appropriate to award twelve (12) years of rigorous imprisonment, and what purpose would have been achieved, which a lesser punishment could not have served. In the case of **Mohindra Hire Purchase (Regd.) v. Jarnail Singh** reported at 2009 (1) JCC 118, the Apex Court while referring to the importance of giving reasons behind any decision, opined:

“6.....Reasons are live links between the mind of the decision taker and the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the inscrutable face of the sphinx’, it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out.....”

37. Punishment is directed to not only creating a deterrent in the society but also towards reforming the guilty. In the case of **T.K. Gopal v. State of Karnataka**, reported at (2000) 6 SCC 168, the Apex Court observed:

“16. Sexual offences, however, constitute an altogether different kind of crime which is the result of a perverse mind. The perversity may result in homosexuality or in the commission of rape. Those who commit rape are psychologically sadistic persons exhibiting this tendency in the rape forcibly committed by them.

17. In some States in the U.S.A., therefore, emphasis was laid on psychotherapeutic treatment of the offender while he was under detention. For that purpose, psychopath sexual offender laws have been enacted in certain jurisdictions in U.S.A. These

laws treat the sex offenders as neurotic persons and psychotherapeutic treatment is given to them during the period of their detention which may, in some cases, be an indefinite period, in the sense that they would not be released till they are cured. But the provision for indefinite detention even beyond the maximum period of imprisonment for that offence was seriously objected to by a group of lawyers and, therefore, in many of the States, this provision was dropped from the statute.

18. Here, in India, statutory provision for psychotherapeutic treatment during the period of incarceration in the jail is not available, but reformist activities are systematically held at many places with the intention of treating the offender psychologically so that he may not repeat the offence in future and may feel repentant of having committed a dastardly crime.”

38. In the facts of this case wherein the Trial Court failed to record reasons for imposing such a harsh punishment of 12 years. Without being overtly sympathetic to the appellant, however I deem it appropriate that the sentence of the appellant be reduced from twelve (12) years of RI to ten (10) years of RI. The appellant was merely twenty four years old at the time of the commission of the offence and was the sole bread winner of the family. Section 376 (2) of the IPC also lays that the minimum sentence which should be awarded for such a heinous crime is ten years, unless and until there are special and adequate reasons to reduce the same. However, in my considered opinion this case does not fall in the bracket of ‘special and adequate reasons’ so as to warrant a sentence less than the statutory minimum.
39. Thus the judgment dated 27.4.2004 is upheld as passed by the learned ASJ in Session’s Case No.275/2002, FIR No.630/2001 under Sections 376/506, IPC, P.S. Sangam Vihar, Delhi. However,

the order on sentence dated 27.4.2004 is partly modified to the extent of reducing the sentence of twelve (12) years of RI to ten (10) years of RI, imposed for the offence under section 376, IPC. Other parts of the sentence remaining same.

40. In view of the above directions, the Crl. M. (B) No. 1471/2008 for reduction of sentence to the period already undergone (approx. eight (8) years) in jail, stands dismissed.
41. The appeal as well as Crl.M.B.No.1471/2008 stand dismissed.

March 02, 2009
'ssn'

G.S.SISTANI
(JUDGE)