

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Crl. A. No. 622/2006

Reserved on: October 8, 2009

Pronounced on: October 13, 2009

NADEEM Appellant

! Through: Mr. Ashish Dhingra,
Advocate

Versus

\$ THE STATE
(GOVT. OF NCT OF DELHI) Respondent

^ Through: Mr. Amit Sharma, Addl.PP.

CORAM:

HON'BLE MR. JUSTICE V.K. JAIN

1. Whether Reporters of Local newspapers 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

V.K.Jain, J.

This is an appeal against the judgment dated 4.4.2006 and Order on Sentence dated 5.4.2006, whereby the appellant was convicted under Section 376/506 and 292

I.P.C. and was sentenced to undergo R.I. for a period of eight years and pay a fine of Rs.5,000/- or to undergo RI for one year in default, u/s 376 of IPC, to undergo R.I. for a period of two years under Section 506 I.P.C. and to undergo R.I. for one year and pay a fine of Rs.1,000/- or undergo R.I. for three months in default u/s 292 of IPC.

2. The case of the prosecution in nutshell is that the prosecutrix was studying in Class V of ABC Mamta Nursery School, in Welcome Colony of Delhi. On 11.3.2004, after the prosecutrix had finished her examination, the appellant who was the Principal/owner of the School, stopped her and asked her to clean his office, which was on the first floor of a nearby building. When she went to the office, the appellant also reached there, bolted the door from inside, and started teasing her. He showed obscene pictures in a book as well as on the television, to her. Thereafter, he forcibly raped her, threatening to kill her, in case she complained to her mother. The matter was not reported to the police till 7.4.2004 when, on receipt of information regarding a quarrel at D-69, Kabutar Market, Welcome Colony, the Investigating Officer reached there. He found no quarrel taking place at the spot. When he came back to the police station, the prosecutrix and

her mother were present there. He recorded the statement of prosecutrix in which she alleged rape by the appellant.

3. During trial, the prosecutrix came in the witness box, as PW-I and stated that on 11.3.2004 when she was going home after her paper was over, at about 11 A.M., the appellant, who used to teach them in the school, asked her to accompany him to the office. He asked her to sweep and clean the office, which was situated in the Gali. Thereafter, he did 'Gandi Harkat' with her. He also showed obscene pictures in the book Ex. PW1/C as well as on television to her and asked her to put off the clothes and dance with him. The iron gates were also closed by him. He raped her and threatened to kill her, in case she complained to her mother. She informed her parents about the incident on 5.4.2004. She proved her statement recorded under Section 164 Cr.P.C. and also identified the book Ex.PW-1/C.

4. PW-2 Mst. Kaniza, who is the mother of the prosecutrix, stated that on 5.4.2004, when her daughter refused to go to her school, she asked the reason for declining to go to school. The prosecutrix stated that on 11.4.2004, the appellant had taken her to the office for the purpose of cleaning it and there he had raped her and

thereafter threatened to kill her, in case she informed anyone about his action. PW-3 Constable Anil Kumar has stated that on 8.4.2004, he joined investigation with the I.O. and the appellant got recovered one book having obscene pictures, from the drawer of the table inside his office.

PW-7 Dr.Suchi is a radiologist who opined that the age of the prosecutrix was between 16-18 years. PW-8 Dr.Asha Sharma, is a senior gynaecologist who has proved the MLC of the prosecutrix and has stated that on medical examination of the prosecutrix, her hymen was found to be torn. PW-10 SI Gokal Chand of PS Anand Vihar, Delhi, is the Investigating Officer of the case. He has stated that after arresting the appellant, he recovered one obscene book at his instance, besides carrying out other investigations. In cross-examination, he stated that there was no tenant in the building in which the rape was committed. He further stated that since the prosecutrix had burnt the clothes which she was wearing at the time of rape, the same could not be seized.

5. In his statement under Section 313 of Code of Criminal Procedure, the appellant denied that the prosecutrix was studying in ABC Nursery School in V standard in March,

2004. He denied being a teacher in that school and stated that he was the owner of the school and was just supervising the work of the other people. He denied the accusation against him and stated that he was implicated because of inimical relations with Nadeem Pradhan and Baba Zahoor, members of the Madarasa Committee, who had asked him to settle the matter regarding the quarrel with a teacher namely Rakesh Kumar. He further stated that the prosecutrix was studying with him for the last five years and a fee of Rs.2000-3000/- was due from her. Since the fee was not paid, there was a quarrel and he turned her out of the class. She was, however, allowed to take all the exams, on the request of her father, who assured payment of the fee at the time of the examination. According to him, on 5.4.2009, he demanded the fee again but her mother insisted on payment at a later date and misbehaved with a teacher. He told them that he would not release the result until fee was paid. On 6.4.2004, brothers of the prosecutrix came to him with a request to admit the prosecutrix in the school, but, he refused whereupon he was beaten upon by them and some other gunda people brought by them. His gold chain and Rs.20,000/- were also snatched by them. He was taken to police station by Shalu Madam. He has further stated that all

the 4 rooms including the room where the rape is alleged to have been committed had been let out by him.

6. The appellant produced seven witnesses in his defence and also came himself in the witness box as DW-8. DW-1 claims to be the owner of House No.A-56 and A-59, Welcome Colony and has stated that the appellant used to run a school in the said premises. He further stated that on 7.4.2004, five or six persons gave beating to the appellant and ran away. DW-2, Smt. Shalu was working under the appellant at the relevant time. She has stated that on 7.4.2004, 2-4 persons came to the school and gave beating to the appellant, who was taken by her to the hospital. DW-3, Mrs. Neeru was also working under the appellant during the relevant time and she had stated that on 7.4.2004, when the prosecutrix was sent back to bring fee, she came accompanied with her mother, who had exchange of hot words with the appellant. Thereafter, brothers of the prosecutrix came there and gave a beating to the appellant. They also snatched his chain and removed some money from his pocket. DW-4, Azimuddin, DW-5 Mohd. Usman and DW-6 Shah Nawaz stated that they were tenants in respect of one room each under the appellant, in respect of House No. E-11, Welcome Colony and

there was no office in that house. DW-7 Smt. Shakeela is the mother of the appellant. She has stated that on 7.4.2004, brothers of the prosecutrix, accompanied by 3-4 boys came there and asked the appellant as to how he dared demand fee from their sister. When the appellant protested, they gave beating to him. They also snatched his chain and removed Rs.20,000/- from his pocket. In his statement on oath, the appellant stated that the prosecutrix was the student of class IV in his school. Sometimes, the fees used to be due from her. On 7.4.2004, he sent her to her house to bring her fee. She came back accompanied by her mother. The brothers of the prosecutrix also came there along with 4-5 persons and gave beating to him. They also snatched his gold chain and money. According to him, Baba Zahoor had an old enmity with him. He denied raping the prosecutrix and stated that all the four rooms in E-11, Welcome Colony had been rented.

7. Learned Counsel for the appellant has pointed out certain discrepancies in the evidence produced by the prosecution. It was pointed out that though the case of the prosecution is that the prosecutrix was raped on 11th March, 2004, in her statement under Section 164 of the Code of Criminal Procedure, she stated that the incident took place

on 10th April, 2004. In my view, this discrepancy, as regards date of the incident, is of no consequence, since it is an admitted case that the FIR was registered and the appellant was arrested on 7th April, 2004. Therefore, the incident in question could not have happened on 10th April, 2004 and there is an obvious mistake as regards the date of the incident, given in the statement of the prosecutrix recorded under Section 164 of the Code of Criminal procedure.

8. It was next pointed out by learned defence counsel that according to Radiologist, the age of the prosecutrix was between 16 to 18 years, whereas in her deposition in the court as well as in her statement under Section 164 of Code of Criminal Procedure, she has given her age as 12 years. Since this is not the case of the appellant that he had sexual intercourse with the prosecutrix with her consent, her age becomes immaterial and consequently the discrepancy in the age given by the prosecutrix and the age determined by the Radiologist becomes irrelevant.

9. It was next pointed out that in her statement under Section 164 of the Code of Civil Procedure, the prosecutrix stated that after 3-4 days of the incident, when she declined to go to school, her mother asked her as to why she was not

going to the school and thereupon she told her about the incident with her, whereas, in their deposition in the court, the prosecutrix as well as her mother have stated that the incident was reported by the prosecutrix to her mother only on 5th April, 2004.

The prosecutrix comes from an under privileged section of the society and was a student only of class V at the relevant time. Her statement under Section 164 of the Code of Criminal Procedure was recorded about 2 months after the incident had taken place. Taking the literacy level of the prosecutrix and her social background into consideration, such contradiction cannot be said to be so material as would persuade the court to altogether discard the testimony of the prosecutrix which otherwise has very well stood the test of cross examination. Such minor contradiction does not to the root of the prosecutrix case if it is otherwise found to be reliable and convincing. While appreciating the evidence of a witness, the approach of the court should be to see whether the evidence of the witness, if read as a whole, appears to have a ring of truth or not. Once the court forms an opinion that the witness appears to be speaking truth, it should evaluate his/her evidence in the light of the discrepancy and

infirmity pointed out in her deposition and then decide whether its earlier impression about the evidence of the witness stands shaken on account of such deficiencies and infirmities so as to render it unworthiness of reliance. Minor discrepancies on matters which do not touch the core of the case should not be given undue importance and would not ordinarily warrant rejection of the testimony of the witness as a whole. In the absence of strong and convincing reason, it would not be appropriate for the court to reject the testimony of a witness on ground of minor contradictions here or there on matters which are not really significant to the case. It was held in a decision reported in AIR 1988 SC 696 that while appreciating evidence, the courts must not attach undue importance to minor discrepancies which do not shake the basic version of the prosecution case and those discrepancies may be discarded.

Not everyone has equal capacity of observation, retention and reproduction of matters to which he is a witness and therefore it would not be fair and reasonable to accept every witness to give an exact and meticulous version of the matter at a later date. This is more so when the witness is of a rather tender age and has a weak social

background. With regard to time or duration of an occurrence, people normally tend to make estimate by way of some guess work, at the time of their examination and therefore they cannot be expected to always make a precise estimate in such matters, particularly when they are examined at different times and before different forums. The court cannot be oblivious to the fact that when the prosecutrix was produced before the learned Magistrate for recording her statement under Section 164 of Cr. P.C., she may still not have fully come out of the trauma faced by her at the hands of the rapist and therefore must be under immense pressure not only on account of the incident that happened with her but also on account of the fact that for the first time in her life, she was facing Police Station and Courts. In such an environment, if she has made a wrong estimate about the number of days after which she narrated the incident to her mother, that by itself would not be enough to impeach her credibility as a witness. Some discrepancy here and there are bound to occur in the deposition of such a witness, attributable to normal errors of memory and mental disposition on account of the shock and horror to which she was subjected to on account of such an incident. In fact, it is a trauma for the victim of rape,

when in totally unfamiliar surroundings, she is asked to narrate all that which took place with her. She would normally be too nervous or confused at that point of time and some discrepancies in the statement of the witness who has been subjected to such a gruesome act are only natural and expected.

10. It was pointed out by learned counsel for the appellant that in the Rukka sent by him the Investigating Officer recorded that the place of occurrence as ABC Mamta Nursery School, Kabootar Market, Welcome, Delhi D-69, Kabootar Market, Welcome, whereas the case of the prosecution is that the prosecutrix was raped in property No. E-11, Welcome. In fact, D-69, Kabootar Market, Welcome is the residential address of the prosecutrix. This is not the case of anyone that ABC Mamta Nursery School was being run in property No. D-69, Kabootar Market, Welcome, Delhi. Obviously there was an error on the part of Investigating Officer in recording the place of incident. When the Investigating Officer was cross examined, he was not asked as to why had had given place of incident as D-69, Kabootar Market, Welcome, in the rukka prepared by him. Since no opportunity was given to the Investigating Officer to explain

this aspect of the matter, no adverse view against the prosecution can be taken on account of such a mistake. In any case, the case of the prosecution cannot be rejected only on account of an error made by the Investigating Officer while writing the rukka when it has absolutely no implication on the merits of the case. As held by the Hon'ble Supreme Court in a decision reported in JT 1995 (6) SC 437, it is not proper to acquit the person due to defective investigation if the case otherwise stand established as being so would be falling into the hands of erring IO.

11. It was also pointed out by the learned counsel for the appellant that the medical examination of the prosecutrix does not show any injury on her person. A perusal of the MLC would show that hymen of the prosecutrix was found torn at 7 O'clock and 5 O'clock position. Moreover, the medical examination was conducted about four weeks after the incident of rape. No visible mark of injury was likely to be present on her body at that time. Moreover, the prosecutrix being of tender age at that time, she being alone in the room which had been locked, the appellant being none other than the owner/Principal of her school and she being under threat from the appellant, it would be unreasonable to

expect her to have put a tough resistance to the advances of the appellant. In fact this is not at all the case of the prosecutrix that she had put a tough resistance to the act of the accused. Moreover, the visible injury on the person of the prosecutrix would be material when either she says that she had actually put up a tough resistance or the accused alleges that this was a case of sex by consent. Neither is the case here. Therefore, absence of marks of injury on the private part of the prosecutrix at the time of her examination on 7.4.04 would not be material in the facts and circumstances of the case.

12. In a leading case *Bhogin Bhai Vs. Hirji Bhai* AIR 1983 SC 753, the Hon'ble Supreme Court gave a number of reasons to accept the testimony of prosecutrix in a rape case. One of the reasons given by the Hon'ble Supreme Court was that "the parents of an unmarried girl would also want to avoid publicity of such incident on account of fear of social stigma on the family name and family honour. The parents of the prosecutrix in this case must be conscious of the consequences when they reported the matter to the police, produced their daughter before the Investigating Officer for recording her statement and then produced her in the court

for deposition. Therefore, it is not at all likely that they would set up a false case when it may result in social stigma being attached to their family and the entire future of their child being in jeopardy. They would gather courage to take these steps only after they are absolutely sure of the dishonor inflicted on their daughter.

13. Ordinarily, a young girl of the age of the prosecutrix would not level false allegations of rape. Her family members also would not like to jeopardize her future by using their young family member as a tool for settling a vendetta, even if they are inimical to a person. The only reason given by the appellant for the prosecutrix to make false allegation of rape against him is that one Baba Zahoor and one Hasin Pradhan, who were members of Madarsa Committee wanted him to intervene in a quarrel involving a teacher namely Rakesh Kumar. There is no evidence other than a bald assertion of the appellant to show that Hasin Pradhan and Baba Zahoor had asked him to intervene in a quarrel which had taken place between a teacher namely Rakesh Kumar and the sons of Hasin Pradhan or that in fact there was such a quarrel. Rakesh Kumar has not been produced in the witness box, though, this is not the case of

the appellant that Rakesh Kumar was also inimical to him. Neither in the cross examination of the prosecutrix nor in the cross examination of her mother it was suggested to them that Baba Zahoor and Hasin Pradhan had asked the appellant to intervene in a quarrel between Rakesh Kumar, on the one hand, and sons of Hasin Pradhan, on the other hand and since he declined to do so, he has been implicated by them in this case. It appears difficult even to conceive that merely because the appellant declined to intervene in a dispute between the sons of Hasin Pradhan and a teacher namely Rakesh Kumar, Hasin Pradhan and Baba Zahoor went to the extent of getting the appellant implicated in a false case of rape. Moreover, it cannot be accepted that merely at the instance of a person known to them, the prosecutrix and her family members would go to the extent of implicating the appellant in a rape case involving their young daughter. The defence taken by the appellant in this regard is patently unbelievable and in fact does not even deserve a serious consideration.

14. The learned counsel for the appellant has referred to the decision of Hon'ble Supreme Court in *Lalliram & Anr v. State of M.P.* ; 2008 (4) JCC 2813. In that case, the case of

the prosecution was that when the prosecutrix along with her husband was passing from fields, the appellant abused the prosecutrix, gave beatings to her husband and took her near a well, where they raped her repeatedly in the night. At the time of medical examination on 25.9.85, no external injuries were found on her body. The trial court found various inconsistencies in the deposition of the prosecution witnesses and a defence witness also probablised the defence taken by the appellants. During the course of the judgment, the Hon'ble Supreme Court noted that though injury is not *sine quo non* for deciding whether the rape was committed, whether allegation is of rape by many persons and several times but no injury is notice that certainly is an important factor and if the version of the prosecutrix is not credible, then there would be need for cooperation. In taking this view, the Hon'ble Supreme Court referred to the case of *Aman Kumar & Ors. V. State of Haryana 2004 (1) JCC 409*. However, the present case is not a case of rape by several persons and there are no allegations of the prosecutrix having been raped several times. She was medically examined after about 4 weeks of the incident. Therefore, absence of injury on her person would be of no consequence, particularly when her hymen has been found to be torn at 7

O'clock and 5 O'clock position. In *Aman Kumar & Ors. V. State of Haryana (Supra)*, the Hon'ble Supreme Court had observed that a prosecutrix complaining of having been victim of rape is not an accomplice and there is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. It was further observed that such a person stands on a higher pedestal than the injured person, she having been injured physically as well as psychologically and emotionally. Only if the court finds it difficult to accept the version of the prosecution on the face value, it may search for evidence direct or circumstantial. In the case of *Lalliram & Anr. (Supra)*, there were allegations of injuries on her cheeks, legs and back, but no such injury was found in her first medical examination. There were a number of other discrepancies in her deposition which were noted by the Trial Court as well as the Hon'ble Supreme Court. Therefore, this judgment is of no help to the appellant.

15. The learned counsel for the appellant has next referred to the decision of a Division Bench of this court in *Chander Dev Rai v. The State (NCT of Delhi)*; 2009 (1) JCC 67. In that case a girl of two years was found missing by her family members. On hearing the cries of the child, coming from the

house of the appellant, her father reached there and found the child wrapped there in a blanket. The child at that time was bleeding from the vagina. There was no direct evidence of rape upon the appellant and there was no incriminating evidence against him except that she was found in the room of the appellant, wrapped in a blanket and bleeding at that time. No stain of semen was found either on the garment or the under garment of the prosecutrix or on her private parts. No forensic evidence was found to connect the appellant with the injuries found on the abdomen of the prosecutrix despite taking the nail clippings of the appellant and analyzing them for any skin tissues and / or blood of the prosecutrix. The prosecution had failed to prove that the appellant was alone in the house at that time and his wife and daughter were not present. There was no conclusive evidence to show that the girl was with the appellant from 7 pm when she was allegedly lost till 9.45 pm when she was recovered from the room of the appellant. The case of the appellant was that he had found the child crying on the road and that since he could not trace her parents, he brought her home. There was no reason to doubt the case of the appellant that his wife and one child were present at the place of incident around that time when the offence purported to have been committed.

The blanket in which the child was found wrapped was not seized by the prosecution. The Division Bench also found that the prosecution had failed to prove, with whom the child was before she was picked up by the appellant. She has nail marks which were not of the appellant and her vaginal swab did not have the semen of the appellant. There were a number of other circumstances which cast serious doubt on the truthfulness of the case of the prosecution. In the facts and circumstances of the case, it was held that the chain of circumstantial evidence alleged against the appellant was not complete. The facts of the case before this court are altogether different. Here, the prosecutrix has come in the witness box and has supported the case of the prosecution and her testimony could not be impeached during cross examination. Therefore, the judgment relied upon by learned counsel for the appellant has no application to the facts of the present case.

16. The learned counsel for the appellant has lastly referred to the decision of a Division Bench of this court in Criminal L.P. No. 144 of 2009 decided on 12th August, 2009. In that case, the prosecutrix claimed to have been raped firstly in September, 2005 then in December, 2005 and lastly

in January, 2006. There was no evidence to show that her hymen was ruptured. She stated that her younger brother was present in the house when she was raped in the night in September, 2005, on the roof of her house. The Trial Judge did not believe that the prosecutrix could be raped in her house in the night when all the family members were expected to be present. The prosecutrix had claimed that it was in the bath room of the house that she was raped in December, 2005 and January, 2006. However, in the cross examination, she stated that size of the Bath Room was 3 feet x 3 feet. In these circumstances it was felt that prosecutrix was shaky witness. The Division Bench found it difficult to accept that a girl in her teens could be raped in a bath room of 3 ft. x 3 ft. In these circumstances, leave to appeal was refused to the State. The facts of the present case, however, are altogether different, and the Trial Court also has believed the version given by the prosecutrix.

17. It was lastly pointed by learned counsel for the appellant that there was delay of about 27 days in lodging the FIR. As deposed by the prosecutrix herself as well as by her mother, the incident that took place with the prosecutrix was disclosed by her to her mother only on 7.4.04. The FIR

was lodged on the same day. Thus, there was no delay in lodging the FIR, once the matter came to the knowledge of the family of the prosecutrix. As regards delay on the part of the prosecutrix in disclosing the incident to her mother, it is to be borne in mind that she was a rather immature girl and the appellant was not an unknown person but the Principal/Owner/Teacher of her school. There is a natural feminine tendency to conceal the outrage of masculine sexual aggression. This is more so when the factum comes from a weaker section of the society, is not well educated and the aggressor is not only very well known to her but also occupies a rather high pedestal in the society, he being her teacher/principal. There would be a natural tendency on the part of a school going girl, to conceal an incident of this nature even from her family members. She would be apprehensive that seeing the status of the appellant, she may not be believed. The very fact that she declined to go to the School on 7.4.04 is yet another corroboration of the aggression committed by the appellant. It was only because of the incident that had taken place with her that the prosecutrix declined to go to the school on that day. She had no option but to disclose the incident to her mother when she persisted in asking her to tell why she was not willing to go

to the school. A girl of tender age, coming from a rather conservative society like ours would be extremely reluctant to disclose such an incident lest it reflects on her chastity, conscious as she would be of the danger of being shunned by her neighbours, relatives and even her own family members who may eventually find one or the other fault on her part. In these circumstances, the delay in disclosing the incident to the mother of the prosecution cannot be said to be abnormal and is not a sufficient ground for discarding the case of the prosecution on this ground alone.

18. It was submitted by learned counsel for the appellant that all the four rooms in house No. E-1, owned by the appellant had been let out to the tenants and none of them was being used by him, as stated by DW-4 to DW-6. I find that the IO has specifically stated in his cross examination that there was no tenant in the building in which the rape was committed. Despite his specific deposition in this regard, no suggestion was given to him in his cross examination that all the four rooms in his house No. E-11, Welcome, were let out to the tenant. There is no documentary proof of DW-4 and DW-5 or DW-6 of being a tenant in house No. E-11, Welcome. No rent receipt, rent

deed or proof of a payment of rent has been produced by any of them in the court. In these circumstances, the deposition of DW-4 to DW-6 does not inspire confidence and cannot be believed.

19. As regards clothes of the prosecutrix not being seized, it has come in the deposition of the IO that prosecutrix had burnt the clothes which she was wearing at the time of rape and therefore the same could not be seized. Since the prosecutrix did not disclose this incident to her mother soon after it was committed, it is quite probable that she had destroyed the cloth so that her mother does not come to know of the incident. Even otherwise, the clothes could not have remained unwashed for so many days and no blood stain or semen stain would have been found on them after 4 weeks even if the prosecutrix had not destroyed them.

20. It was pointed out by learned counsel for the appellant that as per the Date Sheet Ex. PW1/DA, the test of drawing was scheduled to be held on 22.3.04 whereas the case of the prosecution is that prosecutrix had appeared in the test of drawing on 11.3.04. In this regard, I find that the date sheet Ex. PW1/DA does not show that it pertains to examination for standard 5th in which the prosecutrix was studying at that

time. Moreover, in her cross examination, no suggestion was given to the prosecutrix that her drawing test was scheduled on 20.3.04 and that she had appeared in drawing test on that day. In the absence of any suggestion to the prosecutrix in this regard, no advantage can be taken by the appellant on account of this contradiction as regards the subject of the test in which the prosecutrix appeared on 11th March, 2004. In fact it was also not suggested to her in the cross examination that she had appeared in any test on 20.3.04. Therefore, the testimony of the prosecutrix cannot be discarded on this ground also.

21. The deposition of the prosecutrix finds corroboration from the recovery of obscene book Ex. PW1/C from the office of the appellant. The book has been identified by the prosecutrix and the appellant has not given any explanation for such a book being found in his office.

22. The plea taken by the appellant is that he was given beatings by the brothers of the prosecutrix when he refused to admit her on account of non payment of fee. No documentary evidence has been produced by the appellant to prove that any fee was due from the prosecutrix. Though, the appellant chose to come in the witness box as DW, he did

not produce record of the school to prove the alleged dues of fee from the prosecutrix. Therefore, the plea taken by him in this regard cannot be believed as he has not produced the best evidence which was available to him and was very much in his possession to prove the alleged dues of fee payable by the prosecutrix.

23. The MLC of the appellant shows that he was given a beating on 7.4.2004. The case of the appellant is that the brothers of the prosecutrix and their friends gave him beatings when he refused to admit the prosecutrix in the school without payment of arrears of fees. In my view, the factum of beatings given to the appellant proves the case of the prosecutrix instead of proving the defence set up by the appellant. If a family is not in a position to pay the fees of their child, they would go and make a request to the school administration for further time and no sensible person would give beatings to the owner / Principal of the school merely because he insists on payment of arrears of fees due from the student. Such a course of action would be against normal course of human conduct and is not likely to be resorted to. On the other hand, if the brothers are told about the rape with their sister, it would be in natural reaction on their part

to go and thrash the person who committed such a heinous act. Therefore, the act of the brothers of the prosecutrix in giving beating to the appellant on 7.4.04 is yet another circumstance which corroborates the case of the prosecution.

24. For the reasons given above, I am of the considered view that the appellant has rightly been convicted under Sections 376 & 506 of Indian Penal Code. However, offence under Section 292 of IPC is not made out from showing an obscene book to the prosecutrix in the office of the appellant. The possession of an obscene book is punishable u/s 292 of IPC only if it is for the purpose of selling, hiring, distribution, exhibition or circulation. If an obscene book is just kept in a house and is not being used for selling, hiring, distribution, exhibition or circulation, no offence under Section 292 of IPC is made out. Therefore, the appellant is not guilty of the charges under Section 292 of IPC.

25. For the reasons given the preceding paragraphs, while acquitting the appellant of the charge under Section 292 of IPC, his conviction under Sections 376 and 506 of IPC is maintained.

26. Keeping in view all the facts and circumstances of the case including that the appellant has been in custody for more than five years, he is sentenced to undergo Rigorous Imprisonment for 7 years and to pay fine of Rs. 5,000/- or to undergo Simple Imprisonment for 3 months in default under Sec. 376 IPC. The sentence awarded to him by the learned Trial Court under Section 506 of IPC is maintained. The sentences will run concurrently. One copy of this order be sent to the concerned court, whereas another copy be sent to the concerned Jail Superintendent for record and for information of the appellant.

(V.K. JAIN)
JUDGE

October 13, 2009/acm