

in the same premises on the upper floor where the child victim (name of the child victim withheld to conceal her identity) alongwith her parents was residing. The case FIR No.86/2005 was registered on the statement Ex.PW8/A made by Smt. Hema, mother of the child victim to the effect that on the date of occurrence i.e. on 16.02.2005 in the afternoon, she was scolding her three years old daughter for easing out in the open instead of going to the toilet. At that time, the appellant was passing from there to go to his room on upper floor and on seeing that took her daughter upstairs. At that time, her son aged about six months also started crying and she became busy in feeding him.

4. She waited for her daughter to come back but when she did not return even after 15-20 minutes, she went upstairs to the room of the appellant from where she could hear the loud music being played on the Deck and the door was bolted. She peeped through the window and found the appellant sexually assaulting her daughter. Immediately she raised alarm and pushed the door. The appellant started seeking pardon from her and in the meantime, on hearing the noise, the neighbours also collected there.

5. The public persons, on seeing the condition of her daughter, started beating the appellant and somebody informed the police. When the police arrived, she alongwith her daughter and the appellant was taken to the hospital where her daughter was medically examined and given the necessary treatment. Her statement was recorded on the basis of which FIR was registered. The appellant was also arrested in this case.

6. After completion of investigation, chargesheet was submitted

against the appellant for committing the offence punishable under Section 376 IPC.

7. During the course of trial, prosecution examined 14 witnesses in all to prove its case. Out of the 14 witnesses examined by the prosecution, the material witnesses are PW-3 Kailash & PW-5 Pushpa – the neighbours and PW-4 Dr. Neeti Mathur, the Gynaecologist who alongwith Dr. Geetanjali medically examined the child victim. PW-8 Smt. Hema, mother of the child victim has not fully supported the case of prosecution. Apart from these material witnesses, scientific evidence has also been led in the form of FSL result regarding the blood stains and presence of semen on the clothes of child victim.

8. Statement of the appellant was also recorded under Section 313 CrPC wherein he has simply denied the case of prosecution.

9. After considering the testimony of material prosecution witnesses as well as the medical and scientific evidence, the learned ASJ was of the view that despite the fact that mother of the victim did not fully support the case of prosecution, there was enough material on record to connect the accused with the crime for which he has been charged. Thus, the appellant was convicted for committing rape on a child victim aged about three years and sentenced in the manner aforesaid.

10. On behalf of appellant, Ms. Saahila Lamba, Advocate has referred to the MLC of the victim as well as of the appellant to emphasize that the victim had not suffered any external injury. Further the appellant also did not have injury on his penis which would have been there had he sexually assaulted a young girl aged about three years as claimed by the prosecution. It has been urged that the victim was about three years old

but she has not been examined either during investigation or during trial though child of that age could have been able to point out the person who committed the offence. Referring to the FSL report, it has been contended that in Exhibit-P2 i.e. the vaginal swab, semen could not be detected which is pointer towards the innocence of the accused.

11. Learned counsel for the appellant has further submitted that genesis of the present case is the statement of the mother of the victim but during trial, she has not supported the case of prosecution. She denied having seen the appellant committing rape on her daughter and despite that learned ASJ has convicted the appellant on the testimony of PW-3 Kailash.

12. Learned counsel for the appellant contended that testimony of Pw-3 Kailash, which is the basis of conviction of the appellant, is in complete contradiction to the testimony of PW-8 Smt.Hema, mother of the victim.

13. A question mark has also been put on the correctness of the FSL report on the ground that sample was sent to FSL nearly after two months of the date of occurrence as the date of incident is 16.02.2005 whereas the sample has been sent on 11.07.2005 contending that delay in sending the case property to FSL is a pointer to the tampering with the case property and in that circumstance, the Court should discard the scientific evidence as there was every possibility that case property might have been tampered with by the police.

14. While making submissions on the point of sentence, learned counsel for the appellant has submitted that the Court may reduce the quantum of punishment awarded to the appellant as he is the sole earning

member of his family consisting of his aged parents, wife and four minor children.

15. On behalf of State, Ms.Rajdipa Behura, learned APP has submitted that in this case, the victim was just three years old child and due to her young age, she could not be examined as a witness. Though, not disputing that mother of the child victim turned hostile during trial, it was urged that PW-3 Kailash – the neighbour, who has nothing to do either with the appellant or with the child victim, has supported the case of prosecution. Further the medical and scientific evidence adduced by the prosecution is sufficient to nail the appellant with the crime for which he has been convicted. Thus, in the circumstances, it has been prayed that the conviction and the sentence of the appellant may be maintained.

16. I have considered the testimony of the material prosecution witnesses as well as the MLC of the victim and that of the appellant and also the FSL report Ex.PX. First of all, I would like to consider the effect of non-examination of the child victim in this case. As per the statement Ex.PW8/A of the complainant Smt. Hema, mother of the victim, the age of her daughter was three years at the time of occurrence. In the MLC Ex.PW4/A also, the age of the victim has been mentioned as three years by the mother of the victim. At the age of about three years, the victim cannot be considered to be capable to explain or narrate the incident and identify the offender.

17. Taking into consideration the tender age of the child, physical and mental trauma she suffered due to sexual assault, it was very difficult, if not impossible, to record the statement of the child victim. In a case of rape committed on a child of tender age, duty is cast on the Court to

appreciate the evidence in its totality with utmost sensitivity, hence merely because the complainant i.e. Ex.PW-8 Smt. Hema has turned hostile in itself is no ground to reject the testimony of PW-3 Kailash and PW-5 Pushpa, which is creditworthy, inspiring confidence and duly supported by the documents prepared immediately after the occurrence. In the case ***Sayed Pasha v. State of Karnataka 2004 Cri.L.J. 4123***, in para 26 of the report, it was observed as under :

'26. It is the settled principle that where a rape has been committed on a child of tender age, there is no rule of law requiring corroboration from an independent source of evidence of the child as to the identity of the accused. The examination of the child or otherwise does not make any difference. When the fact is taken note of that the child was just aged about 4 or 5 years at the time of committing the crime and could not have expected to examine the child so as to recollect the memory of the worst incident took place in her life. When it involves dignity and honour of the child and her family, it cannot be expected that a child of such a tender age to step into the witness box and depose the facts.'

18. It is worth mentioning that at the time when the incident was noticed, the child was bleeding which fact has also been noticed not only by PW-3 Kailash but also recorded in the MLC prepared at 4.00 pm i.e. just within one hour of the incident. On local examination, blood stains were present on perineal region, bleeding actively from hymenal region and fresh hymenal injury was present with hymen torn. It is also mentioned that no external marks or injuries or scratches were noticed. Merely because there was no external mark or injury or scratch in itself is no reason to form an opinion that the child was not sexually assaulted when other injuries noticed at that time conclusively indicated that the

child had been sexually assaulted as at that time, both legs of the victim were found blood stained.

19. Absence of marks of external injuries on the victim does not prove the innocence of the accused for the reason that the victim of lust in this case was a three years old child incapable to offer any kind of resistance and not even able to comprehend the act of sexual violence.

20. In case of rape of the child victim by a grown-up person, it is not always necessary to have injuries. Absence of injury on the penis of the appellant is also not sufficient to conclude that he had not sexually assaulted the child as held in the case ***State of Himachal Pradesh vs. Gian Chand AIR 2001 SC 2075***. In para 14 of the report, the Apex Court observed as under :

‘The observation made and noted by Dr. Mudita Gupta during medico legal examination of PW-7 clearly make out the prosecutrix having been subjected to rape. The prosecutrix has spoken of “penetration” in her statement. The discovery of spermatozoa in the private part of the victim is not a must to establish penetration. There are several factors which may negative the presence of spermatozoa. (See Narayanamma v. State of Karnataka (1994) 5 SCC 728). Slightest penetration of penis into vagina without rupturing the hymen would constitute rape. (Seen Madan Gopal Kakkad v. Naval Dubey (1992) 3 SCC 304 : (1992) AIR SCW 1480). The suggestion made in the cross examination of Dr. Mudita Gupta that injury of the nature found on hymen of prosecutrix could be caused by a fall does not lead us anywhere. Firstly, no such suggestion was given to prosecutrix or her mother during cross examination. Secondly, why would the girl or her mother implicate the accused, charging him with rape, if the injury was caused by a fall? There is nothing to draw such an inference not even a suggestion, to be found on record. Answer to the suggestion made to Dr. Gupta cannot discredit the

prosecution case in the absence of any other material to support the suggestion. So is the case with absence of external marks of violence on the body of the victim. In case of children who are incapable of offering any resistance external marks of violence may not be found. (See Modi's Medical Jurisprudence, 22nd Edn. P.502). It is true that marks of external injury have not been found on the person of the accused but that by itself does not negate the prosecution case. Modi has opined (see, Modi idid, page 509) that even in the case of a child victim being ravished by a grown up person it is not necessary that there should always be marks of injuries on the penis in such cases. Further, it is to be noted that about two days had elapsed between the time of the incident and medical examination of the accused within which time minor injuries, even if caused, might have healed.'

21. Although learned counsel for the appellant has tried to create a doubt in the correctness of the FSL result urging that the delay in sending the case property for examination gives rise to the inference that the case property was tampered with but the fact that vaginal swab did not indicate the presence of semen is sufficient to negate that. Had there been any tampering with the case property, the FSL result could not have been that in the vaginal swab, semen could not be detected.

22. The absence of semen in vaginal swab is not sufficient to prove the innocence of the accused. In the case ***Sayed Pasha v. State of Karnataka*** (Supra), it was held that :

'Mere non-presence of semen stain, spermatozoa and gonococci itself is not a ground to reject the testimony of prosecution witnesses.'

23. No doubt, PW-8 Smt. Hema – mother of the child victim who is also the complainant and as per the statement Ex.PW8/A, witnessed the

accused sexually assaulting her daughter, did not support the case of prosecution during trial. But the question that arises for consideration is that whether the complainant's turning hostile during trial should be the sole ground to acquit the appellant despite the fact that there is enough oral and documentary evidence to prove the guilt of the appellant beyond reasonable doubt. To my mind, the answer to this question lies in negative. Whatever may be the reason for the complainant to turn hostile during trial, the prosecution has been able to prove that the incident had taken place in the room of the appellant and it was none else but the complainant who raised alarm attracting the attention of neighbours. Not only the PCR was informed by the neighbour i.e. PW-3 Kailash but seeing the condition of the child who was victim of the lust of the appellant, the public persons gathered there thrashed the appellant which fact is being recorded even by the IO i.e. PW-14 SI Sube Singh in the endorsement Ex.PW14/A on the ruqqa Ex.PW8/A that the public had given beating to the appellant. The MLC of the appellant also shows swelling over and below the eye which probably due to the beating given by the public.

24. Learned counsel for the appellant has referred to the testimony of PW-8 Smt. Hema wherein she denied having witnessed the incident of her daughter being raped by the appellant. Acquittal has been sought in view of her reply during cross examination by learned counsel for the accused. The reply given by her to the suggestions put to her is as under:-

'It is correct that accused Shanker has not done any wrong to my daughter in front of me. It is further correct that none had told me

anything that any wrong had been committed by the accused with my daughter in their presence also.'

25. The cross examination by learned counsel for the appellant is restricted to above suggestion only.

26. The reply given by the complainant cannot be accepted as correct to acquit the appellant as the other material facts like injuries mentioned on the MLC especially condition of the child when taken to the hospital with blood on both the legs, injuries on private part to the extent that even exploration was done under general anesthesia and suturing was done to repair the tear on the private part of the child. It appears that defence had made an attempt to win over the complainant to elicit favourable answer by giving the suggested referred to above. The reply given by the complainant is just contrary to the contemporary documents prepared by the police and the doctors in discharge of their duties, without having any ill-will or any animosity towards the appellant. Though in the complaint, she had narrated the entire incident which did not form part of her statement in the Court when she was examined as PW-8 but the fact remains that she had accompanied the child to the hospital and has given the history which fact remains uncontroverted. Hence, even if the evidence led by the prosecution treating PW-8 to be hostile is eliminated, there is statement of PW-3 Kailash – the informant/neighbour and PW-5 Pushpa – another neighbour to prove the case of prosecution.

27. It has been vehemently urged by learned counsel for the appellant that in view of the above reply given by the complainant during her cross

examination, nothing remains in doubt about the innocence of the appellant. Learned counsel for the appellant has submitted that when neither she has witnessed the occurrence nor she was informed by any other person about the incident, the appellant deserves to be acquitted. I am of the considered view that such type of reply in cross examination by the complainant has to be ignored for various reasons such as :

(i) The Police Control Room Form-1 was prepared at the time of receiving the information about this incident. This form Ex.PW12/1 shows the name of the informant :

‘Kailash’, Phone No. : ‘20547638’, Address : ‘I-373, Mangol Puri’, Information : ‘Do saal bacchi ke saath rape kar diya, ladka pakad rakkha hai’.

Wireless staff has reported that local police had already reached the spot and taken the child to hospital. On the back of this form, where Development/Action Taken was to be recorded, it has been recorded :

‘Time 15:30/T-53’ and that ‘the child ‘M’ daughter of Mani Singh, aged two years had been raped by the tenant in the same house namely Shankar aged about 30-35 years and local police had already sent them to Sanjay Gandhi Hospital’.

Further it is recorded that *‘G-1 operation informed at 16:03 hrs’.*

28. This document has been prepared by PCR on the basis of information received from Kailash and information gathered on visit to the spot.

(ii) DD No.48-B (Ex.PW2/A) recorded at 3.15 pm is on the basis of information given by PW-3 Kailash in which it is specifically recorded that at house No.I-373, Mangol Puri, a girl aged about two years has

been raped and the boy has been apprehended.

(iii) The DD was marked to ASI Sube Singh who alongwith Ct. Shish Ram leaves for the spot.

(iv) As per the endorsement on rukka Ex.PW14/A when ASI Sube Singh alongwith Ct. Shish Ram reached there, he met the complainant alongwith her daughter aged about three years and the private part of the child was blood stained.

(v) Appellant Shankar was also found present there and had already been thrashed by the public.

(vi) Leaving Ct. Shish Ram to guard the spot, the child victim and the appellant were taken to Sanjay Gandhi Hospital.

(vii) The MLC No.444 of the child victim prepared at 4.00 pm shows that in the column 'Brought by', the doctor has mentioned '*mother Hema, wife of Manish and ASI Sube Singh*'.

(viii) The MLC No.445 is of the appellant Shankar prepared at 4.20 pm and in the column 'Brought by', it is mentioned "*ASI Sube Singh*".

(ix) In the complaint Ex.PW8/A, PW-8 Smt. Hema – the mother of the victim stated that when she was scolding her daughter for easing herself in the open, the appellant, who was residing on the upper floor, passed from there and picked her daughter and took upstairs in his lap and at that time, smell of alcohol was coming from his mouth.

(x) The MLC Ex.PW4/B of the appellant shows that at the time of his examination at 4.20 pm, smell of alcohol was found '+' (positive).

(xi) There is nothing on record to indicate that when the appellant was arrested in this case and his arrest memo was signed by the complainant, either at that time or on any subsequent date during investigation, she

complained to the Court or the police authorities that her daughter had not been sexually assaulted by Shankar Baitha or that he has been wrongly arrested in this case. When the child victim and the appellant both were taken to the hospital by the same police officer i.e. ASI Sube Singh even at that time she did not inform the doctor that her daughter had not been sexually assaulted by the appellant.

29. PW-3 Kailash is the immediate neighbour of the appellant and the complainant. He has reached the second floor on hearing the cries of the complainant and also noticed the child bleeding from her private part and blood stains on the zip of the pant of the appellant and also on the frock of the victim. It was he who informed the PCR giving his name as informant and also stated that the appellant was present at the spot at that time. PW-5 Smt. Pushpa is resident of the same premises where the appellant and the complainant were residing on different floors. She had also reached the spot on hearing the cries of the complainant and had seen the child victim in the lap of her mother who was raising alarm. She also stated that the appellant was also present in the room at that time.

30. PW-14 ASI Sube Singh, who first visited the spot when DD No.48-B Ex.PW2/A was assigned to him, found the crowd gathered there and the child victim was in the lap of her mother. The appellant was also present there who had been given beating by the public. He had taken the victim alongwith her mother and the appellant to the hospital which fact has been corroborated from the MLCs Ex.PW4/A and B of the child victim and the appellant respectively.

31. The sequence of events right from the stage of making PCR call

by PW-3 Kailash till medical examination of the victim and the offender and the necessary corroboration in the form of scientific evidence i.e. the FSL result rendered full support to the testimony to PW-3 Kailash and PW-5 Pushpa who are natural and impartial witnesses and have deposed before the Court in the most natural and probable manner.

32. So far as contention of learned counsel for the appellant regarding reduction of substantive sentence is concerned, the same is liable to be rejected for the reason that the appellant is convicted for committing the rape on a child aged about three years. The minimum sentence provided for committing rape on a women when she is under twelve years of age, is rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

33. The Apex Court in the case of *State of Karnataka vs. Puttaraja AIR 20904 SC 433*, had dealt with the considerations to be kept in mind by the Court while awarding sentence to the rapist. While observing that a rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, chasity, honour and reputation and that depravation of such animals in human form reach the rock bottom of morality when they sexually assault children, minors and like the case at hand, a woman in the advance stage of pregnancy, it was held in paras 7 to 9 of the report as under :

'7. Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could, not long endure under such serious threats. It is, therefore, 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. This position was illuminatingly stated by this Court in Sevaka Perumal etc. v. State of Tamil Naidu MANU/SC/0338/1991 : 1991CriLJ1845 .

8. The criminal, law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability "that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs" of the perpetrator that, are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

9. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times on account of misplaced sympathies, to the perpetrator of crime leaving the victim or his family into oblivion. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the gravity of the crime, uniformly disproportionate punishment has

some very undesirable practical consequences. Reverting to the sentence awarded to the appellant, the appellant was a married man having four children. The child victim was just three years old daughter of his neighbour and when he took away the child in the presence of her mother, she reposed faith in him that he was taking away the child to comfort her at that time. But he betrayed that faith as neighbour and did not hesitate in committing the rape on a child of tender age though he himself was father of four children.'

34. The appellant, who had been convicted for committing a rape on a child aged about 3 years, had already been dealt with leniently by awarding him just the minimum sentence of ten years. Finding no circumstance to award less than the minimum sentence awarded to him, the prayer in this regard is declined.

35. Finding no merits in the appeal, the same is hereby dismissed. LCR be sent back along with copy of this order.

36. A copy of this order be sent to Jail Superintendent informing the appellant about the dismissal of the appeal.

PRATIBHA RANI, J

October 11, 2012

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