

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

Reserved on: 4th July, 2013
Pronounced on: 31st July, 2013

+ **CRL.A. 877/2010**

SANT RAM @ SADHU RAM Appellant

Through : Ms.Saahila Lamba, Advocate

versus

THE STATE Respondent

Through : Ms.Richa Kapoor, Additional Public
Prosecutor

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE G.P. MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. The appellant (Sant Ram) impugns judgment dated 03.04.2010 and order on sentence dated 24.04.2010 in Sessions Case No.1026/2009 whereby the appellant was convicted for an offence punishable under Section 376 and Section 506 IPC and was sentenced to undergo imprisonment for life for the offence punishable under Section 376 IPC and RI for two years for the offence punishable under Section 506 IPC. A fine of ₹2 lakh for the offence punishable under Section 376 IPC and ₹1,000/- for the offence punishable under Section 506 IPC was also imposed on the appellant. In default of payment of fine, the appellant was sentenced to further undergo SI for a period of two years for the offence under Section 376 IPC and SI for a period of one week for the offence under Section 506 IPC. Out of the total fine of ₹2,00,000/-, if recovered, a sum of ₹1

lakh was ordered to be paid to the prosecutrix and another sum of ₹ 1 lakh was ordered to be paid to the child under Section 357 Cr.P.C.

2. It was directed that the appellant shall not be considered for grant of remission till he undergoes an actual sentence of 20 years.
3. The appellant was accused of and convicted for raping his own daughter who, according to the prosecution, was 16/17 years of age. The prosecution version can be extracted from the impugned judgment as under:

“The case of the prosecution is that on 25.4.2006 Smt. Atri Devi had come to the police station alongwith her daughter and lodged DD no.27A stating that her husband Sant Ram had committed rape with her daughter i.e. the prosecutrix ‘N’ on which she got recorded the statement of the prosecutrix. In her statement to the police the prosecutrix has stated that the behaviour of her father towards her was not good in the absence of her mother and he never kept her like his own daughter and used to kept her as his wife. She has told the police that after 3-4 days of Diwali in the year 2005, in the morning hours when her mother had gone outside to ease herself, the accused committed rape upon her and when she tried to raise an alarm he gagged her mouth. She further stated that at that time his father was also having a knife in his hand and threatened her that she will kill her as well as her mother in case she disclose to anyone. According to the complainant/prosecutrix due to fear she did not disclose the fact of rape upon her to anybody even after the lapse of one and half months. After 8-10 days of Holi her mother inquired from her regarding the enlargement of abdomen but the prosecutrix again did not tell anything to her mother due to fear after which she was got medically examined by her mother and the doctors told her that the prosecutrix was pregnant for about 5 months. It is only thereafter that the prosecutrix disclosed the whole of the incident to her mother.

On the basis of the said complaint of the prosecutrix 'N' the present FIR was registered and the prosecutrix was medically examined. On the pointing of Smt. Atri Devi the accused was arrested and medically examined. The statement of the prosecutrix was also got recorded before the Ld. MM on 6.6.2006. Thereafter on 30.7.2006 the prosecutrix delivered a male child at SGM Hospital and since the prosecutrix was not intending to keep the baby with her, the custody of the male child was handed over to Child Welfare Committee. In order to get the DNA comparison, the blood samples of the baby, accused and prosecutrix were collected by the doctors at SGM Hospital and their DNA sample were also drawn in the FSL Rohini. During the course of investigations the bone x-ray examination of the prosecutrix was also got conducted and after completion of the investigations the charge sheet was filed in the court."

4. On appellant's pleading not guilty to the charge, the prosecution examined 14 witnesses. PW1, the prosecutrix 'N' and PW6 Smt. Arti Devi her mother are the material witnesses; rest of the witnesses have provided various links in the case. They lose significance in view of the prosecution case and the defence taken by the appellant to which we shall advert to a little later.
5. In his statement under Section 313 Cr.P.C., the appellant, who as stated above, is father of the prosecutrix, denied that he committed rape on the prosecutrix. With regard to matching of DNA profile of the appellant, the prosecutrix and the male child born to the prosecutrix, the appellant took the plea that the DNA test had not been properly conducted and the genotype similarity in result may have come because he was admittedly father of prosecutrix. When the appellant was given an opportunity to explain the reason for his false implication, he stated that his wife (PW6) and her daughter (PW-1) had implicated him falsely for money. They

had taken possession of his assets including his plot of land at C-157, Shiv Vihar, Karala, Delhi. He stated that he was victim of a conspiracy.

6. In order to decide the instant appeal, the following questions needs to be answered: (i) whether there was sexual intercourse between the appellant and the prosecutrix; (ii) whether the age of the prosecutrix was less than 16 years and thus she was incapable of giving any consent; and (iii) if she was not less than 16 years, whether she had given consent to sexual intercourse so as to take it out of the definition of rape under Section 375 IPC. There was a long delay in lodging the FIR. The appellant challenges the credibility of the two star witnesses of the prosecution. These factors have also to be considered to find out if the prosecutrix was really raped by her own father.

RE: SEXUAL INTERCOURSE:

7. As stated earlier, PW1, the prosecutrix 'N' and PW6, her own mother are the material witnesses on this aspect. Their testimonies were discussed by the learned Trial Court under the heading Eye witnesses/public witnesses. The relevant portion is extracted hereunder:

"...PW1 has deposed that after Diwali, she was in periods and in the morning hours her father committed rape upon her when her mother went outside after crossing the railway track to ease herself. She has testified that when she tried to raise alarm her father gagged her mouth and at that time her father was also having a knife in his hand and committed rape upon her. She has further stated that her father threatened her that in case she disclosed this fact of rape to her mother then he will kill her mother. According to the witness, due to fear she did not disclose anything to anybody even after the lapse of one and half month. She has deposed that after one and half months, one day her father came to the house in

drunken condition and started beating her as well as her mother and wounded the head of her mother and thereafter in the morning she alongwith her mother went to the house of her Nana at Meerut without informing her father. The witness has further deposed her mother left her there and went Shamli where her mother lived about two months and came back after two months.

According to PW1, there was an occasion of marriage of her Bua's daughter on account of which her father came at Meerut at her Nana's house and took them to Bhajanpura where the marriage was going to take place. I was there that her mother raised question about the enlargement of her abdomen on which she informed her mother about the rape committed by her father. She has deposed that her ultrasound was got conducted and doctors stated that she is already pregnant and a 5½ months issue is in her abdomen and delivery is the only alternative. She has also deposed that her mother collected her Chacha and her dadi and informed them about the problem asking them to resolve the problem on which they suggested to them to go to some unknown place. It was then that they all including three brothers, mother and her father came to Bijwasan where they remained for about a month and from Bijwasan they shifted to Trilokpuri. According to PW1, near the festival of Rakhi she gave birth to a male baby. She has testified that when the doctor informed them that the issue was of 5½ months old then they reported the matter to the police when her statement was recorded which statement is Ex.PW1/A. The witness has also identified the thumb impression of her mother on the said statement. She has deposed that her medical examination was got conducted by the police at Sanjay Gandhi Hospital and her undergarments also might have been taken by the doctor and her statement under Section 164 Cr.P.C. was also recorded by the Ld. Metropolitan Magistrate which statement is Ex.PW1/B. The witness is unable to tell her age at the time of incident and has deposed that he had not attended any school. She has further deposed that the DNA test of the male child was also conducted. PW1 has identified the accused Sant Ram in the court and also the undergarment which is Ex.P-1.

The witness PW1 was subjected to a lengthy cross-examination wherein she has denied the various suggestions put by the counsel for the accused particularly on the aspect of being a consenting party to the act which she has specifically denied and nothing much has come out from the cross-examination of the prosecutrix.

PW6 Smt. Atri Devi is the mother of the prosecutrix 'N' and wife of the accused Sant Ram. She has corroborated the testimony of PW1 to the extent that in the year 2006 in the summer season she noticed some enlargement of abdomen of her daughter and made inquiries from her daughter who did not tell her anything about it. She thereafter took her daughter to a private clinic at Bhajanpura where her daughter was medically examined and doctor told her that her daughter is having pregnancy of about 5-6 months. She has deposed that it was only thereafter that her daughter told her of being raped by her father the accused Sant Ram forcibly against her wishes near the festival of Diwali in the year 2006, but she did not tell her the exact date of the incident. According to the witness, her daughter also told her that the accused had threatened to kill her if she disclose this fact of rape to her or anyone, due to which reason, her daughter did not disclose this fact to her... ”

8. As stated hereinabove, the factum of the sexual intercourse with the prosecutrix came to light when there was an enlargement of abdomen of the prosecutrix. The prosecutrix underwent an ultrasound on 21.03.2006 which disclosed that the prosecutrix was carrying a pregnancy of 20 weeks. After the FIR was registered, a male child was delivered on 29.07.2006. The blood sample of the prosecutrix 'N', the male child 'S' and the appellant were collected in DNA Unit, FSL Rohini. The blood samples were isolated for the purpose of DNA fingerprint profile. It was found that the paternal and maternal alleles from Exs.1 and 2 accounted in Ex.3, that is, the child and, therefore, the Senior Scientific Officer and the Director, In-charge of FSL opined that the appellant and the prosecutrix were the biological parents of the child.

9. The DNA test is challenged by the learned counsel for the appellant on the ground that as per Section 53-A of the Code of Criminal Procedure, 1973 (Code), examination of any person accused of rape has to be done by a registered medical practitioner. No evidence was led by the prosecution with regard to the taking of the sample by a registered medical practitioner. It is urged that no witness was produced to prove that the blood samples of the appellant, the prosecutrix and the male child remained intact till they were deposited with FSL.
10. In this regard, it would be relevant to refer to the testimony of PW14, Inspector Sanjita. She deposed that a male baby was delivered by the prosecutrix 'N' on 29.07.2006. In order to get the DNA comparison the blood samples of the baby of prosecutrix, the prosecutrix and the appellant were collected by the doctor at SGM hospital and the same were seized by memo Ex.PW-6/A. A perusal of the report dated 03.01.2007 shows that the blood was putrefied and the desired tests could not be carried out. Thereafter, an application was moved before the learned ASJ by the IO on 07.12.2006. On 03.01.2007 after recording appellant's 'No Objection Certificate', for taking his blood sample for carrying out DNA test, the application was allowed and the jail authorities were directed to produce the appellant in the FSL for the purpose of taking his sample. A perusal of the identification form (Ex.PW-12/C collectively) reveals that the blood samples of the prosecutrix 'N', her baby child Suraj and appellant Sant Ram were obtained on 22.01.2007 by Dr. A.K. Srivastava. Said Dr. A.K. Srivastava was examined by the prosecution as PW-12 who testified about taking of the three blood samples on 22.01.2007. He further proved his report Exs.PW-12/A and PW-12/B. He concluded that *the DNA profiling (STR*

analysis) performed on the exhibits provide is sufficient to conclude that the Exhibits '1' and '2' are the biological parents of the Exhibit '3' (i.e. Baby male Child Suraj)."

11. It is true that Section 53-A of the Code requires examination of an accused by a registered medical practitioner in order to collect the evidence of the commission of the offence. In the instant case the blood samples were initially taken in SGM hospital by the concerned doctor. The sample got putrefied and in order to avoid any delay in examination of the sample after its drawl, the appellant was produced before Dr. A.K. Srivastava, Senior Scientific Officer for this purpose. The use of the term 'registered medical practitioner' in Section 53-A of the Code has been done only with the purpose that the examination is carried out by a competent person. Thus, if the blood sample is drawn by an expert who is also to carry out the analysis and even if the expert is not a registered medical practitioner, the same is not in violation of Section 53-A of the Code. Moreover, in the instant case the appellant himself voluntarily agreed to give the blood samples as is evident from the order dated 03.01.2007 passed by the learned ASJ. Thus, it cannot be said that he was compelled to be a witness against himself. Moreover, taking blood sample of the accused or his medical examination would not mean that the appellant was compelled to be witness against himself. In the circumstances, no fault can be found with the drawl of the sample by PW-12 Dr. A.K. Srivastava, Senior Scientific Officer in FSL, Rohini.
12. In reply to question No.28 put in his examination under Section 313 of the Code the appellant stated that DNA test had not been properly conducted and that the genotype similarities in the results have come only

because he was father of the prosecutrix. However, no such suggestion was given to PW-12 Dr. A.K. Srivastava in spite of the fact that he was ordered to be recalled for cross-examination on a request made by the appellant and the appellant had an opportunity to cross-examine PW-12 not only on 04.12.2009 but also on 26.12.2010. In the absence of any suggestion to PW-12, the appellant cannot be permitted to take a plea that genotype similarities were found because he was father of the prosecutrix.

13. Moreover, the DNA result holding that the appellant fathered the child delivered by the prosecutrix loses significance in view of the specific suggestions put in the cross-examination of PW1(the prosecutrix). A specific suggestion was given to the prosecutrix that the appellant used to have sexual intercourse with the prosecutrix with her consent. The relevant portion of the cross-examination is extracted hereunder:

“It is correct that at the time of incident above persons were present at their houses but those were sleeping. My father used to tease me and threat me as his wife from the age of 10 years. It is correct that when my father was treating me as his wife I did not brought this fact in the knowledge of police or anyone. My father used to tease me at the bed and when we used to go to temple and other places. It is wrong to suggest that I used to tease my father in the period stated above. It is wrong to suggest that I liked the teasing of my father. I do not remember the date, month and year of the incident of rape but it was few days earlier to the Diwali festival. It is wrong to suggest that I used to do sexual intercourse with my father prior to the incident of rape...”

14. Thus, in view of the fact that the prosecutrix's testimony with regard to allegation of sexual intercourse committed by the appellant was not seriously challenged; rather, a suggestion was given to her that all this

was with her consent and to her liking, it is established that the appellant committed sexual intercourse with the prosecutrix.

15. Moreover, it is difficult for a young girl of 16-17 years to level the allegation of rape against her own father, particularly, when she alleges her pregnancy was owing to the sexual intercourse by her father. We do not find any reason to disbelieve PW1's testimony with regard to the sexual intercourse by her father with her which is fortified by appellant's own defence as also DNA report Ex.PW12/A. According to the prosecutrix, her father committed sexual intercourse with her after Diwali which coincides with the ultrasound report Ex.PW4/A and the delivery of the child on 29.07.2006. Thus, it is proved that the appellant had sexual intercourse with the prosecutrix near Diwali in the year 2005 as is the case of the prosecution.

RE: AGE OF THE PROSECUTRIX:

16. In her statement under Section 161 Cr.P.C.(Ex.PW1/A) recorded on 24.05.2006, the prosecutrix gave her age as 16 years. After registration of the case, prosecutrix's statement under Section 164 Cr.P.C. was recorded by the learned Metropolitan Magistrate on 06.06.2006 wherein again she gave her age as 16 years. The prosecutrix was examined in the Court on 25.09.2007. Here again, she gave her age as 16 years although it was after one year and four months of registration of the case. No authentic evidence either in the shape of the school first attended or any certificate from the panchayat or municipality was produced. The prosecution, therefore, being aware of its obligation to prove the prosecutrix's age obtained medical opinion with regard to her age. As per report of the Medical Board, her dental examination revealed her age

to be less than 18 years and as per X-ray examination, the bone age was found to be between 16-17 years. The medical examination was conducted on 14.07.2006. Thus, giving benefit of doubt and taking the maximum age as per the medical opinion, the prosecutrix was less than 18 years on 14.07.2006. Consequently, on the date of alleged rape, that is, in November, 2005, the prosecutrix was about 17 years of age. The learned Trial Court considered the ossification test and in spite of lack of any reliable oral or documentary evidence with regard to her age held that the prosecutrix at the time of the incident was between 15 to 16 years and was, thus, incapable of giving the consent. This finding reached by the learned Additional Sessions Judge (ASJ) cannot be sustained as the oral evidence produced by the prosecution with regard to the age was merely a rough estimate and, in the circumstances, the ossification test was the only evidence which ought to have been considered to return a finding on the prosecutrix's age. Since she was less than 18 years on 14.07.2006; she was, therefore, about 17 years on the date of the commission of the offence.

RE: CONSENT:

17. Taking into consideration the relationship between the prosecutrix and the appellant, consent to sexual intercourse is the most crucial question to be determined in the instant case. It is urged by the learned counsel for the appellant that the factum of the sexual intercourse was not disclosed by the prosecutrix to her mother either immediately after the incident or even thereafter till prosecutrix's abdomen was found to be exceptionally large raising suspicion in her mother's mind. It is urged that as per the prosecutrix she (PW-1) along with her mother (PW-6) had gone to her

nana's (maternal grandfather) place at Meerut after 1½ months of the incident. There could not have been any fear or pressure upon the prosecutrix once she was at her maternal grandfather's place. Thus, the fact that she did not make any complaint about the appellant's act will clearly indicate that there was consent to the sexual act committed by the appellant. It is urged that the prosecutrix and her mother wanted to grab the appellant's property and thus the act of consensual sex was converted into rape by the prosecutrix in collusion with her mother.

18. We have already extracted PW1's (prosecutrix's) and PW6's testimonies earlier. We have also held that commission of the sexual intercourse with the prosecutrix is established not only by DNA profiling but also by oral evidence of the prosecutrix which is duly supported by her mother PW-6. As stated earlier, the age of the prosecutrix at the time of the commission of the offence has been found by us to be about 17 years even after giving benefit of doubt in appellant's favour. Since it is established that the appellant had committed sexual intercourse with the prosecutrix, who is his own daughter, and it is not the appellant's case that the sexual intercourse was being committed with the prosecutrix by him with his wife's (PW-6's) consent, the appellant's plea that he was falsely implicated because his wife and the prosecutrix wanted money from him or that they had taken possession of his assets including plot No.C-157, Shiv Vihar, Karala cannot be believed. The tanner of the cross-examination, while suggestion was being put to PW-1 (the prosecutrix) that she had physical relations with the appellant at her will, implies appellant's plea of informed consent to the sexual act by the prosecutrix.

19. It has to be borne in mind that on the date of incident the prosecutrix was aged 16-17 years. She testified that the act of sexual intercourse was committed by the appellant by keeping her at knife point and under the threat that if the fact is disclosed to any person she (the prosecutrix) and her mother will be killed. There is strong possibility that the appellant was armed with a knife while the prosecutrix was made a prey to the act. We find no reason to disbelieve PW-1's testimony. We are not inclined to believe that the consensual sexual act with a daughter aged 16-17 years would be converted into rape by her mother when she came to know of it after 3-4 months of the incident.
20. It may be noted that the prosecutrix, her mother and other siblings were dependent on the appellant for their shelter as also for their bread and butter. Keeping in view the economic and social background the prosecutrix did not have the choice to resist the appellant's act and thereafter she wanted to hide the same not only from her mother but also from her maternal grandmother. Thus, the delay in lodging the FIR even after the ultrasound was carried out on 21.03.2006 is of no consequence. In this regard it will be appropriate to refer to PW-1's testimony. She deposed that her mother called her *dadi* and *chacha* for resolution of the problem. It was suggested by them to go to some unknown place (to deliver the child and save the family's honour). In *State of Uttar Pradesh v. Chhotey Lal* (2011) 2 SCC 550 the Supreme Court considered its various earlier decisions and analysed the term consent in the context of the offence of rape. The Supreme Court thus held:-

“15. Be that as it may, in our view, clause Sixthly of Section 375 IPC is not attracted since the prosecutrix has been found to be above 16 years (although below 18 years). In the facts of the case

what is crucial to be considered is whether clause Firstly or clause Secondly of Section 375 IPC is attracted. The expressions “against her will” and “without her consent” may overlap sometimes but surely the two expressions in clause Firstly and clause Secondly have different connotation and dimension. The expression “against her will” would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression “without her consent” would comprehend an act of reason accompanied by deliberation.

16. The concept of “consent” in the context of Section 375 IPC has come up for consideration before this Court on more than one occasion. Before we deal with some of these decisions, reference to Section 90 IPC may be relevant which reads as under:

“90. Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

[Consent of insane person] if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

[Consent of child] unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”

17. This Court in a long line of cases has given wider meaning to the word “consent” in the context of sexual offences as explained in various judicial dictionaries. In Jowitt's Dictionary of English Law (2nd Edn.), Vol. 1 (1977) at p. 422 the word “consent” has been explained as an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side.

It is further stated that consent supposes three things—a physical power, a mental power, and a free and serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.

18. Stroud's Judicial Dictionary (4th Edn.), Vol. 1 (1971) at p. 555 explains the expression “consent”, inter alia, as under:

“Every “consent” to an act, involves a submission; but it by no means follows that a mere submission involves consent’, e.g. the mere submission of a girl to a carnal assault, she being in the power of a strong man, is not consent (per Coleridge, J., R. v. Day (1841) 9 C&P 722”

Stroud's Judicial Dictionary also refers to the decision in Holman v. R. [1970 WAR 2] wherein it was stated:

“But there does not necessarily have to be complete willingness to constitute consent. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously permits it there is ‘consent’.”

19. In Words and Phrases, Permanent Edition (Vol. 8A) at pp. 205-206, few American decisions wherein the word “consent” has been considered and explained with regard to the law of rape have been referred. These are as follows:-

“In order to constitute ‘rape’, there need not be resistance to the utmost, and a woman who is assaulted need not resist to the point of risking being beaten into insensibility, and, if she resists to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not ‘consent’. People v. Mcilvain [55 Cal App 2d 322]

‘Consent’, within Penal Law, Section 2010, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. People v. Pelvino [(1926) 214 NYS 577]

‘Consenting’ as used in the law of rape means consent of the will and submission under the influence of fear or terror cannot amount to real consent. Hallmark v. State [22 Okl Cr 422]....”

21. In *H.P. v. Mango Ram* (2000) 7 SCC 224, a three Judge Bench of the Supreme Court held that *submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent.*”
22. Keeping in view the evidence produced coupled with the prosecutrix’s age of 16-17 years her mere submission of body to the barbaric lust of her father cannot be said to be voluntary participation in the act and consensual in nature as envisaged under Section 375 IPC.

RE : SENTENCE

23. Coming to the sentence to be awarded to the appellant the trial court found that the appellant who was prosecutrix’s father and was expected to take care and protect the prosecutrix himself, betrayed the trust reposed in him and committed the most barbaric act. After referring to various judgments of this Court and the Supreme Court the learned ASJ found that the instant case fell in the category of rarest of the rare cases and thus not only awarded maximum punishment of rigorous imprisonment for life as provided for the offence punishable under Section 376 IPC but also directed that in view of the appellant’s act his case for grant of remission

should not be considered till he underwent the actual sentence of 20 years.

24. The trial court found the appellant guilty of the offence punishable under Section 376 sub-Section (2) which provides for punishment with minimum imprisonment for a term which shall not be less than 10 years but which may be for life in addition to fine.
25. It is urged by the learned counsel for the appellant that the trial court erred in holding the appellant guilty for the offence punishable under Section 376 sub-Section (2) IPC. It is argued that from the evidence adduced it was proved that the prosecutrix was above 16 years of age and even if it is assumed that she was less than 16 years of age the case did not fall under any of the Clauses (a) to (g) of sub-Section (2) of Section 376 and thus the appellant could have been awarded imprisonment which may extend to 10 years or imprisonment for life. The only rider was that he could not have been awarded a sentence of less than seven years except on the ground of special reasons. It is urged that even if there were no special reasons the appellant ought to have been awarded a sentence of seven years of imprisonment as there was neither any violence nor any circumstance which ought to have prevailed upon the court to award sentence of imprisonment for life that too with a rider that the appellant's case for remission will not be considered unless he serves the actual imprisonment of atleast 20 years.
26. Relying on a three Judge Bench decision of the Supreme Court in *Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka AIR 2008 SC 3040*, the learned counsel for the appellant urges that sentence of imprisonment with minimum period of actual imprisonment can be

quantified only in cases where the offence for which an accused is held guilty is punishable with a sentence of death also, as one of the possible sentences. It is urged that in the instant case punishment of death is not one of the possible punishments and thus, the learned ASJ was not justified in qualifying the imprisonment for life with an embargo that his case for commutation shall not be considered before he serves an actual sentence of 20 years.

27. There is no dispute that the instant case did not fall under any of the clauses as laid down in sub-Section (2) of Section 376 and thus the appellant could not be awarded any sentence which could extend to imprisonment for ten years or imprisonment for life. The appellant shall be liable to be punished with minimum imprisonment for seven years unless there were special reasons to take a lenient view. In the instant case, no such circumstance has been pointed out by the learned counsel for the appellant on the other hand, it is established that the appellant, who is father of the prosecutrix and the protector of the daughter himself betrayed her trust. The act committed by the appellant shakes the faith of the children in their own parents. We need not go into the question whether the case would be covered by *Swamy Shraddananda @ Murali Manohar Mishra* or not in view of the fact that even if we do accept that the act committed by the appellant was ghastly, abominable and barbaric; the appellant was not liable to be punished with imprisonment of life with the rider that his case of commutation ought not to be considered unless he serves the actual sentence of 20 years.
28. In *State of Himachal Pradesh v. Asha Ram*, AIR 2006 SC 381 which related to the rape of his own daughter by the convict Asha Ram, the

Supreme Court enhanced the sentence of rigorous imprisonment of five years to imprisonment for life.

29. In our considered view, the interest of justice requires that the appellant should also be sentenced to undergo imprisonment for life in addition to the fine as imposed by the trial court without any rider as to the consideration of the commutation of the sentence awarded to him by the learned ASJ.
30. Thus, while maintaining the conviction for the offence punishable under Section 376(1) IPC and Section 506 IPC, and also maintaining the sentence under Section 506 IPC, it is clarified that the appellant shall suffer rigorous imprisonment for life (without any rider) for the offence punishable under Section 376 IPC. The sentence of fine and the order of payment of compensation is also maintained.
31. The Appeal is disposed of in above terms.

(G.P. MITTAL)
JUDGE

(G.S. SISTANI)
JUDGE

JULY 31, 2013
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