

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

Judgment delivered on : December 11, 2013

+ CRL.A. 1079/2010

BEERU Appellant

Through **Avi Singh, Advocate**

versus

STATE NCT OF DELHI Respondent

Through: **Mr.Sunil Sharma, Additional
Public Prosecutor for the State**

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE INDERMEET KAUR

JUDGMENT

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KAILASH GAMBHIR, J.

1. One can visibly see the growth of the country in all spheres keeping a pace with the modernization, advancement, science and technology but unfortunately the only front which is on the decline is the moral values. In the recent past, the country has witnessed too many horrifying and heart rendering incidents of rapes and many of such cases were so brutal and barbaric, that they jolted the society to ponder whether such beastly acts can be committed by a human being on the other. Amongst such horrifying incidents, sexual assaults involving minor

children are the worst and amongst the worst, the cases involving sexual assault of minor children by none other than their own family members, relatives and friends. An astonishing increase has been seen in the number of cases where children are sexually assaulted by none other than their own family members, relatives and friends on whom they once relied, as their protectors to be protected from the evils of outside world. Such kind of sexual assaults at the hands of family members, relatives and friends is abhorrent as it not only harms the innocent child but it completely destroys and ruptures an innocent soul that has yet not attained enough consciousness even to understand the nature of the act committed upon her. Such cases show as to what extent a person can stoop down just to satisfy his lust for sex. In a society where the custodian of the trust betrays the same and the protector of the dignity and honor becomes the violator, it would not be wrong to say that no one can easily be trusted. Such offences pollute the sanctity of relationship which were said to be made in heaven. A momentary pleasure out of lust for sex leaves an indelible scar not only physically but also emotionally on the victim. Taking note of such an extremely odious and debased offence, the Legislature recently by way of Criminal Law Amendment Act, 2013, incorporated a new clause under Section 376(2) IPC as clause

(f) to cover cases where rape is committed in a fiduciary relationship. The sole object of this provision is to visit with a more severe penalty to the persons in near relation and position of trust and authority who more often than not commit sexual assault on the members of the family or unsuspecting and trusting young persons.

2. The case in hand is a sad reflection of the present day society where a most faithful relationship has been spoiled by the debauch and the degrading act of a family member. The horrid incident unfolded by the prosecution in the charge sheet is as follows:

“Hiri(mausi of the prosecutrix) had gone to Haridwar to meet her sister Ms. Laxmi(mother of the prosecutrix) and also brought the prosecutrix with her to Delhi about 3-4 days prior to the occurrence and thereafter on 29.06.2007, Hiri again went to Haridwar along with her daughter, however she left the prosecutrix in her house at Jhuggi, Camp No. 4, Jwala Puri so that she could cook meals for her husband (accused Beeru) and son. On 29.06.07, the prosecutrix has cooked meals which she served to her cousin brother and accused Beeru at about 11:00 p.m., she slept in the Jhuggi at about 11:30 p.m., the accused came and made her wake up and asked her to remove her clothes which she refused but the accused slapped her and forcibly removed her clothes after which he removed his clothes as well and forcibly committed sexual intercourse with her as a result of which she felt pain and started bleeding and wept as well. After committing the sexual intercourse the accused went outside the jhuggi and the prosecutrix

remained inside the jhuggi and while going out, the accused also threatened her that in case she told about the incident to anybody, he would kill her. Thereafter the prosecutrix wore her clothes and on the next morning she went to the house of her other mausi(aunt) namely Lali who resided in camp No.5 and narrated the entire incident to her and she took her to the house of Pooja (Lali's daughter) to whom also she narrated the entire incident and thereafter they went to police post, SGM Hospital and was got medically examined after which her undergarments and salwar were seized thereafter necessary investigation was conducted by the investigating officer whereupon the accused was arrested."

3. To bring home the charges, the prosecution in all examined 14 witnesses. After recording the evidence of the prosecution, the statement of the accused was recorded under Section 313 of Cr. P.C. and in his statement, he pleaded innocence and false implication by the prosecutrix at the instance of Ms. Lali, her aunt (mausi). Vide judgment dated 20.05.2010, the appellant has been convicted for committing an offence under Sections 376/506 of Indian Penal Code and vide order dated 3rd June, 2010 he has been sentenced to undergo rigorous imprisonment for life together with fine of Rs. 10,000/- and in default of payment of fine to further undergo simple imprisonment for a period of 3 months. The appellant has also been sentenced to undergo imprisonment for a period

of two years and a fine of Rs. 5,000/- under Section 506 IPC. The said judgment and order are under challenge in the present appeal.

4. Addressing arguments on behalf of the appellant, Mr. Avi Singh, Advocate, contended that the appellant has been falsely implicated in the present case at the instance of Ms. Lali, aunt (mausi) of the prosecutrix who was having illicit relationship with many persons and whenever the accused objected to the same, there used to be a quarrel between the accused and the said aunt. Therefore in order to stop the appellant from raising his voice against her illicit relationships, she took the help of the prosecutrix in framing him in such a false case.

5. Learned counsel for the appellant argued that the case as set up by the prosecutrix is otherwise also untenable as the prosecutrix in her statement deposed that she started crying after the alleged rape but nobody had heard her cries or came to her rescue although in the area where the incident took place it was almost a day time even at 11.30 PM. Learned counsel for the appellant further contended, that after the alleged sexual act, the prosecutrix went to sleep although as per her deposition she was suffering from pain and there was bleeding from her private part. Thus, the contention of the learned counsel for the appellant was that in such a state of affairs a child of 11 years at least would not go to sleep

rather would remain awoken after having suffered such a trauma and physical pain. Learned counsel for the appellant further argued that the alleged incident of rape, as per the prosecutrix, had taken place at 11.30 PM and she had woken up at 6 a.m. on the next morning but she reached the Police Station after a gap of almost six hours, i.e. at 12 noon. The contention of the learned counsel for the appellant was that such a wide gap of six hours also, casts shadow of doubt on the prosecution case.

6. Learned counsel for the appellant also argued that the forensic evidence completely contradicts the prosecution case. Inviting attention of this Court to the FSL Report, proved on record, learned counsel for the appellant pointed out that no traces of semen could be detected on the vaginal swab or underwear or salwar of the prosecutrix. The submission of learned counsel for the appellant was that the absence of any trace of semen or blood on the vaginal swab or underwear or the salwar of the prosecutrix and even on the pajama of the appellant and that too when the prosecutrix herself claimed that she had been sexually assaulted by the accused just a night before she was medically examined and the fact there was a bleeding in her private part after the alleged incident, again makes the prosecution case doubtful to say the least.

7. Learned counsel for the appellant also argued that the medical evidence on record also does not support the case of the prosecution. Attention of the court was invited to the MLC of the prosecutrix proved on record as Ex.PW-6/A, which clearly records that no external injuries were seen on the body of the victim and the hymen was found missing (but not torn). Learned counsel for the appellant also pointed out that there was neither any ovulation nor any laceration on the person of the prosecutrix as recorded in the MLC. There is also no medical opinion that there was any form of penetration in the vagina of the prosecutrix to prove the commission of sexual assault by the appellant. Learned counsel for the appellant also submitted that even no external injuries were found either on the person of the appellant or on his penis, as per MLC of the appellant proved on record as Ex. PW-6/A. Learned counsel for the appellant also submitted that neither any gynecological examination of the prosecutrix was conducted nor any such evidence was produced by the prosecution. Submission of the counsel for the appellant was that the medical evidence totally discredits the case of the prosecution. Learned counsel for the appellant also placed reliance on **Modi's jurisprudence 11th Edition Chapter XVII**, which states that “...tears caused by any sexual intercourse or by introduction of any foreign body are usually

situated posteriorly at one or both sides or in the median line, and usually extended to the point of attachment of the hymen at the end of the vagina”. Learned counsel for the appellant also placed reliance on the following para referred to in the **Modi’s text book, page 503:-**

“In nubile virgins, the hymen, as a result of complete sexual intercourse, is usually ruptured, having one or more radiate tears (more so in the posterior half), the edges of which are red, swollen and painful and bleed on touching”

8. Learned counsel for the appellant also argued that all accused persons have a fundamental right of effective representation and if an effective representation is not made by the Legal Aid Counsel, who represented the appellant, then such ineffective representation should not prejudice the case of the appellant. Reliance by learned counsel for the appellant was placed on the judgment of this Court in the case of ***Salamat Ali vs. State***. reported in **174(2010)DLT558**

9. Pleading for acquittal of the appellants, learned counsel for the appellant without prejudice to his above submissions, challenged the finding of the learned trial court believing the age of the prosecutrix to be below 12 years. Contention of learned counsel for the appellant was that although the appellant was charged under Section 376(2)(f) IPC, but there is no finding of fact recorded by the learned trial court that the prosecutrix was less than 12 years of age. Placing reliance on the

ossification Report, proved on record as Ex.PW-13/A, learned counsel for the appellant submitted that if as per the bone age test of the prosecutrix, her age was assessed between 14 to 16 years by the said Medical Board, then with a margin of +/- 2 years, certainly the age of the prosecutrix on the relevant date was more than 16 years. Learned counsel for the appellant also placed reliance on Rule 12 of the Juvenile Justice (Care and Protection of Children) Act, 2000 for giving the said benefit in age. Learned counsel for the appellant also vehemently contended that the learned trial court committed a grave illegality in awarding the sentence for life imprisonment primarily influenced by the age of 11 years, as stated by the prosecutrix herself, totally ignoring and overlooking the opinion of the Medical Board assessing the age of the prosecutrix to be between 14 to 16 years and had the learned trial court taken into consideration the said report of the Medical Board, then certainly, it could have awarded lesser sentence in terms of Section 375(1) of the IPC.

10. Based on the above submissions, learned counsel for the appellant pleaded for the acquittal of the appellant or in alternative to reduce his sentence under Section 375(1) of IPC. Learned counsel for the appellant also pleaded for leniency looking into the mitigating circumstances of the appellant, he being the only bread earner of his family, comprising of his

wife and three teen aged children, with no other criminal antecedents whatsoever. In support of his arguments, learned counsel for the appellant placed reliance on the following judgments:-

1. *Sant Ram @ Dada vs. State, Crl. A. 813 of 2001 decided on 11th October, 2001(Delhi High Court)*
2. *Bavo @ Manulalbhai Ambalal Thakore vs. State of Gujrat, (2012) 2 SCC 684*
3. *Arun Kumar Rao v. State, Crl. A. No. 957 of 2006 decided on 25th February, 2010(Delhi High Court)*
4. *Subhash Chander v. State of Haryana CRA. No. S-1146-SB of 2008(Punjab & Haryana High Court) dated 29th July, 2013*
5. *State of H.P vs. Suresh Kumar, (2009) 16 SCC 697*
6. *Dinesh Jaiswal v. State of M.P AIR 2010 SC 1550*
7. *Rajoo & Ors. V. State of M.P AIR 2009 SC 858*
8. *Salamat Ali vs. State, 174(2010)DLT558*
9. *Dilawar Balu Kurane v. State of Maharashtra (2002) 2 SCC 135*
10. *Mir Nagvi Askari vs. CBI (2009) 15 SCC 643*
11. *KV Chakoo vs. State of Kerela (2001) CrLJ 713(SC)*
12. *Sharad Birdichand Sharda v. State of Maharashtra (1984) 4 SC 116*
13. *Paramjeet Singh @ Panna v. State of Uttrakhand (2010) 10 SCC 439.*
14. *Sarbir Singh v. State of Punjab 1993 Cri. L.J. 1395*

11. The aforesaid contentions raised by the counsel for the appellant were strongly refuted by Ms. Richa Kapoor, learned Additional Public Prosecutor for the State. Learned APP submitted that as per the settled legal position even uncorroborated testimony of the prosecutrix can result into conviction of the accused in a rape case but in the present case, the testimony of the prosecutrix was fully supported by her aunt (PW-3), her cousin sister (PW-4), her mother (PW-9) and the medical evidence placed on record. Learned APP further argued that the testimony of these witnesses remained uncontroverted and the defense did not succeed to create even an iota of doubt on their testimonies. Learned APP also argued that there was no motive on the part of the prosecutrix who was a small child of 11 years to falsely implicate her own uncle (mausa), that too in a case of such a serious nature where the honor and dignity of the prosecutrix would also be at stake. Learned Additional Public Prosecutor also argued that there was no delay on the part of the prosecutrix in lodging the complaint to the police.

12. Learned Additional Public Prosecutor also argued that the appellant who is an uncle (mausa) of the prosecutrix was in a fiduciary relationship and he totally betrayed the trust and confidence reposed in him by the mother of victim as instead of taking care of the said girl child as a

protector, he destroyed her chastity and shattered the said confidence by ravishing her dignity and honor out of sheer lust for sex.

13. Learned APP further pleaded that there are no mitigating circumstances to reduce the quantum of sentence as the appellant was a mature person aged about 40 years at the time of incident and he being a married person knew the moral worth of his acts. Learned APP also submitted that as per the report of National Crime Bureau, Ministry of Home Affairs, the number of rape cases are increasing every year and this heinous crime destroys the body and soul of a woman and should be sternly dealt with. Learned APP also argued that the appellant cannot derive any benefit from the ossification test, as no defense was raised by the appellant that any consent was given by the prosecutrix permitting the appellant to have sex with her.

14. In support of her submissions, learned Additional Public Prosecutor placed reliance on the following judgments:-

1. *State of Himachal Pradesh vs . Asha Ram*
AIR2006SC381
2. *Sant Ram @ Sadhu Ram vs . The State*
013VIAD(Delhi)439
3. *Gurudev vs . The State (NCT of Delhi) Crl.*
Appeal No. 709/2003 (Delhi High Court), decided
on 12.05.2009.

4. *Mohd . Isha vs . State*, (2009) ILR 7 Delhi 405.
5. *Shyam Narain vs . The State of NCT of Delhi* AIR2013SC2209.
6. *Rajesh vs. State* Crl. A. No. 671/2003(Delhi High Court) decided on 24.04.2009.
7. *State of Rajasthan vs. Vinod Kumar* AIR 201 SC2301
8. *State of Karnataka vs. Raju* AIR 2007 SC 3225
9. *State of M.P vs. Santosh Kumar* AIR2006SC3098
10. *Bhupinder Sharma vs State of HP* AIR 2003 SC 4648
11. *Pushpanjli Sahu vs State of Orissa* AIR 2013 AC 1119
12. *State vs. Jai Hind* Cr. A. No. 179/2012 (Delhi High Court), 2012 VI AD (Delhi) 170.

15. We have heard the learned counsel for the parties, perused and scrutinized the evidence and material on record.

16. In the present case, the prosecutrix was a minor girl of 14 years, belonging to Haridwar, one of the seven holiest places of Hindus. Millions of pilgrims, devotees, and tourists congregate in Haridwar to perform ritualistic bathing on the banks of the river Ganges to wash away their sins and to attain Moksha. Her mind and soul was full of purity and she could never have imagined even in the wildest of her thoughts that one day her purity and chastity would be ravished by her own family

member i.e. her uncle (mausa). Just four days before the incident she was brought to Delhi by her aunt. The brazen lust for sex, polluted the mind of the appellant on the night of 29.06.2007, when no one except the prosecutrix, and his son were sleeping in the house of her aunt (mausi) and the appellant awakened the prosecutrix from a deep sleep and forcibly raped her after giving her two three tight slaps. The devil in the appellant did not even differentiate that the prosecutrix was none else but his own niece, of such a tender age. The pain and shrieks of the prosecutrix did not bother him and after committing such heinous offence, the appellant went outside the house (jhuggi), threatening the prosecutrix that if she narrated the incident to anyone, he would kill her.

17. The first contention raised by the counsel for the appellant was that the appellant has been falsely implicated in the present case at the instance of Ms. Lali, aunt (mausi) of the prosecutrix who was having illicit relationship with many persons and whenever the accused objected to the same, there used to be a quarrel between the accused and the said aunt and therefore in order to stop the appellant from raising his voice against her illicit relationships, she took the help of the prosecutrix in framing him in such a false case.

18. In the present case since the victim is a minor child, rule of prudence requires that the evidence of the child shall be scrutinized with utmost care and caution, since at times it has been seen that gullible and obedient daughters are used as a tool out of vengeance for settling personal scores, however, if the testimony of the prosecutrix inspires confidence and it appears to be natural and trustworthy, free from any kind of influence or venom, the conviction can be based on the sole evidence of the prosecutrix and just because she was a minor will not be a ground to discard her testimony. In the matter of ***Bhupinder Sharma vs State of HP, AIR 2003 SC 4648*** the Hon'ble Apex Court observed as follows:-

“In the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl who is raped is

not an accomplice. Corroboration is not the sine qua non for conviction in a rape case”.

19. In the facts of the present case, the testimony of the prosecutrix remained unchallenged and uncontroverted, although she was duly cross examined by the defense. The defense utterly failed to dislodge the creditworthiness of the testimony of the prosecutrix. Before we proceed further, it would be appropriate to reproduce the testimony of the prosecutrix who entered the witness box as PW-2, which reads as under:-

“PW2- Ms. Sonia

My mausi namely Hiri resides in Delhi. My mausi Hiri had brought me to Delhi about four days prior to the incident. My mausi Hiri used to reside in Jwala Puri Jhuggi, Camp No.4. My mausi, Hiri was residing along with her husband who is accused Beeru present in the court (correctly identified). On 30th day of June, 2007, my mausi went to Haridwar. While leaving my mausi advised me to prepare meals for the accused. On the day of incident, my mausi was leaving for Haridwar, I also insisted to accompany mausi, but my mausi did not pay any heed to my request and forcibly asked me to remain at the house at Jwala Puri Jhuggi. So I remained in the Jhuggi of my mausi. I prepared meals. I served meal to the accused. I had also taken my meals and after taking my meals, I went for sleep at about 11.00 p.m. At about 11.30 p.m., accused Beeru came to me and awakened me. He asked me to remove my clothes but I refused. He gave me two or four slaps. And thereafter he removed my clothes.

Thereafter, the accused also removed his clothes and he forcibly committed sexual intercourse with me. I felt pain and started bleeding. I was also weeping. After committing sexual intercourse, the accused went outside the Jhuggi and I remained in the Jhuggi. I wore my clothes. The accused had threatened me that in case I narrate the incident to anyone, he would kill me. In the morning, I went to the house of another mausi Lali who resides in Camp No.5, Jwala Puri and narrated the incident to her. Then we went to the house of my mausi's daughter, namely, Pooja and also told her about the incident. Thereafter, I was taken to police post by me mausi. I made a statement at the police post. I was also taken to SGM hospital and was got medically examined. My statement is Ex.PW2/A which bears my signature at point A. after medical examination, my undergarments and salwar were seized. I can identify my clothes if shown to me. I was also produced before Ld. MM and my statement was recorded.

(At this stage, a sealed envelope sealed with the seal of the court is directed to be opened and on opening it is found to contain the statement of the prosecutrix recorded u/s 164 Cr.P.C.). The statement of the prosecutrix is Ex.PW2/B which bears her thumb impression at point A.

At this stage a sealed parcel sealed with the seal of FSL is produced from malkhana and is directed to be opened and on opening it is found to contain one salwar. The witness indentifies Salwar Ex.P1 to be belonging to her which she was wearing at the time of incident.

At this stage another sealed parcel sealed with the seal of FSL is produced from malkhana and is directed to be opened and on opening it is found to contain underwear. The witness identifies underwear Ex.P2 to be belonging to her which she was wearing at the time of incident.”

20. In ***State of U.P. vs. Krishna Master and Ors., AIR 2010 SC 3071***, while dealing with the testimony of child witness, the Hon’ble Apex Court held that *the child at a tender age is incapable of having any malice or ill will against any person and there must be something on record to satisfy the court that something had gone wrong between the date of the incident and recording the evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of serious nature.*

21. In the present case, nothing has been brought on record to show that the prosecutrix had any planned agenda or motive to attribute the offence to the accused. The mandate of the law as settled by the Hon’ble Supreme court through plethora of judgments is that if the statement of the prosecutrix inspires confidence then the conviction can be based on the solitary evidence of the prosecutrix and no corroboration would be required. However, in the present case the above testimony of PW-2 finds full support from the testimony of Smt. Lali (PW-3), aunt of the

prosecutrix; cousin sister of the prosecutrix (PW-4) and the mother of the prosecutrix (PW-9) leaving no room for suspecting the testimony of the prosecutrix. Hence, this court is of the view that the defense miserably failed to mar the testimony of the said material witnesses and thus there remained no ground to blemish the credit worthiness of their statements.

22. Much arguments were advanced regarding the age of the prosecutrix. As disclosed by her, the prosecutrix was 11 years of age, however if the age of the prosecutrix is taken to be between 14 to 16 years as per the ossification test, it would not be incorrect to state that the prosecutrix was not that small child, who could be tutored or prompted by some person having a personal vendetta to falsely implicate the accused and that too in a case which will cast a mental scar on her own chastity, dignity and prestige. Moreover the defense has failed to place on record any evidence to attribute any motive on the part of the prosecutrix to intentionally make a false statement to implicate the accused. Hence, in the view of the above, this court finds no merit in the contention raised by the appellant that the prosecutrix has falsely implicated him in the present case at the instance of her aunt.

23. The other contention raised by the learned counsel for the appellant was that the hymen of the prosecutrix was found missing but

not torn and the prosecutrix was not examined by the gynecologist. Here, it would be pertinent to refer to the observations of the report given by the Justice Verma Committee and the relevant extract of the same is reproduced as under:-

“However it is largely irrelevant because the hymen can be torn due to several reasons. An intact hymen does not rule out sexual assault, and a torn hymen does not prove previous sexual intercourse. Hymen should therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual assault. Only those that are relevant to the episode of assault (findings such as fresh tears, bleeding, edema etc.) are to be documented.”

24. The Division Bench of this court in the matter of **Pappu vs. State of Delhi**, 2010 (1) Cri.LJ 580 Delhi dealing with similar medical condition of the prosecutrix of six years of age whose hymen was also found torn and her vagina admitted two fingers easily and no injury found on private part, after placing reliance on the medical jurisprudence (5th Edition by Dr. R.M. Jhala and B.B. Raju) held as under:-

“The reason is obvious. Medical jurisprudence evidences that in adolescent girls the hymen is situated relatively more posteriorly and for said reason there is a possibility of rape being committed without the hymen being torn; the converse whereof would be that if the hymen of an adolescent girl is torn due to rape, the penetration has to be a deep penetration. The medical jurisprudence guides that the labia majora are the first to be encountered by the

male organ and they are subjected to blunt forceful blows, depending on the vigour and the force used by the accused and counteracted by the victim. The narrowness of the vaginal canal makes it inevitable for the male organ to inflict blunt, forceful blows on the labia and such blows lead to contusion because of looseness and vascularity. The feature of such contusion is revealed against the pink background of the mucous membrane dark red contusion being evident to the naked eye”

25. As can be seen from the aforesaid authoritative view of the experts in the medical field as referred to by the Hon'ble Division Bench and by Justice Verma Committee, the condition of hymen being torn of the prosecutrix may not necessarily mean a previous sexual intercourse and conversely the hymen being not torn also does not necessarily mean that there was no sexual intercourse. In some of the females hymen can also be missing and in such cases also, mere absence of hymen will not necessarily prove the previous sexual intercourse and likewise will also not rule out the previous sexual assault. Much would depend on the quality, reliability and credibility of the testimony of the prosecutrix and if the same is found to be of unimpeachable character, the conviction of the accused can be based on the same even without looking for corroboration from the medical evidence. The same principle equally applies to the evidence of the Forensic Science as the same is also not a substantive piece of evidence and may not support even otherwise clear

and cogent evidence of the prosecutrix. It is also a settled legal position that for proving the offence of rape, penetrative sexual assault may not necessarily result in ejaculation and therefore in such cases there can hardly arise any question of stains of semen being there on the clothes of the victim and the perpetrator of the crime. Thus the contention raised by learned counsel for the appellant on this aspect also lacks merit and the same is rejected.

26. The other contention raised by learned counsel for the appellant was that the prosecution failed to examine any gynecologist in evidence and therefore also, no reliance can be placed on the MLC proved on record as Ex.PW-6/A. This argument of learned counsel for the appellant is also devoid of any force as the prosecutrix was medically examined by Dr. Renu Gupta (PW-6), who herself was a Senior Resident, Obstetrician and gynecologist and in her testimony she had proved on record the MLC of the prosecutrix as Ex.PW-6/A. No doubt, she had referred to gynecologist on duty for further opinion, but absence of other medical opinion of gynecologist will not create any doubt on the medical opinion already given by Dr. Renu Gupta. Even otherwise, the case of the prosecutrix is primarily based on her own testimony, corroborated by the

testimonies of Smt. Lali (PW-3), aunt of the prosecutrix, cousin sister of the prosecutrix (PW-4) and the mother of the prosecutrix (PW-9).

27. Thus, this court does not find any merit in the contention raised by the counsel for the appellant that there was neither any gynecological examination of the prosecutrix nor any such evidence was produced by the prosecution

28. Dealing with the next contention of learned counsel for the appellant to award lesser sentence to the appellant in terms of Section 375(1) of the IPC instead of Section 376(2) (f) of IPC. As per the prosecutrix, she was 11 years of age at the time of commission of offence but no documentary proof has been placed on record to support her said age. In the absence of any documentary evidence produced by the prosecutrix, the age of the prosecutrix was got assessed through the Medical Board of Sanjay Gandhi Memorial Hospital, Mangole Puri, Delhi. As per the opinion given by the Medical Board, the age of the prosecutrix was assessed between 14 to 16 years, with no further marginal error to be given either side. The said ossification report, proved on record by the Chairman of the Medical Board was exhibited as Ex.PW-13/A. The learned trial court also placed reliance on the said ossification report and took a view that it has been established on the

record that at the relevant time, the age of the prosecutrix was certainly not less than 14 years and was not more than 16 years. Moreover as per the provision of section 375 IPC, if a person commits sexual intercourse with a woman of more than 16 years of age, still it will be rape, if the same is against her will and without her consent. We do not find any infirmity in the said reasoning given by the learned trial court.

29. Sexual intercourse with a woman of the age of 16 years and above against her will and without her consent, or with her consent, when such consent has been obtained by putting her in the fear of death or of hurt, or under any influence or on pretext of fraud or under any misconception of fact, will come within the definition of rape as envisaged under Section 375 of IPC. However in case of a woman of below 16 years (18 years after 2013 amendment), the consent of the female will be of no effect.

30. In the present case, the age of the prosecutrix was taken to be between 14 to 16 years by the learned trial court and not below 12 years in awarding the sentence of life imprisonment to the appellant. Ld. Counsel for the appellant contended that had the Ld. Trial court taken the age of the prosecutrix to be between 14-16 years of age, it would have awarded a lesser sentence to the accused than the life imprisonment. It shall be noted that under Section 376(1) IPC, the punishment for the

offence of rape is prescribed as punishment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, or for a term which may extend to ten years and shall also be liable for fine. What punishment is to be imposed is left to the discretion of the Court to be exercised judiciously. Therefore just because the Ld. Trial court has imposed life imprisonment on the accused, it cannot be a ground to assume that the Ld. Trial court has taken the age of the prosecutrix to be below 12 years and not 14-16 years. We, therefore, do not find any merit in the contention raised by counsel for the appellant that at the time of awarding of sentence, learned trial court took the age of the prosecutrix to be of 12 years into consideration.

31. Dealing with the last contention raised by the Counsel for the appellant as to whether the rigorous punishment for life imposed on the Appellant is excessive or deserves to be modified, the learned Counsel for the Appellant submitted that the Appellant has three teenaged children and a wife, and he is the sole bread winner of the family and thus, if the sentence is maintained, not only his life but also the lives of his children as well as his wife would be ruined. Further the Counsel for the appellant also contended that the accused otherwise has clean antecedents and his conduct in the jail is also satisfactory. In essence, leniency is sought

on the basis of aforesaid mitigating factors. Learned APP on the other hand contended that there are no mitigating circumstances to reduce the quantum of sentence as the appellant was a mature person aged about 40 years at the time of the incident and he being a married person knew the moral worth of his acts. In support of her contention, Ld. APP placed reliance on the judgments of *Shyam Narain vs. The State of NCT of Delhi (supra)* and *State of M.P vs. Santosh Kumar (supra)*

32. The barbarity of the offence of rape cannot be overemphasized, especially when we have witnessed the most gruesome and horrific instances of the same in the recent past. The indifference that was created towards feral men with the quotidian reporting of rape was followed by a furore bringing the heinousness and depravity of the offence once again into the forefront, awakening the yet hitherto dormant attitude of the society. On flipping of the pages of the newspaper or the channels of the television, the only resonating sound is a new incident of rape. The argument being advanced is that the incidents of rape have increased manifold but in reality it is also due to the metamorphic change the society is undergoing, that of the new found willingness of the survivors to report the offence rather than being hapless victims like before. However in the face of this positive development, we cannot turn a blind

eye to the fact that the consequences of this monstrous act remain as devastating as ever, but may be the societal prism which shamed and blamed the survivor has changed angles. The women as a whole, cutting across status, class, culture, creed or sex are a vulnerable group but a minor child is most susceptible of the lot. The tender years of innocence where the children are taught to have faith in the goodness of humanity and nurturing relationships with trust fall apart when the same child becomes a prey in the hands of the lusty and unscrupulous men. It is also brought to light by the recent statistics that the rapists are strangers also but are more often than not people known to the family or in a position to trust with the survivor. The present case is a sordid story of both the factors at play where the minor girl was raped by her own uncle. The beastly act of ravishing a child for exerting his position of male dominance and violating her physical and mental well-being, is attitude of a savage tribe and not of a civilized society. To fathom the aftermath of the sentence of the happening of such tormenting act on the person is to add yet another monumental blow to her dignity. In most cases that this court comes across, the offender is the sole bread winner of his family with parents, wife and children etc. to take care of. The remorse that sets in after the realization of the dastard act committed by him is put on a

backburner and what is vociferated are the so call mitigating circumstances. The criminal who dared to indulge into such a venomous act now wants to walk way as he has to take care of his family and provide for them. The perturbing question that bedevils us is that was he unmindful of these ‘mitigating circumstances’ when he committed the act. The answer is an unfortunate affirmative which brings us to the core of the problem, the mindset of the common man that the law cannot touch him and nothing will happen. This notion of the law being feeble and the offender being actually punished being remote is what needs a tectonic shift. The criminal law amendment act, 2013 has given a new ray of hope to the women and teeth to the law and should act as a deterrent. The need for every person to know the legal ramifications of his vicious acts is important, especially that of rape. The most potent tool is to educate the public of the new law and create awareness about the rights of the victims and at the same time the severity of the punishment of the offence committed. The men folk need to be gender sensitized from the very beginning from school to colleges to treat women not as sex objects but as an equal human being. The emboldening of the law should act as a deterrent to the prevalence of flouting the law with impunity. This can only be done through mass awareness and the media has a big role to play

in this movement of great change in society. The print and television media, both public and private participants have to be partisans of this change. The government has to be the torchbearer to create the fear of law in the minds of the people that they have to think a million times before committing this immoral act. The common man should be daunted by the law and it can only come by ingraining in them the repercussions of their acts. Much has been achieved by the showing of the clipping in theatres of the harmful effects of tobacco and we suggest the same should be done to apprise the people of the new law relating to sexual offences. Such programs should be run on television and radio also. Everyone today has a mobile phone. Be it a rickshaw wala or a jhuggi dweller to the top-notch people in the society and, therefore, the people can be educated about these laws through SMSs as well.

33. Hence the appropriate Government Authorities are advised to consider our aforesaid suggestions and we earnestly hope that in the larger societal interest they will take effective steps in this direction or other steps as they find suitable to sensitize people and create awareness amongst them about the latest amendments and other laws dealing with the various sexual offences and the punishments provided for such offences. The Registrar General of this Court is directed to send copy of

this order to the Secretary, Ministry of Information and Broad Casting, Secretary, Ministry of Woman and Child Development and Lt. Governor of NCT of Delhi for necessary action at their end.

34. We are hopeful that once the people are aware of the law and its reach, the attitudes towards women will also change. The price that one pays for one moment of pleasure to assert ones masculinity and violating the woman's self respect is too great; a life behind bars. The opprobrium that was reserved for the fairer sex has now been reserved for these criminals. The social ostracisation, disgrace and the destitution of the family left behind and of himself should be the reason enough for not committing a crime. The shadow of this can darken the entire future of a person and his family and thus we urge the people to be more gender sensitized and the government and the society at large to take initiative to curb the menace.

35. Adverting back to the facts of the present case, primarily, before the sentence is imposed it is to be borne in mind that sentencing for any offence has a social goal, it has to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The purpose of punishment is to curb the crime and protect the society from the upheaval and turmoil which are consequence of such

offences. The end goal of sentence is not only deterrence but also correctional and reformative and the determination and awarding of adequate sentence should always be commensurate with the gravity of the offence.

36. The Penal Code also prescribes different punishments in cases of rape as per act done in different situations and depending upon the gravity of offence. Under Section 376 of IPC, except in cases provided for in sub-section (2), the punishment for the offence of rape is prescribed as punishment for either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, or for a term which may extend to ten years and shall also be liable for fine and for the offences which fall under sub-section 2, the minimum punishment prescribed is rigorous imprisonment not less than 10 years which may extend to imprisonment for life, and shall also be liable for fine. For better appreciation, section 376 IPC (pre-amended), is reproduced as under:-

“Whoever, except in the cases provided for by sub-section (1), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of

age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years”

(2) Whoever,--

(a) being a police officer commits rape-

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or takes advantage of his official position and commits rape or

(b) being a public servant, ta a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape,

shall be punished with 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,

Explanation 1.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.--"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children.

Explanation 3.--"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation."

36. It would thus be seen that the offence of 'rape' if falls under any of the clauses of sub-section 2 of Section 376 of IPC, it becomes more stringent as instead of seven years, the minimum prescribed sentence is rigorous imprisonment not less than ten years. There is thus a clear

demarcation of the category of cases which fall under sub-section 2 of Section 376 of IPC and those cases, which fall in the remainder. Under the unamended provision the although minimum sentence of imprisonment that can be awarded is 7 years under section 376(1) and 10 years, under Section 376(2) IPC, however even a lesser sentence can be passed, subject, to the condition that the Court has to record adequate and special reasons in the judgment. This proviso of Section 376(1) & (2) of IPC as the same existed earlier stands repealed after Criminal Law Amendment, Act of 2013. Although the rape of a victim in any form or in any manner deserves condemnation in strongest terms and deserves award of severe punishment, especially looking into the phenomenal increase in rape cases in the recent past, but so far as the awarding of sentence is concerned, the Statute itself has made a distinction.

37. Thus, even the legislative intent is also that only in the extreme cases of rape sentence to be imposed should be of imprisonment for life and consequently, in cases of less severity, the sentence has to be less severe. To choose whether the sentence shall be imprisonment for life or otherwise, is left on the judicial prudence of the judge. The Hon'ble Apex Court in plethora of judgments has enunciated principles which the Court shall consider while assessing as to what could be an appropriate sentence

especially in cases where rape is committed upon a minor child. In **State of Rajasthan v. Vinod Kumar** AIR 2012 SC 2301, the Hon'ble Apex Court while dealing with the issue held:

“The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence”.

38. In the matter of **Khem Chand vs. State of Delhi**, ILR (2008) Supp. (5) Delhi 92, the Hon'ble Division bench of this court laid down the following parameters for assessing the quantum of punishment in cases of rape upon a child:

- Criminal and the crime are both important for the purposes of sentence.
- Manner of commission of the crime being with meticulous planning or one on the spur of the moment;
- Violence, If any, accompanying the crime whether **injuries suffered were serious and required extensive** treatment or have caused any

permanent damage to the child bearing capacity or otherwise;

- Whether the offender or accused was in a position of fiduciary trust or exploited a social or family relationship;
- State of the victim, impact of the crime on the victim,
- The antecedents of the accused, his age, whether a first time offender or repeat offender, possibility of recidivism.
- Social backwardness or offender being a poor, illiterate labourer not found to be adequate reason by Courts.
- Passage of time since offence committed by itself considered inadequate reasons for reprieve.
- Rape victim's marriage or rehabilitation may be considered as a mitigating factor.

39. In yet another matter of *State of Himachal Pradesh vs. Gian Chand reported in AIR2001SC2075*, the Hon'ble Apex Court while dealing with a case involving a rape committed by a close relative on a minor, awarded the sentence of rigorous imprisonment for a period of ten years along with fine.

40. Further in the matter of *Dildar Singh Vs. State AIR 2006 SC 3084*, wherein a girl below sixteen years was raped by her teacher, the Hon'ble Supreme Court upheld the decision of High Court and awarded the sentence of seven years rigorous imprisonment.

41. In the light of the aforesaid legal position and considering the fact that in the case at hand the accused is a first time offender and is the sole bread earner in the family, has not committed any brutality, and also considering the fact that a new clause has been introduced to cover fiduciary relationship by Criminal Law Amendment Act, 2013 under Section 376(2) as clause (f), we are of the view that the interest of justice will be best served if the sentence of the life imprisonment as imposed upon the appellant by the learned trial court is reduced to the period of 10 years, while maintaining the judgment on conviction. Further the cases relied upon by the Ld. APP being *Shyam Narain vs. The State of NCT of Delhi (supra)* and *State of M.P vs. Santosh Kumar (supra)* are not applicable in the present case, as the conviction in them is under Section 376(2)(f) IPC and not under Section 376(1)IPC.

42. Accordingly, while upholding the judgment on conviction, the order of the learned trial court on sentence is modified to the extent of reducing the sentence imposed upon the appellant from imprisonment for

life to imprisonment for a period of 10 years together with fine as imposed upon the appellant. In addition, this Court directs that the State shall pay to the victim the sum of Rs.3,00,000/- as victim compensation in terms of Rule 3 & 5 read with Entry 2 to the Schedule to the Delhi Victims Compensation Scheme, 2011 (notified on 2-2- 2012) read with Section 357-A of the Criminal Procedure Code. The terms of the scheme entitle every rape victim to minimum compensation of Rs.2,00,000/- and a maximum compensation of Rs. 3,00,000/-. Having regard to the facts of the case and the tender age of the victim, the Government of NCT is directed to pay the said maximum amount of Rs. 3,00,000/- to the victim. 75% of the amount shall be deposited in a fixed deposit, for a period of three years in terms of Rule 7 of the Scheme, in a nationalized bank. Interest accruing on the said deposit shall be deposited in a separate account to be opened for the benefit of the minor victim for this purpose. The balance 25% shall be deposited directly in the said account. These directions shall be complied within six weeks. The Delhi Legal Services Authority, which is the designated body under the said Scheme, shall oversee the implementation of these directions. The State shall ensure that the victim is duly informed through her parents, within two weeks. The victim's parents or guardians and the concerned authority or official

of the Govt of NCT shall appear before the Delhi State Legal Services Authority, for this purpose, on 02.01.2014.

44. Order Dasti, to the parties as well as to the Home and Law Departments and the Commissioner of Police, Government of NCT of Delhi. The Registry is directed to comply with the directions in terms of paragraph 33 of the above judgment.

45. The appeal filed by the appellant is partly allowed to the extent indicated above.

45. A copy of this order be sent to the Jail Superintendent and the appellant be informed accordingly.

KAILASH GAMBHIR, J

INDERMEET KAUR, J

DECEMBER 11, 2013

pkb