

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

Judgment delivered on: March 12, 2014

+ CRL. A. 768/2010

LOKESH MISHRA Appellant
Through Mr. Ajay Verma, Advocate

versus

STATE OF 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 SUNITA GUPTA

JUDGMENT

KAILASH GAMBHIR, J.

1. The present appeal has been preferred by the Appellant under Section 374(2) of the Code of Criminal Procedure, 1973 (*hereinafter referred to as Cr.P.C*), challenging the impugned judgment and order on sentence dated 15.04.2010 and 29.04.2010 respectively passed by the Learned Trial Court, thereby convicting the appellant for committing the offence of rape under Section 376 of Indian Penal Code and sentencing him to undergo Life Imprisonment and also to pay fine of Rs. 5,000/- in default thereof to undergo simple imprisonment for a period of six

months u/s. 376 Indian Penal Code, 1860 (*hereinafter referred to as IPC*) and also sentenced him to undergo rigorous imprisonment for a period of two years for offence punishable under Section 506(1) IPC. Both the sentences are to run concurrently.

2. It is appalling to see that rape rears its ugly facade almost every day. 'Rape' is one such dark reality in the Indian Society that devastates a women's soul, shatters her self-respect and for a few, purges their hope to live. It shakes the insight of a woman who once was a 'happy person', and had no clue of being a victim of the said horrifying and nightmarish encounters where the daughter had been raped by none else but her own progenitor. A daughter always looks up to her father as a shield of her dignity and honour which is an intrinsic facet of a family especially of father-daughter relationship. It shocks human conscience when the sanctity of father and daughter relationship is ravaged in such a sordid manner and the protector becomes the violator. In such a case the offence assumes a greater degree of vulnerability which shall not go unpunished. There can never be a graver heinous crime than the father being charged of raping his daughter. It is the gravest sin, where the most platonic relationship is shattered by an extreme pervert and shameful act

of nonetheless but one's own father. The moral values of individuals of the society have gone down to such a level that every day we hear similar news which shudders our mind and soul. We have become accustomed to saying that females are not safe outside the house but in few cases, it is seen that they are not even safe inside their homes, where the epitome of God's beautiful creation, a child is ravished by her own father for his momentary sexual needs and pleasure which is heart-rending and odious.

3. The change would not merely come from increasing policing, giving harsher punishments etc. but the required change lies in upgrading the moral values inside all of us and imbibing an essential value that women are not an object of sexual gratification. This Court previously in *Beeru vs. State, Criminal Appeal No.1079/2010 held as under:*

"31. 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 furor 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 sentience 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 away 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.

32. 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."

4. These recommendations were reiterated in the recent judgment of this court in the case of *Ramher vs. State, Criminal Appeal No.846/2010*, the relevant paragraph is as follows:

*While committing an act as unsavoury as that of rape of his own minor child one not only forgets that it will destroy not only the life of the victim but his own life. The trauma attached as an aftermath of such acts not only victimises the immediate sufferer but also the offender. An act done in the moment of rage mutilates the whole family and every existing relation with the offender. The remorse that sets upon the offender subsequently cannot free the offender of the virulent act he committed. The question that perturbs us or rather desolates us by the recent alarming increase in number of rape cases how can an individual, even after the introduction of such stringent laws be ignorant of the consequences of his act. The moral obligation of repentance and self-condemnation seems to be diminishing in this era. It's high time when 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. Thus for the better implementation of these laws we feel that a joint endeavour is required to be made on the part of the society at large to create an awareness of the legal ramifications of their vicious acts. The most potent tool to create awareness 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. In this regard, we also gave directions in the matter of Beeru vs. State Criminal Appeal No.1079/2010. **While emphasizing and reiterating the same, we advise the appropriate Government Authorities, Non Governmental Organisations, Bar council of India, various State Bar Councils, Bar Assemblies, Delhi Legal Services Authority and law colleges and institutes to take effective steps in this direction 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.***

5. The germane of prosecution case is that on the night of 16/17 May 2008, victim/prosecutrix, a class 7th Student complained of being raped by her father. She was living with her two sisters, father i.e. accused and stepmother. It was after the death of her real mother about 3 years ago that her father solemnised the second marriage with one Babita. It was on the night of 16/17 May, 2008 that she went with her stepmother i.e. Babita to the police post and lodged a complaint that her father has been committing rape upon her for one year and threatened to kill her, in case, she reported the matter to the police. She stated that on 14.05.08 her father had given beatings to her mother, on which she left the house with her son. On the same night, her father raped her. After arrival of her mother after 2-3 days, the same was reported to the police by them.

6. The prosecution in total examined 12 witnesses to prove their case. PW-1 was the victim/prosecutrix. The statement of the accused was recorded under Section 313 Cr.P.C. and in answer to incriminating evidence set up against him he pleaded his innocence and false implication by his daughter as she had an illicit relationship and because he objected to the same, she cooked up a false story against him. In his defence the accused also adduced evidence by examining two other

witnesses namely his Brother and daughter younger to prosecutrix.

7. The Learned Counsel for the appellant fervidly argued that in the instant case the prosecutrix has deposed in a manner which cannot be considered to be reliable, since in each of her three different statements, she has made material contradictions. The Counsel laid special emphasis on the argument that Babita i.e. the step mother of the prosecutrix is the architect of the entire conspiracy as she had accompanied the prosecutrix during the complaint, MLC and even Court appearances. He further argued that Babita alongwith the prosecutrix visited the appellant in Jail to extort money from him, which is most unnatural and corroborates the defense version. Learned counsel for appellant also submitted that the non-examination of Babita, allegedly the originator of the entire conspiracy, is fatal and casts a shadow of doubt over the veracity of the entire prosecution case.

8. The Learned Counsel for appellant further submitted that during the preparation of the MLC, the vaginal swab of the prosecutrix was not taken and it is the case of the prosecution that on 14.05.08, the appellant had allegedly raped whereas she reported the matter to police on 16/17.05.08. The Ld. Counsel further cited Medical Jurisprudence to

argue that Semen can be detected in the vagina up to a period of 9 to even 14 days after intercourse has taken place. He also submitted that there is no medical evidence against the accused and the Ld. Trial Court Judge fell in error by overlooking this factor which exonerated the appellant from this alleged crime.

9. The Learned Counsel for the Appellant also submitted that the Ld. Trial Court Judge has wrongly stated that the ruptured hymen of the prosecutrix implicates the involvement of the appellant in this case. The Counsel further stated that the prosecutrix was having an affair with one Ramu and when the appellant objected regarding the same, the prosecutrix along with her step mother, hatched this conspiracy against the accused.

10. The Counsel for Appellant also submitted that the evidence of DW-1 and DW-2 were erroneously discarded and the evidence of Defence witnesses carries equal value as that of the prosecution evidence. Learned counsel further placed reliance on *State of Haryana v. Ram Singh*, (2002) 2 SCC 426 and *Dudh Nath Pandey v. State of U. P.*, (1981) 2 SCC 166 to substantiate his argument. The Counsel specifically relied upon the testimony of DW-2, the younger sister of the prosecutrix,

clarifying that there was neither a history of alleged rape nor sexual molestation of prosecutrix by the appellant, otherwise it would have come to the notice of DW-2.

11. It was also argued by the Counsel for the appellant that there are two possible views in the present case, one in favour of the accused and the other in favour of the prosecution and in such a case benefit of doubt must be given to the accused.

12. In support of his arguments, Counsel for the appellant relied upon the following judgments:

1. Rahim Beg V. State ; (1972) 3 SCC759

2. Bharwada Bhoginbhai Hirjibhai V. State of Gujarat; (1983) 3 SCC217

3. Murugesan V. State ; (2012) 10 SCC 383

13. Per contra, the Learned APP for State strongly contended that the present case shows the most heinous offence where a father committed rape upon her minor daughter. The Learned APP also pointed out from the record that the prosecutrix/victim was of 12/13 years of age, her date of birth being verified as 05.08.1996 (via Ex.PW6/A & B). He also submitted that she encountered the first incident of sexual assault by her father, when her real mother was alive and after her mother's death and

subsequent remarriage of her father/accused, the victimization of the prosecutrix at the hands of her father continued undeterred.

14. The Learned APP responding to the contention of Appellant categorically argued that the accused, whenever he found an opportunity, continued to rape the prosecutrix on several occasions, in the year preceding to the filing of the complaint on 17.05.2008. He further emphasised on the fact that the statement of the victim, first at the police post was recorded by SI Arvind Kumar (PW2), then by the Ld. Metropolitan Magistrate Ms. Geetanjali Goel under Section 164 Cr.PC (Ex.PW1/E), and lastly before the Hon'ble Trial court are all consistent in material particulars and unwavering as to the role of the accused.

15. The Learned APP further submitted that the accused has taken a flimsy ground that the prosecutrix was of promiscuous character, and was having an affair with one Raju and the brother in law of the accused Rakesh, which has also been asserted by the brother of the accused Brij Nandan (DW1) in his statement in the Trial Court. The Learned APP forcefully submitted that, the onus of proving such assertions with regard to the character of the prosecutrix were on the defense, they have neither called nor identified any of the said persons, with whom the prosecutrix

was alleged to be in relationship, nor brought forward any conclusive evidence that the prosecutrix was accessible to any other person outside her house. Therefore, it was his argument that such assertions are mere allegations, not proved by any evidence. He also argued that the other defense witness relied upon by the Appellant was the younger daughter of the accused and sister of the Victim, Dolly (DW-2), who also stated that the prosecutrix was of a promiscuous character, and that she was not told anything about the said incident by the prosecutrix and he pointed out to the Trial Court that he has also reasoned that DW-2 was too young at the time of the incident and as such the prosecutrix conduct of not telling her of the incidents of rape was not abnormal, and therefore, her deposition was held to be of no consequence to weaken the prosecution's case.

16. The Learned APP referring to the allegation made by the defense that the second wife or the step mother of the prosecutrix i.e. Babita, acted in connivance with the prosecutrix, as she wanted to extort money from the accused, submitted that there is nothing on record to suggest that any such demand was made to the accused, other than the mere assertion by the accused, and the fact that she had gone to visit the accused in jail. He also pointed out that despite Court summons, she neither appeared

before the court, nor is her whereabouts known, which seems contrary to the conduct of a person, trying to extort money by falsely implicating another, in which case the person will stay in contact to exert pressure on the accused. He further argued that this ground of the defense stands on whimsical presumption as there can be hardly a case where a step mother will wrongly side with her step daughter to falsely implicate her husband in such a serious and deplorable case of incestuous rape of his own daughter and malign her family and husband's reputation.

17. The Learned APP turning to the MLC Report of the prosecutrix (Ex. PW9/A) submitted that report shows that the hymen was found ruptured which suggested that possibility of rape could not be ruled out, even though no injury marks were found on the prosecutrix or the accused (via Ex.PW10/A). The Learned APP submitted that the Trial Court has discussed the matter at length citing judgments with regard to absence of any injury marks on the person of either the prosecutrix or the accused, as also the absence of the collection of any vaginal swab and came to a conclusion that mere absence of injury cannot rule out the possibility of rape, neither can the absence of semen or even the presence of it, is necessary to constitute the offence of rape. He also submitted that

the statement of the prosecutrix being consistent in its narrative on all three occasions itself suggests the victimization of the prosecutrix to the act of rape and unless the defense could substantially show discrepancies in the prosecution's version of events or the prosecutrix statement, the case of prosecution cannot be dissolved merely because of the non-conclusiveness of medical evidence. It was fervently argued by the Learned APP that, as the defense was unable to prove any substantial discrepancy or even adduce any other evidence highlighting some other facts which may be presumed from the given facts and circumstances, the case of the prosecution stands on a firm footing, and the same was also concluded by the Hon'ble Trial Court in their favour.

18. We have heard learned counsel for the parties at considerable length and given our thoughtful consideration to the arguments advanced by them. We have also perused Trial Court record and the written submissions filed by both the counsels.

19. "Above all, be the heroine of your life, not the victim."
—Nora Ephron. A very beautiful quote by the American Novelist exemplifying the status of a woman in the society. Beautiful creation of God, A woman who plays an array of roles in one's life, she is a

daughter, a wife, a mother , above all a human just like any other, deserves to be respected, adored and valued. It is said and we believe that a girl child is more close to his father and nothing can subside the relationship shared between a daughter and a father. Researches show that a girl's father is one of the most influential people in her life, from infant to toddler to tween to teen. A father's influence in his daughter's life shapes her self-esteem, self-image, confidence and opinions of men. But behind the scenes as they say lies a harsh reality which has become a common practise in a few houses and is majorly noticed in lower stratum of the society, a father raping his own daughter, shattering her faith, desolating her self esteem, her beliefs and making her life a curse. A father who shares an equal responsibility of bringing her to life, kills her insight at the very instance of a few minutes pleasure, and a little girl left with no option surrenders. There cannot be a bigger sin than the sin of raping or molesting one's own daughter. It is beyond imagination that how any father can stoop down to a level of satisfying his sexual lust with his own daughter? The father is considered to be the protector, fortress and refuge of his daughter and is looked upon by the daughter for protection from any kind of onslaughts taking place in the

outside world. No doubt that the offence of rape is grave by its very nature but it is more horrendous and despicable when the perpetrator of the crime is none-else but her own father ravishing the chastity of his own daughter.

20. The appellant herein is the father of three daughters. He had first married one Ms. Poonam and the three daughters were born out of this wed-lock. The first wife of the appellant had died a natural death and thereafter, he had married another lady with the name Babita. One male child was also born out of the said second marriage. As per the prosecutrix, her father even tried to rape her even when her biological mother Poonam was alive. Further she stated that for the last time she was raped by the appellant on the night of 14.5.2008. He did not repeat the said act for two days when the prosecutrix clearly told him that if he would repeat it, she would report the matter to the police. On 17th May, 2008, she lodged a report with the police when she was also accompanied by her stepmother. Her statement was reduced into writing by the Sub-Inspector Arvind Kumar and thereafter, she was sent to the hospital for the medical examination. In her medical examination the doctor found her hymen ruptured with no injury marks found anywhere on her person.

The MLC also records the history of patient being sexually assaulted by her father since past one year and have had sexual intercourse 4-5 times, last on 14.5.2008. Based on her statement and the MLC, case under Section 376/ 506 IPC was registered by the police against the appellant. Further investigation of the case was entrusted to SI Saroj Bala. She went to the house of the appellant at Gujjar Diary with the prosecutrix and seized the bed sheet on which the accused had committed rape. She also got the statement of prosecutrix recorded under Section 164 Cr.P.C. before the Magistrate. She also apprehended the accused and then took him to AIIMS for his medical examination, his underwear was also seized and his blood in gauge was also collected. As per the report of the FSL, human blood group B was deducted on the gauge cloth piece and human semen was detected on the bed sheet and underwear.

21. In any case of rape, the evidence of the prosecutrix is of utmost importance. As per the settled legal position the conviction of perpetrator of the crime can be based even on uncorroborated testimony of the prosecutrix. The prime reason for attaching such an importance to the testimony of the prosecutrix is that a girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant to

falsely implicate or even to admit any incident, which is likely to reflect on her chastity or to put at risk her own image, dignity and prestige in the society. Let us, therefore, first reproduce the testimony of the prosecutrix before we deal with the contentions raised by the counsel for the parties. The testimony of the prosecutrix as recorded in her examination-in-chief which was recorded in camera, is reproduced as under:-

"Earlier I was residing at Gujjar Dairy, Gautam Nagar, house number I do not remember, at second floor alongwith, my mother Babita, my father Lokesh Mishra and my both younger sister namely Dolly and Babli and my younger brother Piyush. Babita is my second mother. My actual mother Poonam had died about three years ago and marriage of my father with Babita is second marriage. Only my brother Piyush had born from Babita and we all sisters were born from our first mother Poonam.

In the lifetime of my mother Poonam we were residing at Vasant Kunj and one day my father Lokesh Mishra had called me in bathroom on the pretext of rubbing his back and tried to commit rape upon me. My mother and my father had raised a quarrel due to the act of accused. My mother then sent me to the village of my grandfather for about 8 months. Thereafter my father brought me to Delhi on the promise that he will not do any wrong act with me. After the death of my mother Poonam my father had married with Babita and we started residing at Gautam Nagar. After two months of marriage with Babita my father had sent my mother Babita outside the house to get repair the pant and in her absence accused (my father Lokesh Mishra) had committed rape. Once accused sent my mother Babita to Dehradun for the mundane of my brother Piyush and at that time he also committed rape upon me. On the next day when my mother Babita came back at our house, I told the incident to my mother. My mother asked me to lodge a complaint against my father but as my father had threatened me not to disclose to anyone and due to fear what will be the future of my other sisters I did not lodge the report. My father used to send my mother Babita in my relative house on one pretext or the other and in her absence he used to commit rape upon me. When we were

residing at Gujjar Dairy accused had also committed rape upon me and due to the behaviour of accused my mother had gone to somewhere for three days after quarrelling with the accused. Before 3 days of 17.5.08 my mother had gone outside the house without disclosing. In the night accused committed rape upon me. I told to my father that I will do something then my father asked me not to do anything. He further told me that in my absence where my younger sister will go. In the morning my father had gone to search my mother Babita and when we came back in the evening I closed the room from inside and did not open it. On the third day my mother came back to our house. My father took me, my sister and my brother to Green Park and left there. In the evening my mother came there and took me to police station where my statement Ex.PW1/A was recorded it bears my signature at Point A. Police officials took me to some hospital where I was medically examined. Police also visited with me at our house and from there one bed sheet was seized by the police vide memo Ex.PW-1/B it bears my signature at point A. the police officials arrested the accused. I have seen memo Ex.PW1/C and Ex.PW1/D it bears my signature at point. My statement u/s 164 Cr. P.C. was also got recovered.

At this stage a sealed envelope with the seal of the court is opened and proceedings u/s 164 Cr. P.C. were taken out from it. I have seen my statement Ex. PW1/E, it bears my signature at point A on each paper.

Accused is present in the court today. Witnesses identified correctly.

Further examination in chief deferred for want of case property."

22. The prosecutrix was below 12 years of age at the time of incident as per her date of birth recorded in the school records, which is 5.8.96. The said testimony of PW-1 was found to be consistent with her previous two statements i.e. one recorded at the police station and the second by the learned MM, Ms. Geetanjali Goel. The learned Trial Court also took a view that no daughter would like to implicate her father in such an

immoral act unless she was subjected to same. Learned Trial Court also held that earlier the prosecutrix kept mum when she was sexually assaulted once or twice but when the accused had beyond control, lost all suavity and moral values, it was then that she was left with no option but to report the matter to the police. Learned Trial Court found the medical evidence as corroborative piece of evidence to support the version of the prosecutrix as during her medical examination her hymen was found ruptured. Learned Trial Court also referred to the evidence of PW9 Senior Resident Gynaecologist AIIMS who in his deposition stated that on the basis of the examination of the prosecutrix the possibility of rape cannot be ruled out. Learned Trial Court also found the FSL report as another piece of corroborative evidence as human semen was found on the bed sheet Exhibit P1/B and on his underwear Exhibit PW-5/A. The learned Trial Court disbelieved the defence raised by the accused that he was falsely implicated in the case by his daughter because of her alleged illicit relationship with Ramu and Rakesh, which were being objected to by him, his relatives and neighbours. Learned Trial Court also did not believe the defence evidence adduced through DW1, brother of the accused and DW2 real sister of the prosecutrix and daughter of the

accused. Learned Trial Court also discarded the extortion theory of defence as no satisfactory answer came forth from the defence as to why Babita, second wife of the accused would extort money from him.

23. Most of the contentions, which have been raised by the counsel for the appellant to assail the finding of the learned Trial Judge, have already been convincingly dealt with by the learned Trial Judge. We find ourselves in complete agreement with the reasoning given by him on these contentions. Nevertheless let us again examine as to whether there is any merit in the contentions raised by the counsel for the appellant which can upset the reasoning given by the learned Trial Court.

24. Considering the first contention raised by counsel for the appellant that Babita had visited the appellant in jail to extort money from him and even the prosecutrix herself had visited the appellant in jail, which is dubbed as most unnatural conduct of the prosecutrix and such conduct corroborates the defence version of extortion of money by Babita. We fail to comprehend as to how the visit paid by Babita in jail to meet her husband could give any impression that she wanted to extort money from the appellant. So far as the visit of the prosecutrix in jail is concerned, she in her cross-examination categorically stated that she was so instigated by

her mother to accompany her to jail to meet her father. She in her cross-examination also deposed that her mother had spoken to her father but she could not listen to their talks and nor she indulged into any kind of talk with her father. It is also an undeniable fact that no evidence has been led by the defence to prove raising of any demand by Babita at any point of time i.e. right from the date of the registration of the said case till the recording of the evidence of the prosecutrix. Learned Trial Court also discarded such allegation of the defence and observed that it is an admitted case that Babita is the mother of the male child from the accused and the said male child was living with the accused and, therefore, there was nothing wrong, if Babita had paid a visit to the accused in jail and her visit to jail could not lead to an inference that she wanted to extort money from him.

25. The next contention raised by counsel for the appellant was that DW2, who is the real sister of the prosecutrix had categorically denied in her evidence that any such incident, as complained by the prosecutrix, had taken place between her sister and the father. This contention raised by the counsel for the appellant is also devoid of any merit. Indisputably, the prosecutrix was below 12 years of age on the date of commission of

the last act of rape committed by the appellant. The prosecutrix also complained that the appellant had tried to commit such acts even during the life time of his first wife, who had died about three years ago from the date of her deposition in Court. DW2 was 5 years younger to the prosecutrix, which would mean she was of 7 years of age as on the date of last act of rape, therefore, the prosecutrix not having shared such obnoxious conduct of her father with the sister is not unusual, looking at her tender age, therefore, the deposition of DW2 saying that she did not know anything regarding the incident which had taken place between her father and sister cannot create any dent in the prosecutrix version, which remained consistent and unflinching throughout .

26. The next contention raised by the counsel for the appellant was that the learned Trial Court Judge has wrongly taken the inference of the presence of semen on the bed sheet recovered from the house of the appellant . Counsel for the appellant also placed reliance on the judgment of the Supreme Court in *Rahim Begh V. State reported in 1972 (3) SCC 759* to support his argument that mere presence of seminal stains on the langot of the accused does not necessarily connect the accused with the offence of rape. There can be no dispute on the said proposition that mere

presence of seminal stains on the langot of the accused or on the clothes of the victim of rape undoubtedly has a relevance when considered with the other corroborative material, but certainly the presence of such seminal stains on the clothes of accused or on the clothes of victim of rape, can exist because of a variety of reasons and would not necessarily connect him with the offence of rape. On the night when the said act of rape was committed by the appellant, his wife was not available in the house. In fact, he took advantage of the situation and committed such an aberrant act of committing rape on his daughter. The bed sheet was recovered immediately within a period of three days and, therefore, it is quite natural that the said bed sheet, which was spread on the bed on the date of commission of the act of rape, is certainly corroborative piece of evidence to support the irrefutable version of the prosecutrix. No explanation otherwise has come forth from the accused as to how there were semen stains on the bed sheet more particularly when in the intervening period the wife of the appellant was not present at the matrimonial house.

27. The next contention raised by the counsel for the appellant was that the entire case of the prosecution is based on the sole testimony of the

prosecutrix who was under pressure from her step mother Babita to depose against the appellant and there is even not a single piece of evidence to corroborate the prosecution story. It is a settled legal position that conviction of the accused in a rape case can be based on the sole uncorroborated testimony of the prosecutrix and refusal to act on the testimony of victim of sexual assault in the absence of corroboration as a rule would amount to adding insult to injury. In the case of ***Bharwada Bhoginbhai Hirjibhai V. State of Gujarat*** reported in AIR 1983 SC 753 dealing with the uncorroborated testimony of a victim of sexual assault, the Apex Court held as under:-

9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opiated, eye in the light of probabilities with our feet firmly. planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society, and its profile. The identities of the two worlds are

different. The solution of problems cannot therefore be identical. It is conceivable in the Western Society that a female may level false accusation as regards sexual molestation against a male for several reasons such as :

(1) The female may be a 'gold digger' and may well have an economic motive to extract money by holding out the gun of prosecution or public exposure.

(2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.

(3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win sympathy of others.

(8) She may do so upon being repulsed.

10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :(1) 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. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the

Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

11. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. 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 a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the Western World, Obeisance to which has perhaps become a habit presumably on account of the colonial hangover. We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the probabilities-factor' does not render it unworthy of credence, as a general rule, there is no

reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification : Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities-factor' is found to be out of tune.

28. In the case of ***Rafiq vs State of U.P. reported in AIR 1981 SC 96***

the Apex Court held as under:-

5. We do not agree. For one thing, Pratap Misra's case (supra) laid down no inflexible axiom of law on either point. The facts and circumstances often vary from case to case, the crime situation and the myriad psychic factors, social conditions and people's life-styles may fluctuate, and so, rules of prudence relevant in one fact-situation may be inept in another. We cannot accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life-styles and behavioral complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggrieved.

6. There are several "sacred cows" of the criminal law in Indo-Anglian jurisprudence which are superstitious survivals and need to be re-examined. When rapists are revelling in their promiscuous pursuits and half of humankind-womankind-is protesting against its hapless lot, when no woman of honour will accuse another of rape since she sacrifices thereby what is dearest to her, we cannot cling to a fossil formula and insist on corroborative testimony, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. In this case, the testimony has commanded acceptance from two courts. When a woman is

ravished what is inflicted is not merely physical injury, but "the deep sense of some deathless shame".

A rape! a rape!...

Yes, you have ravish'd justice;

Forced her to do your pleasure.

7. Hardly a sensitized judge who sees the conspectus of circumstances in its totality and rejects the testimony of a rape victim unless there are very strong circumstances militating against its veracity. None we see in his case, and confirmation of the conviction by the courts below must, therefore, be a matter of course. Judicial response to human rights cannot be blunted by legal bigotry.

29. In the case of ***State of Punjab vs Gurmeet Singh reported in 1996 Crl.L.J. 1996 Crl. L.J. 172***, the Apex Court took a view that the Courts dealing with the rape cases shoulder a greater responsibility and they must deal with such cases with utmost sincerity. Relevant para of the said judgment is reproduced as under:-

.....It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of

the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

30. In the light of the aforesaid legal position, we find no force in the contention raised by the counsel for the appellant that the conviction of the accused cannot be based on the uncorroborated testimony of the victim of a rape. The litmus test is that uncorroborated testimony must inspire confidence of the Court and should appear to be natural and truthful and the same should be free from any kind of suspicion or doubts.

31. The next contention raised by counsel for the appellant was that during the preparation of the MLC the vaginal swab was not taken by the prosecution and the learned trial judge has erroneously ruled that this point is immaterial. Learned counsel for the appellant also placed reliance on the guidelines laid down in ***Modi's Medical Jurisprudence and Toxicology***, 23rd Edition, where in it has been stated that semen can be detected in the vagina upto period of 9 to 14 days after intercourse has taken place. Learned counsel for the appellant further argued that learned trial court has ignored this very vital factor as the absence of such

evidence completely exonerates the appellant from the alleged crime.

32. Dealing with this aspect of the argument, the learned trial court took a view that the incident in question took place on 14th May 2008 and the matter was reported on 17th May 2008 and by that time, semen if any might have been washed out from the vagina. The trial court further held that the seminal emission is not necessary to establish rape, but what is necessary is that there must be penetration. Learned trial court further referred to the MLC of the accused proved on record as Ex.PW-10/A, which nowhere suggested that he was incapable of performing sexual intercourse in the normal course. Learned trial court also referred to relevant extract of Modi's Jurisprudence and Toxicology (21st Edition), also the textbook of Medical Jurisprudence, Forensic Medicine and Toxicology by Parikh's, wherein it has been opined that to constitute an offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda, with or without emission of semen, or even an attempt at penetration is quite sufficient for the purpose of the law. We are not in disagreement with the reasoning given by the learned trial court although we do feel

that there is a lapse on the part of the doctor of AIIMS in not collecting the vaginal swab. Perhaps, the doctor felt the collection of vaginal swab of the victim would be of not much help as there was a gap of three days between the medical examination and the rape committed by her father. The said doctor of AIIMS on local examination of the victim found her hymen as ruptured. The said MLC of the victim was proved on record in the evidence of PW-9 (Dr. Arvind Vaid, Senior Gynea AIIMS and in his examination-in-chief, he was categorical in deposing that on the basis of examination of the victim, possibility of rape could not be ruled out. This witness was not cross-examined by the defence on the said aspect of non collection of vaginal swab of the victims to seek any reasons for the same. PW-9 would have been the best person being a medical expert to give an answer for non collection of the vaginal swab of the victim by Dr. Shikha Sarangi, who had medially examined the victim on 17th May 2008.

33. The Counsel has placed reliance upon ***Modi's Medical Jurisprudence and Toxicology, 23rd Edition***, the relevant extract of the same is reproduced below :

The presence of spermatozoa in the vagina after intercourse has been reported by Pollak (1943) from 30 minutes to 17 days and by Morrison (1972) upto 9 days in the vagina and

12 days in the cervix. However, in the vagina of a dead woman, they persist for a longer period.

34. It becomes pertinent to mention that in ***Modi's Medical Jurisprudence and Toxicology, 24th Edition, Reprint 2012*** the said extract quoted above has been omitted/deleted from its place. Therefore, the reliance placed by the counsel loses its force, especially to substantiate the argument on non-collection of vaginal swab.

35. Be that as it may, in Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology, 6th Edition, the extracts of which have been placed on record by counsel for the appellant, the same clearly states that normally sperms remain motile in the vagina for about 6-8 hours and occasionally 12 hours. It further states that non-motile forms are detectable for about 24 hours with occasional reports of 48 to 72 and very rarely 96 hours. Relevant extract of the same is reproduced as under:-

Presence of spermatozoa and other microorganisms:

Normally, sperms remain motile in the vagina for about six to eight hours and occasionally 12 hours. Non-motile forms are detectable for about 24 hours with occasional reports of 48 to 72 and very rarely 96 hours. Motility persists longer at body temperature. The sperms remain motile in the uterine cavity for 3-5 days. Nonmotile forms may be found in the female genital tract for weeks or months after death. To demonstrate the presence of sperms, the vaginal contents are aspirated by means of a blunt-ended pipette. A wet

preparation is then made on a slide and examined under a microscope for motile spermatozoa. If motile sperms are seen, it would mean that intercourse has taken place within about 12 hours. If the sperms are not motile, it is not possible to say exactly when intercourse took place except that it may be over 12 hours and within about 24 to 48 and occasionally upto 72 hours. Intact spermatozoa are rarely found in the vagina after 72 hours after coitus. In such a case, sperm heads and tails can be separately demonstrated by using picroindigocarmine which stains sperm heads red and the tails green and red. A smear is also made from the vaginal contents, fixed by gentle heat, and stained by Ziehl-Neelson's method, and examined for the presence of spermatozoa and smegma bacilli.

The absence of sperms in the vagina does not mean that sexual intercourse has not taken place. It may be due to non-emission, aspermia, previous vasectomy, very old age, or poor technique by the examining doctor. Detection of seminal fluid from vasectomised males requires the demonstration of prostatic acid phosphatase which should be qualitatively distinguished from vaginal acid phosphatase by electrophoresis. Quantitatively, the normal level of acid phosphatase in the vagina is 340 international units (IU) per litre. It rises to about 3000 IU in about 2 to 3 hours after intercourse and gradually returns to normal in about 12 to 24 hours. Any level higher than 340 IU indicates seminal fluid.

As a result of the discovery of semen specific glycoprotein (P30), acid phosphatase test is used only as a screening test. P30 is present in both normal and aspermic semen. Graves et al found that in some instances P30 test was positive when acid phosphatase test was negative. P30 is detectable in vaginal fluid for a mean period of 27 hours after intercourse as compared to 14 hours for acid phosphatase. If semen is identified, determining of genetic markers, if need be, can be done by enzyme studies and DNA typing. \ Swabbing of mouth, vagina, and anus for sperm detection should always be performed on rape victims.

The presence of smegma bacilli is suggestive of coitus. Its absence is without any significance. Smegma bacillus is seen as an acid fast rod shaped organism thicker than the tubercle bacillus."

36. With the said medical opinion, which categorically states that

spermatozoa are rarely found in the vagina after 72 hours after coitus, the non collection of the vaginal swab of the victim by the doctor will not prove fatal to the case of the prosecution particularly in the background that the testimony of the prosecutrix herself remains coherent, spontaneous, cogent and clinching to inspire confidence of the court.

37. In ***Wahid Khan vs. State of M.P.*** reported in (2010) 2 SCC 9, the Supreme Court reiterated the consistent view that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. The Hon'ble Supreme Court made reference to the opinion expressed by Dr. Modi in his Medical Jurisprudence and Toxicology (22nd Edition) at page 495 as well as to Dr. Parikh's Textbook of Medical Jurisprudence and Toxicology. Dr. Parikh defined the term "sexual intercourse" as under :

"In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains." For the aforesaid reason, we are not in agreement with the learned counsel for the defence that the testimony of the prosecutrix with the aid of the medical evidence, does not disclose an offence of rape. Even assuming that theory of use of condom is afterthought, absence of semen in the vaginal swab is not the evidence of absence of sexual intercourse. Absence of seminal stains on the clothes, vaginal swabs etc. merely indicates that there was no 37 appeal-485-06-i discharge nevertheless, it is not evidence of absence of rape. This is

what precisely Dr. Mody in his Medical Jurisprudence and Toxicology(22nd Edition) at page 495 clarified. "Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda, with or without emission of semen, or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains."

38. It is a settled legal position that the medical evidence is also a corroborative piece of evidence but where the medical evidence does not support the otherwise clinching and trustworthy ocular evidence of any material witness then, the testimony of such ocular evidence will prevail on the medical opinion and not vice versa. In the case of ***Ranjit Hazarika v. State of Assam***, reported in (1998) 8 SCC 635, the opinion of the doctor was that no rape appeared to have committed because of the absence of rupture of hymen and injuries on the private part of the prosecutrix, the Apex Court took a view that the medical opinion cannot throw over board an otherwise cogent and trustworthy evidence of the prosecutrix. Relevant paragraph of the said judgment is reproduced as under:-

6. *The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of*

corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated. In State of Punjab v. Gurmit Singh [(1996) 2 SCC 384 : 1996 SCC (Cri) 316 : (1996) 1 Scale 309] to which one of us (Anand, J.) was a party, while dealing with this aspect observed: (SCC pp. 395-96, para 8)

"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is

not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

We are in agreement with the aforesaid view.

39. The apex court in ***B.C. Deva v. State of Karnataka***, reported at (2007) 12 SCC 122, inspite of the fact that no injuries were found on the person of the prosecutrix, yet finding her version to be reliable and trustworthy, the Apex Court upheld the conviction of the accused. The Court observed that :

"18. The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted."

40. In the facts of the present case also, what we find is that the appellant did not succeed to create any dent in the testimony of the

prosecutrix which remained cogent and trustworthy and therefore, the non collection of vaginal swab by the doctor, AIIMS would have no effect to disbelieve the otherwise inspiring evidence of the prosecution. The said contention raised by learned counsel for the appellant thus lacks any force. However, before parting with this contention, we would like to express our angst that despite repetitive guidelines being laid in various committee reports and various judgments of the Hon'ble Supreme Court's, they are not being adhered to in its strict spirits. The guidelines have been comprehensively drafted even by the department of Health Research. These guidelines clearly lay the entire process that should be followed while dealing with the victim of sexual assault starting from the very instance of police investigating the crime, recording of the history of crime by the doctor as its first prerequisite to how the doctors should examine the victim. The guidelines very aptly deal with each and every aspect of medical care to be given to such victims. The DHR has also drafted a new manual to address the psycho-social impact of sexual violence including counselling that the victims should receive to alleviate her woes. The women being the most vulnerable in such a situation, a doctor at this point in time can act as a huge support, as per the guidelines

doctors should record the history of alleged assault, examine the victim physically and even treat and counsel the victim psychologically, but 90% of the practise is seen to be completely contrary, wherein the doctors do their job for the heck of it, to finish it off with all the recklessness and disinterest and the same is quite apparent by the way the MLC's are prepared in almost every case of such nature. Therefore, when such a casual and cavalier approach is adopted by the doctors or the hospitals in treating the victims of alleged sexual assault, these doctors or hospitals should be dealt with the heavy hand and should entail serious consequences upon them, if they fail to follow the prescribed guidelines in good faith. These guidelines or measures have not just exploded out of the blue but have been brought forth over the years, after proper research and study but they are being flouted and there is a serious gap between their implementation and the force behind them. Medical evidence especially in the cases of rape does play a very pivotal role. The survivors of rape in India are humiliated and discriminated. They could not face it in their own homes, police stations and then in the hospitals where they undergo invasive medical tests that often end up doing little beyond harming their case later in the legal process.

41. If the victim of rape is warily examined in terms of the guidelines already laid down and reiterated time and again in various authorities by the Hon'ble Supreme Court, by the division bench of this court in one such case being, ***Virender V. State, Crl A 121 of 2008*** and most recently in the guidelines issued by the Union Health Ministry, quicker, easy and justified resort to these cases could be attained. Due to these factors, the MLC of the victim would resultantly be of major help and would hold an unvaried importance to establish the case of the prosecution and would be a strong corroborative piece of evidence to inculcate the accused of such a horrendous crime. As seen in the facts of the present case, had the doctor not ignored his duties and implemented the required measures without any doubts or speculations, indeed would have added advantage to the testimony of the prosecutrix. We should not forget that if a girl is raped, a part of our society is let down, deprecated and insulted and it is not always pre-planned, that who would be next, it can be anyone amongst us who can at any point in time face such drastic and terrible reality prevalent in our society. Therefore, we would again like to emphasise that stern action be taken without any delay or if's and but's in such cases, be it by the police or the doctors in various hospitals or at the

time of trial. Let the policies and the guidelines be implemented with immediate effect to suffice the need of the hour and make our home, our nation a better place.

42. Coming back to the case at hand, the next contention of learned counsel for the appellant was that the prosecutrix was having an affair with one Ramu which was objected to by the appellant and as a result the prosecutrix alongwith her step mother hatched this conspiracy to falsely implicate the appellant in a rape case. Learned counsel for the appellant also argued that rupture of hymen of prosecutrix could be the result of having relationship with said Ramu. Undoubtedly, in the statement recorded under Section 313 of Cr. P.C., the accused had raised a defence of the prosecutrix having relationship with Ramu and Rakesh and his false implication because of such relationship being objected by him, his relatives and neighbors. In the cross-examination of PW-1 also, the suggestion was given by the defence to prosecutrix that Ramu used to come to meet her and the accused used to object his coming and used to beat her for this. Surprisingly, it is not known who this Ramu was and who was the man with the name of Rakesh, nothing was proved on record from the side of the defence. Even DW-1 and DW-2 also remained

evasive about such Ramu with whom the prosecutrix was alleged to have illicit relationship. DW-1 who is the real brother of the accused, went to the extent of calling the prosecutrix a girl of loose character. The learned trial court has disbelieved the said defence raised by the accused and also the testimonies of DW-1 and DW-2. We also cannot be oblivious of the fact that the prosecutrix complained her sexual assault by the accused when his first wife was alive which would mean – there was a gap of about three years between the first sexual act and the last act of rape committed by the father. The prosecutrix was below 12 years as on the date of last incident and therefore, she must be of nine years of age when she was sexually assaulted for the first time by her father. To say that she was having some kind of illicit relationship with some person named Ramu at the age of 9 years is totally unfathomable. Who this Ramu was and where was he residing, how the prosecutrix or the family of the accused knew him and how could have he accessed in the house of the accused, nothing has been brought on record by the defence to believe the alleged illicit relationship of the prosecutrix with some Ramu. Similarly, introduction of some Rakesh also finds no legs in the entire defence evidence.

43. The next contention raised by learned counsel for the appellant was that the defence witness also carries equal value to that of the prosecution but the learned trial judge has discarded the testimony of DW-1 and DW-2 without giving any valid reasons. The argument raised by learned counsel for the appellant is worth outright rejection although on legal principle, there cannot be any dispute. DW-1 and DW-2 failed to discredit or shatter the case of the prosecution. We also cannot lose sight of the fact that DW-1 is real brother of the accused who is an interested witness whose prime interest was to save his brother. He went to the extent of demeaning his own niece by deposing her as a girl of loose character without there being any evidence to substantiate the same. DW-2 is the sister of the prosecutrix, who did not say much in her evidence except denying her knowledge about the incident in question which had taken place between her sister and her father. As already stated above, there was a gap of three years between the DW-2 and the prosecutrix and therefore the prosecutrix must not have shared the said treacherous acts of her father with her sister.

44. The other argument raised by learned counsel for the appellant was that the learned trial court had erred by ignoring the certain principles of

criminal jurisprudence that when there are two theories and one is in favour of the accused and the other in favour of the prosecution, then the benefit of doubt should be given to the accused especially in a case based on circumstantial evidence. There cannot be any legal dispute with the said proposition of law but the precise question would be whether the defence succeeded in probalising the other possible view in the present case or not.

45. The Apex Court in *Harijana Thirupala and Ors. Vs. Public Prosecutor, High Court of A.P., Hyderabad* reported in (2002) 6 SCC 470 held as follows :

11. In our administration of criminal justice an accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing the evidence to show him to be guilty of the offence with which he is charged. Further if two views are possible on the evidence produced in the case, one indicating to the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted. In cases where the court entertains reasonable doubt regarding the guilt of the accused the benefit of such doubt should go in favour of the accused. At the same time, the court must not reject the evidence of the prosecution taking it as false, untrustworthy or unreliable on fanciful grounds or on the basis of conjectures and surmises. The case of the prosecution must be judged as a whole having regard to the totality of the evidence. In appreciating the evidence the approach of the court must be integrated not truncated or isolated. In other words, the impact of evidence in totality on the prosecution case or innocence of accused has to be kept in mind in coming the conclusion as to the guilt or otherwise of the

accused. In reaching a conclusion about the guilt of the accused, the court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses. It must be added that ultimately and finally the decision in every case depends upon the facts of each case.

46. It needs no reiteration to say that in the present case the evidence of the prosecutrix remained consistent, reliable and trustworthy and defence did not succeed to create any doubt or suspicion on her testimony and in fact, the accused has created the entire false story at the cost of further attacking his daughter's chastity and honour by alleging her illicit relationship with Ramu and Rakesh. Therefore, inasmuch as the finding of the learned trial court is concerned, we find no infirmity in the reasoning given by the learned trial court in holding the accused guilty of offence of rape punishable under Section 376 IPC.

47. Now coming to the point of sentence, 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.

48. 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 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 subsection (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:

1. 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, to 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:

1. 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.

49. 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.

50. 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."

51. 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."*

52. In yet another matter of State of ***Himachal Pradesh vs. Gian Chand reported in AIR 2001 SC 2075***, 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.

53. 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.

54. In the light of the aforesaid legal position and also considering that in the case at hand the accused is a father to three daughters and one son, we are of the view that his sentence can be altered. These

unfortunate daughters were already deprived of their mother late Mrs. Poonam at the time when they required her the most for their proper and healthy growth but the destiny gave another blow to these children when their own father did not spare his elder daughter and ravished her body and soul to satisfy his lust for sex. If we look at the heinous, barbaric and sinful crime which the appellant had committed with his own daughter, undoubtedly, he deserves severest of punishment but the court has to examine the facts of the case in all equanimity, it cannot be confuted that the imposition of punishment would be decided on the basis of entire factual matrix, the court has to draw a line to segregate the severity of the offence, the law demarcates in the punishment clause beginning from 7 years of punishment at the least to life imprisonment at the most and the same has to be adopted in the light of facts of an individual case.

55. 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 a 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 357A 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 mother/parents, within three 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 30.04.2014 for compliance.

56. Before we part with this judgment, we would like to know whether the suggestions given by this court while disposing of criminal appeal no.846/ 2010 and Criminal appeal no.1079/ 2010, have been considered which in our view were made to take a step forward and 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. Let notice be issued to the Lt. Governor (Govt. of NCT of Delhi) through Standing Counsel (Crl.), Govt. of NCT of Delhi, to Ministry of Women & Child Development, Ministry of Home Affairs, and to the Ministry of Information and Broad Casting, through Mr. Rajeeve Mehra, Additional Solicitor General, to apprise this court regarding the steps taken by them in this regard, returnable on 30th April 2014.

57. A copy of this order be also sent to the Secretary, Delhi Legal Services Authority, which is the designated body under the Delhi Victims Compensation Scheme, 2011 (notified on 2.2.2012) to oversee the implementation of directions issued under the said scheme and file

compliance report in the present case within two weeks from the date of this order.

58. Registry is directed to supply/send copy of this order to the parties as well as to the Ministry of Home Affairs and Law Departments and the Commissioner of Police, Government of NCT of Delhi and to comply with the directions in terms of paragraph 53 of the above judgment.

59. The appeal filed by the appellant is partly allowed to the extent indicated above. A copy of this order be sent to the Jail Superintendent for compliance and the appellant be informed accordingly.

KAILASH GAMBHIR, J.

SUNITA GUPTA, J.

MARCH 12, 2014

rkr/pkb