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

Judgment reserved on: 16th December, 2017

Judgment pronounced on: 8th March, 2018

+ **CRL.A. No. 1395/2013**

SHREE BHAGWAN

.... Petitioner

Through: Mr Pramod Kumar Dubey with Ms
Namita Wali and Mr Savraish Kumar, Advs.

versus

STATE

..... Respondents

Through: Ms Aashaa Tiwari, APP.
Insp. Anil Kumar, P.S. Bawana.

CORAM:-

HON'BLE MR JUSTICE S.P.GARG

HON'BLE MR JUSTICE C. HARI SHANKAR

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(JUDGMENT)

C. HARI SHANKAR, J

1. This is yet another case – sad and sordid in equal measure – of innocence plundered.

Case of the Prosecution

2. The case pleaded by the prosecution, and accepted by the learned Additional Sessions Judge (hereinafter referred to as “ASJ”), may be recited thus:

2.1 Innocent and unaware of the predator lurking for her around the corner, the prosecutrix – who, in view of the proscription imposed by *State of Punjab vs. Ramdev Singh AIR 2004 SC 1290*, must remain unnamed and would, therefore, be designated by the appellation ‘C’ – was, at 4 pm on 7th February 2012, playing with her friends outside her house, when it began to rain. The children dispersed in different directions. Sangeeta (PW-19) – the mother of ‘C’ – made various attempts to trace her, but remained unsuccessful. Finding her alone and seizing the opportunity, the appellant, on the pretext of feeding her “*ber*”, coaxed ‘C’ to accompany him to a spot near the canal (*nehar*) in the vicinity. There, the appellant stifled her by covering her mouth, struck at her face and eyes, burnt her hair and attempted to strangle her, whereafter he proceeded to commit rape on her. Having perpetrated the heinous act, the appellant threw the prosecutrix into the *nehar*, at which time Sonu (PW-16) fortunately arrived at the spot. Sonu found ‘C’ weeping and lying face down in the *nehar*, clinging to the weeds. Her face was swollen and her clothes were wet and blood stained. The appellant, who was standing by the banks of the *nehar*, was also soaked from head to toe. Chagrined at the inopportune arrival of Sonu at the spot, the appellant tried to flee from the spot, but was apprehended by Sonu who, by that time, had picked ‘C’ up from the spot in the *nehar* where she was found by him. Carrying ‘C’ in one arm and holding the appellant by the other, Sonu proceeded to a nearby tea-shop owned by Amit (PW-17). ‘C’, who was in a state of shock and terror, remained silent throughout. At

around this time, someone, using Sonu's mobile, called the PCR. The call, which was recorded by Ct. Alka (PW-9) was noted, by her, as "*ek ladka ek chhoti bachi ke saath baitha hai, caller ko doubt hai kuchh galat kaam kiya hai*" ("a boy is sitting with a young girl, the caller feels that something wrong has been done to her").

2.2 Krishan Kumar (PW-14) was sitting at the tea stall, which belonged to Amit (PW-17), when Sonu arrived there, carrying 'C' in one arm and holding the appellant by the other. As he was carrying 'C', the clothes of Sonu were also wet. The fact of the appellant having committed rape on 'C' was disclosed, by Sonu, to Krishan Kumar. It was noticed by Sonu (PW-16), as well as Amit (PW-17), that 'C' was bleeding from her private parts. The police, having been informed, reached the tea stall 10-15 minutes later.

2.3 Krishan Kumar (PW-14) stated that he knew 'C's parents. The Police, thereupon, directed Krishan Kumar (PW-14) to inform them of what had happened. Krishan Kumar, therefore, proceeded to 'C's house, to inform Virender (PW-15), 'C's father, of the tragedy that had occurred.

2.4 At or around 5 pm, Krishan Kumar (PW-14) reached Virender (PW-15) and informed him that someone had done "*galat kaam*" ("wrong deed") with his daughter 'C' and had been apprehended on the spot. On hearing this, Virender (PW-15), accompanied by his wife Sangeeta (PW-19), rushed to the tea-stall, reaching there within 5

minutes. They found 'C' in tears. Her hair was partly burnt and her underwear was blood stained. On removing her underwear, Virender found that 'C' was bleeding vaginally. She also bore marks around her neck as if someone had strangled her. On his asking, 'C' informed him that the appellant had brought her to the *nehar* on the pretext of eating "*ber*" and had stifled her by covering her mouth, burnt her hair, done "*galat kaam*" ("wrong deed") with her and had, thereafter, thrown her in the *nehar*.

2.5 We must confess, here, that we are inhibited by the inadequacy of language; the expression "*galat kaam*", as used by 'C', has a far more serious connotation, contextually understood, than "wrong deed"; it indicates violation of her innocence; but we must provide the nearest translation that the English language permits. It must, however, be understood, that when a child of tender years alleges that an adult has done "*galat kaam*" with her, it nearly inevitably indicates commission of rape, or, at the very least, outraging of her modesty.

2.6 Virender (PW-15), Sangeeta (PW-19), 'C' and the appellant were brought to the Maharishi Valmiki Hospital (hereinafter referred to as "MV Hospital") by the PCR. 'C' was medically examined and treated and the appellant was handed over to the Police. The MLC of 'C' (Ex. PW-13/A) was prepared by Dr. S.N. Siddharth (PW-13), who referred her for gynecological examination. In the MLC, Dr. S.N. Siddharth (PW-13) observed minor abrasions, on both sides of the face of 'C', swelling on the left side and the fact that her lower

garment was blood stained. For ready reference, the MLC, as prepared by Dr. Siddharth, may be reproduced as under:

“Pt brought by PCR.

Alleged H/o ? Sexual assault

Pt conscious, oriented

PR: 86/min

BP: 110/70 mm Hg

Chest }

CVS } NAD

P/A }

- Minor abrasions (+) over B/S face
- Swelling (+) over left side of face
- Blood stain (+) over lower garment
- Refd to Gynae SR for further physical examination & management”

2.7 ‘C’ was, subsequently, examined by Dr. Shilpi, who noticed that she was bleeding vaginally. As she needed to examine her under anesthesia, which was not possible at the MV Hospital, ‘C’ was referred to the BSA Hospital. The entry, made by Dr. Shilpi on the body of the MLC of ‘C’ (Ex PW-13/A), was as under:

“Attended L1IO of pts’ father Virender yesterday.

Examination tried but victim is very apprehensive and uncooperative. Bleeding from genitals seen.

Adv

Refer to BSA for examination under Anaesthesia and proper sample collection as no Emergency OT/Anaesthesia facility available at MVH.”

2.8 On Virender's (PW-15) and Sonu's (PW-16) asking, 'C' detailed the incident as above, further stating that the appellant had tried to strangle her. She also stated that her statement had been recorded by the Police. C's underwear (Ex. P-1), which was wet as 'C' had been lying in the *nehar*, was seized by the Police.

2.9 At about 6.25 pm on the same day, DD No. 62B was received by ASI Raj Kumar (PW-11), regarding the above occurrence. Acting thereupon, ASI Raj Kumar reached the MV Hospital at about 6.40pm with Ct. Arjun Lal (PW-23), where they collected the MLC of 'C'. At that time, Virender (PW-15), Ct. Kuldeep (PW-5) and Ct. Meenu (PW-7) were present there. Ct. Kuldeep took the appellant to P.S. Bawana, on instructions of ASI Raj Kumar. 'C' revealed, to ASI Raj Kumar, that "*Shri Bhagwan Bhaiya ne galat kaamkiya*" ("Shri Bhagwan *bhaiya* did a wrong deed").

2.10 The statement of Sonu (PW-16) was recorded by the Police. *Rukka* was prepared by ASI Raj Kumar (PW-11) on the basis of the statement of Virender. The *rukka* was taken by Ct. Arjun Lal (PW-23) to the PS, where FIR was registered. Copies of the FIR and original *rukka* were given by Ct. Arjun Lal (PW-23) to SI Anil Tushir (PW-24) for investigation. The appellant was taken into custody. The IO SI Anil Tushir (PW-24), accompanied by Ct. Arjun Lal (PW-23), reached the MV Hospital, where the IO directed W/Ct. Meenu (PW-7) to accompany 'C' and her parents to the BSA Hospital, to which she had been referred for treatment. At about 8.45

pm, C was shifted to the BSA Hospital accompanied by W/Ct. Meenu (PW-7) and other staff. At the BSA Hospital, Virender's statement was recorded by ASI Raj Kumar (Ex. PW-11/A).

2.11 At the BSA Hospital, 'C' was examined by Dr. Shaina, who prepared the MLC of 'C' (Ex. PW-12/A), recording that her hymen was torn, and that she was bleeding per vagina. Her vaginal and rectal mucosa were also found to be torn, and it was further observed she had sustained bruises on her left eye, cuts on both lips and fresh wounds on her chin and neck. Samples were taken for analysis. For the sake of completion of the record, we proceed to extract the MLC of 'C', as recorded by Dr. Shaina, thus:

“Referred from Maharishi Valmiki Hosp.

for EA and proper sampling

Alleged H/O physical and sexual assault

H/O forcep coitus & physical assault in evening of 7/2/12 (given by
pt's mother)

M/H – Pt has not achieved menarche

Unmarried

P/H – NAD

O/E – Pt conscious and oriented

GC fair

BP - 110/70 mm Hg

PR – 98/m

afeb

P/A – soft

– EVA done and tears repaired

- L/E – Hymen torn
- BPV +
- Vaginal mucosa torn
- Rectal mucosa tear present

Injuries

- Bruises present under Lt eye
- Cuts present on both lips
- Fresh aberrations present on Right side of chin and neck”

2.12 Ct. Arjun Lal (PW-23) and the IO SI Anil Tushir (PW-24) returned to the PS, where the IO was met by ASI Raj Kumar (PW-11), who handed over, to him, the MLC of the appellant. The appellant, on being interrogated by the IO, admitted to having committed rape on ‘C’. The IO arrested the appellant, *vide* arrest memo Ex. PW- 23/A. The disclosure statement of the appellant (Ex. PW-23/C) was recorded by the IO, wherein the appellant pointed out the site of incident, the pointing out memo being exhibited as Ex. PW-23/D. Site plan was prepared by the IO, who also recorded the statement of Sonu (PW-16). The appellant was identified by Sonu. The IO also recorded the statement of ‘C’ and Ct. Arjun Lal.

2.13 On the next date i.e. on 8th February 2012, at 9 a.m., Ct. Balraj (PW-3) and IO SI Anil Tushir (PW-24) took the appellant to the Bawana Canal, and, thereafter, to the MV Hospital. The appellant was medically examined. The MLC of the appellant (Ex.PX-5) opined that there was nothing to suggest that he was not capable of sexual

intercourse. The statements of Amit (PW-17) and Krishan Kumar (PW-14) were recorded by the IO. The IO, thereafter collected the MLC of the appellant and sample *pullandas* handed over by Ct. Balraj (PW-3), which were seized by him.

2.14 The appellant was produced before the Court and remanded to judicial custody (JC), and the sealed articles were deposited by the IO in the *malkhana*.

2.15 On 15th March 2012, the seized exhibits were taken by Ct. Anil (PW-4) to the FSL and receipt thereof handed over to the MHC (M).

2.16 On 16th April 2012, investigation of the case was shifted from SI Anil Tushir (PW-24) to SI Narender (PW-25).

2.17 On 3rd May 2012, SI Narender (PW-25) moved an application for permission to record the statement of 'C', whereafter her statement, under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") was recorded by Sh. Deepak Wason, learned Metropolitan Magistrate, Rohini. (The said statement may be reproduced thus (in vernacular, followed by the translation thereof):

"Main mummy papa ke saath rehti hoon.

Q-1 Humen sach bolna chahiye ki jhooth?

Ans. Sach.

Q-2 Kya tum padhti ho?

Ans. Doosri class mein.

Q-3 Ghar mein kaun kaun hai?

Ans. Mummy, papa, bhaiya, char behnen.

Q-4 Kiske saath aayi ho?

Ans. Police ke saath office mein aayi hoon.

Q-5 Kya hua tha tumhare saath?

Ans. Kuchh din pehle ek ladka ber ke bahane mujhe bulakar ek jungle mein le gaya. Woh cycle par mujhe le gaya. Mera baal aur gala daba liya aur behosh kar diya. Thodi der mein mujhe hosh aaya. Usne mujhe naale mein ger diya. Ek aadmi ne mujhe bachaya. Main us ladke ko pehchan nahin sakti. Meri peshab wali jagah par khoon aa raha tha.”

(Translated into English)

“I live with my mother and father.

Q-1 Should we tell the truth or lies?

Ans. Truth.

Q-2 Do you study?

Ans. In Second Class.

Q-3. Who are the persons in your house?

Ans. Mother, father, brother and four sisters.

Q-4 With whom have you come?

Ans. I have come to the office with the Police.

Q-5 What happened with you?

Ans. Some days back one boy, on the pretext of feeding me “*ber*”, called me and took me into a jungle. He took me on a cycle. He strangled me and made me unconscious. I regained consciousness after sometime. He threw me in the *nala*. One man rescued me. I cannot recognize that boy. I was bleeding from the place from which I pass urine. ”

SI Narender thereafter recorded the statement of Virender (PW-15) and W/Ct. Ritu.

2.18 Consequent to completion of investigations, SI Narender, on the next date i.e. 4th May 2012, submitted the charge sheet in the Court of the learned MM supplementary charge-sheet, dated 12th August 2012, was also filed by SI Narender, to place the FSL reports, which he had collected in the meantime, on record. The sequence of events, as recorded in the charge-sheet having already been recited hereinabove, no further allusion is required to be made thereto.

2.19 As the appellant pleaded not guilty and sought trial, the case was committed to the Court of the learned ASJ, before whom trial commenced on 22nd August 2012.

Evidence

3 Having, thus, set out the case as pleaded by the prosecution, let us proceed to reconnoiter the evidence that emerged, in order to assess whether it supported the prosecution’s version.

Oral Evidence

4. We find that the learned ASJ has compartmentalized the oral evidence adduced in the present case into evidence of the public witnesses, medical evidence and evidence of police witnesses. We propose to follow the same scheme, eschewing reference to the evidence of a few witnesses which are formal in nature, and are not really necessary in order to decide the present appeal.

Public Witnesses

5. The first “public witness” whose evidence was recorded by the learned ASJ was Krishan Kumar (PW-14). The examination-in- chief and cross-examination of Krishan Kumar merit reproduction, *in extenso* (substituting the name of the prosecutrix with the pseudonym ‘C’), thus:

“On S.A.

I have been residing at the aforementioned address for the last 13 years and I am employed as Operator/Chowkidaar in Delhi Jal Board.

I know Sonu. I also know ‘C’ aged about 5 years who was residing in J.J. Colony, Bawana with her parents and I also know the place the jhuggi where she was residing as I was known to her parents. On 07.02.2012 at about 5 p.m. I was present at the T shop near Hanuman Mandir at Bawana Mor. I saw that Sonu was bringing accused Shree Bhagwan and ‘C’ by holding their hands and there was blood on the clothes of ‘C’. Sonu told me that accused Shree Bhagwan committed rape with ‘C’. I immediately went to the house of ‘C’ and called her parents.

Accused Shree Bhagwan is present in the court today. Witness correctly identifies accused Shree Bhagwan.

XXXXXX by Ms. Shashi Jaiswal Amicus Curiae for accused.

I identified the child because I had seen her previously and I knew her parents and used to frequent their house. Victim 'C' was wearing *Jumphar* and underwear (kachi). I have seen Sonu only who brought the victim girl and the accused. Sonu with victim girl and accused met me at Tea shop. The police was already informed and police reached at the spot after 10-15 minutes and three police personnels came at the spot in the PCR van. Upper part of pant of Sonu was also wet and his shirt was also wet as the victim girl was on his lap. Sonu brought the accused Shree Bhagwan by holding his hand at the Tea shop. When I reached at the Tea shop already 15-20 persons were standing there. Sonu had already brought the victim girl and accused Shree Bhagwan at the Tea shop before my arrival there and Sonu told all the incident to me. I called the parents of 'C' on the asking of the PCR official because I know the child and her parents. It is correct that the Tea shop is just near the canal. Sonu used to work as a Farmer and used to sell seasonal fruits and vegetables. Sonu used to sell seasonal fruits and vegetables near the tea shop. It is wrong to suggest that I am deposing falsely at the instance of Sonu and police. ”

It would thus be seen that, while, in examination-in-chief, as also initially during his cross-examination, Krishan Kumar deposed that he saw Sonu coming towards the tea-stall carrying 'C' in one arm and holding the hand of the appellant by the other, he prevaricated, to some extent, later during his cross-examination, by deposing that Sonu had already brought 'C' and the appellant to the tea-stall prior to his (Krishan Kumar's) arrival there. The extent, to which such prevarication dilutes the effect of his testimony, is an issue which we would address later in this judgement.

6. Virender (PW-15), the father of 'C' and husband of Sangeeta (PW-19), deposed, in his examination-in-chief and cross-examination, that (i) on 7th February, 2012, Krishan Kumar had arrived at his house and informed him that 'C' was at the tea stall and was totally soaked from head to toe, and that someone had done "*galat kaam*" with her, (ii) when he arrived at the tea stall, he found that the appellant had been apprehended by a large number of members of the public, and that his daughter 'C' was totally wet with her hair partly burnt, forehead swollen and bruise marks on her neck, as if someone had tried to strangulate her, (iii) when he lifted her, he found that she was bleeding from her private parts, (iv) on his asking 'C' what had happened, she revealed "*Shree Bhagwan mujhe bula kar le gaya aur mera khoon nikal diya, baalo me aag laga diya aur nehar mein duba diya*" ("Shree Bhagwan called me and took me with him and made me bleed, he set fire to my hair and threw me in the *nehar*"), (v) the Police, thereafter, took his daughter to the MV Hospital, where she was examined and medically treated, (vi) from MV hospital, they were referred to BSA Hospital, and (vii) his statement (Ex PW-11/A) was recorded at the BSA Hospital. He correctly identified the appellant, who was present in court.

7. Sonu (PW-16) deposed in his examination-in-chief that (i) on 7th February 2012, at about 5 PM, he was coming to the place near the Hanuman temple where he used to sell guavas, where he saw one girl, about 5 years of age, lying in the canal, and one boy standing near her

(at this juncture, Sonu pointed out towards the appellant stating that he was the person who was standing near the girl), (ii) the girl was weeping, (iii) he picked up the girl from the canal and found that her face was swollen and her clothes were blood stained, (iv) the appellant tried to flee, but he apprehended him, and brought the appellant and the girl near the tea shop, where Krishan Kumar (PW-14) met him, (v) he informed Krishan Kumar about the facts and, thereafter, dialed the Police, who reached the spot, (vi) Krishan Kumar informed the parents of the girl, (vii) he handed over the appellant and the girl to the Police, (viii) the underwear of the girl was also blood stained and (ix) on his asking the appellant to tell the true facts, the appellant admitted that the girl was his neighbor and that he had committed rape on her. In cross-examination, PW-16 Sonu further stated that (i) the girl was lying at the corner of the *nehar* with her head in the water and was clutching in the weeds flowing in the water, (ii) she was wearing a frock and underwear, (iii) he carried the girl on the shoulder and held the appellant with his another hand, (iv) the appellant was drunk and smelling of alcohol and was already soaked from head to toe when he met him, (v) when he requested the appellant to carry the child, the appellant questioned him regarding his identity, (vi) the girl did not say anything to him (i.e. to Sonu); she was weeping when he found her and, though her eyes were open on the way to the tea shop, she did not speak, (vii) he neither knew the parents of the girl, nor Krishan Kumar, before the date of incident, though he knew the tea shop vendor Amit (PW-17) very well, and (viii) the rape of 'C' did not take place in his presence.

8. Amit, the tea shop vendor (PW-17) deposed in his examination-in-chief, that (i) he had been running the tea stall near the *nehar* for the last six years, (ii) on 7th February, 2012, Sonu who was previously known to him brought a small girl and the appellant to his tea stall, (iii) he had seen the appellant in the area earlier, as he was a labourer, (iv) the child was shivering and was totally soaked from head to toe, (v) Sonu told him that he had recovered her from the *nehar* and that the appellant had done “*galat kaam*” with her, (vi) at that point, he and Sonu noticed that there was blood on the underwear of the child and that she was bleeding from her private parts, (vii) Krishan Kumar (PW-14), who was present at the shop stated that he knew the child and her parents, and therefore went and called the parents of the child who was about 5 years of age and (viii) in the meantime, Sonu called the police, who reached the spot and took the child and her parents with them. In cross-examination, Amit (PW-17) stated that (i) he did not know the family of the child and had seen her for the first time, (ii) it was Sonu who told them that the appellant had done “*galat kaam*” with the child, (iii) the child who was crying, did not disclose the name of the person who had done “*galat kaam*” with her in his presence and (iv) though he knew Sonu they were not friends.

9. Sangeeta (PW-19), the mother of ‘C’ and the wife of Virender (PW-15), endorsed the deposition of her husband Virender, by stating, in her examination-in-chief and cross examination, that (i) ‘C’ had been playing with her friends outside their house at 4.00 - 4.15 PM on

7th February 2012, when it began to rain, whereupon the children dispersed, (ii) she made all efforts to search for her daughter but was unable to find her, (iii) at about 5 PM, Krishan Kumar (PW-14) arrived at their house, and informed them that their daughter 'C', who was wet and shivering and had been rescued from the *nehar*, had been brought to a nearby tea stall and that it appeared that something wrong had been done to her, (iv) when she, and her husband Virender (PW-15) reached the tea stall, they noticed that 'C' was, in fact, wet and shivering and that her underwear was soaked with blood, (v) they also saw that 'C' was crying and that there were bruise marks around her eyes and forehead, as well as marks around her neck which made it appear that someone had tried to strangle her, (vi) the hair of 'C' was also partly burnt, (vii) consequent to the police arriving at the spot 'C' was shifted to MV Hospital, accompanied by Sangeeta and her husband Virender, (viii) at the MV Hospital preliminary treatment was administered to 'C' whereafter she was referred to the BSA Hospital, (ix) 'C' remained admitted in BSA Hospital for about 8-9 days during which her wounds were stitched, (x) though, while they were at the tea stall, 'C' who went on crying, did not respond on being queried by her (Sangeeta), as to what had happened, (xi) after they had reached the Hospital, she revealed that the appellant had taken her, with him, to the *nehar*, where he did "*galat kaam*" with her, and also burnt her hair and hit her face with his fist, whereafter he strangled her and threw her in the *nehar*, (xii) 'C' further revealed that another person had rescued her from the *nehar* and brought her to the tea stall and that the police had recorded her statement, and (xiii) the

underwear of 'C' was soaked, as she had been lying in the *nehar*. Sangeeta correctly identified the said underwear, which was exhibited as Ex.P1.

10. 'C' was also examined, in chief, and cross-examined, as PW-20, albeit without oath, as she was only 6 years old at the time. Being a child prosecutrix, it would be appropriate to reproduce the entire record of her testimony, in examination-in-chief and cross-examination, as under (the translation, in English, is provided alongside):

“PW-20 Ms. ('C') aged 6 years D/o Sh. Virender R/o J.J. Colony, Bawana, Delhi.

(Camera proceedings conducted in the chamber in the presence of Ld. APP for the State, Ms. Vandana Chauhan, Counsel for Delhi Commission for Women and Ms. Shashi Jaiswal counsel for the accused, in vernacular)

(Without Oath being child is 6 years old)

Q. Tumara Naam Kya Hai? (“What is your name?”)

Ans.

Q. Tumare Papa Ka Naam Kya Hai? (“What is your father’s name?”)

Ans. Virender

Q. Kahan rehti Ho? (“Where do you stay?”)

Ans. J.J. Colony, Bawana, Delhi.

Q. Kya Tum School Main Jati Ho? (“Do you go to school?”)

Ans. Han. ("Yes.")

Q. Aaj Court Main kiske saath Aayee ho? ("With whom have you come to court today?")

Ans. Mummy, papa ke sath aayee hun. ("I have come with mommy and papa.")

Q. Tumare school ka Naam Kya Hai? ("What is the name of your school?")

Ans. School Ka Naam Pata Nahi Hai. Madam Ne Nahi Bataya Hai. Main Tisri class Main Padti Hun. (I do not know the name of my school. Madam has not told us. I study in the third class.)

(Mother of the child is also present in the chamber within her sight to make the victim child comfortable but not permitted to intervene. I find that the victim/child is comfortable and is in a position to depose and hence, I now proceed to record her statement.)

Q. Aap Mujhe Poori Baat Batayengi Kya Hua Tha? ("Will you tell me exactly what had happened?")

Ans.(By nodding her head) Han. Mujhe Shree Bhagwan Ber Khilane Ke Liye Le Gaya Tha. ("Yes. Shree Bhagwan took me with him to feed me 'ber'.")

Court question: Sh. Bhagwan Ko Kaise Janti Ho? ("How do you know Shree Bhagwan?")

Ans. Sab usko Shree Bhagwan Ke Naam Se Bulate Hain. ("Everyone addresses him by the name Shree Bhagwan.")

Q. Kaun sa Ladka Le Gaya Tha? Jisko aap Shree Bhagwan Kehnte Ho usko Pehchan Sakti Ho? ("Who was the boy who took you with him? Can you recognise the person whom you call Shree Bhagwan?")

Ans. Han. ("Yes.")

(At this stage the accused has been produced in the chamber alongwith three other boys of similar height, physique, complexion and wearing similar clothes and the child has correctly identified the accused Shri Bhagwan by pointing out and thereafter by touching him.)

Court Question: *Iska Naam Kya Hai?* (“What is the name of this person?”)

Ans. *Shree Bhagwan.*

Q. *Shree Bhagwan Tumhe Kahan Le gaya Tha?*

Ans. *Shree Bhagwan Ber Khilane Ke liye Mandir Ke Paas Le Gaya tha.* (“Shree Bhagwan took me with him to a place near the temple, to feed me “ber”.)

Q. *Mandir ke Paas Usne Kya Kya Kiya?* (“What did he do, near the temple?”)

Ans. (At this stage child become apprehensive and is feeling shy and has kept quiet and then responded after sometime on persuasions from the Court.)

Ans. *Apni Bhi Kachi Utari aur Meri Bhi uteri. Phir gala dabakar Aankh Main ghooosa Laga diya. Phir Balon Main aag Laga di.* (“He removed his underwear as well as mine. Then he pressed my neck and hit me in my eye. Then he set fire to my hair.”)

Court Observations: Child has been tonsured completely and I am told by her that this was done after the incident.

Q. *Baal Jalene Ke Baad Tumhare Baal Kisne Kate the?* (“After they were burnt, who cut your hair?”)

Ans. *Baal Jalene Ke Baad Nai Se Baal Kataye the.* (“After they were burnt, I had my hair cut by a barber.”)

Court Question: *Kitne Bade Baal The?* (“How long was your hair?”)

Ans. Witness touched her shoulder meaning it was shoulder length.

Q. *Kachi Utari to Shri Bhagwan Ne Kya Kiya Tha?* (“On removing the underwear, what did Shree Bhagwan do?”)

Ans. *Pishab dal diya tha.* (“He poured urine.”)

Q. *Jungle kaha Hai?* (“Where is the jungle?”)

Ans. *Mandir Ke Aage.* (“Ahead of the temple.”) (Child has stretched her hand and has said that ahead the temple)

Q. *Tum Geeli kese Ho Gai?* (“How did you get wet?”)

Ans. *Nehar Mai Shree Bhagwan Ne Phenk Diya Tha.* (“Shree Bhagwan threw me in the canal.”)

Q. *Kya Shree Bhagwan Geela Kaise Ho Gaya tha?* (“How did Shree Bhagwan get wet?”)

Ans. *Baarish Ho rahi thi tab Shree Bhagwan geela Ho gaya tha.* (“Shree Bhagwan became wet as it was raining.”)

Court question: *tum Shree Bhagwan ko kaisi Jante Ho?* (“How do you know Shree Bhagwan?”)

Ans. *Us Waqt dekha tha jab usne kiya tha.* (“I saw him when he was doing it.”)

Q. *Tumhe Kisne Bachaya Tha?* (“Who saved you?”)

Ans. *Ek uncle Ne.* (“An uncle saved me.”)

Q. *Shree Bhagwan Ko Kisne Pakra tha?* (“Who court Shree Bhagwan?”)

Ans. *Jis uncle ne bachaya tha un Uncle Ne Shree Bhagwan Ko pakra tha.* (“The uncle who saved me, caught Shree Bhagwan.”)

Q. Shree Bhagwan Ne Mara aur ganda kaam kiya tha tab Tumhe Uska Naam Pata Tha? (“When Shree Bhagwan hit you and did the dirty deed, did you know his name?”)

Ans. Jab wo aaye tha. Tab Usko sab Shree Bhagwan Bolte The tab mujhe pata chala. (“When he came, everyone used to call him Shree Bhagwan; then I learnt his name.”)

(At this stage, witness has identified her statement ex. PW20/A bearing her thumb impression at point A)

Q. Pehle court mein jab aayee thi tab uncle ko sab bataya tha? (“When you came to the court initially, did you tell uncle everything?”)

Ans. Han. (Yes).

Q. Kye Tumne Pehle uncle (Ld.MM) ko Bataya tha Kis Shree Bhagwan Ne Galat Kaam Kiya tha? (“Did you initially tell uncle that the “galat kaam” was done by Shree Bhagwan?”)

Ans. Han. Naam Bataya tha. (“Yes. I told his name.”)

Court observations: Name of the accused was not mentioned in the statement of accused u/s 164 CrPC.

XXXX by Ms. Shashi Jaiswal, Amicus Curiae for accused.

Q. Kisne Bola tha Ki Court Mai Eaise Bolna. (“Who told you to depose like this in court?”)

Ans. Maine Khud Bola Hai. Kisi nai nahi bataya. Ye kehya Galat Hai Ki Maini Mummy Papa Ke Kehne Par Shreee Bhagwan Ka Naam Liya tha. Yeh Kehna galat Hai Ki Shree Bhagwan Ne Mujhe Bachaya Tha aur galat kaam nahi kiya tha.” (“I have spoken of my own will. No one told me to do so. It is wrong to say that I took the name of Shree Bhagwan on being asked to do so by my mother and father. It is wrong to say that Shree Bhagwan saved me and did not do “galat kaam”.)

Medical Witnesses

11. Dr. S.N. Siddharth (PW-13), who was the first to have medically examined the prosecutrix 'C', proved, in his examination-in-chief, the MLC (Ex PW-13/A) drawn up by him after examining 'C', and further confirmed that he had referred 'C' for gynaecological examination. He deposed that, on local examination, he had observed minor abrasions over both sides of her face, swelling over the left side of the face and bloodstains over her lower garment. He was not cross-examined, despite grant of opportunity.

12. On behalf of Dr. Shilpi, Senior Resident, Gynaecology in MV Hospital (who had examined 'C' after she was referred by Dr. Siddharth), Dr. Geetanjali Singh (PW-18) entered the witness box, stating that she could identify the signatures of Dr. Shilpi, having seen her writing and signing in the course of her official duties. Dr. Geetanjali Singh deposed, further, that, consequent to being referred by Dr. Siddharth, 'C' had been examined by Dr. Shilpi, after obtaining requisite consent from her father. She further deposed that Dr. Shilpi had tried to talk to 'C', and examined her, but that 'C' remained apprehensive and uncooperative. She confirmed that 'C' was bleeding vaginally. Dr. Geetanjali Singh further stated that 'C' was, therefore, referred to the BSA Hospital, for examination under anaesthesia and proper sample collection, as no emergency OT/anaesthesiologist facility was available at the MV Hospital. She

identified the signatures of Dr. Shilpi, on the MLC of 'C'. She was not cross-examined, despite grant of opportunity.

13. Dr. Shimpi Goyal, Senior Resident in the Gynaecology Department of the BSA Hospital, deposed, as PW-12, in place of Dr. Shaina, who had medically examined 'C' in the said hospital, clarifying, at the outset, that Dr. Shaina was not working in their Hospital any more, and that her present address was not known to them. Dr. Goyal stated that she could identify the handwriting and signatures of Dr. Shaina, as she had worked with her and seen her signing and writing documents. Dr. Goyal went on, after this preliminary clarification, to prove the MLC prepared by Dr. Shaina, after examining the prosecutrix 'C', which was, consequently, exhibited as Ex PW-12/A. She identified the signatures of Dr. Shaina, on the said document. Thereafter, she reiterated the contentions of the MLC. She was not cross-examined, despite grant of opportunity.

Police Witnesses

14. Ct. Sunil (PW-1) tendered his examination-in-chief by way of affidavit dated 30th July 2012 (PW-1/1), in which he deposed that (i) on 7th February 2012, at about 6.00 PM, he had received a PCR call to the effect that, at the tea stall near the Hanuman Temple, one boy was sitting with a small girl, and that the caller suspected that something wrong had happened, (ii) on receiving the said call he, along with the PCR van staff, reached the spot where the appellant

was found sitting with 'C', who was about 5-6 years of age, (iii) the parents of 'C' reached the spot and asked her what had happened, whereupon she revealed, to her parents, that Shree Bhagwan had "*galat kaam*" (wrong deed) with her and tried to drown her in the canal, (iv) he, along with the PCR van staff, took 'C' and her parents Virender (PW-15), Sangeeta (PW-19) and the appellant, to the MV Hospital, where 'C' was handed over to the Duty Constable and the appellant was handed over to ASI Raj Kumar. In his cross examination, PW-1 Ct. Sunil, however, turned hostile, stated that 'C' was not understanding Hindi and was, therefore, only crying and not saying anything.

15. Lady Ct. Ritu (PW-2) also tendered her examination-in-chief by way of affidavit (Ex PW-2/1), wherein she affirmed that, on 3rd May 2012, she, along with SI Narender (PW-25) accompanied the prosecutrix 'C' and her father Virender to the Rohini Court, where they got the statement of 'C' recorded under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr PC"). She was not cross-examined, despite grant of opportunity.

16. Ct. Balraj (PW-3), too, tendered his examination-in-chief by way of affidavit (Ex PW-3/1), wherein he confirmed that, on 8th February, 2012, he, along with the I/O SI Anil Tushir (PW-24) accompanied the appellant, from the lock-up at PS Bawana, to the Bawana Canal, for investigation and that, thereafter, they went to the MV Hospital and had the appellant medically examined and his MLC

drawn up. He also deposed as to the handing over, to him, of samples by the doctor at the MV Hospital, which he handed over, in turn, to the IO SI Anil Tushir. Thereafter, he deposed, the appellant was produced before the learned MM and remanded to JC. Though he was cross-examined, nothing substantial emerged therefrom.

17. Ct. Anil, who deposed as PW-4, also tendered his evidence-in-chief by way of affidavit (Ex PW-4/1), wherein he confirmed having taken the exhibits of the case, from the *malkhana*, on 15th of March 2012, and having deposited them at the FSL, Rohini, and that, so long as the exhibits remained in his custody, they were not mishandled. He was not cross-examined, despite grant of opportunity.

18. Ct. Kuldeep (PW-5) also tendered his examination-in-chief by way of affidavit, which was exhibited as Ex PW-5/1, in which he affirmed that, on 7th of February 2012, ASI Raj Kumar (PW-11) handed over, to his custody, the appellant, who, in turn, was handed over, by him, to the IO SI Anil Tushir (PW-24). He was not cross-examined, despite grant of opportunity.

19. W/Ct. Meenu (PW-7) also filed her examination-in-chief, by way of affidavit (Ex PW-7/1), in which she confirmed that she had reached MV hospital at about 7:30 PM on 7th February 2012, where she met ASI Raj Kumar (PW-11) and Ct. Arjun Lal (PW-23), and that the prosecutrix 'C', 5 years of age, was under treatment there. He also confirmed that, from the MV hospital, she, along with the PCR staff,

‘C’ and her parents, reached the BSA Hospital, for further treatment, where ‘C’ was diagnosed and medically examined, and her MLC prepared. The samples in the MLC were handed over, to her, by the doctor which, in turn, she handed over to ASI Raj Kumar. In fine, she stated that she, along with her staff, the prosecutrix and her parents, came to the Police Station. Though she was cross-examined by learned *amicus curiae* appearing for the appellant, nothing substantial emerged therefrom.

20. W/Ct. Alka (PW-9) also tendered her examination-in-chief by way of affidavit (Ex. PW-9/1). She testified, in the said affidavit, having recorded, at 5.51 PM on 7th February 2012 “regarding *ek ladka ek choti bachhi ke saath baitha hai caller ko doubt hai kuchh galat kaam kiya hai*” (“a boy is sitting with a young girl, the caller feels that something wrong has been done to her”). She was not cross-examined, despite grant of opportunity.

21. HC Dharmpal (PW-10) who, too, tendered his examination-in-chief by way of affidavit (exhibited as Ex PW-10/1) deposed, therein, that the exhibits, in the above case, were deposited by the IO SI Anil Tushir (PW-24) on 7th and 8th February 2012 which, as per the directions of the IO, were handed over, by him, to Ct. Anil Kumar (PW-4) on 15th March 2012 and that, after submitting the said exhibits to the FSL, Rohini, Ct. Anil Kumar handed over, to him, the receipts of the exhibits and a copy of the RC registered in the case. He further deposed that, so long as the exhibits were at the *malkhana*, they were

tampered with. He was not cross-examined, despite grant of opportunity.

22. ASI Raj Kumar, as PW-11, also tendered his examination-in-chief by way of affidavit (Ex PW-11/1), and further deposed, orally before the learned ASJ, that he had recorded the statement of Virender, i.e. the father of the prosecutrix 'C', which was, accordingly, exhibited as Ex PW-11/A. In his affidavit by way of examination-in-chief, ASI Raj Kumar testified that, on 7th February, 2012, on entrustment vide DD No 60 2B, he, along with Ct. Arjun Lal (PW-23) reached the MV hospital, collected the MLC of the prosecutrix 'C' and, after recording the statement of Virender, sent Ct. Arjun Lal to PS Bawana, for registering a case. He further stated that the appellant was also sent to PS Bawana in the custody of Ct. Kuldeep (PW-5), and that he had handed over the MLC of 'C' to the IO SI Anil Tushir, who had arrived at the MV hospital. He was not cross-examined, despite grant of opportunity.

23. ASI Shree Bhagwan (PW-22) deposed, in his examination-in-chief, that, on 7th February, 2012, at about 6 PM, he received a call from the PCR, that one boy was sitting with a small girl at the Hanuman temple tea stall, and that the caller suspected that the boy had raped the girl. He further stated that, on receiving the said information, he immediately reached the concerned site, where he found the appellant and the prosecutrix, who was about 5 years of age, as well as the caller who had contacted him. In the meantime, the

parents of the prosecutrix 'C' also reached there and, as per the deposition of ASI Shree Bhagwan, 'C' disclosed, to her parents, the fact that the appellant had committed rape with her and tried to throw her in the *nehar*. ASI Shree Bhagwan further deposed that, thereafter, they took 'C', her parents and the appellant to the MV hospital, where she was medically examined and that, on arrival of ASI Raj Kumar there, the appellant was handed over to him. He also correctly identified the appellant, who was present in the court. In his cross-examination, PW-22 ASI Shree Bhagwan further elucidated that the appellant and the prosecutrix 'C' were both wet, at the time when they, i.e. PW-22 and the other members of the Police, reached the spot, though it was not raining. He further stated that he did not check whether the appellant was smelling of alcohol or not and that, as there was a large number of persons at the spot, they hurriedly removed 'C' and the appellant to the hospital.

24. Ct. Arjun Lal (PW-23) deposed, in his examination-in-chief, that, on 7th February 2012, while on emergency duty, he, along with ASI Raj Kumar (PW-11) reached the MV Hospital and collected the MLC of 'C'. He further deposed that the appellant was handed over, by the PCR officials, to ASI Raj Kumar who, thereafter, recorded the statement of Virender (PW-15) and prepared the *rukka*, which he carried, with him, to the Police Station for registration of a FIR. After the FIR was registered, as per the statement of Ct. Arjun Lal, a copy of the FIR, along with the original *rukka*, were handed over, by him, to the IO SI Anil Tushir (PW-24) for further investigation, after which

they reached the MV hospital, where they met ASI Raj Kumar and Ct. Meenu (PW-7). Ct. Arjun Lal further stated that 'C' was taken to the BSA Hospital, along with Ct. Meenu, where the doctor handed over, to her, the MLC of 'C' along with 15 sealed exhibits, which were seized by the IO. The appellant, he stated, was handed over to the custody of Ct. Kuldeep (PW-5) and sent to the Police Station, where he reached later, with the IO. He further deposed that, at the Police Station, the appellant was interrogated by the IO, whereupon he disclosed that he had committed rape on 'C' at the *nehar*, whereupon the IO proceeded to arrest the appellant, *vide* Arrest Memo exhibited as Ex PW-23/A. He also stated that the disclosure statement, of the appellant, was recorded by the IO, which was exhibited as Ex PW-23/C, and bore his signatures. He also testified to the fact that the appellant pointed out the place of incident, *vide* pointing out memo exhibited as Ex PW-23/D which, too, bore his signatures. He correctly identified the appellant, who was present in the court. In cross-examination, PW-23 Ct. Arjun Lal deposed that the prosecutrix 'C' did not make any statement in his presence, and that ASI Raj Kumar had recorded the *rukka* on the basis of the statement of Virender, i.e. her father. He further stated that, of the persons present at the tea stall, one of them revealed that he knew the parents of 'C'. He also accepted that the IO did not interrogate 'C', or record her statement, in his presence. He went on to state that, when they met the appellant in the hospital, his clothes were wet, and that, on being asked the reason thereof, by the IO, the appellant initially stated that he had been sitting at the banks of the *nehar* and was trying to save

‘C’ but, later on, broke down and confessed that he had done “*galat kaam*” with her. He emphatically denied the suggestion, put to him, that the appellant had not made any statement, to the IO, to the effect that he had done “*galat kaam*” with ‘C’, or that he had always insisted that he was innocent and trying to save her.

25. SI Anil Tushir (PW-24) supported the above statements, by deposing, in examination-in-chief, that (i) consequent to being handed over a copy of the FIR and original *rukka*, by Ct. Arjun Lal (PW-23) on 7th February 2012, he, along with Ct. Arjun Lal, reached the MV Hospital, at the time when the prosecutrix ‘C’ was about to be shifted to the BSA Hospital, (ii) after recording the statement of the officials of the PCR, he returned to the Police Station, where ASI Raj Kumar (PW-11) provided him the MLC of ‘C’ (iii) he interrogated the appellant, who was in the custody of Ct. Kuldeep (PW-5), at which the appellant confessed about his involvement in the crime, whereupon he arrested the appellant and proceeded to record his disclosure statement (Ex PW-23/C), (iv) thereafter, the appellant pointed out the place of incident, *vide* memo exhibited as Ex PW-23/D, (v) he, thereafter, prepared the site plan (Ex PW-24/A) and also recorded the statement of Sonu, who met him near the place of incident, (vi) Sonu identified the appellant, (vii) he also recorded the statements of the parents of ‘C’ and of Ct. Arjun Lal, and had the seized articles deposited in the *malkhana*, (viii) on the next day, i.e. 8th February 2012, he recorded the statements of Amit (PW-17) and Krishan Kumar (PW-14), (ix) the appellant was taken to the MV Hospital for medical examination, after

which he collected his MLC and 5 *pullandas* from Ct. Balraj (PW-3), which he seized and (x) the appellant was, thereafter, produced before the learned MM and sent to JC, and the seized articles were deposited in the *malkhana*. He further deposed that, on 15th March 2012, the exhibits of the case were sent to the FSL through Ct. Anil (PW-4) and statements were recorded by him, whereafter he was transferred from the case. He correctly identified the appellant, who was present in the court. In cross-examination, he stated that, at the MV Hospital, the prosecutrix 'C' was not in a position to speak and did not inform him anything about the incident, as she was continuously crying and was extremely scared and apprehensive, and that, even at the BSA Hospital, she was not in a fit condition to make a statement. He further stated that 'C' never mentioned the name of the appellant to him directly, as the person who had done wrong with her and that the name of the appellant was mentioned by her father and by the public witness. He further accepted that he did not find the appellant to be smelling of alcohol, though the interrogated him at the Police Station, but denied the suggestion that the appellant had claimed that he was innocent and was only trying to save 'C', who was drowning in the *nehar*. He also denied the suggestion that the appellant did not make any disclosure confessing his involvement in the crime, or that he had recorded the same on the asking of the father of the prosecutrix 'C'.

26. The last witness, whose statement was recorded, was SI Narender (PW-25), who testified regarding the fact of his having got recorded the statement of the prosecutrix 'C' under Section 164 of

the CrPC, which was, consequently, exhibited as Ex PW-20/A, as also to having recorded the statement of her father Virender and of W/Ct. Ritu. He further deposed regarding his having submitted the charge sheet against the appellant, collected the FSL report (Ex PW-25/A), and having submitted a supplementary charge-sheet, along with the said report, in the Court of the learned MM, on 26th August 2012. He correctly identified the appellant, who was present in the court. In cross-examination, he denied the suggestion that he had tutored the prosecutrix 'C', or that she had identified the appellant, in the court, on his having pointed him out.

Statement of the appellant under Section 313 of the Cr PC

27. The statement of the appellant was recorded, under Section 313 of the CrPC, on 12th September 2012. He professed ignorance regarding most of the events that had taken place, as retold to him, and insisted that he had been falsely implicated in the case. He denied the fact that he had pointed out the place of occurrence, and insisted that he was trying to save the prosecutrix 'C', as she was drowning in the *nehar*. He insisted that he never tried to flee from the spot and was, rather, standing at the bank of the *nehar*, after having saved the life of the prosecutrix 'C'. He flatly denied all allegations, made against him, by the various witnesses, as also the fact that 'C' had been raped, following which there was blood on her underwear, etc. He asserted that all witnesses, who had deposed against him, had deposed falsely.

FSL Report

28. The FSL report, issued on 4th July, 2012, is significant only to the extent that it failed to detect any semen on the “Step 9 vaginal secretions” (Ex 1L(a) and 1L(b), the” Step 9 cervical mucus collection” (Ex 1M), the “Step 10 Culture” (Ex 1N), or the “Step 12 Rectal examination” (Ex 1P(a), 1P(b) and 1P(c)) samples of the prosecutrix ‘C’.

The impugned judgement

29. The learned ASJ, *vide* the impugned judgement dated 17th October 2012, convicted the appellant under Sections 363, 366 and 376(2)(f) of the Indian Penal Code, 1860 (hereinafter referred to as “the IPC”), for having committed the offences of kidnapping of ‘C’ from the lawful guardianship of her parents, with the intention of forcing or seducing her to illicit intercourse and, thereafter, committing aggravated sexual assault/rape upon her.

30. *Vide* subsequent order dated 31st October, 2012, the learned ASJ sentenced the appellant to (i) 7 years’ rigorous imprisonment and fine of Rs. 10,000/–, with default punishment of simple imprisonment of 15 days, for the offence under Section 363 read with Section 366 of the IPC, and (ii) rigorous imprisonment for life, with fine of Rs. 50,000/–, with default punishment of 6 months’ simple imprisonment, for the offence under Section 376 (2) (f) of the IPC.

31. In arriving at the decision to convict the appellant, the learned ASJ reasoned thus:

(i) The identity of the appellant stood established, in view of the undisputed position that he was apprehended by public persons at the spot itself, and was handed over to the Police, as also because he was specifically identified, not only by the prosecutrix 'C', from amongst other persons of similar profile, but also by her mother Sangeeta (PW-19), her father Virender (PW-15), Sonu (PW-16) and Krishan Kumar (PW-14), as the person who was apprehended from the spot. There was no reason to disbelieve their testimonies.

(ii) The age of the prosecutrix was also proved to be 5 to 6 years, at the time of commission of the crime, in view of the un-controverted testimonies, to this effect, of her parents, i.e. Virender (PW-15) and Sangeeta (PW-19).

(iii) The MLC of 'C' (Ex PW-12/A), as prepared by Dr. Shaina, stood duly proved by Dr. Shilpi Goyal (PW-12) and Dr. Geetanjali Singh (PW-18). Dr. Shilpi Goyal had further proved that, on local examination, the hymen of 'C' was found torn, she was bleeding per vagina and her vaginal and rectal mucosa were found torn. She further deposed that, under local anesthesia, the said tears were prepared. She also testified to the bruises, under the left eye of 'C', cuts on both her lips and fresh wounds on the right side of chin and neck, as observed in the MLC. Dr. Geetanjali Singh also proved that, at the time of

medical examination of 'C', the child was apprehensive and uncooperative and was bleeding vaginally. The testimony of this witness had gone completely uncontroverted. As such, the medical evidence that had come on record was compatible with the allegation of aggravated sexual assault and rape having been committed upon 'C'.

(iv) While it was true that the FSL Report (Ex PW-25/A) stated that semen could not be detected on any of the exhibits, this finding could not help the appellant, in view of the peculiar circumstances in which the crime had been committed, being that, after commission of the offence, 'C' was thrown into a flowing '*nehar*'. In these circumstances, it was quite possible that the semen would have been washed off.

(v) The examination-in-chief of 'C', during trial, completely and categorically inculpated the appellant. The only suggestions, made to her in cross-examination, were that she had named and identified the appellant on the tutoring of her parents, and that the appellant had not, in fact, committed any "*galat kaam*" with her and had, rather, saved her. She denied the said suggestions.

(vi) Sonu (PW-15) also deposed, in his examination-in-chief, that the prosecutrix 'C', when he found her, had her face swollen and clothes blood stained, and that the appellant had tried to flee from the spot, but that he had apprehended him and brought him, with the prosecutrix 'C', to the tea shop near the Hanuman Temple, where he was met by Krishan Kumar

(PW-14), to whom he narrated all the facts. His deposition that, on his asking the appellant to tell the true facts, the appellant admitted to having committed rape with 'C', also stood uncontroverted. In his cross-examination, Sonu clarified that he was able to apprehend the appellant, as he was drunk at the time and smelling of alcohol.

(vii) The testimony of Sonu found independent corroboration in the depositions of Krishan Kumar (PW-14) and Amit (PW-17).

(viii) The assertion, by the appellant, that he was trying to save 'C', and had been falsely implicated by Sonu, was demolished by the deposition of 'C' herself, as she identified the appellant from amongst many persons, of similar profile, present in the court, and also went on to describe the various acts committed by the appellant, towards her violation. There was no reason for 'C', who was merely a child, to lie or wrongly identify the appellant; neither was there any history of animosity between the appellant and her parents, or between the appellant and Sonu, or Amit, or Krishan Kumar.

(ix) The defence, of the appellant, that the oppressor of 'C' was, actually Sonu, was improbable. There was no reason why, if Sonu had perpetrated these atrocities on her, 'C' would have named the appellant, instead of Sonu. Even otherwise, it was improbable that a person, who had committed such a crime on 'C', would himself save the child; rather, his instinct would have been to flee from the spot.

(x) Rather, the conduct of the appellant was more suspicious, as there was no explanation for his presence at the corner of the *nehar*, where the prosecutrix was clinging on to the weeds and trying to save herself from drowning. It was clear that, in fact, Sonu had saved 'C' and, but for his intercession, she would have drowned.

(xi) In the circumstances, as the identity of the appellant, the manner of commission of offence, the place of commission of offence and the various documents, stood proved, and the veracity of the prosecution witnesses was neither shattered, nor their testimonies falsified, and in the absence of any inherent contradiction, inconsistency or infirmity amongst the statements of the various PWs, the offence under Sections 363, 366 and 376(2)(f) of the IPC (as it existed then), stood proved against the appellant.

Submissions of learned counsel

32. We have heard Mr. Pramod Kumar Dubey, learned counsel for the appellant, and Ms. Aashaa Tiwari, learned Additional Public Prosecutor ("APP") for the State.

33. Appearing for the appellant, Mr. Pramod Kumar Dubey ventilates the following submissions:

(i) In her statement under Section 164 of the CrPC, the prosecutrix did not name the appellant. Rather, she stated that

she was not in a position to identify the boy who had committed rape on her.

(ii) Reliance could not, justifiably, be placed on the identification, by the prosecutrix, of the appellant, in Court during trial, as the light was low.

(iii) Neither had the prosecutrix named the appellant, in her statement to Sonu.

(iv) Sonu and Krishan Kumar had stated that the incident of rape took place behind the Hanuman temple, whereas the site plan (Ex PW-24/A) showed that it took place on the bank of river.

(v) No question had been put, to any of the doctors, regarding the issue of whether penetration, of the vagina of 'C', had taken place. *Sans* penetration, there could be no question of rape.

(vi) The explanation, for the absence of semen on any of the exhibits, to the effect that the semen could have been washed away by the flowing water in the canal, was facile, as, had rape taken place, semen would be inside the vagina, and could not, therefore, disappear merely because the prosecutrix was lying in the canal.

(vii) The site plan also indicated that the spot of alleged occurrence of rape was not an isolated place.

34. *Per contra*, Ms. Aashaa Tiwari, learned APP, merely placed reliance on the statements of the prosecutrix 'C', under Section 164 of

the CrPC and, thereafter, during the course of trial. She emphasised that these were sufficient to indict the appellant, and that no further proof was required.

Discussion and findings

35. Sections 375 and 376 (sans the Explanations thereto, which are not of significance insofar as the present case is concerned) of the IPC, as they stood prior to their amendment by the Criminal Law (Amendment) Act, 2013 (w.e.f. 3rd February 2013), read thus:

“375. Rape. – A man is said to commit “rape” who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the 6 following descriptions: –

First. – Against her will.

Secondly. – Without her consent.

Thirdly. – With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly. – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. – With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. – With or without her consent, when she is under 16 years of age.

Seventhly.– When she is unable to communicate consent.

Explanation. – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. – Sexual intercourse or sexual acts by a man of his own wife, the wife not being under 15 years of age, is not rape.”

“376. Punishment for rape. –

(1) Whoever, except in the cases provided for by subsection (two), commits rape shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years but which may be for life for a term which may extend to 10 years and shall also be liable to fine unless the woman raped is his own wife and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years or with fine or with both:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgement, 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

(b) being a public servant, takes advantage of his official position and commits rape on 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 women'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 12 years of age; or

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than 10 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 judgement, impose a sentence of imprisonment of either description for a term of less than 10 years."

36. Rape, of a child of tender years, is a crime *sui generis*. It resides in a netherworld all its own, and betokens a depravity, in the perpetrator, which falls decidedly outside the pale of humanity. The perpetrator of such an offence is a psycho-social deviant, who brutally

indoctrinates his victim into adulthood, when she is still at the cusp of infancy, and is yet to savour the first fragrance of adolescence. Sympathy has no part to play in dealing with such an offender, and any attempt at benevolence, or mercy, would be an affront, not only to the hapless victim, but to the entire social fabric of womankind.

37. Though it is an oft repeated aphorism that precedent has little value in criminal cases. It would, nevertheless, be instructive to examine how the Supreme Court has been dealing with cases arising under Section 376 (2) (f) of the IPC.

38. In *State of Chhattisgarh v. Dehra*, (2004) 9 SCC 699, the respondent committed rape on an eight year old girl, when she was alone at the home. The victim narrated the incident to her mother, on her return. The High Court acquitted the respondent, on the ground that there was some discrepancy regarding the issue of whether penetration had taken place or not, medical examination of the respondent did not show any injury on the victim's private parts and there was a possibility that the victim, being a child was tutored. The Supreme Court, in appeal, reversed the decision of the High Court. It was observed that there could be no doubt regarding the factum of rape of the prosecutrix having been taken place, as there was *blood on her private parts, her hymen was torn and her labia minora was inflamed*. Reiterating the well settled proposition that, in such cases, conviction could be based solely on the evidence of the prosecutrix, the Supreme Court reversed the decision of the High Court and

restored the sentence awarded to the respondent therein by the Trial Court. An important proposition that emerges, from this decision, is that, in such cases, irrefutable proof of penetration is not a *sine qua non* for the offence under Section 376 (2)(f) of the IPC to be said have been made out, and bleeding from the genital area, coupled with the injuries on the genitals, were sufficient proof that the offence had been committed.

39. In *Datta Vs. State of Maharashtra (2013) 14 SCC 588*, the appellant-accused was convicted for committing rape of a 10 to 12 year old girl. Medical examination of the prosecutrix, in that case, found no labial injuries or presence of sperm; however, the hymen of the prosecutrix was torn and there was laceration on her posterior vaginal wall. Additionally, in that case, the doctor had opined that the injuries found on the prosecutrix could be attributable to partial penetration of her vagina. Given these facts, the Supreme Court upheld the conviction of the appellant and the sentence awarded to him. This decision underscores the position that the absence of sperm/semen would not rule out the possibility of the offence under Section 376 (2)(f) having been committed, and that the fact that the hymen of the prosecutrix was torn and that vaginal injuries had been sustained by her, were sufficient to constitute the offence.

40. *Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688* involved the rape of a 11 year old girl, after having been enticed by the appellant therein, on the pretext of purchasing bangles.

Adjudicating on the appeal, the Supreme Court held that the absence of any actual wound on the private parts of the prosecutrix was not conclusive of the fact that she was not subjected to rape. As human semen was traceable in the private parts of the girl, rape was held to have been committed, even without any proof of penetration. On these facts, the Supreme Court held that limited penetration of the prosecutrix, in that case, was proved.

41. In *Shyam Narain v. State*, (2013) 7 SCC 77, the appellant-accused was convicted of having raped an 8 year old girl. In that case, too, the prosecutrix was bleeding from her private parts, and the MLC revealed vaginal injuries and a torn hymen. It was held, by the Supreme Court, that the unimpeachable evidence of the child *M*, the testimony of the treating physicians, the medical evidence and the conduct of the accused, were sufficient to secure his conviction. The following findings, returned by the Court while examining the issue of sentence, are of stellar significance:

“19. The aforesaid authorities deal with sentencing in general. As is seen, various concepts, namely, gravity of the offence, manner of its execution, impact on the society, repercussions on the victim and proportionality of punishment have been emphasised upon. In the case at hand, we are concerned with the justification of life imprisonment in a case of rape committed on an eight year old girl, helpless and vulnerable and, in a way, hapless. The victim was both physically and psychologically vulnerable. It is worthy to note that any kind of sexual assault has always been viewed with seriousness and sensitivity by this Court.

20. In *Madan Gopal Kakkad v. Naval Dubey* [(1992) 3 SCC 204 : 1992 SCC (Cri) 598] it has been observed as follows: (SCC p. 226, para 57)

“57. ... though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilized society should be mercilessly and inexorably punished in the severest terms.”

21. In *State of A.P. v. Bodem Sundara Rao [(1995) 6 SCC 230 : 1995 SCC (Cri) 1097 : AIR 1996 SC 530]* this Court noticed that crimes against women are on the rise and such crimes are affront to the human dignity of the society and, therefore, imposition of inadequate sentence is injustice to the victim of the crime in particular and the society in general. After so observing, the learned Judges had to say this: (SCC p. 232, para 9)

“9. ... The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment.”

22. In *State of Punjab v. Gurmit Singh [(1996) 2 SCC 384 : 1996 SCC (Cri) 316 : AIR 1996 SC 1393]* this Court stated with anguish that crime against women in general and rape in particular is on the increase. The learned Judges proceeded further to state that 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 of the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. Thereafter, the Court observed the effect of rape on a victim with anguish: (SCC p. 403, para 21)

21. ... 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.”

23. In *State of Karnataka v. Krishnappa* [(2000) 4 SCC 75 : 2000 SCC (Cri) 755] a three-Judge Bench opined that the

“[c]ourts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years ... and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court.” (SCC pp. 83-84, para 18)

It was further observed that to show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced.

24. In *Jugendra Singh v. State of U.P.* [(2012) 6 SCC 297 : (2012) 3 SCC (Cri) 129] , while dwelling upon the gravity of the crime of rape, this Court had expressed thus: (SCC p. 311, para 49)

“49. Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu.”

25. Keeping in view the aforesaid enunciation of law, the obtaining factual matrix, the brutality reflected in the commission of crime, the response expected from the courts by the society and the

rampant uninhibited exposure of the bestial nature of pervert minds, we are required to address whether the rigorous punishment for life imposed on the appellant is excessive or deserves to be modified. The learned counsel for the appellant would submit that the appellant has four children and if the sentence is maintained, not only his life but also the life of his children would be ruined. The other ground that is urged is the background of impecuniosity. In essence, leniency is sought on the base of aforesaid mitigating factors.

26. It is seemly to note that the legislature, while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended up to life. The legislature, in its wisdom, has left it to the discretion of the court. Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilised society. The age-old wise saying that “child is a gift of the providence” enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers.

27. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullyng the physical frame of a woman is the demolition of the accepted civilised norm i.e. “physical morality”. In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on the one hand, society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some perverted members of the same society dehumanise the woman by attacking her body and ruining her chastity. It is an assault on the individuality

and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of “Spring of Life” and might be psychologically compelled to remain in the “Torment of Winter”. When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court.

28. The mitigating factors put forth by the learned counsel for the appellant are meant to invite mercy but we are disposed to think that the factual matrix cannot allow the rainbow of mercy to magistrate. Our judicial discretion impels us to maintain the sentence of rigorous imprisonment for life and, hence, we sustain the judgement of conviction and the order of sentence passed by the High Court.”

42. *State of Himachal Pradesh v. Sanjay Kumar*, (2017) 2 SCC 51, again involved rape of a 9 year old. The High Court acquitted the accused on the ground that the offence had been alleged to have been committed in the house of the prosecutrix, where there were 20 to 25 persons residing, between 8AM and 9AM. The possibility of such an incident taking place was, it was held, doubtful, if even some of the members of the family were not in the house at that time. The inaction, on the part of the prosecutrix, to disclose the incident to other members of the family, including her mother, was also regarded as an exculpatory circumstance. Additionally, it was held that the observation, that the *salwar* of the prosecutrix was blood stained was

difficult to believe, as this would not have gone unnoticed. These factors, coupled with the fact that the complaint, regarding the incident, was lodged three years thereafter, according to the High Court, defeated the case of the prosecution. Observing, initially, that, while examining the issue, the Court was required to take into consideration the realities of life that prevailed in the Indian social milieu, the Supreme Court, in appeal, held that it was quite understandable that a 9-year old child, who had undergone such a traumatic experience, would be frozen with fear, and unable to speak. (The fact that the oppressor in that case was the uncle of the prosecutrix, was also relied upon.) Significantly, in that case, the prosecutrix narrated the incident two to three years after the offence had taken place, when she began of complaining of continuous stomach ache and, on being referred to a gynaecologist, the fact of her having been sexually assaulted, two to three years earlier, came to light. It merits reiteration, that, given these circumstances, the Supreme Court refusal to treat the delay of two to three years, in reporting the incident – which would ordinarily have been irremediably fatal to the case of the prosecution in any other case – as an extenuating circumstance. In the facts of the case, the reliance by the High Court, on the family being joint, and on the improbability of the allegedly blood-stained *salwar* of the prosecutrix going unnoticed, were, it was held, misguided. The following observations, in para 31 of the report, are vital:

“31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High

Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. 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? The plea about lack of corroboration has no substance (See *Bhupinder Sharma v. State of H.P. v. State of H.P.*, (2003) 8 SCC 551 : 2004 SCC (Cri) 31). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.”

43. These, and a host of other decisions on the point, reference where to may not be necessary, establish the fact that, while dealing with cases of sexual assault on minors, the Court has to display a much higher degree of sensitivity than in other cases. It would be fundamentally fallacious to subject the testimony of the prosecutrix, in such cases, to the same rigours as those to which the evidence of the victim in criminal cases is usually subjected. It is impossible to fathom the psychology of a child of tender years, who has been

subjected to sexual abuse, and courts are required to be alive to this fact. While it is true that, in exercise of his adjudicatory functions, the judge is, to an extent, required to psychoanalyze the minds of the parties before him, especially in the case of a victim subjected to criminal assault, this test fails completely, when dealing with a child who has been ravished. Expecting coherence and corroboration, *inter se*, among the various statements made by the prosecutrix in such cases at different points of time, would be irrational and unrealistic. The Court has, at all times, in such cases, to be aware of the nature of offence alleged, and the innocence and naiveté of the victim of the offence.

44. In the present case, there can be no question of any doubt regarding the factum of rape having been committed on the prosecutrix 'C'. The MLC (Ex. PW 13/A) of PW-13 Dr. Siddharth coupled with his evidence during trial, clearly establishes the fact that 'C' had sustained wounds and that there were blood stains over her lower garment. This was further established by the opinion entered by Dr. Shilpi on the said MLC, to the effect that 'C' was found to be bleeding vaginally. The opinion of Dr. Shilpi was vouchsafed by Dr. Geetanjali Singh (PW-18), whom the appellant did not choose to cross-examine. The MLC drawn up at the BSA Hospital (Ex. PW 12/A) by Dr. Shaina, coupled with the statement of Dr. Shimpi Goyal (PW-12), Senior Resident in the Gynecology Department of the said Hospital, further established the fact of vaginal bleeding. Dr. Shimpi Goyal, too, was not cross examined. In view of the fact that these

MLCs unambiguously found that ‘C’ was bleeding vaginally, her hymen was torn (thereby establishing the fact of penetration given the fact that she was only 5 years old), her vaginal and rectal mucosa were torn and she had suffered vaginal injuries, there can be no doubt regarding the fact that she had been subjected to rape.

45. The only issue that would remain to be decided before us, therefore, would be whether such rape was, was not, committed by the appellant. The appellant, predictably, alleges that the offender of the prosecutrix ‘C’ was Sonu and that he, on the other hand, was trying to save her from drowning in the *nehar*.

46. We have reproduced, in extenso, in para 10 (*supra*), the evidence tendered by the prosecutrix ‘C’ as PW-20 before the learned ASJ, and we are entirely convinced that, on the basis of the said evidence, the offence of having committed rape on ‘C’ is brought home to the appellant, without a shred of doubt. The prosecutrix has recited, in exhaustive and excruciating detail, all that transpired with her during the nightmarish encounter with her assailant on the banks of the *nehar* and has been painfully consistent throughout. She has, clearly, unequivocally, and without an iota of ambiguity or doubt, deposed that (i) the appellant had enticed her to accompany him on the pretext of feeding her “*ber*”, (ii) he took her to a spot near the temple, (iii) he removed his own, and her, underwear, (iv) he thereafter throttled her neck and smote her in her eye, (v) he then set fire to her hair, (vi) he thereafter “urinated” in her, and (vii) having done so, he

threw her in the *nehar*, as a result of which she was soaked when found by Sonu. The deposition, is entirely spontaneous and natural, and does not admit of any sign of doubt, hesitance or prevarication. It commands, and commends, instant acceptance. 'C', moreover sustained cross-examination and, in equally clear and categorical terms, asserted that she had not been tutored and had given her statement of her own accord. She unhesitatingly denied the suggestion that the appellant had tried to save her from drowning. We are of the firm conviction that this deposition of 'C' would, by itself and without any supportive evidence, be sufficient to bring the offence, of kidnapping, grievously injuring, and committing rape on the prosecutrix 'C', squarely home to the appellant.

47. An attempt was made, by learned counsel for the appellant-accused to rely on the statement, of the prosecutrix 'C' under Section 164 of the CrPC, pointing out the fact that, in the said statement, she had not named the appellant. The naming of the appellant, by 'C' in her deposition before the learned ASJ, was therefore, it was sought to be contended, an improvement on her statement under Section 164 CrPC and probably, therefore, tutored.

48. We are not persuaded to accept this contention. In the first place, as we have already noted hereinabove, on her being specifically questioned in this regard in cross-examination, the prosecutrix 'C' categorically asserted that her statement had been given of her own accord and she had not been influenced by her parents to do so. We

also find that the deposition of 'C' was detailed as well as spontaneous, and that her answers were natural responses to the questions put to her. Even more significantly, her identification, of the appellant, from four boys of similar height, physique and complexion, wearing similar clothes, clearly belies the assumption, sought to be inferred by Mr. Pramod Kumar Dubey from the statement of 'C' under Section 164 of the CrPC, that she could not have recognized her assailant.

49. Adverting now to the statement of 'C' under Section 164 of the CrPC, we observe that, in the said statement, 'C' has pointed out that, a few days earlier, a boy had enticed her to accompany him into the jungle under the pretext of feeding her '*ber*' and that they had proceeded on his cycle. She also pointed out that the boy had tried to strangle her and had made her unconscious and that, after she regained consciousness, he pushed her into the canal, from which she was rescued by another man. She further confirmed that, after regaining consciousness, she found that she was bleeding from the place from where she used to pass urine.

50. Learned counsel for the appellant seeks to capitalize on a single sentence in her statement viz. ("*Mai us ladke ko pehchan nahin sakti* i.e. "I cannot identify that boy".) To our mind, this single and isolated statement of 'C', in her deposition under Section 164 of the Cr.P.C, cannot be of any substantial assistance to the appellant. We have to bear in mind the fact that the prosecutrix was only 7 years of age at the

time, and that she was being asked to recall the particulars of what was perhaps the most traumatic assault she would ever suffer. In such circumstances, we are hesitant to accept the statement, made by her, that she could not identify the boy who had violated her, as irrefutable evidence that she would never be able to identify the boy even if he were physically present before her. It has to be borne in mind that the question was put to 'C' without the appellant, or any likeness of him, being shown to her. Without the appellant before her, 'C', who was merely a child of tender years, might well have been unsure whether she would be able to recognize her attacker; however, that cannot lead to an inference that, even if the attacker was before her in flesh and blood, she would still be unable to recognize him. That apart, we cannot attribute, to a seven-year old child, the same comprehension, of the question put to her and the same accuracy, of the answer given by her thereto, as could be attributed to an adult witness of matured intelligence. It would, therefore, in our view be entirely impermissible to use the statement, of the prosecutrix 'C' rendered under Section 164 of the CrPC – which was otherwise complete and coherent in all material particulars – as eroding, in any manner, the effect of her subsequent deposition, in evidence, before the learned ASJ.

51. In any event, the prosecutrix having accurately identified the appellant from amongst four youths of similar appearance, wearing similar clothes, and having stood by the said identification in cross-examination, we are clear in our mind that the prosecutrix 'C'

recognized the appellant as the boy who had assault her on the fateful evening of 7th February 2012.

52. We also note that the testimony of ‘C’ was significantly corroborated by PW – 16 (Sonu). During the course of arguments a feeble attempt was made, by learned counsel appearing for the appellant, to shift the blame upon Sonu and to hold him responsible for the victim’s fate.

53. In his court statement, Sonu provided a vivid account of the incident and deposed that, on 7th February, 2012, at about 5.00 p.m., when he was approaching the Hanuman Temple, where he used to sell guavas, he saw a girl, around five years of age, in the canal. He identified the appellant to be the individual who was standing that time near the said girl. As the girl was weeping, Sonu brought her out of the canal and noticed that her face was swollen and her clothes bloodstained. The appellant tried to run away from there but was apprehended by Sonu and brought to the tea shop near the Hanuman Temple. He met Krishan Kumar there and apprised him of the incident; call was made to the police at 100. ‘C’s’ parents arrived there on the call of Krishan Kumar, and Sonu handed over the appellant and ‘C’ to the police. He further stated that the girl’s underwear was bloodstained. In cross- examination, he explained that his residence was nearby and he used to sell seasonal fruits and vegetables on the pavement. He further informed that the appellant was drunk at that time and smelling of alcohol. The appellant, who

was found standing on the banks of the 'Nehar' was soaked with water from head to toe. He denied the suggestion that the appellant had rescued the prosecutrix. He further claimed that on his confronting him, the appellant questioned him saying '*Tu Kya Lag Raha Hai?*'. He denied the suggestion that the appellant did not try to run away and he himself accompanied him to the tea stall. Sonu volunteered to add that the appellant had attempted to run away, but that he did not allow him to do so. He was fair enough to inform that the child did not divulge anything to him. He denied the suggestion that the child was not brought by him to him to the tea shop or that the appellant did not commit any wrong with the victim.

54. On analysing the testimony of this material witness, it is clear that the appellant's presence at the spot is not under challenge. Conflicting suggestions were given to Sonu, by the defence in cross – examination. At one stage, it was suggested that the appellant had accompanied Sonu to the tea stall 'himself'. Elsewhere, an entirely inconsistent suggestion was given that Sonu had not brought the appellant and the victim from the canal to the tea shop. Apparently, the appellant was not sure as to what defence he was to plead. No suggestion was advanced, during the effect that Sonu was the perpetrator of the crime, or that the appellant had saved the girl from drowning in the canal. The appellant, who was in the company of 'C' soon before his apprehension, did not offer any explanation for the underwear/clothes of 'C' being bloodstained, or for her face being swollen. These facts were in the especial knowledge of the appellant,

which he failed to divulge or explain, as required by Section 106 of the Evidence Act. In the absence of any prior animosity or ill-will, Sonu, aged around 24 years, a poor guava seller, cannot be expected to falsely implicate the appellant in such a heinous crime. It appears, rather that 'C' was fortunate that Sonu happened to reach at the spot in time for her; or else the appellant could have caused even more harm to her.

55. Though the deposition of the prosecutrix 'C' would, by itself, be sufficient to bring the charge of rape home to the appellant, we also take notice of the fact that the appellant was accurately identified by Krishan Kumar (PW-14), Virender (PW-15), Amit (PW-17), ASI Shree Bhagwan (PW-22), Ct. Arjun Lal (PW-23), SI Anil Tushir (PW-24) and SI Narender (PW-25). These depositions were either not subjected to cross examination or, where they were, withstood the same.

56. In conjunction with the deposition of 'C', we would also be inclined to believe the evidence of Amit (PW-17) who clearly stated that he saw Sonu coming towards his stall, carrying the prosecutrix in one arm and holding the appellant by the other. The said statement stood supported by his evidence, in cross examination, where he reiterated that it was around 5.00 PM when the child *was brought to his shop*. We also note, in this regard, the evidence of Krishan Kumar (PW-14) in his examination-in-chief, in which he categorically stated

that he “saw that Sonu was bringing to accused Shree Bhagwan and ‘C’ by holding their hands” In his cross-examination, too, Krishan Kumar stated, initially that he had “seen Sonu only who brought the victim girl and the accused” and, further, that “Sonu brought the accused Shree Bhagwan by holding his hand at the Tea shop.” It is, no doubt, true that, later in his cross-examination, PW-14 Krishan Kumar did state that Sonu, had already brought ‘C’ and the appellant at the tea shop before his arrival there. However, we are not inclined to discard the evidence of PW-14 Krishan Kumar, to the effect that Sonu had, infact, brought the prosecutrix ‘C’ and the appellant with him to the tea stall, as this fact also stands corroborated by the evidence of PW-17 Amit, in cross-examination, to the effect that, at 5.00PM, *when ‘C’ was brought to his shop, Krishan Kumar was already present there.* As such, it appears clear, to us, that, apart from Amit, Krishan Kumar was also present at Amit’s shop before Sonu reached there, and that Amit and Krishan Kumar were both witnesses to the fact that Sonu was bringing, with him, the prosecutrix ‘C’, carrying her in one arm, and the appellant, holding him by the other.

57. We, therefore, reject the contention, assiduously canvassed before us, by Mr. Pramod Kumar Dubey, that the perpetrator of the offence against ‘C’ was not the appellant, but Sonu.

58. In this connection, we also entirely endorse the observation, of the learned ASJ, to the effect that, had Sonu been her oppressor, there was no reason for the prosecutrix ‘C’ to identify the appellant in

Court, or name him during her deposition. There is no evidence of any previous enmity, animosity or ill-will between the prosecutrix 'C' and or family members, and the appellant, and there is no reason whatsoever, therefore, for any of them to wrongly implicate the appellant for an offence that he had not committed.

59. We also find no justification forthcoming, for the appellant to have been present, in the company of the prosecutrix 'C', at the banks of the *nehar*, when, hardly an hour earlier, she had been playing with her friends outside her house. It is impossible to believe, that for no rhyme or reason, a five year old girl would steal away from her friends, with whom she was playing, and run towards the nearby canal. If anything, one would expect that, when it started raining, the natural instinct of the child would be to run indoors, and not to run further away from the protection of her home, especially when her mother was at home. It is obvious that her presence at the corner of the *nehar* was not of her own volition, but she had been enticed to the said spot. Given the fact that the appellant and Sonu were the only two persons, who were present at the spot with 'C', and in view of our finding, hereinabove, that Sonu, infact had arrived there later and rescued 'C', we have no doubt about the fact that the appellant was the one who had enticed the prosecutrix away from the warmth of her home and family, and into his private hell.

60. We had, infact, pointedly queried of Mr. Pramod Kumar Dubey as to the circumstance in which his client was found in the company of the prosecutrix ‘C’ at the banks of the *nehar*, but we could obtain no satisfactory response.

61. We may, before parting with this judgement, deal with three other ancillary submissions advanced by Mr. Pramod Kumar Dubey appearing for the appellant-accused.

The “*res gestae*” argument

62. Mr. Pramod Kumar Dubey sought to press, into service, the doctrine of *res gestae*. “*Res gestae*”, literally, means “things done”, and stands statutorily engrafted in Section 6 of the Indian Evidence Act, 1872 (hereinafter referred to as “the Evidence Act”). Section 5 of the Evidence Act permits evidence, to be given, in any suit or proceedings “of the existence or non-existence of every fact and issue and of such other facts as our hereinafter declared to be relevant, and of no others.” “Facts in issue” are defined, in Section 3 of the Evidence Act, and, as meaning and including “any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability or disability, asserted, or denied in any suit or proceeding, necessarily follows.” The various Sections, which follow Section 5 in the Evidence Act, set out the circumstances in which facts can be treated as “relevant”, of which

Section 6, as already noted hereinabove, embraces the concept of “*res gestae*”. Section 6 of the Evidence Act reads thus:

“6. Relevancy of facts forming part of same transaction. – Facts which, though not in issue, also connected with the fact in issue as to form part of the same transaction, are relevant, whether they could the same time and place or at different times and places.”

Simply put, invocation of the principle of *res gestae* would require identification, in the first instance, of the “facts in issue”. Once that is done, all facts, forming part of that transaction, become relevant under Section 6, even if, seen by themselves, they are not “facts in issue”, as defined in Section 3. It is well-recognised that Section 6 is most often invoked to treat, as relevant, evidence which would otherwise constitute “hearsay” and would, consequently, be inadmissible in evidence, by virtue of Section 60 of the Evidence Act. Allowability of *res gestae* evidence, as introduced by Section 6 of the Evidence Act, is amplified by Section 8 thereof, which reads as under:

“8. Motive, preparation and previous or subsequent conduct.—

Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1. - The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2. - When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.”

We are frankly unable to comprehend how the principle, engrafted in the above provisions, is being pressed into service by learned counsel for the appellant. Undoubtedly, applying Section 6, if evidence made relevant thereunder, even if otherwise constituting hearsay, is either not obtained or, if obtained, is not taken into consideration, it would defeat the case of the prosecution. However, in the facts of the present case, application of the said principle would, if anything, strengthen the case of the prosecution, rather than that of the defence. Learned counsel for the appellant has not been able to demonstrate that the evidence of any material witness, which could be regarded as constituting part of the same “transaction”, of the assault on ‘C’, the attempt to subsequently drown her in the *nehar*, and her being rescued therefrom, stands excluded. There is nothing to indicate the presence of any other person, or bystander, and the said time and place of occurrence. Insofar as the parents of ‘C’ were concerned, their statements were recorded, both during investigation as well as in the course of trial, and they clearly deposed that their daughter ‘C’ had disclosed, to them, that the appellant had done “*galat kaam*” with her. It has been sought to be contended, in the grounds urged in the appeal, that the evidence of the children who were playing with ‘C’ should also have been recorded. In any case, such evidence could not be regarded as constituting *res gestae*, not being part of the “transaction” involved in the offence. Mr. Dubey has further argued that he was

invoking the said doctrine to urge that the prosecutrix ‘C’ had not mentioned the name of the appellant to Sonu, and that, therefore, the recital of what had transpired, as allegedly retold by Sonu was his own imagination. We have already noticed, hereinabove, how the evidence available is more than sufficient to prove the commission of rape on the prosecutrix ‘C’ as well as to establish the culpability of the appellant therein. This contention of Mr. Dubey, therefore, is totally devoid of merit.

63. Secondly, Mr. Dubey sought to contend that no reliance could be placed, on the identification, by ‘C’, of the appellant, during trial, as the light in the courtroom was dim. We find nothing, on record, to substantiate this submission; ergo, it is rejected outright.

64. Thirdly, it was sought to be submitted, by Mr. Dubey, that the site plan of the area showed the place of occurrence of the crime to be on the bank of the *nehar* opposite to the temple, which falsified the version of the prosecution, to the effect that the rape had taken place behind the temple. To us, this aspect appears to be too insignificant to merit consideration, given the fact that there can really be no doubt about rape having, in fact, been committed upon ‘C’. We may also note, in passing, that ‘C’, in her evidence during trial, had stated that the incident had taken place “ahead of the temple”.

65. Oft has it been said that “out of the mouths of babies and sucklings” does, at times, the truth emerge and we are sanguine that it

has so emerged, in the present case, to the eternal, but well-deserved, misfortune of the appellant.

66. We, therefore, unhesitatingly concur with the findings of the learned ASJ that the appellant was guilty of the offence of kidnapping 'C' from the lawful guardianship of her parents, with the intention of forcing and seducing her to illicit intercourse and of, thereafter, committing aggravated sexual assault/rape upon her. We, therefore, confirm the conviction of the appellant under Section 363 read with Section 366 and Section 376 (2)(f) of the IPC.

67. We also find no justification whatsoever to interfere with the sentence awarded to the appellant by the learned ASJ. Rape devastates, irreversibly and irreparably. It is a vicious expression of subjugation of woman by man, where the perpetrator seeks to take brute advantage of what is, at best, a chance chromosomal circumstance. It is an anachronism, which, decidedly, cannot be tolerated, in a day and age in which the sexes march arm in arm, matching stride for stride. Rape is, in the ultimate eventuate, a crime not of passion but of power, and when committed by an adult on an innocent child, a crime of unmentionable perversity. The appellant, in the present case, did not contend himself with ravishing the innocence of prosecutrix 'C'; he also grievously injured her face, lips and chin, burnt her hair, attempted to strangle her and threw her in the *nehar*. The appellant must consider himself fortunate that Sonu intervened

and rescued the prosecutrix 'C'; else it is quite possible that the appellant might have faced the extreme wrath of the law.

68. In the circumstances, we see no ground to interfere with the sentence awarded to the appellant by the learned ASJ, which is upheld *in toto*.

69. The appeal is, therefore, dismissed.

70. Trial Court record be sent back with copy of the judgement. Intimation be sent to the Superintendent Jail.

**C.HARI SHANKAR
(JUDGE)**

**S. P. GARG
(JUDGE)**

March 08, 2018
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