$~R-50-51

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

Judgment reserved on: 16th December,2019

Judgment pronounced on:24th December,2019

+ CRL.A. NO. 1607/2014

STATE ..... Appellant

Through: Ms. Neelam Sharma, APP for the State

versus

SUNIL KUMAR ..... Respondent

Through: Mr. Biswajit Kumar Patra, Advocate.

AND

+ CRL.A. NO. 219/2014

SUNIL KUMAR ..... Appellant

Through: Mr. Biswajit Kumar Patra, Advocate.

versus

STATE ..... Respondent

Through: Ms. Neelam Sharma, APP for the State

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J

1. Present appeals are directed against a common judgment dated 13.09.2013 and order of sentence dated 16.09.2013 passed by the learned Additional Sessions Judge-01, West District, Delhi in

Sessions case No. 06/2012 arising out of FIR No. 504/2011 registered under Sections 363/376/506 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') at Police Station Uttam Nagar, Delhi whereby the learned Sessions Judge found the appellant-accused guilty and sentenced him as follows:

> *"Keeping in view the aforesaid submissions and the facts and circumstances of the case and the seriousness of the offence, the convict is sentenced to* ***Rigorous Imprisonment for three years and a fine of Rs.2,000/-*** *ID Simple Imprisonment for fifteen days U/s* ***363 IPC****, the convict is sentenced to* ***Rigorous imprisonment for ten years and a fine of Rs.5,000/-*** *ID Simple Imprisonment for 30 days U/s* ***376 IPC*** *and he is also sentenced to* ***Rigorous Imprisonment for two years*** *U/s* ***506 IPC****. All the sentences shall run concurrently."*

2. Criminal Appeal No. 219/2014 has been preferred by the appellant-accused/Sunil Kumar aggrieved by his conviction and sentence awarded to him as detailed in para 1 above. However, the prosecution chose to file Criminal Appeal No. 1607/2014 seeking enhancement of sentence imposed upon appellant-accused/Sunil Kumar. Since, both the appeals were directed against the same order of sentence, these appeals were taken up for hearing together and are decided by this common judgment.

3. The brief facts of the case, as mentioned by the learned Trial Court are reproduced as under:

> *"In brief, the case of the prosecution is that on 18.10.11, complainant Shri Vijay Kumar lodged the missing report of her daughter (prosecutrix) aged about 7 years as she has been missing since 9:30 p.m.*

on 17.10.11. On this information, FIR was registered. The complainant along with prosecutrix and other relatives came to the police station and alleged that the prosecutrix has been raped by the accused Sunil. The prosecutrix was got medically examined from DDU Hospital. The accused was arrested from Dwarka More Metro Station and he was medically examined from DDU Hospital. The statement of the prosecutrix was got recorded U/s. 164 Cr.PC in which the prosecutrix has stated that accused has taken her to a lonely place and had raped her. The accused has also threatened the prosecutrix with threat of her life."

4. After the completion of the investigation, a charge sheet was filed and Charges were framed against the accused person for offences punishable under Sections 363/376/506 IPC to which the accused pleaded not guilty and claimed trial

5. In order to bring home the guilt of the accused person, the prosecution examined 13 witnesses in all. The incriminating evidence and circumstances were put to the accused person during his statement recorded under Section 313 Cr.P.C., wherein he claimed to have been falsely implicated in the present case and chose not to lead any evidence in his defence.

6. After appreciating and considering rival contentions of the parties and scrutinizing the evidence, the learned Trial Court held the accused guilty and convicted him for the charged offences.

7. Mr. Biswajit Kumar Patra, learned counsel for the appellant, opened his arguments by submitting that the impugned judgment dated 13.09.2013 is based on conjectures and surmises and the same is against the facts and settled proposition of law and that the learned

trial court has ignored and omitted the material evidence and has disregarded the cogent evidence in favour of the appellant.

8. Learned counsel for the appellant further contended that the learned Trial Court had erred in holding the appellant guilty for the charged offences and the judgment rendered by the learned Trial Court is perverse; that evidence that surfaced during the course of the trial was not properly appreciated and a proper appreciation of the facts and circumstances would have definitely resulted in the acquittal of appellant for the charged offences; that the testimony of prosecutrix is totally unreliable as well as there are material contradictions and concealments in her statement recorded under Section 164 Cr.P.C and in her deposition before court; that the evidence of a child witness has to be evaluated carefully with greater circumspection and the same can only be relied upon if there are no embellishments or improvements therein; that there are severe contradictions and inconsistencies in the testimonies of other material witnesses; that the case of the prosecution is neither supported by medical evidence nor by scientific evidence; that the sole testimony of the victim in a case of rape is sufficient to convict the accused subject to condition that the same inspires confidence of the Court, but in the instant case, the sole testimony of the victim fails to inspire confidence and is unworthy of acceptance. In support of his contention he relied on the case of ***State of M.P. vs Ramesh & Ors*** reported in ***(2011) 4 SCC 786.***

9. Ms. Neelam Sharma, learned APP for State, on the other hand, strongly refuted the submissions made by the counsel for the

Appellants and submitted that the learned Trial Court after sound appreciation of the evidence adduced by the prosecution, has rightly convicted the appellant for the charged offences and the appeal filed by the respondent-accused is liable to be dismissed.

10. Learned APP for the State further submitted that the trial Court has appreciated the testimony of the prosecutrix in its right perspective while relying on the well-settled proposition of law that the sole testimony of the victim of sexual offence is sufficient to base conviction of the accused. She further submitted that the version of the victim recorded under Section 164 of the Cr.P.C and the testimony of the prosecutrix before court was consistent, and unimpeachable. She further submitted that in such cases of heinous crimes, normal discrepancies are bound to occur in the deposition of a child witness, due to errors of observation, namely, error of memory, due to mental disposition at the time of the incident. To substantiate her arguments learned APP for State relied upon the case of ***Rameshwar vs State of Rajasthan*** reported in ***1952 (3) SCR 377***; ***Brij Lal vs State*** reported in ***2017 (1) JCC 583***.

11. Learned APP for the State further added that the testimony of the victim is corroborated by the medical evidence*(i.e. MLC of the prosecutrix*), as hymen of the victim was torn and there was redness around her hymen, the same is sufficient enough to credit the version of the prosecutrix that she was sexually assaulted. She further submitted that as per the MLC of the prosecutrix she had also sustained linear external injuries as there were two abrasions on her palm and one on her forehead. To substantiate her arguments the

learned APP for State relied upon on Modi's "*A Textbook of Medical Jurisprudence and Toxicology*" 24th edition page 668 wherein the Ld. Author observed-

> *—in small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum."*

12. Reliance was also placed on Parikhs's textbook of "*Medical Jurisprudence, Forensic Medicine and Toxicology*" 6th edition page 5.38, wherein the Ld. Author have noted that:

> *"in young children as the vagina is very small and hymen deeply situated, the adult penis cannot penetrate it. In rare cases of great violence, the organs may be forcibly introduced, causing rupture of the vaginal vault and associated visceral injuries. Usually, violence is not used and the penis placed either within the vulva or between the thighs. And as such, only redness and tenderness of the vulva may be caused. The hymen is usually intact……. There may be no signs or very few signs of general violence, since the child has no idea of the act is also unable to offer resistance."*

13. Learned APP for the State further contended that the Trial Court in its impugned order had erred in convicting the appellant-accused for the imprisonment of ten years. She submitted that the sentence awarded to the respondent-accused was inadequate and should be enhanced to life imprisonment. To substantiate her arguments, learned APP for State placed reliance on cases titled as ***Abdul Wahid vs State of U.P*** reported in ***(2016) 1 SCC 583***; ***Mofil Khan & Anr vs State of Jharkhand*** reported in ***(2015) 1 SCC 67***; ***Mahesh vs State***

of M.P. reported in ***1988 Cri LJ 1380***; ***Sevaka Perumal vs State of Tamil Nadu*** reported in ***1991 3 SCC 471***; ***Rajbala vs State of Haryana & ors*** reported in ***AIR 2015 SC 3142***; ***Rajiv vs State of Rajasthan*** reported in ***AIR 1996 SC 787***.

14. We have heard the learned counsel for the parties and carefully examined the impugned judgment and the material available on record as well.

15. It is a settled principle of law that in a case of sexual assault, the conviction can be based on the sole testimony of the victim without corroboration from any other evidence and where the testimony of a victim of sexual assault appears to be unblemished, trustworthy and instills confidence in the Court and should be of sterling quality. It is also a well settled principle of law that the sole testimony of child witness can be relied upon along with other, circumstances and corroborative evidence to convict the accused. Undoubtedly, the settled proposition of law that the evidence of child witness is required to be scrutinised and approached with great caution. In this regard, reference can be made to the dicta of the Apex Court in the case of ***Yogesh Singh Vs. Mahabeer Singh and others*** reported in ***AIR 2016 SC 5160***, wherein the Apex Court has held that:

> ***"22. It is well settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law.*** *(See Prakash v. State of M.P. [Prakash v. State of M.P., (1992) 4 SCC 225 : 1992 SCC (Cri) 853] , Baby Kandayanathil v. State of Kerala [Baby Kandayanathil v. State of Kerala, 1993 Supp (3) SCC 667 : 1993 SCC (Cri) 1084] , Raja Ram*

Yadav v. State of Bihar [Raja Ram Yadav v. State of Bihar, (1996) 9 SCC 287 : 1996 SCC (Cri) 1004] , Dattu Ramrao Sakhare v. State of Maharashtra [Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341 : 1997 SCC (Cri) 685] , State of U.P. v. Ashok Dixit [State of U.P. v. Ashok Dixit, (2000) 3 SCC 70 : 2000 SCC (Cri) 579] and Suryanarayana v. State of Karnataka [Suryanarayana v. State of Karnataka, (2001) 9 SCC 129 : 2002 SCC (Cri) 413] .)

23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring*. (Vide Panchhi v. State of U.P. [Panchhi v. State of U.P., (1998) 7 SCC 177 : 1998 SCC (Cri) 1561])"*

16. In view of the settled law, we shall now examine whether the evidence adduced by the prosecution, particularly the testimony of the victim, is trustworthy, credible and can be relied upon. From the perusal of the record, it transpires that the prosecutrix has deposed on same lines and there are no material contradictions her testimonies. In her statement recorded under Section 164 Cr.P.C, the victim has stated that:

"Do din purv sham ke waqt mere mama ji (Surender) ne mujhe Dukaan per dahi lene bheja tha. Dukaan band thi. Paas hee ek gali me lohe ka jheena (stair case) tha. Wahan per ek ladka tha. Usne mujhse mere mummy papa ka naam poocha tha. Fir usne mujhe kha ki woh mujhe 200 rs. Dega. Maine mana kr diya tha. ***Fir wah mera hath pakadh kar mujhe apne sath le jane laga tha. Maine mana kiya toa woh jabardasti***

mera hath pakad kr mujhe le gaya tatha dhamki di ki agar awaaz nikali to woh jaan se mar dega. Fir mujhe ek sunsan jagah (Kaanto wali) jagha per le gaya tha. Aaspas koi nhi tha fir meri kachi utar di. Sunil ne apna pajama bhi utar diya tha. Mujhe niche lita diya tha tatha woh mere upar let gaya tha. Fir usne apni susu meri susu me dalne laga. *Mujhe dard bhi hua tha. Main ro rahi thi. Mera muh apne hath se sunil ne band kr diya tha. Mujhe chaku se marne ki dhamki bhi di thi. Mere pet wah chati main mukke bhi mare the. Uske bad rote rote meri neend lag gayi thi. Sunil ne mujhe kha tha ki woh mera pati hai aur main uski patni hu. Jab meri ankh khuli tab wahan Sunil nhi tha. Atha: main jaldi jaldi (bigair nikkar ke) apne ghar bhag ayi thi. Sunil bhot ganda aadmi hai."*

17. The victim during her examination-in-chief stepped into witness box as PW-3 and deposed that :-

> *"At the time of incident, I was staying in the house of my maternal uncles and my maternal grandfather at Uttam Nagar, Delhi. At that time I was studying in class 2nd. On the day of incident, my Surender @ Sonu Mama (maternal uncle) had sent me to bring curd by giving me Rs.5/- or Rs.10/-. I went to the dairy outside the gali where the house of my maternal uncle is situated. That dairy was closed at that time. So, when I was returning towards the house of my maternal uncle,* ***accused Sunil present in the court (at this stage the prosecutrix was asked to identify the accused) met me on the way. I knew the accused and his name as I used to see him in the gali where the house of my maternal uncle is situated and the accused had told his name to me on the date of incident****. He asked about the name of my parents. He said that he would give me Rs.100/-. Thereafter he told me to go. When I was proceedings towards the house of my maternal uncle, he again called me and told me that he would*

give me a Lolypop. Accused took me to a place where there were thorns. One boy and girl were sitting there and nobody else was present there at that time. Accused again told me that he would give me a Lolypop. Thereafter, accused removed my underwear and also removed his own underwear. When I told him not to do so, accused gave me fist blows in my stomach and also pulled my hair and also threatened me that if I wept or shouted, he would stab me with a knife. Thereafter accused put his urinating part into my urinating part. I felt severe pain in my urinating part and I had started bleeding and my hands and legs were got smeared with blood. I became semi conscious/sleepy. I was feeling pain due to pricking of thorns on my body also. When I got up, I saw accused sitting beside me and I was also feeling cold. Accused had put his shirt on my body. When I tried to weep, accused again gave me fist blows. In the morning, I went back to my house on my own. I told the whole incident to my mother. I was taken to the police station. Police recorded my statement. I was taken to the hospital. My clothes were taken by the doctor. I was brought in the Court also and I told the whole incident in the court. My thumb impression was taken in the court at that time. Now, I am staying with my parents.
At this stage a sealed envelope having seal of court of Sh. Rajinder Kumar MM is opened out of which statement of the prosecutrix U/s 164 Cr.P.C. is taken out and shown to the witness and the witness had identified her thumb impression at the point A on the same and the same is Ex.PW3/A."

18. Perusal of the aforesaid testimony reveals that PW-3 (prosecutrix) has been consistent in her statement throughout that intercourse was against her wishes and that there was no consent as she had been caught, threatened and thereafter, she had been subjected to rape by

the appellant-accused/Sunil. It is settled law that in cases involving sexual assault/rape, it is generally difficult to find any corroborative witnesses, except the victim herself and therefore, the evidence of the victim is sufficient for conviction unless there exist compelling reasons for seeking corroboration. Thus, a conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence.

19. The Apex Court has time and again held that the sole testimony of the prosecutrix is sufficient to hold the accused guilty if it inspires confidence and the same principles have been reiterated in ***Vijay v. State of Madhya Pradesh*** reported in ***(2010) 8 SCC 191***. Relevant paragraph of the judgment reads as under:

> *"14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."*

20. In ***Gagan Bihari Samal v. State of Orissa*** reported as ***(1991) 3 SCC 562***, the Hon'ble Supreme Court of India whilst observing that corroboration is not the sine qua non for conviction in a rape case, held as follows :

> *"**6.** In cases of rape, generally it is difficult to find any corroborative witnesses except the victim of the rape. It has been observed by this Court in Bharwada Bhoginbhai Hirjibhai v. State of Gujarat [(1983) 3 SCC 217 : 1983 SCC (Cri) 728 : AIR 1983 SC 753] as follows: (AIR headnote)*
>
> > *"Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting,*

refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.

A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors, the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated."

The above observation has been made by this Court relying on the earlier observations made by this Court in Rameshwar v. State of Rajasthan [1952 SCR 377, 386 : AIR 1952 SC 54 : 1952 Cri LJ 547] with regard to corroboration of girl's testimony and version. Vivian Bose, J., who spoke for the Court observed as follows: (SCR p. 386)

"The rule, which according to the cases has hardened into one of law, is not that

> *corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, ... The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."*

21. Further, it is also a well established proposition of law that minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for not accepting an otherwise reliable prosecution case. The Hon'ble Supreme Court of India in the case of ***State of U.P. v. Naresh*** reported in ***(2011) 4 SCC 324***, has held as under:

> *" **30.** In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record*

a finding as to whether his deposition inspires confidence.

> *"9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." [**Ed.**: As observed in Bihari Nath Goswami v. Shiv Kumar Singh, (2004) 9 SCC 186, p. 192, para 9.]*

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide State v. Saravanan [(2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580 : AIR 2009 SC 152] , Arumugam v. State [(2008) 15 SCC 590 : (2009) 3 SCC (Cri) 1130 : AIR 2009 SC 331] , Mahendra Pratap Singh v. State of U.P. [(2009) 11 SCC 334 : (2009) 3 SCC (Cri) 1352] and Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra [(2010) 13 SCC 657 : JT (2010) 12 SC 287] .]"

22. Keeping in view the facts of the present case and applying the principles laid down by the Hon'ble Apex Court, the prosecutrix has clearly and unequivocally stated that she was raped by the Appellant-accused, in her deposition before the court and in her statement U/s 164 Cr.P.C. In view of the above, we are of the considered opinion that the contradictions pointed out by the counsel on behalf of the appellant-accused are minor in nature and do not render the evidence unbelievable.

23. Having discussed the testimony of the victim in detail, we deem it appropriate to examine whether the ocular evidence of the victim finds any support with the medical evidence adduced by the prosecution. Dr. Deepshikha (PW-10) SR, DDU Hospital, New Delhi appeared on behalf of Dr. Nakul, SR who had medically examined the victim and proved the MLC as Ex.PW10/A wherein the doctor opined that *"there was redness around the hymen and the hymen torn, no active bleeding or injury present"*. The relevant portion of his statement recorded is reproduced below:

> *"On 18.10.11, I was posted as Sr. Resident at DDU Hospital. On that day I had examined Ms. Garima aged 7 years brought by W/Ct. Suchitra with alleged history of physical and sexual assault. After her medical examination,* ***I prepared her MLC which is Ex. PW10/A bearing my signatures at point A.*** *I referred the patient to Gynae/Surgery Department.*
>
> *Dr. Nakul, SR has left the services of the hospital and his present whereabouts are not known. I identify his signatures and handwriting as I have seen him signing and writing during the ordinary course of her duties.*
>
> ***I have seen the MLC of the prosecutrix and he has been examined on 18.10.11 by Dr. Nakul. As per local examination of the prosecutrix, there was redness around the hymen and the hymen torn, no active bleeding or injury present.*** *Genital vaginal smears slides made and handed over to the police in sealed conditions with the seal of hospital. The MLC has been prepared by Dr. Nakul Ex.PW10/B bearing his signatures at point A."*

24. Relevant portion of the MLC No. 21463 is reproduced herein below:-

> *"L/E- No fresh injury mark present*
> *L/E-Redness around the hymen*

Hymen torn
No active bleeding or injury present"
"L/E- linear abrasion
1) Of size 4cm
2) Of size 1cm
Palm
An abrasion of size 5cm X 2cm
forehead"

25. After examining the testimony of Dr. Deepshikha and the MLC of the prosecutrix (Ex.PW10/A) it is observed that the hymen of the victim was torn and there was redness around her hymen. Further there were two abrasions on her palm and one on the forehead. Herein it is relevant to highlight that as per the Modi's Textbook of Medical Jurisprudence and Toxicology extracted hereinabove records that an adult penis cannot penetrate the vagina of a small child and in rare cases of great violence the organs may be forcibly introduced. As in small children partial penetration may generally cause redness and inflammation around the hymen. This aforesaid position has also been noted in Parikhs's textbook of Medical Jurisprudence, Forensic Medicine and Toxicology.

26. Further it is apparent that the absence of major external injuries on body of the prosecutrix on the date of her medical examination would not necessarily mean that she had not been raped or that she had not resisted at the time of commission of the crime. Absence of injuries does not indicate her consent or the falsity of the allegations or discredit the version of the prosecutrix. The Hon'ble Apex Court in ***Rafiq v. State*** reported as ***(1980) 4 SCC 262*** has cited their observations on absence of injuries on the victim, as well as,

importance of corroborative evidence in rape cases. Germane portion of the judgment is extracted below:

> ***"5……*** *Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life-styles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny.* ***The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed.***
>
> *6. .....When rapists are revelling in their promiscuous pursuits and half of humankind — womankind — is protesting against its hapless lot,* ***when no woman of honour will accuse another of rape since she sacrifices thereby what is dearest to her, we cannot cling to a fossil formula and insist on corroborative testimony, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable…..***"

27. Further relevant portion of FSL Report No. 2011/B-6969 is reproduced below:

> ***RESULTS OF ANALYSIS***
>
> 1. *Blood was detected on exhibit '5'.*
> 2. *Blood could not be detected on exhibits '3a', '3b', '3c', & '4'.*
> 3. *Human semen was detected on exhibit '6'.*
> 4. *Semen could not be detected on exhibits '1a', '1b', '3a', '3b', '3c', '4' & '8'.*
> 5. *Vaginal epithelial cells could not be detected on exhibit '4'.*

6. *Report of serological analysis in original is attached herewith.*

28. Consequently, from the perusal of the FSL Report, it is evident that the Semen was not detected on Exhibit '1a' & '1b' (*Two Micro slides having faint whitish smear*), Exhibit '3a' (*One Underwear*), Exhibit '3b'(*One pyjama*), Exhibit '3c'(*One Shirt*), Exhibit '4'(*Bunch of hair described as 'Pubic Hair'*) & Exhibit '8' (*One Nikkar*).

29. The Hon'ble Apex Court in the case of ***Wahid Khan v. State of M.P*** reported in ***(2010) 2 SCC 9*** has held that the absence of semen cannot discard the version of the prosecution because penetration with or without emission of semen is sufficient to make out an offence of rape. Germane portion of the judgment is extracted below:

> ***"19.*** *It was also contended by learned counsel for the appellant that since hymen of the prosecutrix was found to be intact, therefore, it cannot be said that an offence of rape was committed on her by the appellant. This contention cannot be accepted as the offence of rape has been defined in Section 375 IPC. Explanation to Section 375 reads thus:*
>
> > *"Explanation.—**Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.**"*
>
> *It has been a consistent view of this Court that **even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial.***
>
> ***20.*** *It is appropriate in this context to reproduce the opinion expressed by **Modi in Medical Jurisprudence and Toxicology (22nd Edn.) at p. 495** which reads thus:*
>
> > *"Thus, to constitute the offence of rape, it is not necessary that there **should be complete penetration***

> ***of penis with emission of semen and rupture of hymen.*** *Partial penetration of the penis within the labia majora or the vulva or pudenda* ***with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law.*** *It is therefore* ***quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains****. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed.* ***Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis*** *to be made by the medical officer treating the victim.* ***The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.****"*
>
> *(emphasis supplied)*
>
> ***21.*** *Similarly in* ***Parikh's Textbook of Medical Jurisprudence and Toxicology, "sexual intercourse"*** *has been defined as under:*
>
> > ***"Sexual intercourse.—In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen.*** *It is therefore quite possible to commit legally the* ***offence of rape without producing any injury to the genitals or leaving any seminal stains."***
>
> ***22.*** *If the aforesaid facts are kept in mind, it cannot be disputed that the act of the* ***appellant would certainly constitute an offence of rape and leaves no amount of doubt in our mind."***
>
> (emphasis supplied)

30. In view of the ratio of the judgments cited above, we are of the view that though no semen was detected and no major external injury was found on the body of the prosecutrix does not demolish the version of

the prosecution as the same are countered by ocular evidence which has a better standing than medical evidence.

31. During the course of arguments an apprehension was expressed by the learned APP for the State, that the Trial Court in its impugned order had erred in convicting the appellant-accused for ten years rigorous Imprisonment as the same was inadequate and the same should be enhanced from rigorous imprisonment for ten years to life imprisonment.

32. Accordingly, the question which arises for consideration is that whether the impugned order on sentence requires any interference or not. This Court is of the view that it is a settled law that the sentence imposed on an accused person should be appropriate and proportionate with the crime that he/she has committed. The Supreme Court in ***Hazara Singh vs. Raj Kumar & Ors.*** reported in ***(2013) 9 SCC 516*** while elucidating upon the concept of sentencing in India has held as under:-

> *"11. The cardinal principle of sentencing policy is that the sentence imposed on an* ***offender should reflect the crime he has committed and it should be proportionate to the gravity of the offence.*** *This Court has repeatedly stressed the central role of proportionality in sentencing of offenders in numerous cases.*
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> *xxx xxx xxx*
>
> *17. We reiterate that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the*

conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. ***We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.*** *The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the* ***imposition of appropriate punishment****."*

(emphasis supplied)

33. The aforesaid judgment was followed by the Apex Court in the case of ***State of Madhya Pradesh vs. Udham and Ors*** reported in ***2019 SCC OnLine SC 1378***. The relevant paras are reproduced as under:

> *"9. At this stage the observations of this Court in Accused 'X' v. State of Maharashtra, (2019) 7 SCC 1, in which two of us were part of the Bench, with respect to sentencing in India are relevant here-*
>
> > *"49.* ***Sentencing is appropriate allocation of criminal sanctions, which is mostly given by the judicial branch****. [Nicola Padfield, Rod Morgan and Mike Maguire, ―Out of Court, Out of Sight? Criminal Sanctions and No Judicial Decision-making‖, The Oxford Handbook of Criminology (5th Edn.).] This process occurring at the end of a trial still has a large impact on the efficacy of a criminal justice system.* ***It is established that sentencing is a sociolegal process, wherein a Judge finds an appropriate punishment for the accused considering factual circumstances and equities. In light of the fact that the legislature provided for discretion to the Judges to give punishment, it becomes important to exercise the same in a principled manner.*** *We need to*

appreciate that a strict fixed punishment approach in sentencing cannot be acceptable, as the Judge needs to have sufficient discretion as well.

*50. Before analysing this case, we need to address the issue of the impact of reasoning in the sentencing process. The reasoning of the trial court acts as a link between the general level of sentence for the offence committed and to the facts and circumstances. The trial court is obligated to give reasons for the imposition of sentence, as firstly**, it is a fundamental principle of natural justice that the adjudicators must provide reasons for reaching the decision and secondly, the reasons assume more importance as the liberty of the accused is subject to the aforesaid reasoning**. Further, the appellate court is better enabled to assess the correctness of the quantum of punishment challenged, if the trial court has justified the same with reasons…" (emphasis supplied)*

xxx xxx xxx

12. Sentencing for crimes has to be analyzed on the touch stone of three tests viz., crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defense, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list)."

34. In view of the ratio of the judgments cited above, we are of the view that the question of sentence is normally a matter of judicial discretion of the trial court and the superior Court does not as a rule interfere with the exercise of such discretion. Accordingly, in a matter of enhancement, there should not be interference when the sentence passed imposes substantial punishment. Enhancement of a sentence by an appellate Court is justified in cases only where there is a particular and cogent ground warranting interference. In broad terms, the appellate Court will interfere when:-

a) The sentence is not justified by law, in which case it will interfere not as a matter of discretion, but of law;

b) Where sentence has been passed on a wrong factual basis;

c) Where some matter has been improperly taken into account or there is some fresh matter to be taken into account; or

d) Where the sentence was wrong in principle or manifestly excessive/inadequate.

35. Consequently, interference is only called for when the sentence awarded is manifestly inadequate. The Supreme Court in ***Ram Narain and Ors. Vs. State of U.P*** reported in ***1970 (3) SCC 493*** has held as under:-

> *"5. ....Merely because the appellate court feels that left to itself it would have preferred to impose the sentence of death is by itself and without more not a sufficient ground to justify enhancement.* ***It is only when the sentence appears on the facts and circumstances of the case to be so manifestly inadequate as to have resulted in failure of justice that enhancement of the sentence may be justified by the appellate Court.***

xxx xxx xxx

7. It is true that this Court normally does not interfere with the discretion exercised by the High Court on the question of sentence even though the same has been enhanced ***but where the trial court has exercised its discretion on proper consideration of the material on record and its order cannot be described to be either contrary to recognised principle or otherwise having caused failure of justice*** *and further when the State does not consider that the ends of justice require enhancement of the sentence but the High Court interferes at the instance of a private complainant this Court would be fully justified in considering for itself the propriety of the sentence as enhanced by the High Court...."*

(emphasis supplied)

36. Further, it is worthwhile to notice the observations of a coordinate bench of this Court in ***Khem Chand & Ors. v. State of Delhi*** reported in ***2008 SCC OnLine Del 1611*** which while dealing with cases of statutory rape of minor, had summarized the principles and the factors which may be taken into consideration while assessing the appropriate sentence. The relevant portion is as under:

"9. Before proceeding with the evaluation of the 12 appeals on merits, the principles and factors emerging from Judicial pronouncements, ***which are relevant in the matter of choice of sentence or reprieve in the sentence awarded are enumerated below for facility of reference.*** *These are the factors which are, or may be taken into account by the Court while assessing as to what could be an appropriate sentence in a given case.*

i. Criminal and the crime *are both important for the purposes of sentence. Bachan Singh Vs. State of Punjab (1980) 2 SCC 684.*

ii. *Manner of* ***commission of the crime*** *being*

with meticulous planning or one on the spur of the moment;

iii. Violence, If any, accompanying the crime *whether injuries suffered were serious and required extensive treatment or have caused any permanent damage to the child bearing capacity or otherwise*

iv. *Whether the offender or accused was in a position of fiduciary trust or exploited a social or family relationship;*

v. State of the victim, *impact of the crime on the victim,*

vi. The antecedents of the accused, his age, whether a first time offender or repeat offender, possibility of recidivism.

vii. Social backwardness or offender being a poor, illiterate labourer not found to be adequate reason by Courts*. (State of M.P Vs. Munna Choubey & anr. 2005(2) SCC 710 and State of M.P Vs. Babbu Barkare @ Dalap Singh (2005) 5 SCC 413.*

viii. Passage of time since offence committed by itself considered inadequate reasons for reprieve. *(Urmila (minor) Vs. Raju & Anr., (2005) 12 scc 366.*

ix. Rape victim's marriage or rehabilitation may be considered as a mitigating factor.

x. The Supreme Court in a number of decisions Dinesh @ Buddha Vs. State of Rajasthan (2006) 3 SCC 771, State of Karnataka Vs. Krishnappa (2000) 4 SCC 75, Bantu @ Naresh Giri Vs. State of M.P (2001) 9 SCC 615 and State of M.P Vs. Santosh Kumar (2006) 6 SCC 1 ***where the victims were below the age of 12 years and rape had also been committed with some injuries, has chosen to uphold the award of minimum sentence.***

10. One of us (Manmohan Sarin, J.) in Sheikh Falsar Vs. State (Crl.A.154/2005) ***reduced the sentence from life imprisonment to 10 years though the victim had suffered tear of the hymen, second degree perennial tear resulting in stitches being required for vagina, following the judgment of the Supreme Court in the State of Karnataka Vs. Krishnappa (supra) and considering that accused was a first time offender and this was a solitary offence,*** *pleas of intoxication or the accused belonging to the weaker section of the society were not accepted.* ***The Supreme Court in State of Karnataka Vs. Krishnappa (supra) also noted the rationale propounded by Kautilya of „just punishment". Kautilya"s philosophy was "whoever imposes severe punishment becomes repulsive to people while he who awards mild punishment becomes contemptible.*** *The ruler just with the rod is honoured. When deserved punishment is given, it endows the subjects with spiritual good, material well being and pleasures of the senses." This philosophy is woven into our statute and our jurisprudence and it is the duty of those who administer the law to bear this in mind.*

11. Accordingly, while determining the sentence in appeals under consideration, ***we have considered the aspects as noted above and in particular whether the accused was a first time offender or a repeat offender, whether offence was accompanied or committed with violence, nature of injuries sustained, whether any permanent physical damage caused, did it involve betrayal of trust, possibility of recidivism*** *i.e repeat offending or there was possibility of rehabilitation/ readjustment within the community, post conviction conduct of the accused displaying penitence or propensity to crime are few of the factors which have been considered.* ***Cases where rape was committed more than once or over sustained periods or cases where there was no possibility of rehabilitation or***

amalgamation or adjustment in society, have not merited a reprieve in sentence."

(emphasis supplied)

37. Further, A coordinate Bench of this Court in ***Nandan v. State*** reported in ***2015 SCC OnLine Del 10664*** has held as under:-

> ***"12****. Sentence is to be imposed keeping in mind the nature of the offence and the manner in which the offence has been committed. Primarily it is to be borne in mind that sentencing for any offence has a social goal. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.*
>
> ***xxx xxx xxx***
>
> *21. Furthermore we believe that being a civilised society-a* ***tooth for a tooth*** *and an* ***eye for an eye*** *ought not to be the criterion and as such the question of there being acting under any haste in regard to the life imprisonment would not arise;* ***Rather our jurisprudence speaks of the factum of the law courts being slow in that direction and it is in that perspective a reasonable proportion has to be maintained between the heinousness of the crime and the punishment****. While it is true, punishment*

> *disproportionately severe ought not to be passed but that does not even clothe the law courts, however, with an opinion to award the sentence which would be manifestly inadequate having due regard to the nature of offence since an inadequate sentence would not subserve the cause of justice to the society.* ***The Courts would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts.*** *The principle of proportion between the crime and the punishment is the principle of just deserts that serves as the foundation of every criminal sentence that is justifiable. In other words, the doctrine of proportionality has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large"*
>
> *(emphasis supplied)*

38. Consequently, in view of the judgments cited above, it is clear that law vests great discretion in the hands of the courts and the sentence imposed on an accused person should be appropriate and proportionate to the crime that he/she has committed and the Court while awarding a sentence has to consider all mitigating as well as aggravating circumstances that arise in each case. Further, it is a settled principle that the enhancement of a sentence by an appellate Court is justified in cases only where there is a particular and cogent ground warranting interference i.e on the ground that the sentence was not justified by law and the sentence was passed on a wrong factual basis.

39. Keeping in view the facts of the present case and applying the principles laid down by the Apex Court, the accused person has already undergone the sentence of eight years and one month and approximately three months and seventeen days are left as the unexpired portion from his Rigorous imprisonment and the overall jail conduct of the appellant/accused has been stated to be satisfactory by the Superintendent of Prison, Central Jail No. 14, Mandoli, Delhi vide the nominal role dated 10.12.2019, we do not find any infirmity in the impugned judgment passed by learned trial court. We also find no reasons to take a different view than the one taken by the learned trial court. The conviction of the appellant under Sections 363/376/506 of the Indian Penal Code is upheld. The appellant is stated to be in Judicial Custody. Let him serve his sentence.

40. Accordingly, CRL.A No.1607/2014 and CRL.A. No. 219/2014 being devoid of merit are dismissed.

41. Copy of the order be communicated to the Trial Court as well as to the Jail Superintendent, Tihar Jail.

42. Trial Court record be sent back along with a copy of this order.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

DECEMBER 24, 2019
afa/da*/sr