

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 20th May, 2016

+ Crl.A.696/2000

DOODH NATH

..... Petitioner

Through: Mr.Kartikey Mathur, Advocate

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Mr.Hirein Sharma, Additional
Public Prosecutor for the State
alongwith SI Pradeep Singh from
PS Gulabi Bagh, Delhi.

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: **SUNITA GUPTA, J.**

1. In the words of Hon'ble Mr.Justice Dipak Mishra as observed in *Shyam Narain vs. The State of NCT of Delhi*, (2013) 7 SCC 77, the wanton lust, vicious appetite, depravity of senses, mortgage of mind to the inferior endowments of nature, the servility to the loathsome beast of passion and absolutely unchained carnal desire have driven the appellant to commit a crime which can bring in a 'tsunami' of shock in the mind of the collective, send a chill in the spine of the society, destroy the civilized stems of the milieu and comatose the marrows of sensitive polity.

2. This is a case of brutal rape of a seven years old girl. The learned Trial Judge after recording conviction under Section 376(2)(f)

of Indian Penal Code (for short “IPC”) had taken note of the brutality meted out to the child and sentenced him to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.18,000/- in default, to undergo further rigorous imprisonment for a period of one year.

3. The horrid episode, as unfurled by the prosecution, is that on 18.04.1996 the victim ‘M’ (PW-5) had gone to play outside her house. The accused who was residing in a temple took her to his room, removed her underwear and his own clothes, made her lie on the cot on which bedding was already spread and thereafter committed rape on her. Blood started oozing out from her private parts and her legs and feet were stained with blood. Thereafter, accused took her to a park and bought ice-cream for Rs.2 and offered the same to her and thereafter left her outside her house. She cried but nobody came to her rescue. After coming to her house, she narrated the incident to her parents. She was taken to police post Andhamugal. Her father Sh.Mewa Lal (PW8) gave his statement Ex.PW8/A which became bedrock of investigation. After making endorsement Ex.PW15/B by SI Raghunath Singh (PW-15) on the said statement, same was sent through Head Constable Braham Pal for registration of the case on the basis of which FIR Ex.PW7/A was recorded by Head Constable Ramesh Chand (PW-7). SI Raghunath Singh alongwith Mewa Lal (PW-8), the victim, Constable Amar Pal and Braham Pal went to the place of occurrence and prepared site plan Ex.PW15/D at the instance of prosecutrix. At the pointing out of prosecutrix, accused Doodh Nath was arrested. Prosecutrix was sent for medical examination alongwith Constable

Bhim Singh and Brij Pal to Hindu Rao Hospital where she was examined by Dr.Vineeta Goel (PW-14) who gave her report Ex.PW14/A. After medical examination, blood collected on slide, one frock Ex.P2 and underwear Ex.P1 of victim were handed over to Constable Bhim Singh which were seized vide memo Ex.PW3/A. From the house of accused, one underwear of red colour Ex.P3 and one pillow cover Ex.P4 were taken into possession. One gunny bag Ex.P5 was also seized from the spot. Accused made a disclosure statement Ex.PW7/A and produced one blood stained *lungi* Ex.P6 wrapped in a blanket which was seized vide seizure memo Ex.PW7/B. Photographs were taken. Ossification test of prosecutrix was got done by Dr.C.P.Sharma (PW1) who gave his report Ex.PW1/A opining the age of victim to be between 7 to 9 years. Accused was also sent alongwith PW-6 Head Constable Braham Pal Singh to Hindu Rao Hospital where he was medically examined by Dr. C.B. Dabas (PW3) who gave his report Ex.PW3/A opining that there was nothing to suggest that he was not capable of doing sexual intercourse. On 30.05.1996 an application for recording statement of the prosecutrix under Section 164 Cr.P.C was moved. During the course of investigation, exhibits were sent to FSL from where report Ex.PW15/I was received. After completing investigation, chargesheet was submitted against the accused.

4. In order to bring home the guilt of the accused, prosecution examined as many as 15 witnesses. All the incriminating evidene was put to the accused while recording his statement under Section 313 Cr.P.C wherein he denied the case of prosecution. He pleaded innocence and alleged false implication in this case by the father of

prosecutrix at the instance of his landlord. In support of his defence, he examined DW-1 Sh Hari Singh and DW-2 Sh Matapher.

5. After scrutinising the testimony of the witnesses and the entire material on record, vide impugned judgment dated 18.07.2000 the accused was convicted for offence under Section 376(2)(f) IPC and sentenced on 19.07.2000, as mentioned hereinbefore.

6. Feeling aggrieved and dissatisfied, present appeal has been preferred by the appellant.

7. Assailing the findings of the learned Trial Court, counsel for the appellant submits that the prosecutrix was known to the accused from before since she used to live in the vicinity, however, she did not name the appellant at the initial stage of the investigation, or when she was produced before the doctor who conducted her MLC or before the Metropolitan Magistrate where she was produced for recording her statement under Section 164 Cr.P.C. The appellant has been convicted solely on the testimony of the prosecutrix who have happened to be a child of 9 years at the time of recording of evidence. Her statement was never recorded after the incident. She was declared unfit for statement by the learned Metropolitan Magistrate before whom she was produced for recording her statement under Section 164 Cr.P.C. Her statement was recorded before the Court for the first time wherein she admitted that she has been tutored by her parents. The prosecutrix was not mentally matured and was acting under the influence of her parents. There are glaring discrepancies in her statement which is reflected from the fact that in her examination, she stated that the appellant was wearing white pyjama at the time of incident whereas the prosecution

has produced one *lungi* alleged to be worn by the appellant at the time of incident. Moreover, according to her, her clothers were changed when she was taken to hospital by her mother but police has seized the clothes which she was wearing when her medical examination was conducted. Under the circumstances, solitary testimony of the prosecutrix could not be the basis for conviction of the appellant. Reliance was placed on *State of Karnataka vs. Shantappa Madivalappa Galapuji* AIR 2009 SC 2144. Counsel further submits that the person who had allegedly seen the prosecutrix and the accused together after alleged incident did not support the case of prosecution, as according to the prosecution, after committing the alleged offence, the appellant took the victim to an ice-cream vendor and bought an ice-cream for her, however, the ice-cream vendor PW-9 Ram Kumar did not support the case of prosecution. Counsel further submits that although the factum of rape upon the prosecutrix is not seriously disputed but the appellant is not responsible for the same which is clear from the fact that there was no injury mark on the male organ of the appellant. Though in ordinary course, it may not be necessary that there shall be injury mark on the accused but since the victim is child of 9 years and if the alleged act of violence on the prosecutrix causes such injuries then there shall be injury on the private part of the accused which is absent in the instant case. Even no semen was detected on the clothes of the accused or the prosecutrix. Counsel further submits that the alleged place of incident is inside temple. It is not believable that after hearing the cries of the child, no person would intervene. The learned Trial Court has failed to appreciate the testimony of DW-1 who

was pujari of the temple and has deposed that the appellant was sleeping inside the temple when the policeman came. He went alongwith them to the room of the appellant and did not see blood stains on the cot, floor or on the clothes. The photographs allegedly taken by the Investigating Officer of the case has not been proved. Under the circumstances, it is submitted that prosecution has failed to bring the guilt of the accused beyond reasonable doubt, as such, he is entitled to be acquitted of the offence alleged against him.

8. Per contra, learned Additional Public Prosecutor for the State submits that the entire evidence was minutely scrutinised by the learned Trial Court for arriving at the conclusion that it was the appellant who committed the gruesome act with the small child and, therefore, no interference is called for. The appellant does not deserve any leniency.

9. I have bestowed my considerable thoughts to the respective submissions of learned counsel for the parties and have independently analysed the entire oral and documentary evidence appearing on record in order to appreciate the respective contentions of learned counsels for the parties.

10. Main thrust of the argument of learned counsel for the appellant is on the fact that the victim was a small child aged about 9 years who was found to be not fit for recording statement u/s 164 Cr.P.C. Therefore, it was not safe to convict the appellant on her sole testimony.

11. The question for consideration, therefore, is as to whether a conviction can be recorded on the sole testimony of a child witness or not.

12. The conviction on the sole evidence of a child witness is permissible if such witness is found competent to testify and the court after careful scrutiny of evidence is convinced about the quality and reliability of the same. It should be accepted albeit with circumspection.

13. A common sense approach was advocated by the Court in the early case of ***Mohamed Sugul Esa v. The King***, AIR 1946 PC3, where it was observed:

"Once there is admissible evidence a court can act upon it; corroboration, unless required by a statute, goes only to the weight and value of the evidence. It is a sound rule not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

14. Later in ***Rameshwar Kalyan Singh v. State of Rajasthan***, AIR 1952 SC 54, the Court held:

"The rule, which according to 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."

15. This issue was also dealt by the Apex Court in “*Virendra@
Buddhu & Anr v. State of UP*, (2008) 16 SCC 582. Relevant paras
are 18 to 21 and the same are reproduced as under:-

“18. The Indian Evidence Act, 1872 does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that

“118. Who may testify- All persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease, whether of mind, or any other cause of the same kind”.

19. *A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.*

20. In *Dattu Ramrao Sakhare v. State of Maharashtra*, (1997) 5 SCC 341 it was held as follows: (SCC p. 343, para 5)

“5. ...A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.”

21. Subsequently, in the case of *Ratansinh Dalsukhbhai Nayak v.State of Gujarat*, 2004 Cri LJ 19 wherein one of us (Dr. Arijit Pasayat) was a member the bench held that:

“the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath.”

16. **State of Karnataka** (supra) relied upon by counsel for the appellant instead of helping the appellant goes against him. That was a murder case where conviction was based on evidence of child witness. Interference was sought on the ground that the child was tutored by his uncle. Repelling the contention, it was observed as under:-

“5. The position of in law relating to the evidence of child witness has been dealt with by this Court in **Nivrutti Pandurang Kokate and Ors. vs. State of Maharashtra** [2008 (12) SCC 565] and **Golla Yelugu Govindu v. State of Andhra Pradesh** [2008 (4) SCALE 569].

6. The Indian Evidence Act, 1872 (in short “the Evidence Act”) does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease – whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in **Wheeler v. United States** (159 US 523). The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. [See **Suryanarayana v. State of Karnataka** (2001 (9) SCC 129).

7. In **Dattu Ramrao Sakhare v. State of Maharashtra** [(1997) 5 SCC 341] it was held as follows: (SCC p. 343 para 5):

“A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and

credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored”.

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

8. *The above position was highlighted in **Ratansingh Dalsukhbhai Nayak v. State of Gujarat** (2004(1) SCC 64). Looked at from any angle the judgments of the trial court and the High Court do not suffer from any infirmity to warrant interference.*

17. The legal position which can be culled out from the aforesaid decisions is that before recording conviction on the solitary testimony of a child witness, i.e., prosecutrix herein, the court has to ensure that she is a reliable witness. If her testimony is found to be trustworthy and reliable then conviction can be recorded on her sole testimony.

18. Reverting to the case in hand, since the prosecutrix was a minor child aged about 9 years on the date when she appeared as a witness, the learned Trial Court took extra precautions by putting several questions to her in order to ascertain her capability to understand the

question and only after satisfying herself, her statement was recorded without oath. Prosecutrix testified that the accused was residing in mandir while she was residing in the house of Chaudhary. It was hot weather and it was night. She was playing outside the house. Accused took her to his room, removed her underwear, his own clothes, made her lie down on the cot on which bedding was already spread thereafter he did '*galat kam*' with her. She felt pain. Blood started oozing out. Her legs and feet got stained with blood. Thereafter he took her to a park and offered her ice-cream worth Rs.2 and thereafter left her outside her house. She had cried but nobody came to her rescue. After coming to her house, she told about the incident to her mother. She was taken to hospital. She identified her clothes Exs.P1 and P2. Although a minor contradiction has appeared in her statement as, according to her, the accused was wearing white pyjama at the time of incident, however, it is to be kept in mind that the incident took place on 18.04.1996 while her testimony came to be recorded on 05.09.1997 i.e., after about one a half years of the incident. Keeping in view her such tender age, this discrepancy is not fatal to cast any doubt on her testimony. As regards the submission that she was tutored by her parents, no doubt PW5 admitted towards the end of her cross-examination that she was tortured by her parents but that does not mean that her deposition is false or not voluntary as immediately thereafter, she denied that she had deposed falsely at the instance of her parents. Moreover, factum of commission of rape upon victim was not seriously challenged by the accused during the cross-examination of PW5, PW8 and PW11. Rather during the course of

argument learned counsel for the appellant submitted that he is not challenging the factum of commission of rape upon the victim but according to him, accused was not responsible for the same.

19. As regards the submission that victim was not mentally fit to give statement which is clear from the fact that when she was produced before Sh. Sanjay Garg (PW10) Civil Judge for recording statement u/s 164 Cr.P.C., same could not be recorded because as per proceedings Ex. PW10/D, she was not found to be mentally fit, is devoid of merit as at that point of time prosecutrix must be under extreme trauma because of the brutal crime committed on her and, therefore, when she was produced before the Magistrate, she could not give any statement. However, when she was brought before the Court, she narrated the entire incident succinctly and stood the test of cross-examination.

20. Keeping in view her tender age, at the most, it can be said that as a matter of prudence, her statement required corroboration which is available in abundance.

21. It has come in the statement of Mrs. Nagina PW11, mother of the victim that her daughter had gone out of the house at 7:00 pm. Her husband came home after 8:00 pm and inquired about 'M' and she informed him that she had gone out for playing. Her husband went to search her. Mewa Lal (PW8) father of the victim corroborates her by deposing that on being informed by his wife that 'M' had gone to play, he wanted to search her. She was coming home weeping and on inquiry, she informed about the commission of rape on her by the accused.

22. The factum of making the complaint and the terms thereof become relevant as subsequent conduct. Such a conduct is relevant under Section 157 read with Section 8 of the Indian Evidence Act. In ***Emperor vs. Phagunia Bhuran***, AIR 1926 Pat. 58, it was observed as under:-

"If the girl went to her relatives straight after the occurrence and complained on her own initiative, there is no doubt that her conduct would have a direct bearing upon and connection with the occurrence itself".

23. In ***Rameshwar Kalyan Singh*** (supra) also, it was observed that where the raped girl instinctively ran home to her mother, but not finding her there, she went to sleep and when the mother returned four hours later, the girl told her what had happened, the statement made to the mother fell within the ambit of Section 157 read with Section 8 illustration (J) of the Evidence Act.

24. ***Nagam Gangadhar vs. State***, 1998 CrL. L.J. 2220 considered the similar situation, where a child of four years was raped. Hon'ble Apex Court observed as under:-

"It is then contented that PW3 is a child witness and no importance can be attached to that evidence. It is true that the evidence of PW3 cannot be given the same weight as a grown up victim in a case of rape, the reason being that she is aged four years at the time of occurrence. However, she appears to have communicated to her parents that the revision petitioner has committed an act due to which she was getting pain in her private part. PW-1 as well as PW-2 have sworn to the fact that PW-3 disclosed the said act, even if the testimony of PW-3 is to be ignored, the circumstances set out supra are, in view of Hon'ble Apex Court, sufficient to bring home the guilt of the revision-petitioner."

25. In ***Syed Pasha vs. State of Karnataka***, 2004 Cr. L.J. 4123 also the child informed her mother about the incident and the person, who had committed rape upon her. It was held this information was

admissible in evidence and it points out to the guilt of the accused.

26. Similar view was taken by this Court in, *Nannu Gupta @ Bablu v. State*, 2010 II AD (Delhi)117 and in *Hari Om v. State* 2010 Cr.L.J.1281, where it was held that previous statement of prosecutrix are admissible in evidence under Section 157 of the Evidence Act and this proposition of law was recognized by Hon'ble Apex Court in *Madan Lal vs. State of J&K*, AIR 1998 SC 386, where statement made by the prosecutrix to her mother soon after the incident was accepted to be corroborative piece of evidence.

27. Applying the ratio of the aforesaid cases to the testimony of PW8 and PW11, there is no hesitation to arrive at the conclusion that their statement that the prosecutrix informed them immediately after the incident that she was subjected to rape by accused is admissible under Section 6 of the Evidence Act. Moreover, it was pursuant thereto that Mewa Lal took the prosecutrix to P.P. Andhamugal and gave his statement as Ex.PW8/A on which police machinery swung into action.

28. The ocular testimony of prosecutrix that as a result of commission of rape blood started oozing out, her legs and feet were stained with blood finds corroboration from Mewa Lal (PW-8) and Mrs. Nagina (PW-11) both of whom have also deposed that the underwear of the prosecutrix was stained with blood, her legs were also blood stained.

29. Ocular testimony of these prosecution witnesses find substantial corroboration from medical evidence. Prosecutrix was taken to Hindu Rao Hospital where she was examined by Dr.Vineeta Goel (PW-14).

According to her, the patient was brought to her by the police with alleged history rape. Local examination revealed bleeding, second degree perineal tear, hymen freshly torn and tenderness present over and near external genitalia. She also proved her history sheet Ex. PW14/B according to which her examination was done under anesthesia. Perineal tear was repaired under general anesthesia and the patient was discharged on 24.04.1996. It is apparent from the MLC, history sheet and statement of the doctor that tear, bleeding and softness was found only on the vagina of the victim and no other injury was found on any other part of her body. Despite opportunity given, this witness was not subjected to cross-examination. This assumes significance as DW-2 Matapher deposed that the prosecutrix received injuries when she met with an accident by a cycle. It was never the case of the accused that the injuries sustained by the prosecutrix on her private parts resulted from an accident. Firstly, no such suggestion was given to the prosecutrix or her mother or her father during cross-examination. Even no such suggestion was given to Dr.Vineeta Goel who examined the prosecutrix and was the best person to depose whether the rupture of hymen as in the instant case was possible due to an accident. Moreover, why the prosecutrix or her parents implicate the accused charging him with a rape, if the injury was caused by an accident. Before the doctor also, she was brought with the history of rape.

30. After the accused was arrested on the pointing out of the prosecutrix, according to SI Raghunath Singh (PW-15) Investigating Officer of the case, from the house of accused one underwear of red

colour and one pillow cover which was wet as the same was washed by the accused were seized. One gunny bag was also seized. Pursuant to the disclosure statement made by accused he got recovered one *lungi* wrapped in a blanket which was blood stained. The clothes of the prosecutrix and the articles seized from the house of the accused or at his instance were sent to FSL. As per the FSL report Ex.PW-15/I given by Dr.Rajender Kumar, Senior Scientific Officer blood was detected on underwear, frock, underwear of accused, gunny bag and the *lungi*. The species of origin was human and the blood group was 'O'. The accused has failed to disclose as to how his underwear, gunny bag and *lungi* were stained with human blood of 'O' group if he was not involved in the incident. Although semen could not be detected but as observed by Hon'ble Supreme Court in *State of Himachal Pradesh vs. Gian Chand* AIR 2001 SC 2075, the discovery of sperms in the private part of the victim is not a must to establish penetration. There are several factors which may negate the presence of spermatozoa observed in *Narayamman vs. State of Karnataka*, (1994) 5 SCC 728. Similarly the plea that absence of injury on the male organ of the accused is a pointer to his innocence was negated by Hon'ble Supreme Court in *State of Himachal Pradesh*(supra). Modi has opined that even in the case of a child victim being ravished by a grown up person it is not necessary that there should always be marks of injury on his penis.

31. The version of the prosecutrix that she raised cries but nobody came to her rescue find corroboration from Hira Singh (PW-4) in whose house at one time accused used to reside as a tenant and at the

time of incident, the prosecutrix alongwith her parents were residing as a tenant. According to him, on the date of occurrence, he was passing from nearby house of the accused, he heard cries of child. He looked here and there but could not guess from where the voice of cry is coming. He was going to take vegetables towards *ganda nala*. When he came back to the house then he came to know that the prosecutrix was subjected to rape and she was admitted in hospital. Despite cross-examination nothing material could be elicited as to why this witness would depose against the accused. He denied the suggestion that he has forced the accused to vacate his house.

32. Although, it is true that ice-cream vendor PW9 Ram Kumar did not fully supported the case of prosecution as such, he was declared hostile by the prosecution but it is settled law that merely because a witness is declared as hostile, there is no need to reject his evidence in toto. The evidence of hostile witness can be relied upon, at least to the extent it supports the case of prosecution. (Vide ***State of Gujarat vs. Anirudh Singh and Anr.***, (1997) 6 SCC 514; ***Radha Mohan Singh @ Lal Sahib and Ors. Vs. State of U.P.***, (2006) 2 SCC 450; ***Mahesh vs. State of Maharastra***, (2008) 13 SCC 271; ***Rajender and Anr. Vs. State of U.P.***, (2009) 13 SCC 480; ***Govindapa and Anr. Vs. State of Karnatka***, (2010) 6 SCC 533; ***Paramjit Singh @ Pamma vs. State of Uttrakhand***, AIR 2011 SC 200; ***Rameshbhai Moahanbhai Koli and Ors. Vs. State of Gujarat***, (2011) 3 SCC (Cri) 102.

33. The witness has deposed that about 3 years back, one girl came to take ice-cream from him, however, he denied that on 18.04.96 accused came alongwith a girl and bought ice-cream for her. This

mere denial is of no consequence because a suggestion was given to Mewa Lal PW8 that before committing rape, accused provided her with a kulfi.

34. According to the accused, he was falsely implicated in the instant case, however, it was rightly observed by learned Additional Sessions Judge that no sufficient explanation could be given by the accused for his false implication in this case as he has been taking different pleas at different stage of the proceedings. It was suggested to prosecutrix that her mother used to take money from the accused on credit and did not pay back whereas it was suggested to Mewa Lal (PW-8) that he took a sum of Rs.1500 from the accused for committee which he did not pay whereas in his statement recorded under Section 313 Cr.P.C he took the plea that he was falsely implicated in this case by the father of prosecutrix at the instance of his landlord. There was no plausible reason as to why the parents of the prosecutrix will falsely implicate him at the instance of his landlord, more particularly, when he had already vacated the premises. Furthermore, except for giving a bare suggestion which is also not consistent, it does not appeal to reason that even if there is some monetary transaction between the parents of the prosecutrix or the accused, for that reason they will allow the real culprit to go scot free and would implicate the appellant in this false case by putting the honour and prestige of the minor child at stake.

35. Hon'ble Supreme Court in ***Bharwada Bhoqinhai Hirjibhai vs. State of Gujrat***, AIR 1983SC 753 had noticed peculiar conditions and circumstances in which a girl or woman, who happens to be victim of

rape, in Indian conditions would find herself and so will be reluctant to disclose such incident to anyone and it is observed as under:-

“Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or woman in India make false allegations of sexual assault... The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibility from amongst the urban elites. Because: (1) A girl or a woman in the tradition bound non-permissible Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down upon by the society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame and account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not want to avoid publicity on account of fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the Court, cross-examination by counsel for the culprit, and the risk of being disbelieved, act as deterrent”.

36. In this regard, observations made by this Court in *Hari Om* (supra) may be reproduced with advantage:-

“Prosecutrix being a young girl aged about 7 years at the time of incident, it is not likely that her parents would have implicated the accused in a false case of rape of their daughter, conscious as they would be that reporting of such a

matter to police, particularly, when parents of prosecutrix as well as the accused were living in the jhuggies situated in the same locality, was bound to expose their daughter to scrutiny and questions not only by the police and the Court, but also by their neighbour and relatives. They could not have been ignorant of the fact that they may even have difficulty in finding a suitable match for their daughter once it is known that she has been subjected to rape in her childhood. Therefore, if they, despite realising these consequences do report the matter to police. It would be only if what they were reporting was absolutely true and correct. In fact, some of the parents even refrain from reporting such incident lest their child not face embarrassment on account of incident becoming public and her marriage being jeopardised on account of prospective in-laws becoming aware of the incident, at the time of her marriage. The parents of prosecutrix knew that if they report the matter to the police, they will have to take their child first to police station, then to the hospital and ultimately in the Court, and the child will be made to repeat the worst incident of her life at every place at considerable discomfort and embarrassment to her. Therefore, unless the incident of this nature actually happened with their child, no parents would take such step.

37. Even in ***Radhu vs. State of Madhya Pradesh***, (2017) 12 SCC 57, Hon'ble Apex Court observed that it is unlikely that child of eight or nine years of age can even be tutored to make allegations of rape by a person otherwise well known to her and then repeat those allegations before police, Magistrate, doctor and then during trial.

38. In support of his defence, the appellant examined DW1 Hari Singh and DW2 Matapher. According to DW1 on the day of incident, at about 9:30 pm, accused was sleeping in the temple where he was also present. When the police came he accompanied them to the room of accused but there was no blood stains on the cot, floor or clothes. He, however, could not say whether accused committed rape on victim or not. Moreover, in cross-examination, he deposed that on the date of incident, accused was alone in his room. However, he is contradicted by DW2 in this regard who deposed that on the date of incident,

family of accused was residing with him. He went to the extent of saying that victim sustained injuries when she met with an accident with a cycle which was not even the case of accused during the entire trial. As such, appellant does not get any benefit from those two witnesses.

39. Entire evidence was minutely scrutinized by learned Trial Court for returning a verdict of conviction which does not call for interference.

40. Coming to the quantum of sentence, the victim was only seven years old child when this gruesome and abhorring act of committing rape was committed by the accused. Such an act leaves a permanent scar on the personality of the child, inhibiting growth and development. It instils a feeling of fear, insecurity and a brooding sense of shame and guilt for no fault of the victim. An author has aptly narrated the inner turmoil of victims and repeat victims of sex abuse or child rape in the following words:

“Lost innocence”

*Looking back on a time and place
Seeing a child's innocent face
Knowing that things aren't as they appear,
For inside she cries silent tears
Deep inside she is filled with pain
She feels dirty and full of shame
Innocence lost at a very young age
Locked this child in a pain filled cage
There is no freedom of escape
From the fact this child was raped
While the guilty man is roaming free
This child is sentenced to eternity
Eternity locked away with all this shame*

*She can't help but feel that she was to blame
Even though common sense says it was not her fault
She can't seem to help from having these thoughts
What it's keep running through her mind
She keeps going back to those moments in time
If there isn't something different she could have done
Why didn't she scream or at least try to run
Fear kept her frozen to the spot
While this grown man did what he should have not
Shame and fear made her keep the silence
Kept her telling anyone about the violence
The thing that is shocking beyond belief
Is that this child could not get any relief
The same thing happened again and again
The first one was just how it began
More than one man did his worst
None of them caring about the child they hurt
After the first time was it easy to tell
Was it her pain and shame they could smell
With every touch a part of her died
Now she is in a prison that has no gate
Every one of them sealing her fate.*

41. The observations made by Hon'ble Supreme Court in ***Shyam Narain*** (supra) which was also a case of a brutal rape of 8 years old girl deserves to be reproduced as under:-

"14. Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. 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.

15. In this context, we may refer with profit to the pronouncement in *Jameel v. State of U.P.*, wherein this Court, speaking about the concept of sentence, has laid down that 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 sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence.

16. xxxxx xxxxxx xxxxx

17. xxxxx xxxxxx xxxxx

18. In *Gopal Singh v. State of Uttarakhand*, while dealing with the philosophy of just punishment which is the collective cry of the society, a two-Judge Bench has stated that just punishment would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors.

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*** 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 civilised society should be mercilessly and inexorably punished in the severest terms."

21. In **State of A.P. v. Bodem Sundara Rao** 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, para9)

"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** 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** 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.

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 judgment of conviction and the order of sentence passed by the High Court."*

42. In this case, the appellant was sentenced to rigorous imprisonment for life and after making the aforesaid observations, Hon'ble Supreme Court was of the view that the mitigating circumstance which the appellant has set forth in that case that he had four children and in case the sentence is maintained, not only his life but also the life of his children would be ruined did not find favour by observing that the factual matrix cannot allow the rainbow of mercy to magistrate. In the instant case, the learned Additional Sessions Judge has imposed the minimum sentence as was prior to Criminal Law Amendment Act, 2013. There are no special reasons which warranted imposition of a sentence of imprisonment for a lesser term keeping in view the brutality of the crime.

43. The appeal being, sans of merit, stands dismissed.

44. Record reveals that the sentence of the appellant was suspended vide order dated 27.11.2000 and he was ordered to be released on bail. As per the nominal roll dated 11.2.2016, the appellant had undergone a period of 4 years, 8 months, 16 days besides earning remission of 25 days as on 6.1.2001 leaving the unexpired portion of sentence of 5 years, 2 months and 19 days. As such, the appellant is directed to surrender before the Trial Court on or before 30.05.2016 failing which, learned Trial Court is directed to take necessary steps to get the appellant arrested for serving the remainder period of his sentence.

Copy of the judgment along with Trial Court record be sent back forthwith.

MAY 20, 2016
mb

(SUNITA GUPTA)
JUDGE