

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.A.1514/2011 and CRL. (BAIL) 8089/2015**

Reserved on: 17.05.2016

Date of decision: 10.08.2016

IN THE MATTER OF:

MUKESH

..... Appellant

Through: Mr. Ajay Malviya, Advocate

versus

STATE

.....Respondent

Through: Ms. Kusum Dhalla, APP for the State

AND
CRL.A.1125/2012

NESAR ALIAS KOTHI

..... Appellant

Through: Mr. Sumeet Verma, Advocate

versus

STATE

.....Respondent

Through: Ms. Kusum Dhalla, APP for the State

AND
CRL.A.102/2015

_SUNNY

..... Appellant

Through: Mr. Jatin, Advocate

versus

STATE

.....Respondent

Through: Ms. Kusum Dhalla, APP for the State

CORAM

HON'BLE MS.JUSTICE HIMA KOHLI

HIMA KOHLI, J.

1. This judgment shall dispose of three appeals arising out of a common judgment dated 02.9.2011 in respect of FIR No. 330/2009 at PS Kalyan Puri, registered against the three appellants under Section 376(2)(g) of the IPC.

2. The appellants herein have challenged the impugned judgment dated 2.9.2011 and the order of sentence dated 5.9.2011, passed by the learned District Judge & Additional Sessions Judge-I/C (East) holding *inter alia* that they are guilty of the offence punishable under Section 376(2)(g) IPC and sentencing them to undergo rigorous imprisonment for a period of 10 years and fine of Rs.5,000/- each and in default of payment of fine, directed that the appellants shall undergo SI for a period of three months each.

3. The case as set up by the prosecution during the trial and noticed in the impugned judgment relates to an incident that had taken place on 25.10.2009, when SI Harpal Singh (PW-14) had received DD No.22A that a girl had been raped. PW-14 reached Jhuggi No.651, Block No.18, Indira Camp, Kalyan Puri, Delhi, where he had met the prosecutrix (PW-7), who had informed him that she had been subjected to rape. Accompanied by Ct. Amrik Singh (PW-2) and Lady Ct. Poonam (PW-1), the prosecutrix was sent to LBS Hospital along with her mother, where she was medically examined vide MLC (Ex.PW9/A) and the attending doctor gave his report (Ex.PW6/A).

4. In her statement recorded by the police (Ex.PW7/A), the prosecutrix had stated that she was working as a maid in Dharma Apartments at Pandav Nagar. On the fateful day, at about 9.00PM, after completing her work, when the prosecutrix was returning home and had reached the chowk of Block-18, Indira Camp, the three appellants also residents of Jhuggies in the same Block whom she knew, met her. All the three appellants caught hold of the prosecutrix and forcibly took her to the upper floor room of a nearby jhuggi belonging to Sunny (appellant in Crl. Appeal No. 102/2015). Though the prosecutrix had raised an alarm, but none had stepped forward to help her. One of the accused, Mukesh (appellant in Crl. Appeal No. 1514/2011) had removed the clothes of the prosecutrix, the co-accused Sunny had caught hold of the hands of the

prosecutrix and gagged her mouth and the third co-accused, Nesar (appellant in Crl. Appeal No. 1152/2012) had caught hold of her legs. Despite stiff resistance put up by the prosecutrix, who kept on struggling to free herself from the clutches of the appellants, the accused Mukesh had committed rape upon her and thereafter all the three had fled away. After commission of the rape, the prosecutrix had dressed up and returned to her Jhuggi but due to a disturbed state of mind and an apprehension of the social stigma attached to such a crime, she did not inform her family members of the crime on the same day. On the next day i.e. on, 26.10.2009 when she had gathered sufficient courage, the prosecutrix narrated the incident to her family members. Immediately, her brother had called up the police at 100 number and the wheels of the criminal process were set into motion.

5. On the basis of the statement made by the prosecutrix, IO SI Harpal Singh (PW-14) had prepared a rukka (Ex.PW14/B) and despatched the same to Police Station through Ct. Amrik Singh (PW-2) for registration of a FIR. HC Rajender Kumar had registered FIR No.330/2009 (Ex.PW3/A). During the course of investigation, SI Harpal Singh (PW-14) had inspected the spot and prepared a site plan (Ex.PW14/C) and had recorded the statement of the witnesses including that of the prosecutrix under Section 161 Cr.P.C. After conducting the medical examination of the prosecutrix, the attending doctor, Dr. Vaibhav Aggarwal had handed over a number of exhibits to the Lady Ct. Poonam (PW-1), which were seized vide seizure memo (Ex.PW1/A). A perusal of the Sexual Assault Evidence Collection Kit(Ex.PW6/E) and the medical examination reports of the prosecutrix conducted by the doctor on duty at LBS Hospital on 26.10.2009(Ex. PW6/B and Ex.PW6/C) shows that the samples that were collected for being despatched to the Forensic Laboratory for obtaining reports included the clothes of the prosecutrix, her nail scrapping,

breast swab, pubic hair combing, pubic hair clipping, matted pubic hair, vaginal secretion, cervical swab, washings from the vagina, oral swab, blood sample, rectal swab etc. The exhibits handed over by the attending doctor to Ct. Poonam (PW-1) were seized vide seizure memo (Ex.PW1/A) and deposited by the IO in the Malkhana.

6. Though, the age of the prosecutrix at the time of the commission of the offence has not been disputed by either side before this court, it may be noted that on 28.10.2009, the prosecutrix was produced before the Dr. Sushil Kumar (PW-5), who had prepared her MLC (Ex.PW5/A) and he had referred her to a Forensic Medicine Expert for her bony age determination.

7. The impugned judgment has taken note of the fact that in the statement made by the prosecutrix before the police on 25.10.2009 (Ex.PW7/A) she had stated that she was 18 years old and the same age was mentioned by her in her MLC (Ex.PW5/A and Ex.PW9/A). In the age assessment report submitted as Ex.PW6/C, it was noted that the age of the prosecutrix was 16-17 years at the relevant point in time. Keeping in mind the fact that in the case of a Bony age report, there is always a margin of two years on either side, the benefit of two years was given by the trial court to the appellants by taking the age of a prosecutrix on the upper side, as 19 years. In other words, the prosecutrix was held to be a major at the time of commission of the offence.

8. Coming back to the narrative of the case, on 26.10.2009, SI Harpal Singh (PW-14) accompanied by Ct. Amrik Singh (PW-2) and Ct. Bhupinder (PW-4) had joined the prosecutrix in the investigation and they went to search for the appellants. Upon reaching the jhuggies in Block-18, where the prosecutrix resided, two of the appellants, namely, Nesar and Sunny, were identified as the ones who along with the other appellant, Mukesh had committed rape upon her.

Both the accused were arrested. The appellants, Nesar and Sunny had made their disclosure statements, (Ex.PW2/A and Ex.PW2/B, respectively) in the presence of the prosecutrix and they had pointed out the place where they had taken her forcibly and committed rape upon her. The pointing out memo prepared by PW-14 (SI Harpal Singh) is marked as Ex.PW2/G.

9. Efforts were made to search the third accused Mukesh, but he could not be traced. On 14.12.2009, NBWs were issued against him and he was declared a Proclaimed Offender. After almost two years, on 02.1.2011 upon HC Dinesh Kumar (PW-10) receiving secret information, the accused, Mukesh was apprehended and produced before the Court on 18.1.2011. He was made to join the investigation and he pointed out the same spot where the crime was committed, vide pointing out memo Ex.PW11/B.

10. Charges under Section 376(2)(g) of the IPC were framed against the appellants, Nesar and Sunny on 11.3.2010, to which both of them had pleaded not guilty and claimed trial. As for the third appellant Mukesh, charges were framed against him on 21.3.2011 and he too had pleaded not guilty and claimed trial.

11. In support of their case, the prosecution had examined 14 witnesses, the important ones being, the prosecutrix herself (PW-7), the IO, SI Harpal Singh (PW-14), Dr. Neema Sharma (PW-9) who proved the MLC of the prosecutrix, Dr. Sushil Kumar (PW-5) who proved the MLC in respect of the prosecutrix, Dr.V.K. Singh (PW-6) who proved the report prepared in respect of the prosecutrix by Dr. Vaibhav Aggarwal on 26.10.2009 (Ex.PW6/A) and the medical examination reports of the prosecutrix for her age assessment (Ex.PW6/B and Ex.PW6/C).

12. In his defence, the appellant Mukesh alone had led evidence and produced three witnesses, Smt. Nazma (DW-1), Smt. Lovely (DW-2) and Smt. Kamla (DW-3). However, the remaining two appellants opted not to lead any evidence in their defence.

13. The statement of the three accused persons were recorded under Section 313 Cr.P.C., wherein they denied all the allegations levelled against them and claimed that they had been falsely implicated in the case and were innocent. The appellant, Mukesh stated that two days prior to the incident, they had a fight with one Rahish, a friend of the prosecutrix and they both were harbouring malafide intentions of taking revenge upon them, as a result whereof he had been unnecessarily roped into the crime. He alleged that the prosecutrix is a girl of loose character and she was arrested by the police earlier to and after the incident. In their testimony, DW-1 and DW-2 had stated that a quarrel had taken place between all the appellants on the one hand and the prosecutrix and Rahish on the other and the latter had threatened to implicate them in a crime. All the three witnesses produced by Mukesh had denied that the crime of rape had ever taken place.

14. After going through the records and examining the evidence produced by the prosecution and defence, the trial court had accepted the testimony of the prosecutrix by holding that the same was reliable, trustworthy and stood corroborated by medical evidence, which had revealed that she had been subjected to sexual intercourse. Turning down the plea of the appellant, Mukesh that he had been falsely implicated by the prosecutrix in the case only to take revenge on him, the trial court had flatly refused to accept the defence version on the ground that no evidence was produced to demonstrate that any fight had taken place between the accused persons and Rahish and that too prior to the date of commission of the crime, which could have been attributed as a motive

to falsely implicate them in the present case. The impugned judgment concluded that the prosecution had succeeded in establishing the case against the appellants beyond any reasonable doubt and noting the fact that charges under Section 376(2)(g) of the IPC were made out against all of them irrespective of the fact that two of the appellants, Sunny and Nesar had not physically committed rape upon the prosecutrix and it was the appellant, Mukesh who had raped her, by invoking Explanation -1 appended to Section 376 of the IPC which contemplates that where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of them shall be deemed to have committed gang rape within the meaning of the provision, it was held that all the three accused were actively involved in the commission of rape on the prosecutrix and they were held guilty for the offence punishable under Section 376(2)(g) of the IPC and accordingly convicted.

15. Addressing arguments on behalf of the appellant Nesar, Mr. Sumeet Verma, learned counsel had contended that his client had been falsely implicated in the present case. He urged that the trial court had erred in overlooking material discrepancies in the testimony of the prosecutrix. To buttress the said submission, he sought to point out some of discrepancies in the deposition of the prosecutrix which included the incorrect date of the crime mentioned by her at the time of recording her testimony in court; her allegation that the accused had raped her at the point of a knife, which was contrary to her statement as recorded at the time of registering the FIR; the contradiction in her deposition that she was raped by all the three accused whereas in her statement recorded under Section 161 Cr.P.C., she had stated that she was only raped by Mukesh; the incorrect statement allegedly made by her with regard to the manner of calling the police on the next day; the contradiction in her statement made to the police that all the three accused persons had kept her in the Jhuggi

of Sunny whereas in her deposition before the court she had named only Mukesh; the discrepancy in the statement of the prosecutrix made before the police that she knew the appellants, Mukesh and Sunny very well whereas during the course of her cross-examination, she had reneged and stated that she did not know them earlier and their names had been revealed by one Mahesh, who was not produced as a witness by the prosecution.

16. It was also argued by learned counsel for the appellant, Nesar that the case of the prosecution is simply based on the uncorroborated evidence of the prosecutrix; not supported by any forensic evidence which is contrary to the mandate of Section 53-A of the Cr.P.C. In support of the said submission, he had referred to the decision of the Supreme Court in the case of Krishan Kumar Malik vs. State of Haryana, reported as **AIR 2011 SC 2877**. Lastly, it was urged that the only role that was attributed to the appellant, Nesar was of catching hold of the legs of the prosecutrix at the time of the commission of the offence which aspect had not been specifically put to him in the course of recording his statement under Section 313 of the Cr.P.C. To substantiate his arguments that what is not put to an accused cannot be a ground to indict him, learned counsel had placed reliance on the decision of the Supreme Court in the case of Ranvir Yadav v. State of Bihar, reported as **2009 (7) Scale 60**.

17. On the aspect of quantum of sentence, learned counsel for the appellant, Nesar had stated that out of the sentence of 10 years rigorous imprisonment imposed on him, by now he had undergone more than six years, which factor may be taken into consideration by this court and he be discharged for the period already undergone by him, just as was done by the Supreme Court in **Crl. Appeal No. 1506/2008**, “Narayan vs. State of Chhatisgarh”, decided on 22.9.2009.

18. The aforesaid arguments have been adopted in toto by Mr. Jatin, learned counsel for the appellant Sunny, who submitted that as per the prosecution version, his role was of having gagged the mouth of the prosecutrix and of catching hold of her in order to prevent her from resisting her rape at the hands of the appellant, Mukesh at the place of crime, i.e., the upper floor of Sunny's Jhuggi. He stated that the act of rape was not committed by Sunny and therefore he is entitled to remission of sentence.

19. As for the appellant Mukesh, his advocate, Mr. Ajay Malviya, had laid much emphasis on the fact that the prosecution had failed to establish his true identity which according to him, puts a big question mark on his alleged involvement in the crime. He submitted that while the FIR registered against all the three appellants had mentioned the name of Mukesh as the son of Smt. Uma Devi, at the time of his arrest in January, 2011, he was described in the records as the son of Mr. Kalu Ram, thus creating a clear doubt about his identity which the prosecution failed to dispel. Learned counsel sought to argue that it was for the police to have conducted a thorough investigation into the parentage of the appellant, Mukesh to dissipate any ambiguity about who the real accused was. It was contended that the prosecution ought to have ensured that Mukesh underwent a TIP, which was not done in the present case and instead, he was directly identified in the Court room. Lastly, it was submitted that no specific questions were posed by the trial court to the appellant, Mukesh while recording his statement under Section 313 Cr.P.C. and he had not been asked to explain the circumstances that had emerged against him, which amounted to gross non-compliance of the said provision and as a serious lapse had been committed in following the prescribed procedure, there was sufficient ground for interfering in the impugned judgment of conviction, and discharging the appellant.

20. The aforesaid arguments advanced by learned counsel for the appellants were strongly refuted by Ms. Kusum Dhalla, learned Addl. PP for the State, who had submitted that the argument of the counsels for the appellants to the effect that the statement of the prosecutrix is unreliable, is without any merits. She submitted that the discrepancies in her deposition sought to be pointed out by Mr. Sumeet Verma, counsel for Nesar, are minor in nature and not so grave as to shake her credibility. She asserted that the questions posed by the trial court while recording the statements of the three appellants under Section 313 Cr.P.C. were general in nature and meant to elicit from each one of them as to what was their exact role in the crime and thereafter, it was for the accused to have volunteered the relevant circumstances of the case and offered an explanation, which would have weighed with the Court for explaining the evidence that was produced against them. She concluded by submitting that adequate compliance of Section 313 Cr.P.C. was made by the trial court in the present case and there was no ground for interfering in the findings returned in impugned judgment or the order of sentence.

21. Rebutting the argument of the counsel for the appellant, Mukesh that the testimony of the defence witnesses had been wrongly discarded, learned Addl. PP had submitted that the appellants had failed to discharge the onus cast on them by proving that any fight had actually taken place between them and the prosecutrix and her friend Rahish, two days earlier, which could be treated as a motive for her to have levelled false allegations against them and nor was any attempt made by any of appellants to substantiate their allegations about the quarrel that had allegedly taken place during the cross examination of the prosecutrix.

22. Coming next to the submission made on behalf of the appellant, Mukesh of the police having failed to satisfactorily establish his parentage which could

have authenticated his identity, learned APP had submitted that the said argument is a sheer afterthought and no such argument had been raised on behalf of the appellant during the course of the trial. She clarified that the parents of the appellant, Mukesh had separated and he was living with his mother. She submitted that after the NBWs were issued against Mukesh, he was declared as a proclaimed offender and the records relating to the said proceedings clearly mention his father's name as Kalu Ram. It was thus argued that merely because Mukesh was described as the son of Smt. Uma Devi and his father's name was not specifically mentioned at the time of registering the FIR, would hardly be a ground to interfere in the impugned judgment since his identity was never in doubt. She refuted the arguments advanced by the other side that there was an omission in failing to conduct the TIP of the appellant, Mukesh and submitted that a TIP was dispensable in the present case as the prosecutrix had named all the three accused in her statement recorded by the police under Section 161 Cr.P.C. and they were also named in the FIR.

23. In the course of arguments, learned Addl. PP had handed over a document listing the involvement of the appellant, Mukesh in several FIRs and stated that out of 16 FIRs, enumerated therein mostly registered at PS Kalyan Puri, he had been convicted in FIR No. 156/2006 under Sections 25/54/59 of the Arms Act, FIR No. 516/2004 under Sections 457/380/411 of the IPC, and FIR No. 152/2008 under Section 20 NDPS Act, which amply demonstrates that he is a notorious criminal and given his dubious antecedents, he does not deserve any remission in sentence.

24. The court has heard the learned counsels for the parties at length and given its thoughtful consideration to the arguments advanced by them in the light of the evidence produced before the trial court. The first argument addressed by learned counsels for the appellants, Nesar and Sunny is that the

testimony of the prosecutrix is unreliable and untrustworthy and there are several material contradictions in her statement made at the time of registration of the FIR, vis-a-vis her testimony recorded in the court. Some of the contradictions pointed out by them have been summarized in para 15 above.

25. At the outset, it may be stated that in any case of rape/sexual assault, the main evidence has to be that of the prosecutrix herself and her evidence ought to be treated at par with the evidence of an injured or a complainant or a witness. It is also a settled legal position that the sole testimony of the prosecutrix, if found reliable in itself, would be sufficient to convict the accused and it is not necessary that the said testimony be corroborated from other sources. The only caveat is that the said uncorroborated testimony of the prosecutrix should be of sterling quality, appearing to be truthful and found to be reliable by the court. In this context, in the case of Md. Iqbal and Anr. vs. State of Jharkhand reported as **AIR 2013 SC 3077**, the Supreme Court had pertinently observed as below:-

“There is no prohibition in law to convict the accused of rape on the basis of the sole testimony of the prosecutrix and the law does not require that her statement be corroborated by the statement of other witnesses.”

26. Similarly, in the case of Narender Kumar vs. State (NCT of Delhi) reported as **2012 SC 2281**, it was observed that even if the woman is of an easy virtue or used to sexual intercourse, it cannot be treated as a licence for any person to commit rape upon her.

27. In the case of Gurvinder Singh vs. State of NCT of Delhi in **Crl. A. 659/2011** decided on 16.12.2013, the Supreme Court had stated as below:

“24. Conviction can be based on the sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version

of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected. (emphasis added)

The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of.”

28 In the case of Sadashiv Ramrao Hadbe vs. State of Maharashtra and Anr. reported as (2007) 1 SCC (Cri.) 161, the Supreme Court had opined that when a court is acting on the sole testimony of the prosecutrix, it must show caution and expressed their view in the following words:-

“9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.

10. In the present case there were so many persons in the clinic and it is the highly improbable that the appellant would have made a sexual assault on the patient who came for examination when large number of persons were present in the near vicinity. It is also highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able-bodied person of 20 years of age with ordinary physique. The absence of injuries on the body improbabilise the prosecution version.” (emphasis added)

29. It would also be expedient to advert to the Supreme Court's observation in the case of Madho Ram and Anr. vs. The State of U.P. reported as **1973 CriLJ 673** that the only rule of law is the rule of prudence, namely, that the advisability of corroboration should be present in the mind of the judge or the jury, as the case may be. However, there is no rule of practice in every case of a corroboration before conviction can be allowed to stand.

30. In fact, in the case of State of Punjab vs. Gurmeet Singh reported as **1996 CriLJ 1728**, the Supreme Court had gone to the extent of stating that seeking corroboration of the statement of a prosecutrix before relying upon the same, amounts to adding insult to injury. However, the court had cautioned that while appreciating the evidence of a prosecutrix, a court may look for some assurance of the statement to satisfy its judicial conscience, as a prosecutrix is a witness who is interested in the outcome of the charges levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. In the captioned case, laying emphasis on the fact that while trying an accused on charges of rape, the courts shoulder a great responsibility and must demonstrate utmost sensitivity, the Supreme Court had advised that the court must examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature. In the event the court finds it difficult to place reliance on the testimony of the prosecutrix, it may look for evidence which may lend an assurance to her testimony.

31. When the deposition of the prosecutrix in the instant case is tested on a conspectus of the law laid down in the aforesaid cases, this court does not find any material contradiction in her testimony which could be considered sufficient to discredit her. Looking at the evidence in totality and the story projected by the prosecutrix, there does not appear any force in the argument addressed by

learned counsels for the appellants that the testimony of the prosecutrix is utterly unreliable and untrustworthy due to material contradictions and it ought to have been discarded by the trial Court. In fact, this court is of the opinion that except for some minor contradictions or insignificant discrepancies, there is nothing in the deposition of the prosecutrix that would compel it to disregard the same in entirety or put it under the needle of suspicion.

32. As was noted in the case of Jugendra Singh vs. State of Uttar Pradesh reported as **AIR 2012 SC 2254**, a discrepancy can occur due to the normal errors of perception or observations made due to lapse of memory and it is for the court to delve into its vast experience and assess the material on record by excluding an exaggerated version given by any witness and ignoring the embellishments and also a version which could occur on account of an inherent fear in their mind that their testimony may be rejected by the court. In the present case, the prosecutrix has resolutely stuck to her version of the sequence of events that had unfolded on the night of 25.10.2009. Except for some minor discrepancies here and there, she had not only named all the three accused at the first opportunity, she had identified two of the accused when accompanying IO SI Harpal Singh to the site of the crime on the very next day i.e. on, 26.10.2009. She had also unhesitatingly identified them in court. Not only that, the prosecutrix had clearly identified the site where she had been raped by the accused.

33. Moreover, the medical evidence that has come on record also demolishes the arguments of the learned counsels for the appellants that the case of the prosecution is based on the uncorroborated evidence of the prosecutrix alone. A perusal of the MLC of the prosecutrix (Ex.PW9/A) shows that the hymen was not intact. The doctor had particularly noted that there were teeth marks on the right side of the breast of the prosecutrix. The Report of the victim of the sexual

abuse (Ex.PW6/E) also establishes that sexual intercourse was done on the prosecutrix as her hymen was found to be torn. Given the fact that the testimony of the prosecutrix has remained unshaken during her examination and lengthy cross examination and further, considering the fact that the said testimony stands corroborated by the medical evidence placed on record, the contention of the learned counsels for the appellants that the prosecution had based their case solely on the uncorroborated evidence of the prosecutrix, is found to be untenable and is rejected outright.

34. The second argument advanced by learned counsels for the appellant, Nesar and Sunny was to the effect that the provisions of Section 313 Cr.P.C. had not been complied with by the trial court, while recording the statements of all the three appellants. On going through the questions posed by the learned trial court to each of the appellants, this court is not inclined to accept the suggestion coming from the learned counsels for the appellants that it is a case where the attention of the appellants was not drawn to the specific point in the charge and in the evidence on which the prosecution had based its case against them, for them to have offered an explanation. No doubt the decision relied upon by Mr. Sumeet Verma, learned counsels for appellant, Nesar in the case of Ramvir Yadav (supra) has elaborated the object of Section 313 Cr.P.C. which is to give an opportunity to an accused to explain the case made out against him and has emphasized the fact that the questions must be framed in such a way so as to enable the accused to know what he is expected to explain and what are the circumstances for which the explanation is needed, one must not lose sight of the fact that the entire purpose of the said provision is to ensure that the accused is offered a fair opportunity to explain the circumstances that had appeared against him. In this context, it is relevant to refer to the case of Bakshish Singh Dhaliwal vs. The State of Punjab reported as **AIR 1967 SC**

752, where the Supreme Court had clarified that under Section 313 Cr.P.C., the questions that are to be put to an accused is meant to enable him to explain any circumstance appearing in the evidence against him and for said purpose, he is to be questioned generally in the case, after the stage of examining the prosecution witnesses is over but before he is called upon to produce his defence. However, the provision does not contemplate that each separate piece of evidence in support of the circumstances appearing against him ought to be put to the accused and nor is it necessary that he should be questioned separately in respect of the same.

35. In the present case, records reveal that several pertinent questions were posed by the trial court to each of the appellants, in response where to, all of them had made bald denials and elected not to offer any cogent explanation or put forth their stand. In fact, specific and cogent questions were posed to each of the appellants separately. This is not a case of a nature where a series of facts were strung together and only one question was asked by the trial court which had resulted in causing some confusion in the minds of the appellants for them to contend that the trial court had fallen foul of Section 313 Cr.P.C. In such circumstances, this Court is not inclined to accept the submissions made by learned counsels for the appellants that the trial court had erred in recording the statements of the accused in the manner prescribed in law, under Section 313 Cr.P.C.

36. Lastly, reliance has been placed by learned counsels for the appellants on a decision of the Supreme Court in the case of Narayan (supra), which pertains to an offence under Section 376 (2)(g) of the IPC and where the punishment of rigorous imprisonment of 10 years imposed on two co-accused, was reduced to 7 years in the case of the appellant therein. The said decision would however not be of any assistance to the appellants herein for the reason that a reading of

the said judgment does not spell out the circumstances which had weighed with the Supreme Court and had persuaded it to arrive at the conclusion that the role of the appellant therein was different from the role of the other co-accused as the observation made is that he had only “assisted the accused in commission of rape”. In the absence of material particulars that would demonstrate as to what was the exact role attributable to the appellant in the captioned case, the two appellants herein, Nesar and Sunny cannot seek any benefit of reduction of punishment vis-à-vis the sentence imposed on the third appellant, Mukesh who had actually committed the offence of rape on the prosecutrix. As noted in the impugned judgment, the prosecutrix has attributed a specific role in the commission of rape on her to each of the accused, by deposing that Nesar had held her legs so that she could not escape from being ravished by the third co-accused, Mukesh. She had gone on to depose that the crime had taken place in the Jhuggi of the second accused Sunny, who had caught hold of her and gagged her mouth.

37. Given the mandate of Explanation-1, appended to Section 376(2)(g) of the IPC, which takes in its fold the definition of gang rape to include the role of a group of persons acting in furtherance of their common intention, learned counsels for the appellants cannot be heard to state that the role of the two appellants, Nesar and Sunny in the entire sordid crime was so miniscule that they are entitled to any remission or for discharge on the period of imprisonment already undergone by them, as against the sentence of rigorous imprisonment of 10 years imposed on them. There are no extenuating circumstances offered on behalf of the appellants for this court to take a lenient view. In any event, the provision in question prescribes a punishment of rigorous imprisonment for a term which is not less than 10 years. A minimum period of punishment contemplated under the Act having been

imposed by the trial court on the appellants, this Court sees no justification in interfering in the order on sentence, by reducing the said punishment to any lesser period.

38. Lastly, coming to the argument advanced by learned counsel for appellant, Mukesh that he had not been correctly identified, as at some places, he has been described as the son of Kalu Ram and at some places, as the son of Uma Devi, in the course of arguments learned counsel for the appellant was called upon to clarify as to whether the appellant had placed any authentic and reliable documents on record which could reveal his true parentage or prove that it was contrary to what had been recorded before the trial court, but to no avail. In fact, the learned Addl. PP had pointed out that the said argument was not even raised by the appellant before the trial court. Learned counsel for the appellant was also requested by this court to produce before it any reliable official document to authenticate his submission that the parentage of Mukesh had been wrongly recorded by the trial court for which he is entitled to a benefit of doubt, as claimed by him, but he has failed to produce any document to substantiate his submission. This being the position, the appellant cannot hide behind the smokescreen of incorrect identity to evade the consequences of the crime committed by him. In any event, as noted above, the prosecutrix has stood firm and unwavering in identifying the appellant, Mukesh before the court as the very same person who had committed the offence of rape on her and not only that, she had stood steadfast in identifying all the three accused from day one, till the conclusion of the trial.

39. Given the aforesaid facts and circumstances and in view of the fact that the evidence of the prosecutrix has been found to be cogent, convincing, trustworthy and reliable, and it stands duly corroborated by the medical evidence brought on record, this court does not find any illegality, perversity or

infirmity in the impugned judgment dated 02.9.2011 and the order on sentence dated 05.9.2011, passed by the learned District Judge & Additional Sessions Judge-I/C (East) in Sessions Case No.18/2010, FIR No.330/2009 under Section 376(2)(g) IPC PS Kalyan Puri. The three appeals are accordingly dismissed, being devoid of merits.

40. Having regard to the facts and circumstances of the case, this court directs that the State shall pay compensation to the victim in terms of Rule 3 & 5 read with Entry 2 to the Schedule to the Delhi Victims Compensation Scheme 2011(notified on 2.2.2012), read with Section 357A of the Criminal Procedure Code which entitles every rape victim to a minimum compensation of Rs.2,00,000/- and a maximum compensation of Rs.3,00,000/-. The Delhi Legal Services Authority which is the designated body under the Scheme shall decide the quantum of compensation to be awarded to the victim and direct the State to pay the same to the victim. The method of disbursement prescribed in Rule 7 shall be followed. The State shall take steps to ensure that the victim is duly informed of this order within two weeks. The victim and the concerned official of the Government of NCT of Delhi shall appear before the Delhi Legal Services Authority on 5.9.2016.

41. Before parting with the present appeals, it is considered imperative to highlight the shoddy and sloppy manner in which the case has been investigated by the police. As noted in para 5 above, several samples related to the medical examination conducted in respect of the prosecutrix were collected by the doctor and handed over to the I.O. against a seizure memo, for undertaking forensic investigation. However, not a single report in respect of the said samples appears to have been collected from the forensic department and filed by the prosecution. It is not even known if the said samples were ever forwarded to the Laboratory for investigation. The significance of forensic

examination cannot be overstated in cases of rape as other corroborative evidence is ordinarily hard to come by. Had the forensic reports been brought on record by the prosecution, it would have left no scope for the appellants to raise all kinds of frivolous pleas, questioning their involvement in the crime. In fact the said reports would have helped in nailing them down with much more certainty and certitude.

42. It is an absolute mystery as to what was done with the several samples and swabs handed over by the doctor to the I.O. Learned Addl. PP has also not been able to throw any light on the fate of the said samples that were seized by the I.O. and admittedly deposited in the Malkhana. The failure of the part of the I.O. in forwarding the seized samples to the Forensic Laboratory for testing, amounts to gross dereliction of duty and has resulted in giving enough latitude to the appellants to take all and sundry pleas to try and demolish the prosecution case. But for the unwavering and unflappable testimony of the prosecutrix read in conjunction with the MLC conducted on her, the prosecution would have ended up on a weak wicket, for which the State would have had none else to blame but itself. A copy of this order shall be forwarded to the Commissioner of Police, Delhi for perusal and appropriate action.

Orders be given ***DASTI*** to the Home and Law Departments, Govt. of NCT of Delhi, the Commissioner of Police and the Delhi Legal Services Authority, New Delhi.

AUGUST 10, 2016
ap/mk

(HIMA KOHLI)
JUDGE