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

+ **CRL.A. No.283/2013**

Date of Decision: 19.09.2016

SURYA PRAKASH @ OMU

..... Appellant

Through

Mr.K.K. Manan, Sr. Adv.
with Mr.Ankush Narang,
Adv., Ms.Anjali Rajput,
Adv., Mr.Nihit Dalmia, Adv.
& Mr.Eric Karan Sharma,
Adv.

versus

STATE NCT OF DELHI

..... Respondent

Through

Ms.Aashaa Tiwari, APP for
the State, SI Arun Dagar,
PS Kapashera.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE P.S.TEJI

GITA MITTAL, J (Oral)

1. By way of the present appeal, the appellant assails the judgment dated 17th January, 2013 passed by the learned Additional Sessions Judge (Special Fast Track Court), Dwarka, New Delhi whereby he stands convicted for commission of the offences punishable under Section 376 as well as under Section 506 of the Indian Penal Code (*hereafter 'IPC'*). By the

consequential order on sentence dated 29th January, 2013, the appellant was sentenced to undergo imprisonment for life with fine of Rs.50,000/- for commission of the offence punishable under Section 376 of the IPC, which was payable to the victim. In default of payment of fine, the appellant was sentenced to undergo simple imprisonment for one year. The appellant was additionally sentenced to undergo rigorous imprisonment for a period of one year with fine of Rs.10,000/- for the offence punishable under Section 506 of the IPC and in default, the appellant was sentenced to undergo simple imprisonment for three months.

2. At the outset, we may note that the instant case displays blatant disregard of the mandatory requirement that the identity of a complainant/victim in a case involving sexual offences, should not be disclosed. We find that the trial court record is replete with the first name of the complainant/victim in the record. Care should have been taken to ensure that the name of the complainant does not appear in the record. We, in the present record advert to her as 'M'.

3. To the extent necessary, we are noting the brief facts giving rise to the present appeal. The case of the prosecution rests primarily on the testimony of PW 9 'M' the complainant who was the victim of the alleged offence.

4. On 21st August, 2011, DD No. 21B (Ex. PW6/A) was entered in the *roznamcha* by ASI Raghbir Singh (PW 6) at PS New Delhi Railway Station. With regard to this entry, ASI Raghbir Singh (PW6) has stated that while posted on emergency

duty on 21st August, 2011, at about 2.30 p.m., a social worker of the Child Line 1098 and Constable Satish (*who was not examined during trial*), came to the police station with the girl who appeared to be a juvenile. The DD entry records that this girl gave her name as 'Meena', daughter of 'F', resident of a village in Banaras, U.P. and disclosed her age as fifteen years

5. She informed the police that she did not know anybody in Delhi and that she may be sent to a secure place. This 'Meena' also disclosed that she had left her house on her own wishes and that nobody had done any mischief ("*Chhed Chhad*") with her.

6. As per DD No.21B (Ex. PW6/A), the social worker was a lady named Smt. Asha Thakur and records the above information. It also notes that 'M' had been discovered in abandoned condition ("*lavaris halat*") at the railway station. . It is also noted in the diary that she had to be produced before the Child Welfare Committee. The deposition of ASI Raghbir Singh (PW6) notes that this girl was found roaming at the New Delhi Railway Station in suspicious conditions.

7. DD No. 21B also notes that the girl was in a good condition and that she was handed over to Smt. Asha Thakur with the instructions that she must be produced before the Child Welfare Committee for her medical and that further directions be complied with.

8. In the witness box, ASI Raghbir Singh (PW6) was categorical that he had relied absolutely on the disclosure of identity and age by the girl who was apprehended and that she was

not carrying any platform ticket. He also supported the noting in the police report that no untoward incident had taken place with her.

9. It appears that 'M' was kept in the care, custody and protection of the Child Welfare Committee (*hereafter 'CWC'*) Mayur Vihar, Delhi and on 21st August, 2011, transferred to the CWC, Nirmal Chhaya to be produced on 25th August 2011. No complaint of any kind or any kind of violence or misbehaviour to her was made by 'M' against any person or authority.

10. After about a stay of one month in the Nirmal Chhaya, it is in evidence of 'M' (PW9) that she disclosed an incident of rape on her person which purportedly happened on the 12th August, 2011. She claims that his disclosure was made to one madam called Charu (*who was also not examined as a witness*).

11. The information of the complaint regarding the alleged incident of rape was telephonically given on 29th September, 2011 to the SHO, Police Station Kapashera who directed WASI Nirmala (PW11) to proceed to Nirmal Chhaya. 'M's statement (Ex. PW 9/A) was recorded by WASI Nirmala in the presence of Ms. Shweta Tripathi, Welfare Officer, Children Home. The endorsement made on the *tehrir* by IO/WASI Nirmala PW-11 has been proved as Ex. PW11/A. This *rukka* was sent to the Police Station Kapashera which resulted in registration of FIR No.168/11 (Ex. PW10/A) under Section 376 of the IPC. The information of registration of the FIR was logged as DD No.30A (Ex. PW10/B) at 9:15 p.m. by the police. The copy of the FIR was marked to WASI Nirmal

(PW11) for investigation.

12. With the permission of In-charge, CWC, Nirmal Chhaya, 'M's medical examination was conducted on the 29th September, 2011 at the Deen Dayal Upadhyay Hospital, New Delhi. Lady Constable Vikash Sirowa (PW3) has proved the same as also the handing over of a sample on a slide and the sample seal vide seizure memo Ex. PW3/A.

13. The prosecution examined Dr. Rita Moni Baruah, as PW4 who conducted the medical examination of 'M' on 29th September, 2011 at the Deen Dayal Upadhyay Hospital vide MLC No. 20032 (Ex. PW4/A). The gynaecology report on the MLC seems to have been scribed by one Dr. Parul Mehra, who has not been examined as a witness.

14. Accompanied by Constable Ganga Ram (PW2), the investigating officer WASI Nirmala (PW11) took the complainant 'M' to the spot as well which was located in the Ramesh Nursery, Bijwasan, Delhi and arrested the appellant who had been implicated by 'M' in her statement (Ex. PW9/A) vide arrest memo (Ex. PW2/A). Personal search of the appellant was undertaken vide Search Memo (Ex. PW2/B).

15. The prosecution has alleged that after his arrest, the appellant made a disclosure statement (Ex. PW2/C) which was reduced to writing and got recovered a rolling pin ("*belan*") which was seized vide Seizure Memo (Ex. PW2/D).

16. The medical check up of the appellant was done in Safdarjung Hospital. His medical report has been proved on

record as Ex. PW 11/B. Blood samples of the appellant were also collected vide Seizure Memo (Ex. PW1/A).

17. The exhibits handed over by the hospitals after medical examination of M at the Deen Dayal Upadhyay Hospital and the appellant at Safdarjung Hospital by the police (*three sealed parcels*) were sent to the Forensic Science Laboratory, Rohini, Delhi under the cover of a letter dated 24th November, 2011. The description of articles was as follows:-

“ DESCRIPTION OF ARTICLES CONTAINED IN PARCEL

Parcel ‘1’: One sealed plastic container sealed with the seal of “DEPTT. OF FORENSIC MEDICINE SJH NEW DELHI” containing exhibit ‘1’.

Exhibit ‘1’: Dirty blackish whitish brown gauze cloth piece described as ‘Blood on Gauge’

Parcel ‘2’: One sealed cloth parcel sealed with the seal of “CMO DDU HOSPITAL” containing exhibit ‘2’.

Exhibit ‘2’: Dirty bluish blackish cotton wool swab on a stick kept in a tube described as ‘HVS’

Parcel ‘3’: One sealed cloth parcel sealed with the seal of “CMO DDU HOSPITAL” containing exhibit ‘3’.

Exhibit ‘3’ One microslide having faint whitish smear describes as ‘Slide from HVS’.”

18. The report, under the signatures of Ms. Manisha Upadhyaya, Senior Scientific Officer (Biology), was furnished to the SHO

Kapashera vide Report No. FSL-2011/B-7159 (Ex. PW11/C) with the result of the analysis as follows:-

“ **RESULT OF ANALYSIS**

1. *Blood was detected on exhibit '1'.*
2. *Blood could not be detected on exhibit '2'.*
3. *Semen could not be detected on exhibit '2' and '3'.*
4. *Report of serological analysis in original is attached herewith.”*

The report of the biology division showed blood of human origin on exhibit '1'.

19. Neither the FSL report, nor the MLC of 'M' (Ex. PW4/A) show anything of significance so far as the commission of the offence is concerned.

20. The prosecution case rests heavily on M's statements including her statement recorded on oath under Section 164 of the Code of Criminal Procedure (*hereafter 'Cr.P.C.'*) by Sh. Sushil Kumar. Metropolitan Magistrate on the 1st of October, 2011 (Ex. PW8/B).

21. After completion of the investigation, the police filed a charge-sheet under Section 173 of the Cr.P.C. before the concerned court.

22. By the order on charge dated 31st January, 2012, the learned ASJ charged the appellant for commission of offence under Section 376 of the IPC as well as a second offence under Section 506 of the IPC. The appellant pleaded not guilty and claimed trial.

23. The prosecution examined 13 witnesses in support of its

case. The statement of the appellant was recorded under Section 313 of the Cr.P.C. The appellant led evidence and examined his daughter Parul as DW 1 as a witness in defence. The Trial Court completely disbelieved the defence of the appellant and found that the prosecution had proved the case beyond reasonable doubt. As a result, the appellant was convicted with the charged offences and sentenced as aforenoted.

Challenge on behalf of the appellant

24. Mr. K.K. Manan, learned senior counsel for the appellant has challenged the conviction on the ground that there is no credible evidence to support the charges and that the trial Court has gravely erred in convicting and sentencing the appellant.

25. It is urged that rather than being the perpetrator of a heinous offence, the appellant is a victim of having taken mercy and given shelter to 'M' who was brought to his residence as a homeless person needing assistance of his daughter Parul Singh. As per Mr. Manan, 'M' is a completely unreliable witness and deserves to be completely disbelieved for the contradictory stands taken by her and the improvements in her testimony at every stage. He would further submit the fact that the conduct of the complainant renders the narration of events constituting the offence completely implausible and unbelievable. It is submitted by Mr. Manan that the impugned judgment is based on no evidence at all and the learned Judge has gravely erred in finding the appellant guilty of commission of the offence. We find that the case hinges

completely on the testimony and conduct of 'M' and we, therefore, propose to examine this aspect of the matter in some detail.

Concealment of Name and Age

26. The evidence on record would show that that 'M' was not a resident of Delhi. She had explained her presence in Delhi in the official record for the first time in the statement made by her in DD No.21B (Ex. PW 6/A) on the 21st August, 2011.

27. The first public disclosure of the identity and age of the appellant is also to be found in DD No.21B wherein the complainant 'M' had disclosed a wrong name as 'Meena' and age as 15 years and, therefore, lodged in the care and protection of the CWC and its officials. She has maintained this facade over the entire period till 29th September, 2011 when she was subjected to a medical.

28. We have noted above the MLC recorded by Dr. Rita Moni Barua (PW-4) after M's examination. MLC No.20032 dated 29th September, 2011 has been proved on record as Ex. PW4/A. Dr. Rita Moni (PW-4) had noted the history of sexual assault on 12th August, 2011 by her friend's father given by 'M' herself. 'M' has given her age as 15 years even to the doctor who has so noted the same in the MLC.

29. Mr. Manan, learned Senior Counsel for the appellant has vehemently contended that 'M' did not disclose her name and age right from the inception and deliberately lied about it with the

malafide intention of securing accommodation in Delhi as she merely wanted to perpetuate her stay here.

30. Mr. Manan, has vehemently argued that the false allegations were made by 'M' against the appellant inasmuch as the CWC had passed an order dated 29th September, 2011 (ExPW5/A) directing that 'M' needed to under a gynaecology check-up and that when she was last medically examined before her admission to the Child Welfare Committee Home, her gynaecological check-up was not done.

31. It is the submission of Mr. Manan, that it is only when the appellant apprehended that the truth would be revealed as she was being subjected to medical examination on the 29th September, 2011 that she gave out the particulars of her schooling.

32. Ms. Neera Mullick, Chairperson of the Bench of Magistrates, CWC, Nirmal Chhaya was examined as PW5 and disclosed that 'M' was lodged in the Children's Home based on the information given by her to the investigating officer.

So far as the disclosing her age is concerned, Ms. Neera Mullick (PW5) had also stated that 'M' had not disclosed her correct age at the time of being inducted into the Children Home nor thereafter. Later on, 'M' disclosed that she was educated upto 12th class as well as her place of education. Enquiries were thereupon made by the CWC in this regard. In these enquiries, a letter dated 12th October, 2011 was received from the Principal of the Shri Harihar Mahadev Inter College, Dev Chandpur, Varanasi, informing that 'M' had been student in the college and her date of

birth was 1st September, 1992.

According to Neera Mullick (PW5), 'M' having been discovered to be a major and her having expressed the desire to go on her own, was set free on 22nd October, 2011.

33. We find that under the shield of the inquiries referred to by PW 5, 'M' still managed to perpetuate her stay in the Child Welfare Home till 22nd October, 2011.

34. 'M' has not disclosed any reason as to why she gave a false identity and false information about her age when she was taken into custody by the police on 21st August, 2011 or thereafter till the end of September, 2011 when her medical examination was conducted.

Evidence of commission of the offence - contradictions and material improvements in the statements of the complainant

35. We now come to the only material piece of evidence on record to support the allegation of rape against the appellant. This is 'M's statements.

The record contains several statements attributed to her.

Statement recorded by the Investigation Officer (Ex. PW9/A) on 29th September, 2011

36. So far as the alleged offence is concerned, the first ever complaint recorded at her instance was recorded only on 29th September, 2011 by IO WASI Nirmala (PW11) in the presence of lady Ct. Vikash Sirowa with the permission of the Incharge of the

Child Welfare Committee, Nirmal Chhaya before the Child Welfare Committee and has been proved as Ex. PW 9/A. In this statement, 'M' disclosed that in the year 2009, her parents had expired and that she had two brothers who were working in Mumbai. 'M' disclosed that she also had one elder sister who was also married in the year 2010. She further disclosed that she cleared her inter examination in the year 2011 from Shree Harihar Mahadev Inter College, Deochand Pur, Varanasi; that she wanted to continue with her education but her brother wanted to get her married off.

37. 'M' further disclosed in Ex. PW 9/A that for this reason, in June, 2010, she left her house and came to reside with one Mamta Chaubey, a friend of her mother, at Shivpur, Purani Chungi, Varanasi. Unfortunately, the behaviour of Shri Arvind Srivastava, husband of Mamta Chaubey, was not appropriate which compelled her to leave their residence and she took a train to Delhi in April, 2011.

'M' claimed that she had disclosed these facts to her married sister.

38. As per Ex. PW9/A, in the train, 'M' befriended, a fellow passenger, another young girl Parul Singh (DW1-daughter of the appellant) and after disembarking from the train at Delhi, went with Parul with her to her village Chimna, Hardoi. 'M' has claimed that till July, 2011 she stayed in that village with her. Thereafter, 'M' returned to reside with said Mamta Chaubey, at Varanasi. In August, 2011, she had a telephonic conversation with

Parul and on her invitation, came to Delhi on 11st August, 2011. In Delhi, 'M' claims in Ex. PW 9/A that she went to reside with Parul Singh and her father (the appellant) in their one room in a farm house on the Bijwasan Road opposite Ramesh Nursery, Kapashera and she stayed with Parul and her father in this farm house.

39. So far as the alleged incident is concerned, it is stated that on the 12th August, 2011, Parul went to her village Chimna to celebrate the *rakshabandhan* festival with her brother. 'M' states (in Ex. PW 9/A) that at about 10.00 p.m., the appellant asked her to prepare dinner; that he came into the room at about 11.00 p.m. in a drunken condition. It was alleged that the appellant asked 'M' to lay along with him on bed. When 'M' resisted, the appellant first gave a note of Rs.50/- and after that Rs.100/- which 'M' took believing the amount to be on account of *rakshabandhan*. 'M' alleges having been pushed on to bed and when she resisted, the appellant hit her on the head with wooden rolling pin ('*belan*'). 'M' states that despite her resistance, the appellant committed rape upon her. In her statement, she is categorical that she raised her hue and cry after the offence was committed on her.

40. It is further stated by 'M' therein that after the event, she stayed the whole night in the same room and kept quiet out of fear. She has clearly stated that the appellant threatened that he would throw her out of the room and also threatened her life. For this reason, she did not disclose this incident to anybody. 'M' has stated that she disclosed the incident only on 16th August, 2011 for

the first time to her friend Parul who completely disbelieved her.

41. It is stated in Ex. PW 9/A that thereafter, on 21st August, 2011, the Manager of the farm house declared that no woman, who was an outsider, would be allowed to stay on the property. For this reason, Parul and her father-the present appellant, on 21st August, 2011, told her to leave the premises. 'M' has alleged that the appellant took all her money as well as her mobile from her purse before she was turned out.

42. In Ex. PW9/A, 'M' has categorically stated that she managed to reach the railway station somehow where the police found her and first kept her in Kilkari Rainbow Home in Kashmere Gate and after two days, she was moved to Nirmal Chhaya, Tihar Jail, New Delhi where she had disclosed the complete incident.

Statement of 'M' recorded on 1st October, 2011 under Section 164 of the Cr.P.C. (Ex. PW8/C)

43. During investigation, the investigating officer WASI Nirmala (PW-11) had made an application dated 30th September, 2011 for recording M's statement under Section 164 of the Cr.P.C. (Ex. PW8/A). On this, the Metropolitan Magistrate had passed an order dated 30th September, 2011 directing her statement to be recorded on 1st October, 2011. 'M's statement on oath (Ex. PW8/C) was recorded by Sh. Sushil Kumar, Railway Magistrate in which, for the first time, she gave her name and age correctly as 19 years and informed the Magistrate that she had studied up to 12th Class. She had displayed no tension or anxiety. She reiterates that

she had befriended the appellant's daughter Parul on 11th April, 2011 on a train and had accompanied to her house. It is also in her statement that she had an aunt in *Benaras* with whom she was residing but she made a grievance that this aunt used to make her do housework, beat her, not give her food and therefore, on one Monday in the monsoon, 'M' had run away from her house. 'M' further stated that Parul Singh used to reside in a farmhouse in Kapashera with her father; and that her friend Parul Singh had rung up the aunt's house to call her back.

So far as the allegedly fateful day is concerned, in Exh.PW-8/C, it is stated that on 12th August, 2011, Parul Singh had gone to her village Hardoi leaving the appellant alone with 'M'. At about 10 o'clock, the appellant had returned home in a drunken condition. After eating food, he asked 'M' to make his bed and went out. He returned at about 11 o'clock and gave 'M' some money. 'M' has stated that she presumed that the money was on account of *rakshabandhan* and so she kept it. When she refused to sleep with him, the appellant was physically violent with her. He threw 'M' on the bed and hit her on the head with a rolling pin (*Belan*). 'M' had stated that she did not have the strength to remove him and she fell down. Thereafter the appellant told her that she could call out to anybody but he would have sexual relations with her and that he pressed her hand and feet and was yelling that he would indulge in sex with her. The appellant has alleged to have undressed 'M' and raped her. According to 'M', the appellant had threatened that if she disclosed this to anybody, he

would kill her, give her poison. 'M' claims to have telephoned Parul Singh after the incident but Parul did not believe her.

44. In her statement dated 1st October, 2011 recorded by the Magistrate (Ex. PW8/A) 'M' alleged ill treatment by Ms. Mamta Choubey, with whom she had lived for 6-7 months, compelling her to leave *Benaras*. We have noted above the appellant's statement under Section 161 of the Cr.P.C (Exh.PW-9A). The behaviour attributed to her aunt Ms. Mamta Chaubey that she used to make her housework; beat her and not give her food is not to be found in Ex. PW9/A or her court testimony.

45. Interestingly, she makes no aspersions in Ex. PW8/C, on the behaviour of Ms. Mamta Choubey's husband Sh. Arvind Srivastava as the reason which compelled her to leave their residence, as alleged by her in Ex. PW9/A on the 29th of September, 2011. However, again, testifying as PW9 on 25th of May, 2012 on 26th of May, 2011, she repeated her allegations of misbehaviour against Sh. Arvind Srivastava.

46. Yet despite this factor, inexplicably she has stated that in July, she returned to Benaras to reside with them again!

47. In her statement under Section 164 of the Cr.P.C. on 1st October, 2011 she has stated that she had informed Parul Singh about her father's conduct only on the 16th of August, 2011 upon Parul's return to Delhi.

48. In her testimony in court on 25th May, 2012, 'M' has stated that she had telephonically informed Parul Singh on the 12th August, 2011 itself immediately after the offence. 'M' has testified

that she not only informed Parul but Parul's brother Rahul (appellant's son) as well.

49. It is noteworthy that Parul Singh appeared as DW-1 in the case. No suggestion was made to her that 'M' had informed her about the incident on the telephone on the 12th August, 2011 soon after the incident. On the contrary, in her cross-examination, the prosecution had suggested that 'M' had told her about the incident when Parul returned to the house after *rakshabandhan*.

50. The above narration sets out the material contradictions in 'M's statement on every important aspect of the case. 'M' began by concealing her identity and age even from the social worker and the police. She was lodged in the safe and secure environment of the Children's Home (*because of her misrepresentation about her age*) and had full opportunity to disclose any trauma suffered by her, yet she does not do so. 'M' makes contradictory statements about the circumstances in which she left her home as well as her Aunt's home in Varanasi.

51. All the above allegations and M's court testimony are completely contrary to the first ever statement made by 'M' after leaving the farm house. This statement has been noted by ASI Raghubir Singh (PW6) in DD No. 21B at 2:35 pm on 21st August, 2011, 'M' was categorical that nobody had misbehaved with her (*'ched chad'*). It is the prosecution case that Smt. Asha Thakur, a social worker & a Constable Satish were present with 'M' at that time. In fact 'M' was entrusted to and had accompanied Smt. Asha Thakur to the Children's Home.

This remained the position till her statement was recorded by WASI Nirmala on the 29th of September 2011 when she has made the aforenoticed allegations.

No confinement or threat post offence

52. Mr. Manan, learned Senior Counsel for the appellant has dwelt at length on 'M's' conduct after the alleged incident.

53. In the complaint 'M' as PW-9 has disclosed that the farmhouse where the appellant was living was being looked after by a Manager on behalf of the owner who lived in Mumbai. She has stated that there was 7-8 rooms in the farmhouse.

54. So far as the other residents on the premises are concerned, PW-9 has disclosed that amongst other inhabitants whose names she did not know, one Shiv Pal, the co-villager of the appellant and one Pappu were also residing there.

55. In her cross-examination, PW-9 'M' has stated that she had called Parul from the mobile phone of the said Shiv Pal, on the date of the incident and not from her own mobile. Thus 'M' had access to Shiv Pal immediately after the incident.

Shiv Pal has not been investigated at all. Parul has denied receiving any such phone call.

56. In the *tehreer* (Ex. PW9/B), the appellant makes no reference to a phone call to Parul Singh or any other person. She has stated that it was only when Parul Singh returned on 16th August, 2011 that she told her suffering to Parul which she had

disbelieved.

57. The incident is alleged to have been taken place around 11:00 pm on the 12th of August 2011 as 'M' has claimed that she made the call immediately thereafter. This means that even at that time of the night, she was not confined but was able to request Shiv Pal for use of his phone and make the call.

58. It is in evidence that the appellant and his daughter were residing in a single room. It can reasonably be presumed that the bathroom and the toilet were outside the boundary of the room and therefore, occupants of the room would have had to leave the room for the daily functions. 'M' has also made no allegation that the appellant had confined her within the room. There is not a whit of a grievance that 'M' was prevented from communicating with any person or leaving the farmhouse. The evidence is to the contrary that despite the appellant allegedly making the effort to expel her from the room, she herself requested the alleged rapist to let her continue to reside there.

59. It is noteworthy that 'M' has not made even a whisper of allegation that she was kept under wrongful confinement or that there was any threat emanating from the appellant after the incident of 12th August, 2011. 'M' has not complained or suggested a violence - physical, mental or emotional at any time after the 12th of August, 2011, from either the appellant or Parul to her.

60. It is 'M's' grievance that the appellant had indulged in physical violence and had even hit her on the head with a rolling pin apart from sexually violating her to the extent of rape. In her

testimony in court, on the 25th of May 2012 appearing as PW-9, 'M' has stated that after threatening her with death if she disclosed the incident, the accused "tried to expel me from the room but I requested the accused to allow me to stay there".

61. The record would show that 'M' was admittedly residing alone in the room on 12th August, 2011 with the appellant who was her friend's father, and despite the alleged incident on the night of 12th, she has continued to reside alone with the appellant till Parul returned on 16th August, 2011. Even after Parul returned and as claimed by 'M' did not believe her allegations, she continued to reside with the offender till she was asked to leave the farm house on 21st August, 2011 because of the order of the Manager of the Farm House.

62. Ex. PW9/A scribed on 1st October, 2011 further records 'M's statement that on 21st August, 2011 she was compelled to leave the farmhouse only because objection was taken by its Manager to any outsider residing in the premises. In court, on the 26th of May, 2012, 'M' tried to cast aspersions of criminality to the appellant's conduct and alleged that on 21st August, 2011, he took all her money as well as her mobile and sent her to Varanasi. It would appear from the above that but for the fact that the Manager of the Farm House had required all outsiders to be removed from the premises, 'M' would have willingly continued to reside in the same farm house along with the appellant with or without the presence of her friend Parul.

63. We find that appearing as PW-9, 'M' has stated that she was

using the mobile phone No.8853548706 during the period between 11th to 21st August, 2011. From her evidence, this phone was throughout in her possession and she had unhindered and uninterrupted access to it, and therefore to all her relatives, well wishers, in fact, to the world at large.

64. 'M' therefore voluntarily continued to reside thus in the same premises with the alleged offender without any sense of fear from him either of physical or sexual violence or on account of threat to her life.

65. The record would show that 'M' had close relatives including two brothers and a married sister. The only apprehension from her brothers was that she believed, they would have attempted to get her married off, even though she wanted to further educate herself. She has not given any reason why she did not contact or seek help from them or her sister.

66. 'M' has also disclosed a close relative being paternal aunt (bua) based in Varanasi as well as her mother's friend Mamta Chaubey with whom she was residing in the past. Though she makes different complaints against her, there is not even a remotest suggestion of an explanation as to why 'M' has not complained to anybody or approached any of these persons for assistance with whom she would have had more confidence rather than continuing to stay alone with the appellant if she had suffered with the violence at this hands or with strangers in the Nirmal Chhaya Complex.

67. The appellant is not an illiterate person and has displayed the

confidence and capacity to move around between cities. We are noting these facts only in an effort to understand as to why she has not complained about the unfortunate incident at any stage prior to the end of September, 2011.

68. She has testified that she was apprehended by the New Delhi Railway Police when she was attempting to travel without ticket.

69. So far as the explanation for not reporting the matter is concerned, on the 12th of August, 2011, 'M' has stated that she was threatened for the reason she did not disclose her ordeal. On 16th August, 2011, Parul had returned to the farmhouse to whom the appellant claims to have revealed the violence to which she was subjected.

70. On 21st August, 2011 'M' has reached New Delhi Railway Station all the way from Kapashera. We have no explanation as to how she did so, if her money had been taken by the appellant.

71. On the 21st of August 2011, 'M' was sent away from the farmhouse when she was completely out of control of the appellant. At the railway station, she met not only the policeman but also the representative of the Child Welfare Committee. She stayed for two days at the Kilkari Home, Kashmere Gate and thereafter at Nirmal Chhaya for about a month.

72. It is in the evidence of Ms. Neera Mullick (PW5) that during care and protection at the Children Home for Girls, the child is periodically talked to by the members of the Welfare Committee which period varies from two days to fourteen days. Counselling was also provided by Welfare Officers and also through the

psychologist made available in Manas Foundation, an NGO engaged by the department working in the same complex.

73. We may note that PW5 does not point out any element of fear upon 'M' during the period when she remained in the custody of the authorities apart from a bald statement in court on 25th May, 2012 that she was '*frightened*'. She did not tell anybody about the incident. There is not a whisper of an allegation as to the source of the fear.

74. The fear articulated for the first time on the 25th of May 2012 is in complete contradiction to 'M's conduct after the incident on 12th of August 2011 when she had requested the appellant ("the alleged offender") to permit her continue to reside with him even though he was alone and she has done so peacefully without any allegation of any misbehaviour on his part.

75. Clearly 'M' has displayed no element of fear in her conduct and therefore her testimony that she did not make any complaint of the offence till the end of September, 2011 because of fear is not credible.

76. The prosecution is therefore unable to explain the reasons for the delay in making the complaint.

Defective Investigation

77. We are handicapped in our examination of the evidence by the glaring fact that the investigating officer WASI Nirmala (PW11) has not cared to undertake the first step in any

investigation i.e. to prepare a site plan.

78. Even though she has claims to have visited the spot and recovered a rolling pin (*'belan'*) at the instance of the appellant, it is an item of normal use in every North Indian household. And recovery of rolling pin by itself may not be of much utility in the present case. No other seizures, say for instances the mattress or bed clothes, if any were seized. No forensic examination of any recovered articles has been undertaken.

79. We find that it is in the testimony of IO WASI Nirmala (PW11) that so far as the site is concerned, there were four or five other rooms in Ramesh Nursery. She has also deposed that other public persons were present at the farm house.

80. In 'M's statement under Section 164 of the Cr.P.C. (Ex. PW8/B) recorded on 1st October, 2011, she alleged that it was the appellant who was screaming ("*chilla*") before indulging in forcible sexual activity with her on 12th August, 2011.

81. It is in the testimony of 'M' herself as PW9 that she had raised hue and cry. No effort has been made to conduct investigations at the spot with regard to the unfolding of events which may have transpired on the 12th of August, 2011.

82. We find that Parul Singh (DW1) has categorically stated that other persons were also residing in the same farm house near their room. She has disclosed that the room was made of bare tin sheets at low levels. Photographs of this room have been marked as D-1/1 though not exhibited.

83. The room in which the appellant was residing wherein the

incident alleged to have taken place, is not a room of thick walls. The resistance to her violation referred to in her statement by 'M' as well as that the hue and cry would clearly have been audible beyond the tin walls.

84. No investigation worth the name has been conducted by the investigating officer. The incident took place after 11'o clock in the night. Sound would travel far in the late night especially in the quiet of the farmhouses.

85. Certainly there could have been some corroborative evidence of someone having heard the appellant yelling or the cries of the victim. No effort has been made to make enquiries from the other inhabitants.

Defence of the appellant erroneously disbelieved

86. The evidence led by the prosecution against him was put to the appellant and his was statement recorded under Section 313 of the Cr.P.C. on the 5th of December 2012. He had admitted that 'M' had met his daughter Parul in the train; that on her request she went to her Village Hardoi via Delhi after staying two days in Gurgaon and that she stayed with them till July; went to Mamta Choubey in Varanasi and came back to Delhi in August, 2011 where the appellant was residing with his children. The appellant has completely denied the incident of 12th August, 2011 or the allegation that he had asked 'M' to cook food for him or that he was under the influence of liquor at that time or any of the other

allegations made against him. He stated that he had been falsely implicated.

87. So far as his false implication is concerned, in answer to question No.32, when the evidence was put to him under Section 313 of the Cr.P.C., the appellant has categorically asserted that 'M' wanted to marry his son Rahul and he was against this marriage. For this reason, 'M' had falsely implicated him in the case as a measure of threat.

88. We find that the appellant had led evidence of his daughter Parul Singh as DW-1 who had explained the circumstances in which 'M' came to Delhi and started residing with her family. Parul had stated that 'M' was living with them as if she was her sister and stated how 'M' was freely going away and coming back to them in Delhi. According to Parul, on the 12th of August, 2011, her brother and she had gone to the house of her *bua* (paternal aunt) in Shastri Park in Delhi. She stated that on the 13th of August 2011 itself, she had returned and met 'M' but 'M' did not tell her about any happening. So far as learning about allegations against her father is concerned, Parul has categorically stated that she learnt about them for the first time on 29th of September 2011 when her father was arrested.

89. It is further in her evidence that in September, 2011, 'M' had telephoned Parul from the Nirmal Chhaya and requested to get her released. Parul has claimed that she arranged for her release from Nirmal Chhaya and thereafter 'M' had remained in her house for 2-3 months as well as at their village. She has claimed that 'M' still

talks to her on the telephone.

90. Parul has proved a letter, written in vernacular by 'M', marked as D 1/2 on the record explaining the circumstances in which she had made the false complaint against the appellant. We are not taking into consideration this document as the same has not been proved in accordance with law.

91. The learned trial judge has completely ignored the appellant's defence. In view of the above discussion, it would appear that the appellant was liable to be relieved.

Conclusion

92. From the above discussion, we find that there no credible evidence to support the explanation for the delay in making the FIR. The conduct of the complainant 'M' in fact contradicts the tendered explanation.

93. We also find that the complainant 'M' has made four different statements starting from the first at 2:35 pm on 12th August, 2011 (DD No. 21B); the second being the statement dated 29th August, 2011 (Ex. PW9/A) under Section 161 of the Cr.P.C. to the Investigating Officer; a third statement on oath dated 1st October, 2011 (Ex. PW8/C) recorded by the Metropolitan Magistrate under Section 164 of the Cr.P.C. and her oral testimony in court as PW9 on the 25th and 26th of May 2012. There are contradictions in material particulars and improvements in these statement, for which 'M' has failed to tender an explanation,

rendering her evidence incapable of belief.

94. In view of the above discussion, we are unable to agree with the conclusion of the learned Trial Judge that the prosecution has proved the commission of the offences by the appellant beyond reasonable doubt.

Result

95. The appeal, therefore, succeeds and we accordingly set aside the judgment dated 17th January, 2013 and the order on sentence dated 29th January, 2013 passed by the learned Additional Sessions Judge (Special Fast Track Courts), Dwarka, New Delhi in Sessions Case No.08/13 arising out of FIR No.168/2011 registered at Police Station Kapashera, New Delhi.

96. The appellant is directed to be set at liberty forthwith, if not required in any other case.

GITA MITTAL, J

SEPTEMBER 19, 2016/aj/aa

P.S.TEJI, J