

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

Date of Decision: 12th July, 2016

+ **CRL. A. 1637/2013**

DEEPAK RAI

..... Petitioner

Through Mr Pramod Kr. Dubey and Ms
Megha, Advs.

versus

STATE (GNCT OF DELHI)

..... Respondent

Through Mr Akshai Malik, Additional Public
Prosecutor for the State alongwith
Sub Inspector Rekha Police Station
Mayur Vihar, Delhi

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. This criminal appeal is directed against the judgment dated 17/07/2013 and order on sentence dated 22/07/2013 of Additional Sessions Judge passed in Sessions Case No.143/11 arising out of FIR No.191/11 PS Mayur Vihar whereby appellant herein was convicted under Section 376/377 Indian Penal Code. He was sentenced to undergo rigorous imprisonment for a period of ten years with fine of Rs.2,000/-. In default of payment of fine he was directed to undergo Simple Imprisonment for a period of two months for offence under Section 376 IPC. For the offence under Section 377 IPC he was sentenced to undergo rigorous imprisonment for a period of five years with fine of Rs.1,000/-. In default of payment of fine he was directed to undergo Simple

Imprisonment for a period of one month. Both the sentences were ordered to run concurrently. Benefit of Section 428 Cr.P.C. was given to the convict. The gravamen of prosecution case, succinctly stated is as under:-

On 05/08/2011 at around 8:20 PM the prosecutrix 'X' (assumed name) aged around 05 years was raped by the appellant. Information conveyed to the police was recorded as DD No.34A PS Mayur Vihar. After recording statement of victim's mother (Ex.PW-3/A), the Investigating Officer lodged First Information Report. 'X' was medically examined. The accused was arrested. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent for examination to Forensic Science Laboratory. Upon completion of investigation, a charge sheet was filed against the appellant in the court. To bring home the guilt, the prosecution examined 11 witnesses. In 313 Cr.P.C. statement, the appellant pleaded false implication. He pleaded that he had gone for his work at W-10, Noida which is a garment factory and returned to his house at about 9:00 P.M. He opted not to lead any defence evidence. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, convicted and sentenced the appellant as

mentioned hereinbefore. Being aggrieved and dissatisfied, the appellant has preferred the appeal.

2. The main thrust of assailing the impugned judgment by learned counsel for the appellant is on the testimony of the prosecutrix where in pursuance to a question put to her, she has deposed that the accused did not remove his clothes. Based on this statement, it was vehemently argued by the learned counsel for the appellant that if the accused did not remove his clothes there was no question of penetration which is *sine qua non* for offence under Section 376 IPC as prevailing at that time. Counsel submits that, at the most, the allegations may attract the provisions of Section 354 IPC. When the offence in question took place, the maximum sentence prescribed for offence u/s 354 IPC was five years. The appellant is languishing in jail for more than five years. As such, he be sentenced to the period already undergone.

3. Per contra, learned Additional Public Prosecutor for the State submits that for commission of rape, it was not necessary for the appellant to remove all his clothes. The factum of commission of rape stands established from the testimony of prosecution duly corroborated by the medical as well as scientific evidence. Under the circumstances, the impugned judgment does not suffer from any infirmity. Moreover,

the accused had taken a plea of alibi which however, was not proved by him. Under the circumstances, the appeal deserves dismissal.

4. I have bestowed my considerable thoughts to the respective submissions of learned counsel for the parties and have perused the record.

5. Admittedly, the prosecution case is based on the testimony of the victim child who was approximately five years of age at the time of incident. The fact that prosecutrix was aged about 5 years proved from the testimony of the prosecutrix(PW4) herself who disclosed her age as 6 years in her court deposition on 29th February, 2012. Furthermore PW-2 (Kamlesh Kumari), Principal, MCD Primary Girls School, 28 Block, Trilok Puri, Delhi proved admission form of 'X' (Ex.PW-2/A to Ex. PW-2/C) where her date of birth was recorded as 16.03.2006. As per admission register, 'X' got admission in the aforesaid school on 04/04/2011. No sound reasons prevail to disbelieve the date of birth recorded in Ex.PW-2/B as X's parents never anticipated such an unfortunate incident to happen in future to manipulate her age that time. As such, it stands proved that the child was approximately five years of age at the time of unfortunate incident. Even accused has not disputed this fact that the age of the victim was between 5 to 6 years on the date of incident.

6. Since the star witness of the prosecution is the prosecutrix herself who was aged about 5 years, therefore, the question for consideration is whether the conviction can be recorded on the sole testimony of a child witness or not.

7. 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.”

8. While appreciating the evidence of a child witness of extreme tender age, it would be desirable for the Court to keep in mind the principle that although there is no bar in accepting the uncorroborated testimony of a child witness yet prudence requires that court should not act on the uncorroborated evidence of a child whether sworn or unsworn. While dealing with this aspect of the case, their Lordships of the Privy Council in ***Mohamed Sugul Esa v. The King***, AIR 1946 PC 3, observed as follows (at pages 5 & 6) :

“In the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a Court can act upon it, corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice 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.”

9. In ***State of Madhya Pradesh v. Ramesh and Anr.***, (2011) 4 SCC 786 it was held that a child would not be a competent witness unless the trial court finds him otherwise and that the court may rely upon the evidence of such child witness in the event his deposition inspires the confidence of the court and there was no embellishment or improvement. The Court may also reject the testimony of such child witness if it is found that the child has been tutored, which inference can be drawn from the contents of the deposition. In this judicial precedent, the court placed reliance on prior judgments related to child testimony. Reference was made to ***Rameshwar vs. State of Rajasthan***, AIR 1952 SC 54, where Court examined the provisions of Section 5 of Indian Oaths Act, 1873 and Section 118 of Evidence Act, 1872 and held that:-

“every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other casue of the same kind. There is always competency in fact unless the Court considers otherwise.”

The Court further held as under:-

“..... it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate.....”

-In Mangoo and Anr. v. State of Madhya Pradesh, AIR 1995 SC 959, this Court while dealing with the evidence of a child witness observed that

there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

*-In **Panchhi and Ors. v. State of U.P.**, (1998) 7 SCC 177, this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that:-*

"the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring."

*-In **Nivrutti Pandurang Kokate and Ors. v. State of Maharashtra**, (2008) 12 SCC 565, this Court dealing with the child witness has observed as under:*

"10. '...7.....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, shaped 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."

- The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross- examination

*whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. (Vide: **Himmat Sukhadeo Wahurwagh and Ors. v. State of Maharashtra**, (2009) 6 SCC 712).*

-In **State of U.P. vs. Krishna Master and Ors.**, AIR 2010 SC 3071 (supra), Hon'ble Apex Court held that:-

"there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature."

-Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide: **Gagan Kanojia and Anr. v. State of Punjab**, (2006) 13 SCC 516.

10. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but

in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

11. Since the prosecutrix was of a tender age, therefore, before recording her evidence, the learned Presiding Officer conducted preliminary enquiry to ascertain if she was a competent witness and was able to give rational answers to the questions put to her. It was also ensured that she was making her statement voluntarily without any fear or pressure. After recording his satisfaction, the learned Presiding Officer recorded her statement without oath. In her Court statement, 'X' fully supported the prosecution case. Her statement was recorded in question-answer form. For better appreciation of her statement, same is reproduced as follows:-

“Q. What is your name?”

A. Victim (correct name was given but it is changed for this judgment)

Q. What is your mother's name?”

A. My mother's name is Mala.

Q. Who accompanied you to Court?”

A. With my parents.

Q. How many brothers and sisters you have?”

A. I have one elder brother Sonu and four sisters who live in village.

Q. What are the names of your sisters?

A. Shelly. The witness failed to give names of other sisters.

Q. In which class do you read?

A. I am studying in 1st Class.

Q. What is the name of your school?

A. Witness failed to give the name of the school and again repeated that she is studying in 1st class.

Q. What does your father do?

A. He plies rickshaw.

Q. Whether one should speak truth or lie?

A. Truth.

Q. Why have you come to the Court today?

A. To speak truth.

(In view of the above questions put to the victim and the manner in which she replied I am satisfied that she has got rational understanding and can make rational statement. Her statement is being recorded without oath).

Q. Do you know who is this man (accused is pointed and shown to the witness after removing the partition)?

A. Witness nodded her head in affirmative and stated that he is father of Golu.

Q. What was done by Golu's papa with you?

A. Noo-Noo.

Q. Where Golu's papa had taken you?

A. In latrine.

Q. If he removed his clothes?

A. No.

Q. If he removed your clothes?

A. Yes.

Q. Did you feel pain and bleed from anywhere?

A. this question was repeated to the witness by me, by Ld. APP and Ms. Neha Raj, Advocate from DCW (Delhi Commission for Woman). The witness nodded her head in affirmative stating that she felt pain and also bled but beyond this point she did not say anything.

Q. Did you cry at that time?

A. Witness nodded her head in affirmative.

Q. If you were slapped by Golu's papa?

A. The witness failed to give any answer. On putting question again she nodded her head in affirmative.

Q. Did you tell everything to your mother?

A. Witness nodded her head in affirmative.

Q. Were you taken to hospital?

A. Witness nodded her head in affirmative.

Q. Who took you to hospital?

A. Mummy.

Q. Did police uncle also accompany you?

A. Witness nodded her head in affirmative.

Q. If your cloths got smeared in blood?

A. Witness nodded her head in affirmative.

Q. If in the hospital you were given other clothes to wear?

A. I was given other clothes in the hospital.

Q. If you can identify you clothes?

A. Witness nodded her head in affirmative.

*To check if on putting any question witness nods her head in affirmative, she is asked if her mother beats her.
Witness nodded her head in denial.*

XXX by Sh. Subhash Chauhan, learned Defence counsel for accused.

Q. Why have you come to Court today?

A. Today I have come to Court to depose.

Q. Whether there was electricity in the house when father of Golu had taken you with him?

A. Witness nodded her head in affirmative.

Q. Who was present in the house at the time when you were taken by father of Golu in latrine?

A. Aunty was present in the room at lower (neechey) floor.

Q. Had you greeted Aunty when you were taken taken by father of Golu in latrine?

A. No.

Q. Who else were present on the roof where latrine is constructed?

A. No one was present there.

Q. Whether any children from the neighbourhood had come on the roof when you cried?

A. No.

Q. Whether your mother and father were present in the house when you come back to your house after the incident?

A. Only my mother was present at my house, Papa had gone for work.

Q. Had you told to your mother about the incident?

A. I had told to my mother about the incident.

Q. You were not taken to the latrine by father of Golu and someone else had taken you there?

A. I was taken by the father of Golu to latrine.”

12. A perusal of the aforesaid testimony of prosecutrix reveals that she has given the details of the incident. Accused was well known to her even prior to the incident, as such, there is no question of mistaken identity. Nothing material could be elicited in cross-examination to discredit her testimony. As such, no sound reason exists to disbelieve the testimony of the child witness. She has no ulterior motive to level serious allegations of rape and carnal intercourse against order of nature against the appellant with whom there was no history of previous enmity or hostility.

13. In ***Radhu vs. State of MP***, (2007) 12 SCC 57, Hon’ble Apex Court observed that it is unlikely that child of 8-9 years of age can even be tortured to make allegations of rape by a person otherwise well known to her and then repeat those allegations before the police, Magistrate, doctor and then during trial.

14. Furthermore, it has come in the statement of PW3-Smt. Mala, mother of the victim that at about 8:30 pm, her daughter came to her and she was weeping. When she enquired from her daughter as to why she was weeping then she informed her that the father of Golu, i.e., Deepak took her in the latrine at second floor and did “noo-noo” with her. The factum of making complaint immediately after the incident and the terms thereof becomes relevant as subsequent conduct. Such a conduct is relevant under Section 157 r/w Section 8 of the Indian Evidence Act as held in *Emperor vs. Phagunia Bhuran*, AIR 1926 Pat. 58; *Rameshwar Kalyan Singh*, AIR 1952 SC 54; *Nagam Gangadhar vs. State*, 1998 CrL. L.J. 2220; *Syed Pasha vs. State of Karnataka*, 2004 Cr. L.J. 4123; *Nannu Gupta @ Bablu v. State*, 2010 II AD (Delhi)117 and in *Hari Om vs. State* 2010 Cr.L.J.1281 and *Madan Lal vs. State of J&K*, AIR 1998 SC 386.

15. As per the version of PW3 after the victim disclosed to her about the incident, she noticed blood on her vagina. She also checked her anus and there was a cut mark and swelling on the private part of her daughter. She called the accused but he did not come. Wife of the accused came outside and she informed his wife about the commission of rape upon her daughter. Thereafter, she made a call at 100 number. Police came and took her daughter to LBS Hospital. Her statement Ex.PW3/A was recorded by the police on the same day wherein she gave the details of the entire

incident as disclosed to her by her daughter and were noticed by her on her person.

16. The victim was taken to LBS Hospital by ASI Ami Chand (PW7), lady constable Babita (PW1) accompanied by her mother Smt.Mala (PW3) with alleged history of rape by neighbour Deepak Rai. She was examined by Dr.Neera Singh (PW9) who prepared her MLC Ex.PW9/A. On local examination, *thigh perineum stained with clotted blood and some fresh and hymen was not intact, perennial swelling with gapped and multiple superficial cut with abrasions* were noticed and the following samples were taken:-

1. Body fluid collections
2. In between fingers
3. Nail scrapping
4. Breast swab
5. cervical mucus collection
6. vaginal secretion
7. culture
8. washing from vagina
9. rectal examination
- 10.oral swab
- 11.blood collection of victim
- 12.urine and oxalate blood vial

These collections were handed over to ASI Ami Chand.

17. On the same day, the accused was arrested. He was sent to hospital for medical examination with Constable Sonu. His MLC Ex.PW5/A was prepared by Dr.S.B. Jangpangi (PW5) and it was opined that patient was not incapable of performing sexual intercourse. His blood sample, semen sample, pubic hair and undergarments were taken and after sealing were handed over to the Investigating Officer of the case.

18. During the course of investigation, the said parcels were sent to CFSL/CBI, CGO Complex, Lodhi Road. The same were examined by Sh. Kaushal Kumar, PW10, Sr. Scientific Officer who examined the exhibits biologically and gave his report Ex.PW10/A whereas serological report Ex.PW11/A was given by Sh. Suresh Kumar Singhla, Senior Scientific Officer (PW11). As per Ex.PW10/A, human semen was detected on the exhibits 1e, 1g, 1i(I), 1i(II), 1i(III), 2a and 3. Ex.1i(I), Ex.1(i)(ii) and Ex. 1i(iii) are the cotton wool swab and two microslides having whitish smear taken by the doctor in rectal examination of prosecutrix. Ex.2a is the underwear of the victim. Ex.3 is the semen sample of accused. Ex.1e is the sample taken by the doctor on cotton wool swab of cervical mucus of the prosecutrix. Ex.1g is the sample of culture taken by doctor on cotton wool swab. As per serological examination report Ex.PW11/A, the semen found on Ex.1e, 1g, 1i(I) and 2a (samples of prosecutrix taken during

medical examination and her underwear) was found having same group, i.e., “B Group” as semen sample of accused.

19. The submission of the learned counsel for the appellant that there was no penetration as according to the victim the accused did not remove clothes has no substance as the victim was of very tender age and it was not necessary for the accused to remove all his clothes while committing the gruesome act. The commission of the carnal intercourse against the order of nature as well as rape find corroboration from the testimony of the mother of the victim who on checking the anus of her daughter found the cut mark and swelling on the private part of her daughter. She also noticed blood on the vagina of her daughter. Thereafter on medical examination also, her hymen was not found intact. There was *thigh perineum stained with clotted blood and some fresh and hymen was not intact, perennial swelling with gapped and multiple superficial cut with abrasions*. Furthermore, scientific evidence also conclusively proves the commission of rape as well as carnal intercourse against the order of nature upon the victim. There is absolutely no explanation or suggestion to any of the prosecution witnesses by the accused as to how the blood was noticed on the private part of the prosecutrix or how the hymen was torn or cut injuries were found on her anus. Accused has also failed to explain as to how semen was detected on her exhibits as well as his. As such, from the

testimony of the prosecutrix coupled with the medical and scientific evidence, the prosecution had succeeded in establishing its case beyond reasonable doubt. The entire evidence was minutely scrutinized by the learned Trial Court for returning a finding of guilt against the accused which does not call for any interference.

20. A vague suggestion was given to mother of the prosecutrix that she was compelled by the landlord to vacate the premises at the instance of the accused which suggestion was denied by her. No evidence has been led by the accused to prove that there was any animosity between him and the mother of the prosecutrix for which reason she would falsely implicate the accused in this case while allowing the real culprit to go scot free.

21. 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".

22. In this regard, observations made in ***Hari Om v. State***, 2010

Cr.L.J.1281 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.

23. In his statement recorded u/s 313 Cr.P.C., the accused had taken a plea of alibi by stating that on the fateful day he has gone for his work at W-10, NOIDA, Garment Factory and returned to his house at about 9:00 pm. At 9:30 pm, he was arrested by the police from his house and falsely implicated in this case. When a plea of alibi is raised by an accused, it is for him to establish the said plea by positive evidence as held in ***Sheikh Sattar vs. State of Maharashtra***, (2010) 8 SCC 430.

24. In ***Mulak Raj vs. Satish Kumar***, 1992, CrL.J 1529, ***Balvinder Singh vs. State of Punjab*** (1987) 1 SCC 1, ***Anurag & Others vs. State***, 2010 II AD (Delhi) 105, it was held that a false plea of *alibi* is an incriminating circumstance giving rise to an inference of guilt of the accused. It was further held in ***Sharad Birdhichand Sharda Vs. State of Maharashtra***, 1984 SCC (Cri.) 481, ***Rameshbhai Mohanbhai Koli Vs. State of Gujarat***, (2011) 3 SCC (Cri.) 102 that a false plea taken by an accused in a case of circumstantial evidence is an additional link in the chain of circumstances. Strict proof is necessary to establish the plea of alibi ***Binay v State***, (1997) 1 SCC 283.

25. In the instant case absolutely no evidence has been led by the accused for proving that he was not present at the time of incident or that the gruesome crime was committed by some other person. Although it is pleaded by him that one other boy named Gullu of the age of his son, i.e., 8-9 years was residing in his neighbourhood, however, even this fact is not proved by him. Since the parties were living in the neighbourhood, as such, the identity of the accused is not in dispute and the victim has identified him to be the person responsible for committing the heinous act upon her. In fact, it was not even suggested to her that it was not the accused but some other person who has committed rape upon her. That being so, the conviction of the appellant does not warrant any interference.

26. Even as regards quantum of sentence, no interference is called for. An act of rape is a gruesome and abhorring act. It 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.

27. Supreme Court in the sensational paedophilia case of ***Childline India Foundation and Anr. vs. Allan John Waters and Ors.***, (2011) 6 SCC 261 held as under:-

“Children are the greatest gift of humanity. Sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent.”

28. Hon'ble Supreme Court in *Madan Gopal Kakkad vs. Naval Dubey & Anr.*, (1992) 3 SCC 204 pointed out with deep concern that though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilized society should be mercilessly and inexorably punished in the severest terms.

29. In *State of Karnataka vs. Krishnappa*, (2000) 4 SCC 75, a three-Judge Bench opined that the courts 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. It was further observed that to show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency is wholly misplaced.

30. *Shyam Narain vs. The State of NCT of Delhi*, (2013) 7 SCC 77 was a case of rape of an eight years'old girl. The learned Trial Court sentenced the accused to undergo rigorous imprisonment for life and fine. The order

was up held by the High Court. In appeal before Hon'ble Supreme Court, leniency in sentence was prayed on the ground that the appellant has four children and in case the sentence is maintained not only his life but also the life of his children would be ruined.

Repelling the contention, it was observed as under:-

"22.It is seemly to note that the legislature, while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended upto life. The legislature, in its wisdom, has left it to the discretion of the Court. Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilized society. The age old wise saying "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a State of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullyng the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize 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. 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."

31. The learned Additional Sessions Judge has already taken a lenient view by awarding the sentence of 10 years under Section 376 IPC which could have been extended to life imprisonment and awarding five years sentence under Section 377 IPC which could have been upto ten years or imprisonment for life. That being so, there is no warrant for any leniency in the matter. Even otherwise, matter fall under Section 376(2)(f) IPC wherein the minimum sentence prescribed is ten years, therefore, no discretion vested in the Court to impose a lesser sentence.

32. Accordingly, the appeal being, bereft of merits, is dismissed.

33. While convicting the appellant, the learned Additional Sessions Judge had directed DLSA, East to pay compensation to the victim as per the guidelines of Delhi Government under Victim Compensation Scheme. There is nothing on record to show whether any compensation has been

paid to the victim, as such, Registry is directed to make an inquiry whether any compensation has been paid to the victim or not. In case no compensation is paid, the copy of the judgment be sent to Delhi State Legal Services Authority to pay compensation to the victim as per Victim Compensation Scheme, 2015. Compliance report be submitted within 60 days.

Appellant be informed through Superintendent Jail.

(SUNITA GUPTA)
JUDGE

JULY 12, 2016

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