

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

1.

CRA-S-1402-SB-2012 (O&M)
Date of decision: 30.8.2017
- Bhupinder Singh

...Appellant
- Versus
- State of U.T., Chandigarh

...Respondent
2.

CRA-S-1406-SB-2012 (O&M)
- Kamla

...Appellant
- Versus
- State of U.T., Chandigarh

...Respondent
3.

CRA-S-1712-SB-2012 (O&M)
- Maya

...Appellant
- Versus
- State of U.T., Chandigarh

...Respondent
4.

CRA-S-1785-SB-2012 (O&M)
- Naresh Kumar

...Appellant
- Versus
- State of U.T., Chandigarh

...Respondent
5.

CRA-S-1846-SB-2012 (O&M)
- Devinder Singh

...Appellant
- Versus
- State of U.T., Chandigarh

...Respondent
6.

CRA-S-1861-SB-2012 (O&M)

CRA-S-1402-SB-2012 and connected appeals	2
Jamna Kumar Rana	...Appellant
Versus	
State of U.T., Chandigarh	...Respondent
7.	CRA-S-1989-SB-2012 (O&M)
Bijender Singh	...Appellant
Versus	
State of U.T., Chandigarh	...Respondent
8.	CRA-S-505-SB-2015 (O&M)
Bhagwan Deen Yadav	...Appellant
Versus	
State of U.T., Chandigarh	...Respondent

CORAM: HON'BLE MR.JUSTICE JITENDRA CHAUHAN

Present: Mr.HS Bhullar, Advocate
for the appellant in CRA-S-1402-SB-2012 (O&M)

Mr.Bipan Ghai, Sr. Advocate with
Mr.Paras Talwar, Advocate
for the appellant in CRA-S-1406-SB-2012 (O&M)

Mrs.Aditi Girdhar, Advocate
for the appellant in CRA-S-1712-SB-2012 (O&M)

Mr.APS Deol, Sr. Advocate with
Mr.HS Deol, Advocate
for the appellant in CRA-S-1785-SB-2012 (O&M)

Mr.Durga Dutt Sharma, Advocate
for the appellant in CRA-S-1846-SB-2012 (O&M)

None for the appellant in CRA-S-1861-SB-2012 (O&M)

Mr.Gurinder Singh, Advocate
for the appellant in CRA-S-1989-SB-2012 (O&M)

Mr.HS Jaswal, Advocate
for the appellant in CRA-S-505-SB-2015 (O&M)

Mr.Sukant Gupta, APP for UT, Chandigarh

JITENDRA CHAUHAN, J.

1. This judgment shall dispose of the present batch of
aforementioned appeals, which have arisen out of common judgment and
order dated 9.4.2012 passed by Additional Sessions Judge, Chandigarh
vide which the accused-appellants were convicted and sentenced as
under:-

Accused	Under Sections	Sentence
Bhupinder Singh, Jamna Kumar Rana, Bijender Singh, Kamla and Maya	120B IPC	10 years rigorous imprisonment each and a fine of Rs.2,000/- each. In default of payment of fine, defaulting accused to further undergo rigorous imprisonment for 15 days
Bhupinder Singh, Jamna Kumar Rana, Bijender Singh, Naresh Kumar, Devinder Singh and Bhagwan Deen Yadav	376(2)(c) IPC	10 years rigorous imprisonment each and a fine of Rs.2,000/- each. In default of payment of fine, defaulting accused to further undergo rigorous imprisonment for 15 days

Accused	Under Sections	Sentence
Kamla and Maya	376(2)(c) IPC read with Section 120-B IPC	10 years rigorous imprisonment each and a fine of Rs.2,000/- each. In default of payment of fine, defaulting accused to further undergo rigorous imprisonment for 15 days
Maya	201 IPC	Three years rigorous imprisonment and a fine of Rs.500/-. In default of payment of fine, to further undergo rigorous imprisonment for a week

2. All the substantive sentences were ordered to run concurrently.
3. In brief the case of the prosecution as mentioned in para Nos. 2 to 14 of the impugned judgment passed by learned trial Court is as under:-

“2..... On 18.05.2009, a telephonic message was received at Police Station Sector 26 that the prosecutrix had been admitted in Govt. Medical College and Hospital, Sector 32, Chandigarh in connection with rape on her. On receiving the this information, after recording D.D.R., S.I. Uday Pal Singh alongwith other police officials reached there. There prosecutrix, a mentally retarded girl, care of Ashreya Home for mentally retarded fellows Sector 47, Chandigarh alongwith Miss Pragti Pandey

Medical and Social Worker of Ashreya Home met him and that social worker got recorded her statement, which is read as follows:-

“That she is working as Medical & Social Worker in Ashreya Home for mentally challenged in Sector 47, Chandigarh. At Ashreya, mentally retarded inmates are admitted and she used to look after them. On 13.03.2009, a mentally retarded girl (prosecutrix) from Nari Niketan, Sector 26, Chandigarh was admitted in Ashreya. In May 2006, she started vomiting. On 16.05.2009, her pregnancy test was conducted by staff nurse posted in the aforesaid institute, which was found positive. Then she informed this fact to their convener Miss Vani Rattnam. She asked about it from prosecutrix and she told that there was one person, in the name of Bhupinder in Nari Niketan, who had committed wrong act with her for 6-7 times. She also told her that she was being taken to Bhupinder by a lady named either Kamla or Kamlesh.”.

3. On the basis of this statement ExP1, after making endorsement ExP241, ruqa was sent through constable Sanjay for registration of the case, on the basis of which FIR ExP242 was recorded vide endorsement ExP243.

4. Thereafter, S.I. Uday Pal moved application for getting conducted the medico legal examination of prosecutrix. After medico legal examination, the prosecutrix was found to be pregnant of 8-10 weeks. On the same day, accused Bhupinder was arrested vide memo ExP244. He was identified by victim vide identification memo ExP2. Accused was also got medically examined. His blood sample was also obtained.

5. Further during investigation on 20.5.2009, the Investigating Officer collected relevant documents from Nari Niketan, Sector 26, Chandigarh as well as from Ashreya, Sector 47, Chandigarh. Statements of witnesses were recorded.

6. On 21.5.2009, one white colour bed sheet from the store room of shelter home, which is situated in the building of Nari Niketan itself containing the stains of semen was taken into possession. That was sent to CFSL for chemical examination.

7. Further during investigations, the rosters of security guards and other relevant documents of both these institutes were taken into possession.

8. Further as per prosecution with the help of Rekha, who was inmate of prosecutrix as well as also with the help of Dr. Paramleen Kaur, MD Psychiatrist GMCH, Sector 32, Chandigarh, the Prosecutrix was interrogated. Then she disclosed that besides Bhupinder, there was another person having bald head and used to have spectacles also used to commit wrong act with her. The lady in the name of Kamla used to take her; whereas another lady namely Maya used to stand outside the door when the bad act was done with her. The prosecutrix was shown photographs of the suspects and then at that time, she identified two persons Jamna Kumar bald head having spectacles and the other photograph was of Bhupinder. She also disclosed that Ms. Kamla and Ms. Maya assisted them.

9. Further as per prosecution, during investigation, the prosecutrix even showed bath rooms, where the said act was committed with her. Then the site plans of those places were got prepared.

10. Further during investigations, Special

Investigation Team was constituted and investigation was handed over to DSP Kulwant Singh, who at that time was posted as such in Women and Child Supports Unit, Sector 17, Chandigarh. He arrested accused Kamla on 11.6.2009 vide memo Exp105. Accused Jamna Kumar was arrested on 12.6.2009 vide memo Exp245. Accused Maya was arrested on 19.6.2009 vide memo Exp108. After the arrest of the accused, they were got medically examined as well as their blood samples were taken.

11. Further as per prosecution the blood samples of all employees working in Nari Niketan as well as at Ashreya were taken and those were sent to CFSL for analysis purposes, as the police was having suspicion no all of them . He also took into possession one torn register, which accused Maya used to maintain regarding the menstrual period of girls of Nari Niketan. Further during investigations, he got prepared the scaled site plans of those bath rooms, where the said act was committed and also took into possession the relevant record regarding the postings of the employees in these institutes. The spot was photographed as well as videographed.

12. As in the said case initially the challan was

presented only against accused Bhpinder Singh, Kamla, Jamna Kumr and Maya.

13. As per prosecution, as the prosecutrix is mentally retarded girl, so from time to time, she was interrogated. In the statement, which was recorded on 25.5.2009 she named accused Bhpinder Singh, Kamla, Jamna Kumar and Maya. Then when her statement on 15.5.2009 was recorded and she was shown the photographs of the suspects, she identified Bijender accused and stated that he was the person, who also used to do wrong act with her in the bath room of shelter home. Then in her statement recorded on 24.12.2009, she stated that Chhotu Ram, who was Security Guard at Ashreya also used to do bad act with her in the bath room of madam and she identified his photograph which was shown to her on laptop. Then in her supplementary statements recorded on 25.12.2009, 26.12.2009 and 27.12.2009, she identified accused Davinder Singh, Bhagwandeem as well as Naresh Kumar when photographs were shown to her on laptop. She stated that these persons also committed wrong act with her when she was at Ashreya. Davinder Singh and Bhagwandeem were employees of Ashreya; whereas accused Naresh was

employee of Government Institute of Mentally Retarded Children, Sector 32, Chandigarh, as he used to come to deliver food at Ashreya.

14. Further as per prosecution, the prosecutrix gave birth to a female child on 3.12.2009 and then the blood sample of newly born child to her as well as her own blood sample were sent for DNA report as the blood samples of all the suspects were already taken by the prosecution during investigation and were sent to CFSL for analysis purposes. The DNA report to this effect has been received that accused Chhotu Ram is the biological father of the child of prosecutrix.

4. The appellants and accused Chhotu Ram were charge sheeted for the offences punishable under Sections 120B, 376(2)(g) and 201 IPC, to which they pleaded not guilty and claimed trial.

5. To support its version, the prosecution examined the following witnesses:-

PW-1, Pargati Pandey	Complainant
PW-2 Dr.Paramleen Kaur, Assistant Professor GMCH, Sector 32, Chandigarh	A member of the committee constituted to assess the mental status of the victim
PW-3, prosecutrix	
PW4- Vani Ratnan,	Convener, Ashreya, Sector 47, Chandigarh

PW-1, Pargati Pandey	Complainant
PW-5 Dr.Poonam Goel, PW-6 Dr.Bharti Goel GMCH, Sector 32, Chandigarh	Members of the medical board, who conducted medico-legally examination the prosecutrix
PW-7, Meenakshi	Staff Nurse of Ashreya
PW-8 Lady Constable Usha Rani	Posted as Guard duty in Nari Niketan, Sector 26, Chandigarh
PW-9 Gian Chand	Research Officer, posted in Social Welfare Department, Chandigarh, who proved the appointment letter of Kamla, Maya, Kamlesh, Jamna Kumar Rana and Bhupinder Singh
PW-10 Dr.Ravinder Kaur, GMCH, Sector 32, Chandigarh	Member of the Board constituted for medico-legal examination of the prosecutrix
PW-11 HC Mohinder Singh, Photographer	He proved the photographs Ex.P30 to Ex.P-35; Ex.P42 to Ex.P52 and negatives Ex.P53 to Ex.P63.
PW-12, Dr.Vipan Kaushal, MS, GMCH, Sector 32, Chandigarh	He handed over the record Ex.P65 to Ex.P97 to the investigation team.
PW-13 Surekha Sharma, Senior Assistant, Establishment, GMCH, Sector 32, Chandigarh	She proved the appointment letter Exs.P98 appointment letter of Pragati Paney and her resignation Ex.P99.
PW-14, SI Rohit Kumar PW-15 SI Kulbir Kaur	Members of the Investigation team
PW-16, Dr.Rajneesh sood, Medical Officer, GMSH, Sector 16, Chandigarh	He proved the blood samples authentication forms of the accused appellants.

PW-1, Pandey	Pargati	Complainant
PW-17, Girhotri, Scientific Officer, CFSL, Sector 36, Chandigarh	Rajivn Junior	He proved the DNA analysis report Ex.P133, according to which Chhotu Ram is the biological father of the female child of the prosecutrix.
PW-18 Bakshi	Dr.Deepak	He conducted the medico-legal examination of accused Jamna Kumar Rana and proved his MLR Ex.P186
PW-19, Dr.Parijat		He examined accused Bhagwandin Yadav and proved his MLR Ex.P187.
PW-20 Shingari	Dr.Monika	She proved the blood authentication forms Exs.P 120, P122 and P127
PW-21, Sharma	Dr.Deepak	He conducted medico-legal examination of accused Bijender, Naresh Pal and Devender and proved their MLRs Exs.P188, P 190 and P191 and Ex.P189 opinion whereby he deposed that there was nothing to suggest that they were incapable to perform sexual intercourse
PW-22 HC Draftsman	Yashpal,	He prepared the scale site plans of Nari Niketan, Sector 26, Chandigarh and Ashreya and Institute of Mentally Retarded Children Sector 32, chandigarh.
PW-23, Satnam Chand,	Constable	He conducted videography of the places of occurrence and proved Ex.P199 and P200.
PW-24 Jagroop, Photographer	Constable	He proved the photographs and negatives of Ashreya Ex.P201 to P230
PW-25, Raj Photographer	Constable Pal,	He proved the photographs of Govt. Institute for Mentally Retarded Children, Sector 32, Chandigarh and negatives Ex.P231 to P-240.
PW-26, Udey Pal Singh	Inspector	He partly investigated the case.
PW-27, Singh, Women Cell, Sector 17, Chandigarh	ASI Sadhu	He proved Exs.P 248 and P249
PW-28, MHC Singh	Mahe	He proved Ex.P250 and P251
PW-29, Rattan, Ashreya Home	Bindu Warden	She handed over the staff record of Ashreya to DSP Kulwant Singh and proved Ex.P252 to Ex.P290.

PW-1, Pandey	Pargati	Complainant
PW-30, Ritika Rathi		She was the superintendent of Nari Niketan, Sector 26, Chandigarh at the relevant time. She handed over the duty record of the staff to the Investigation team.
PW-31 Kulwant Singh	DSP	Investigating Officer
PW-32 Chaudhary	Dr.Neena	She medico-legally examined accused Chhotu Ram and proved his MLR Ex.P367
PW-33 Kumar Medical Superintendent, GMCH, Sector 32, Chandigarh	Dr.Bipan Kaushal,	He proved the applications forms, bio data and appointment letters and attendance of the accused i.e.Ex.P368 to Ex.P410.

6. The statements of accused were recorded under Section 313 Cr.P.C, in which all the incriminating circumstances appearing in the prosecution evidence were put to the accused, which they denied and pleaded false implication. In defence the accused examined DW1 Deep Rana, Superintendent, Nari Niketan, Sector 26, Chandigarh, DW2 Sister Brenden, Superior of Missionaries of Charity, Sector 23, Chandigarh, DW3 Jaspal Sharma (wrongly mentioned as DW2) from the office of Regional Institute of Mentally Handicapped Children, Sector 32, Chandigarh and DW4 Dr.Devender Kaur, Attendant, Ashreya, Sector 47, Chandigarh and their defence evidence.

7. After appraisal of the evidence, the trial Court vide impugned judgment and order dated 9.4.2012, convicted and sentenced the accused- appellants as narrated above. Accused Chhotu Ram (non-appellant) was also convicted and sentenced vide judgment and order of

even date.

8. Feeling aggrieved against the judgment and order dated 9.4.2012, passed by the trial Court, the accused have filed the instant eight appeals. Accused Chhotu Ram also preferred a separate appeal, wherein he has been show caused as to why the sentence awarded to him be not enhanced in view of his role and evidence on record.

9. Mr.HS Bhullar, Advocate for appellant Bhupinder Singh opening his arguments, submits that the prosecution has miserably failed to prove its case against the appellant and thus, the conviction and sentence of the appellant under Section 376(2)(c) IPC is bad in law as a charge under Section 376(2)(g) IPC was framed against him. The ingredients of both the offences are different. The prosecutrix is a differently abled person and her mental faculties are not fully developed. No credence can be attached to the testimony of such a witness, particularly when there is evidence on record that she had been tutored. The prosecution has to stand on its own legs. No test identification parade was conducted. The appellant was identified by the prosecutrix in the court on the basis of the photograph of the appellant shown to her time and again by the investigating agency. Referring to DNA analysis report Ex.P133, learned counsel submits that accused Chhotu Ram has been proved to be the biological father of the female child of the prosecutrix. This unerringly points towards the guilt of accused Chhotu Ram and completely exonerates the appellant.

10. Mr.Bipan Ghai, Sr. Advocate assisted by Mr.Paras Talwar,

Advocate for appellant Kamla contends that the appellant joined as a Sweeper in Nari Niketan on 25.2.2009. She remained on leave from 6.3.2009 to 15.3.2009. It has also come in evidence that for most of the times, co-accused Bhupinder Singh also remained on leave and there was no occasion for her to hatch conspiracy with the co-accused. The appellant is entitled to the benefit of doubt as the prosecutrix has herself stated in her statement Ex.P1 that she was being taken to co-accused Bhupinder Singh by a lady named either Kamla or Kamlesh. Learned Senior counsel states that in fact the real culprit was one Kamlesh, who has been left out for extraneous reasons best known to the prosecution. Said Kamlesh was earlier employed in the Nari Niketan. The prosecution has not examined PW Rekha, inmate with the prosecutrix, the most material witness in the present case. The evidence of the prosecutrix is not trustworthy. Furthermore the conviction of the appellant under Section 376(2)(c) read with Section 120B IPC could not be sustained as a woman could not be convicted for the said offence. No test identification parade of the appellant was conducted at any point of time.

11. Ms.Aditi Girdhar, Advocate/ Amicus Curiae for appellant Maya has also adopted the arguments advanced by learned senior counsel. She hastens to add that as per DNA Report, biological father of the child is Chhotu Ram, who was an employee of Ashreya. This establishes that rape of the prosecutrix was committed at Ashreya but the appellant was an employee of Nari Niketan, Sector 26, Chandigarh. A false case was foisted upon the appellant due to media hype.

12. Mr.APS Deol, Sr. Advocate assisted by Mr.HS Deol, Advocate for accused-appellant Naresh Kumar, contends that case of the appellant is distinguishable from his co-accused since his name did not figure in any of the five statements, which were recorded on 18.5.2009, 25.5.2009, 24.12.2009, 25.12.2009, 26.12.2009 and 27.12.2009 under Section 161 Cr.P.C. by Special Investigating Team. The appellant was arrested on 11.1.2010 on the basis of the identification by the prosecutrix from the passport sized photographs. The appellant was neither the employee of Nari Niketan nor Ashreya. He was a driver on contract basis in Govt. Institute of Mentally Retarded Persons, Sector 32, Chandigarh. He was having no access to Ashreya where the prosecutrix was lodged. This fact stands proved from the statement of DW3 Jaspal Sharma.

13. Mr.Durga Dutt Sharma, Advocate for appellant Devender Singh urges that the prosecution story is highly doubtful. The duty of the appellant was in male ward in day time, therefore, he had no access in the female ward. He reiterates that PW Rekha the most material witness of the prosecution has not been examined and as such, adverse inference ought to be drawn against the prosecution.

14. There is no representation on behalf of appellant Jamna Kumar Rana. The grounds of appeal filed on his behalf have been meticulously perused. It is asserted in the grounds of appeal that the prosecution has failed to examine any of the inmates of the room where the prosecutrix was living. The best evidence has been withheld by the prosecution. The duty of the appellant was on the outer gate of Nari

Niketan at the relevant time. There was no occasion for him to enter the building. The prosecutrix is not a normal person. No specific date and month has emerged on record when the rape was committed on her. Further in the Nari Niketan there is round the clock police guard in order to check the inmates.

15. Mr.Gurinder Singh, Advocate for appellant Bijender Singh submits that the prosecutrix had in general manner stated that the appellant had also committed wrong with her but she nowhere stated any incidence of commission of offence by the appellant. He refers to a part of her cross-examination where she has candidly admitted that she was residing with Janki and Anita, whom the victim used to address as aunt and was told what was to be deposed by her in Court. Police uncle and police aunt used to come to her and tell as what was to be deposed. The appellant was working at Shelter Home, which is situated in a separate building adjoining Nari Niketan, Sector 26, Chandigarh.

16. Mr.HS Jaswal, Advocate for appellant Bhagwan Deen Yadav at the outset seeks permission to withdraw the appeal. However, keeping in view the seriousness of the offence, the prayer of the counsel for withdrawal of the appeal is declined.

17. Per contra, learned State counsel vehemently opposes the submissions made by learned counsel for the appellants. The case of the prosecution stands fully proved from the statement of prosecutrix, which finds corroboration from the medical evidence as well as other prosecution witnesses. He further submits that the Intelligence Quotient

(IQ) level of the prosecutrix was that of a child of 8-9 year old, which is brought out in the judgment of this Court dated 9.6.2009 (Ex.P411) and 17.6.2009 (Ex.P412), whereby this Court had allowed termination of pregnancy of the unborn child of the prosecutrix, conceived as a consequence of her gang rape by the appellants and their co-accused Chhotu Ram. The unfortunate and sordid tale of the prosecutrix speaks volume of the unholy nexus among the appellants and said Chhotu Ram to defile the human frame of the prosecutrix. They found the prosecutrix to be an easy target, who was sexually abused

18. I have heard the learned counsel for the parties and perused the record with due care and circumspection.

19. The learned trial Judge has observed that the victim, who was examined as PW-3, was a mentally challenged girl and was able to respond the Court questions with difficulty, however she was able to give rational answers. Therefore, learned trial Judge recorded her evidence on oath.

20. As already stated, victim (PW3) was a mentally challenged girl. In the circumstances, endeavour of the Court is to find out whether substratum of evidence given by victim has been consistent and credible. The Court being conscious of the fact of victim's disability, is making an earnest attempt to understand and appreciate the facts and circumstances that have come on record to impart complete justice to the parties.

21. Before the trial court, the victim (PW3) had reiterated the version that the accused, namely, Bhupender, had sexually assaulted her whereas appellants Kamla and Maya, facilitated the commission of

rape. Not only the accused/ appellants were identified by the prosecutrix during investigation *albeit* from their photographs but were also identified in the Court during her examination-in-chief by the victim. She specifically denied the suggestion of her being a tutored witness to depose against the accused.

22. The victim was a mentally challenged girl, but for physical growth, her activities were akin to activities of a girl aged about 8 to 9 years. The victim was an innocent girl unaware of worldly affairs. She did not have grudge or enmity against the accused as she was mentally not capable of developing animosity or grudge against the accused. She had difficulty to record evidence before Court and had difficulty in narrating sequence of events. In the circumstances, contention of learned counsel for the appellants that the victim was tutored by the prosecution/ police officials to give evidence against the accused cannot be accepted. Therefore, there are no reasons to suspect the evidence of PW3 (victim).

23. Learned counsel for UT, Chandigarh has pointed out that in pursuance to the judgment of this Court and Hon'ble the Supreme Court, the prosecutrix gave birth to a female child on 3.12.2009 and the blood samples of the newly born child as well as prosecutrix were sent for DNA analysis to the CFSL, which reported that accused Chhotu Ram (non-appellant) is the biological father of the child of the prosecutrix.

24. Unfolding the prosecution story, it is apposite to refer to the position, institution and role of the appellants. Appellant Bhupender

Singh, aged 25 years, was posted as guard at main gate of Nari Niketan, Sector 26, Chandigarh. He is the main accused, who was named in the first statement of the prosecutrix recorded on 25.5.2009 under Section 161 Cr.P.C. She was allegedly raped 6/7 times in toilets at Shelter Home behind Nari Niketan and toilet at Govt. Institute for Mentally Retarded Children, Sector 32, Chandigarh.

25. Appellant Kamla joined Nari Niketan as Sweeper on 25.2.2009. She used to take the victim without the permission of the Incharge of the Nari Niketan to appellant Bhupender on the pretext of cleaning and sweeping the floor. She also used to bring new clothes for the victim after appellant Bhupender used to tear them off.

26. Appellant Bijender was deputed as Peon-cum-Chowkidar at Shelter Home, behind Nari Niketan, Sector 26, Chandigarh. As per the statement of the prosecutrix (PW3) he used to rape her in the gents toilet of Shelter Home.

27. Appellant Jamna Kumar Rana was posted as Guard at main gate of Nari Niketan, Sector 26, Chandigarh. He ravished the prosecutrix in the toilet / bathroom inside the security room at main gate several times in standing position using condom (referred to as 'envelop' by the victim in her deposition).

28. Appellant Maya was Nursing attendant at Nari Niketan, Sector 26, Chandigarh. She used to apply some medicines on the breasts of the victim, bitten by appellant Bhupender while committing rape and she also used to stand guard at the gate.

29. Appellants Bhagwandeem Yadav and Devender were posted as Attendants at Ashrey, Sector 47, Chandigarh. They used to commit rape upon the prosecutrix in the gents toilet and toilet in the dinning room.

30. Appellant Naresh Kumar was employed as driver at Govt. Institute for Mentally Retarded Children, Sector 32, Chandigarh and used to come to Ashrey, Sector 47, Chandigarh to deliver food and hang curtains. He used to rape the prosecutrix in room No.12, 1st Floor, Female Wing of Ashrey.

31. The evidence of the victim (PW3) is consistent, cogent and is corroborated from the other circumstantial evidence. She has given a detailed description of the role played by each accused.

32. Hon'ble Division Bench of this Court in CWP No.8760-2009, Chandigarh Administration vs. Nemo decided on 9.6.2009, while describing the victim and her circumstances when the question for retaining the fetus of the victim came up observed as under:-

“The system and the society both have been very unfair and cruel to the victim in this case. The material on record does suggest that her bony deformity and the consequential life-long disability might have been the factor which made her parents so cruel that they threw her out to survive all by herself in an unknown and unkind world. After she ran away and was brought back, efforts should have been made

to persuade the Missionary of Charity at Chandigarh, to take her back before putting her amidst altogether new surroundings of Nari-Niketan. The casual approach and criminal negligence of the authorities is writ large by the fact that the victim was sent with Roshan Ara Khatun even without verifying the bonafide of the claimant or an iota of evidence to establish her relationship with the victim. The fact that the victim is alleged to have been ravished by none else than the guard of the institute, is enough for us to form a firm opinion that the victim has been treated like a subject, traumatised to the highest degree and has been made to witness all possible miseries. We are at pains to observe that the mechanical approach and callousness with which the welfare institutions are being apparently run, the victim has been deprived of an environment which could have been conducive to her mental growth, social behaviour and an over-all personality development.”

32. The victim was the only witness. In the circumstances, to insist corroboration to evidence of victim would be adding insult to injury. There are no reasons to suspect the evidence of victim, who had complained of sexual assault by accused 1 & 2, more Particularly when

victim (a mentally retarded girl) did not bear animosity or ill-will against accused 1 & 2.

33. So far as, the contention raised by learned defence counsel that the sentence of the appellants under Section 376(2)(c) IPC is bad in law, is concerned does not cut much ice. It is apposite to refer to Section 376 IPC, which reads as under:-

“376. Punishment for rape:- (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever: -

(a) Being a police officer commits rape-

- (i) Within the limits of the police station to which he is appointed; or
- (ii) In the premises of any station house whether or not situated in the police station to which he is appointed; or
- (iii) On a woman is his custody or in the custody of a police officer subordinate to

him; or

(b) Being a public servant, takes advantage of his official position and commits rape on a woman in custody as such public servant or in the custody of a public servant subordinate to him; or

(c) Being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) Being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) Commits rape on a woman knowing her to be pregnant; or

(f) Commits rape when she is under twelve years of age; or

(g) Commits gang rape,

Shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.”

34. A conspectus of law and facts would reveal that the victim was subjected to rape by the staff of the Nari Niketan and Ashrey, who were responsible for the care and custody of the inmates and the appellants in that capacity took undue advantage of the mental health of

the victim, who was an inmate, repeatedly ravished her, traumatized her and used her as a sex object. The appellants cannot take the benefit of the framing of charge under Section 376(2)(g) IPC against them as it has not caused any prejudice to them. The allegations against the appellants were well known to them and it cannot be said that they were taken by any surprise.

35. It is settled position of law that where through oversight or inadvertence no charge has been framed or some omission, error or irregularity has crept into a charge which has been framed, the conviction shall not be set aside on appeal or revision if the omission and the irregularity have caused no injustice. Cases however are easily conceivable in which the total absence of a charge may not result in any injustice. On the other hand absence of a charge in a particular case may by itself provide sufficient evidence of prejudice and need for a positive finding of prejudice may be obviated. No hard and fast rule can be laid on this point and the decision in each case must rest on its own facts and circumstances.

36. Hon'ble the Supreme Court in **Willie (William) Slaney versus State of Madhya Pradesh, AIR 1956 SC 116** observed as under:-

“...the Code is a procedural law and, therefore, has to be interpreted in a manner that does not frustrate ends of justice by introduction of needless technicalities. The object of the Code is to ensure that the accused

gets a full and a fair trial as per certain well established and well understood principles that accord with our notions of natural justice. **Vivan Bose J.** observed that in procedural laws disregard of provisions of certain nature can be fatal to trial and at once can invalidate the conviction but certain other procedural aspects may not be fatal and the irregularities can be cured and in that event conviction must stand unless the court is satisfied that there was prejudice. Further, the Code has dealt with some aspects and full effect must be given to these provisions. The courts have to administer justice and justice requires punishment of the guilty as much as protection of the innocent and this essence of the Code should not be lost in technicalities.

Principles of natural justice and fair play must be brought to bear, when determining a matter of prejudice as in indulging guilt. The courts are concerned to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. If all these elements are there and no prejudice is

shown, the conviction must stand whatever the irregularities be, whether traceable to charge or want of one.”

37. In the present case, no prejudice whatsoever has been caused to the appellants, who were well aware of the charges framed against them by the trial Court. The appellants were not misled by the charge framed. It cannot be said that the charges framed against the appellants were groundless. Rather it is not *per se* fatal.

38. The appellants cannot take the benefit of the fact that only accused Chhotu Ram (non-appellant), has been found to be the biological father of the child of the prosecutrix. The paternity of the child is not the issue in this case rather the issue is whether the appellants raped the victim on a number of occasions. The appellants sexually abused the victim to gratify their lust and behaved in a beastly manner.

39. Insofar as, the contention of learned Senior Counsel appearing on behalf appellant Kamla to the effect that her identity has not been proved, lacks merit. Learned trial Court has rightly rejected the argument raised by learned defence counsel that the real culprit was one Kamlesh, who was exonerated by the police for extraneous reasons. The victim clearly identified appellant Kamla in the Court. The case of the prosecution cannot be brushed aside even if no test identification parade was conducted. Hon'ble the Supreme Court in a recent pronouncement titled as “**Sheikh Sintha Madhar @ Jaffer vs State Rep.By Inspector**

of Police reported in 2016(2) RCR (Crl.) 818 has held as under:-

“The purpose of a TIP is to ensure that the investigation is going on the right track and it is merely a corroborative evidence. The actual identification must be done in the Court and that is the substantive evidence. If the accused is already known to the witness, the TIP does not hold much value and it is the identification in the Court which is of utmost importance.”

40. In the present case, PW3 the victim identified all the appellants including Chhotu Ram (non-appellant) in the Court as well as through their respective photographs. Even if, PW Rekha, another inmate was not examined by the prosecution, the same cannot be said to be fatal to the prosecution case, because it is the quality of evidence that matters and not the quantity. It is not obligatory for the prosecution to examine each and every witness before the Court. The victim is the most material witness in this case, who has proved the case of the prosecution in all material particulars.

41. The victim was sexually abused in both the institutions, managed by the Union Territory Administration viz., Nari Niketan as well as Ashreya. It cannot be said that the case of the prosecution is false or that due to some media hype, the appellants were falsely implicated in this case.

42. Insofar as appellant Naresh Kumar is concerned, even

though, his name did not figure in any of the five statements of the victim recorded by the Special Investigation Team under Section 161 Cr.P.C., but he was duly identified by the victim in the Court and also during investigation from his photograph. May be he was not an employee of both the institutions but certainly he was a driver on contract basis and had access to Ashreya where the victim was lodged. The victim had no axe to grind against the appellants. Why will she implicate the appellants in a false case? The victim has a vivid and true account of the repeated rape committed by the appellants.

43. The stand taken by appellant Devender Singh that his duty was in male ward in day time and that he had no access in the female ward also deserved to be rejected. The victim has very categorically deposed that appellant Devender Singh ravished her on a number of occasions. Similarly, appellant Jamna Kumar Rana was also identified in the Court as one of the perpetrators of the crime. The plea raised on behalf of appellant Jamna Kumar Rana that his duty was on the outer gate of Nari Niketan and that there was no occasion to him to enter into the building in the presence of round the police guard is also not acceptable. The victim was raped on a number of occasions and it was a continuing offence committed by the appellants. Even if no specific date and month have emerged on record, it does not mean that the case of the prosecution has not been proved. The victim was a mentally challenged girl. No benefit can be extended to the appellants on account of admission of the victim in her cross-examination that she had deposed in

the Court as was told to her by her aunts Janki and Anita. It cannot be construed to be tutoring in any manner. The victim has minced no words in testifying that all the appellants and Chhotu Ram (non-appellant) committed rape upon her. The role of appellants Kamla and Maya is even more serious as they facilitated the crime. The case of the prosecution is that the rape was committed by appellants Bhupender Singh, Naresh Kumar, Devender Singh, Jamna Kumar Rana, Bijender Singh Bhagwandeem Yadav and non appellant Chhotu Ram and the role of appellants Kamla and Maya, as alleged by the prosecution, was that they were parties and had connived and allowed their aforesaid co-accused to commit rape with their active participation.

44. In **Om Parkash vs. State of Haryana, 2015(2) SCC 84**

Hon'ble the Supreme Court in para 15 has held as under:-

“In the light of above provisions of law, we have carefully gone through the record and considered the cases referred as above. We find that in the present case, there is positive evidence adduced by the prosecution that accused Chhoti has aided the commission of offence by asking the victim to go to her house to take ‘lassi’ where accused Om Prakash and Kartar Singh bolted the room and subjected the victim to rape. From the record, it appears that for about an hour, the victim was not allowed to go out from the house where she was subjected to rape. It

was the house of accused Chhoti and her husband where the incident is said to have taken place. As such, both the courts below have rightly concluded that it cannot be said that accused Chhoti has not abetted the crime in the manner suggested by prosecution. We concur with the view taken by the courts below. Intentional aiding of the offence is covered by the third clause mentioned in Section 107 IPC.”

45. Thus, it can be safely concluded that appellants Kamla and Maya Devi abetted the commission of the offence and their conviction cannot be said to be bad in law.

46. It is a rare case wherein the fence has eaten the crop. The protectors have acted as predators.

47. Though, the defence has examined DW1 Deep Rana, Superintendent, Nari Niketan, Sector 26, Chandigarh, DW2 Sister Brenden, Superior of Missionaries of Charity, Sector 23, Chandigarh, DW3 Jaspal Sharma (wrongly mentioned as DW2) from the office of Regional Institute of Mentally Handicapped Children, Sector 32, Chandigarh and DW4 Dr.Devender Kaur, Attendant, Ashreya, Sector 47, Chandigarh to prove the innocence of the appellants, but the same is not of any avail. The case of the prosecution has been well established on record and the learned trial Court has rightly convicted and sentenced the appellants, which calls for no interference.

48. In the upshot, the impugned judgment of conviction and order of sentence qua all the appellants are upheld. Consequently, all the appeals fail and are hereby dismissed.

49. A photocopy of this judgment be placed on the files of the connected cases.

30.8.2017
gsv

(JITENDRA CHAUHAN)
JUDGE

Whether speaking / reasoned?	Yes	/	No
Whether reportable?	Yes	/	No