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

Reserved on: 28th April, 2018

Pronounced on: 29th May, 2018

+ CRL.A. 779/2004

ANIL MEHTO

..... Appellant

Through : Ms.Rakhi Dubey, Advocate

Versus

STATE

..... Respondent

Through : Ms.Aashaa Tiwari, APP.
Insp.Ved Prakash with SI A.Pratap
Singh, PS S.P.Badli.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

HON'BLE MR. JUSTICE C.HARI SHANKAR

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JUDGMENT

C. HARI SHANKAR, J.

1. The impugned judgement, dated 17th March, 2004, followed by order on sentence, dated 25th March, 2004, passed by the learned Additional Sessions Judge (hereinafter referred to as “the learned ASJ”) convicts the appellant Anil Kumar Mehto, under Sections 376 and 506 of the Indian Penal Code, 1860 (hereinafter referred to as “the IPC”), for committing rape of the prosecutrix (who shall be designated, hereinafter, with the ubiquitous ‘M’) and for criminally intimidating her. Consequently, the appellant has been sentenced to imprisonment for life, with fine of ₹ 10,000/– and default simple imprisonment of one year, for the offence under Section 376 of the IPC, and to rigorous imprisonment of 7 years, with fine of ₹ 10,000/–

and default sentence of one year's simple imprisonment, for the offence under Section 506 of the IPC. The sentences have been directed to run concurrently, and the benefit of section 428 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C.") has been extended to the appellant.

2. The appellant is in appeal, before us, thereagainst.

3. A brief recapitulation of facts: The prosecutrix, who was 10 years old at the time, was stated to have been sleeping, in her house, on the night between 16th and 17th August, 2000, when the appellant entered her room, put his hand over her mouth, and proceeded to commit rape on her, firstly in the room and, thereafter on the roof of the house, to where he carried her. Having committed the said offence, it was alleged that the appellant threatened to eliminate the prosecutrix, in case she disclosed, to anyone else, what had transpired. As the prosecutrix was bleeding, and in pain, she unburdened herself, in the morning, to the ladies of the neighbourhood, who intimated the Police, who arrived and had the prosecutrix medically examined. On the basis of the statement of the prosecutrix, *rukka* was prepared, FIR registered, and investigations commenced. The appellant was, subsequently, arrested. The statement of the prosecutrix was recorded under Section 164 of the Cr.P.C., wherein she categorically accused the appellant of having committed rape on her and, thereafter, of having threatened to eliminate her, were she to disclose the incident to anyone. The appellant was, accordingly, charge-sheeted under Sections 376 and 506 of the IPC, to which he pleaded not guilty and claimed trial. The impugned judgement, dated 17th March, 2004, and

order on sentence, dated 25th March, 2004, represent the culmination thereof.

4. The statement of the prosecutrix, as recorded by the learned MM under Section 164 of the Cr PC, may be translated thus:

“Pr. ASI Rajpal Singh. He has produced the prosecutrix ‘M’ for recording the statement u/S. 164 Cr.P.C., forwarded by Ms. Seema Maini, Ld. MM. The prosecutrix has been identified by ASI Rajpal. His sign are obtained.

Before recording the statement, certain questions are being asked from the prosecutrix so as to ascertain whether she can understand the questions put to her and whether she can make a statement without fear or favour or pressure. The court is asking following questions:

(1) What is your name, parentage, education, residence?

My name is (‘M’). Father’s name is Bilat Shah. I study in 3rd class, in a Government school. I cannot state the No. of my house, which is in Bhalaswa. We are 6 brothers and sisters. One sister is older than me. The others are younger.

(2) Do you know why you have come to court?

I have come to court, to state what had happened with me.

(3) Are you under any pressure or fear to make a statement?

No one has told anything to me. I am not scared of the Police. My father did not ask me anything.

The witness appears to be confident. From the facts, questions and answers of the prosecutrix, the Court is of the opinion that she can make statement U/S1 64 Cr PC without fear or pressure. Let her statement be recorded.

Statement of ('M'), Prosecutrix, without oath as the prosecutrix is only 10 years of age.

It happened on the 16th of this month, on the night between 16th and 17th. My father, after having dinner, went to sleep in the neighbouring room. I slept with my younger brother. It was very hot. There was no electricity. I had left the door open and gone to sleep. A boy named Anil, resides next-door, whom I knew earlier. He removed my underwear and committed wrong acts ("galat galat kaam") with me. I started bleeding profusely. I tried to scream but he tied my mouth and, lifting me, carried me to the roof. There he again committed wrong acts ("galat galat kaam") with me. Then I became unconscious. I do not know when he placed me on my couch. When my father woke up in the morning and went, we were all sleeping. I came to consciousness at 9 AM. I recited everything to one aunty, named Parvathi. Aunty then called the Police. The Police took me, in their car, to the hospital. In the hospital, my wounds were bandaged, etc. My statement was recorded by the Police. My blood stained clothes were, thereafter, seized by the Police. I have spoken the truth.

Statement of prosecutrix recorded. Certified that the statement contains exact facts as stated by the prosecutrix."

5. In order to avoid repetition, we may straightaway proceed to set out the evidence, available, in the case, as the facts would become apparent therefrom.

6. The prosecution cited 16 witnesses, in its favour, whereas the appellant cited 3 witnesses in his support.

7. For the sake of convenience, we may deal with these witnesses, category wise.

Deposition of the prosecutrix

8. The prosecutrix 'M' herself deposed as PW-2. Her deposition, duly translated, deserves to be set out, *in extenso*, as under:

“PW2, ‘M’, D/o Sh. Balit Shah, aged 10 years, R/o H. No. 9, Shalimar Village, Delhi.

Q 1. How many brothers and sisters do you have?

Ans. We are six brothers and sisters. There are two brothers and four sisters.

Q 2. In which school do you study?

Ans. I do not know the name of the school. It is a government School in Balaswa Dairy.

Q 3. In which class are you?

Ans. In Class I.

Q 4. Which subjects do you study?

Ans. Hindi, Science, Maths and English.

Q 5. What does your father do?

Ans. My father works in a plate factory.

Q 6. Which subject do you like?

Ans. I like Hindi.

Q 7. Should we speak the truth or tell a lie?

Ans. We should speak the truth.

Q 8. What happens if you lie?

Ans. Lying is a sin.

Q 9. Will you speak the truth or lies?

Ans. I will speak the truth.

From the above questions and answers I am satisfied that the witness is able to understand the questions correctly and answering the questions properly and intelligently.

Statement of 'M' / without oath

One year ago we lived in Rajiv Nagar. I do not remember the House Number. My mother lives in Damarpati Village in Bihar. I, my two younger brothers and my father live here in Delhi. On the night of 16th August, 2000, I was in my house in the inner room, sleeping with my two younger brothers. My father was sleeping in the outside room. Due to the heat the door was open. *Around 10:45 P.M., Anil, accused present in Court came to my room. He lives in the neighborhood which is why I know him. That day, he came to my room, put his hand on my mouth and took off my underwear and then took his underwear off and did wrong acts (ganda kaam). Then, he took me upstairs. Because of the wrong acts (ganda kaam), I felt pain and I bled from my urethra. Accused, picked me up, and took me to the roof where he again did wrong acts (ganda kaam) with me and said that if I told anyone then he would kill me. Out of fear, I did not tell my father and he left for work in the morning. I told my neighbor about this incident because I was in a lot of pain. Her name is Parvati. She telephoned the Police. The Police called for my father. Then the police took me to the hospital. There, my testimony was taken which is Ex.PW2/A bearing my signature at Point A. The doctor took my blood-stained frock and underwear. My testimony was also taken in Court.*

At this stage, a sealed parcel M1 bearing seal of FSL is opened, out of which one frock and underwear is taken out, which the witness has identified to be hers and the same which the doctor had taken, which are Ex. P-1 and P-2 respectively.

At this stage, a sealed parcel containing seal of FSL is opened and bed sheet Ex. P-3 is identified by the witness as the same on which she was lying in her room when the accused committed rape upon her.

Court observation; Ex.P1,P2, P3 have blood-stains which are visible even now.

When the accused took me on the roof, he made me lie down on a mattress which was already kept there. The mattress is not ours; must be of the accused. After doing wrong acts (ganda kaam), the accused wiped the blood from the roof using his sister-in-law's (bhabhi's) blouse and I can identify both of them if they are presented before me. The blood-stained mattress and the blouse have been taken out from the same parcel from which the bedsheet was taken out and the witness has identified them and these have been exhibited as Ex.P4 and P5 respectively.

At this stage another sealed envelope containing seal of S.S. Malhotra is opened and the witness had identified her signature at Point A which is Ex. as PW2/B. *I had informed the police about the place. On the same date, the police arrested the accused.*

XXXXXX by Cl. Sh. Sikandar Arora, Cl for accused.

One of my brothers is 8 years old and one is around 9 years old. *It is wrong to suggest that they were not in deep sleep.* My room has three doors. Only one door was open. There is also one main gate of iron outside my house. That door was also opened. That door was not locked.

When the accused had put his hand on my mouth I woke up from my sleep. *The accused kept his hand on my mouth for as long as he did wrong act (ganda kaam) with me. It is wrong to suggest that he had not kept his hand on my mouth. I could not make any noise because the accused had pressed his hand on my mouth.* It is correct that sometimes I get nightmares while sleeping. *It is correct that I was already scared of the accused because he has in the past also sexually harassed me.* It is wrong to suggest that I have dreamt of the accused committing wrong acts (ganda kaam) with me and based on that alone I have disclosed the name of the accused. The accused took off his underwear with one hand while sitting. When the accused had taken me upstairs he had worn his underwear at that time. It is wrong that the accused had not committed any wrong act (ganda kaam) with me. I have only told Parvati aunty about the pain. The police was telephoned in front of me. It is incorrect that Ex.P1, P2 are not the clothes that I was wearing that night. It is wrong that my father and the accused had disputes between them. It is

wrong that I am deposing at the behest of my father. The Police had not taken any photographs of the spot of occurrence in front of me. It is correct that photographs of the spot of incident are Ex.PW2/DA to PW2/DC. It is incorrect that the mattress Ex.P4 is of our house. When the accused took me upstairs to the roof from my room then too he had kept my mouth shut which is why I could not make any noise. I know how to read Hindi. It is correct that I had signed PW2/A without reading it.

RO&AC

‘M’

(Recorded under my
dictation and camera
from 10.40 to 11.50
a.m.)

A.S.J/Delhi/27-7-01”

Public witnesses to the occurrence

9. Bilat Shah, father of ‘M’, deposing as PW-3, testified that, (i) when he was returning from his work, in the evening of 16th August, 2000, the appellant, who was his neighbour, offered him liquor, and that, after partaking thereof and having dinner, he went off to sleep, (ii) the next day, i.e. on 17th August, 2000, while he was on work, he received a telephonic call, from his neighbor, informing him that ‘M’ was not well, whereupon he rushed home, where he came to know through his neighbour Parvati Devi (PW-7), that the appellant had committed rape upon ‘M’ the previous night, after getting him i.e. PW-3 (Bilat Shah) intoxicated, (iii) from the hospital, to where ‘M’ had been taken, he, along with ‘M’, proceeded to the Police Station and, thereafter, to their house, where the Police prepared the site plan of the premises, at the pointing out of ‘M’, (iv) from the roof of the house of the appellant, a mattress and a blood stained blouse were recovered by the Police and seized *vide* seizure memo Ex.PW-3/A, (v)

the Police also seized a sample, of the blood lying on the floor, with the help of a cotton swab, *vide* Seizure Memo Ex. PW-3/B, (vi) at the time of medical examination, the clothes of ‘M’, i.e. frock and underwear, had been taken by the doctor, and (vii) the appellant was, later, arrested, when Bilat Shah pointed him out to the Police. Bilat Shah was shown the frock and underwear of ‘M’, and the blood stained bed sheet, mattress and blouse, in court, all of which were identified by him and were, thereafter, exhibited as Ex. P-1 (frock), Ex. P-2 (underwear), Ex. P-3 (mattress), Ex. P-4 (bed sheet) and Ex. P-5 (blouse). He confirmed the fact of recording of the statement of ‘M’, under Section 164 of the Cr.P.C, by the learned Metropolitan Magistrate (hereinafter referred to as “the learned MM”).

10. In cross examination, PW-3 Bilat Shah deposed that his two sons, aged 7 and 8 years, slept, along with the prosecutrix, in the interior room. He admitted that he had not seen the appellant in his house at the time of incident, but stated that he was fast asleep at that time. He further admitted that at the time of leaving for his factory, he did not notice any blood stains. The suggestion that the rape of the prosecutrix might have been committed by his friends Arvind and Shrinivas, was categorically denied by Bilat Shah, who further deposed that the appellant had taken the prosecutrix to his own roof, from where the bed sheet and the blouse had been seized. He further deposed that he had seen the sister-in-law (*bhabhi*) of the appellant, wearing the said blouse.

11. Parvati (PW-7), a resident of the same locality, deposed, on 1st April, 2002, that she was a social worker and that, at about 10.30 AM on 17th August, 2000, she found the prosecutrix lying on the road in front of her house, surrounded by a crowd that had gathered, and that, on approaching the prosecutrix and inquiring, from her, as to what had happened, the prosecutrix revealed that the appellant had committed rape upon her. She further testified that she, thereupon, lifted the prosecutrix and put her in the PCR van in which she was taken to the BJRM hospital, accompanied by Parvati. She confirmed that the police reached the hospital and recorded the statement of the prosecutrix, and that the doctor retained, with him, the frock and underwear worn by 'M', which were later sealed with the seal of the hospital and handed over to the Police along with the slides prepared by the doctor.

12. The testimony of Parvati was corroborated by Rais Ahmed (PW-8), another neighbor.

Police Witnesses

13. There were four police witnesses.

14. Const. Anil Kumar (PW-9) confirmed having taken the appellant, to the hospital, for his medical examination, and having received, from the doctor in the hospital, two duly sealed parcels, which he had handed over to the Investigating Officer (IO), who seized the articles *vide* Seizure Memo Ex.PW-9/A.

15. Vijender Singh, MHC(M), deposing as PW-10, confirmed the depositing with him, of these sealed parcels, bearing seals of “BJRM” and “RPS”, by ASI Rajpal Singh (PW-11), on 17th August, 2000 and the forwarding of the said samples, to the Forensic Science Laboratory (FSL), through Const. Satish Kumar, on 31st October, 2000, under RC No. 310/21. He further confirmed having received the said samples back from the FSL on 2nd January, 2001, *vide* entry in the *Malkhana* Register exhibited as Ex.PW-10/A. He also confirmed that the samples had not been tampered with, so long as they were in his custody.

16. PW-11 ASI Rajpal Singh, who was, at that time, posted as ASI at PS Samaipur Badli, deposed, in his examination-in-chief on 21st January, 2003, that on 17th August, 2000, he proceeded to the hospital, leaving Const. Ramesh Katare (PW-14) at the place of occurrence of the crime at F-10, Rajiv Nagar, Shardhanand Colony, and to having collected the MLC of the prosecutrix from the hospital. He further confirmed that the doctor had declared her fit for statement, whereupon he recorded the statement of the prosecutrix (Ex. PW-2/A). After her medical examination, ASI Rajpal Singh confirmed having received, from the doctor, three sealed parcels, which were seized by him *vide* Seizure Memo Ex. PW-7/B, whereafter he returned to the site of the occurrence and sent Const. Ramesh Katare (PW-14), with the *rukka*, to the police station, for registration of FIR. He confirmed the seizure, by him, of the mattress, bed-sheet and blouse, and of lifting blood from the spot with the help of a cotton swab and securing it in a glass bottle, all of which were seized by him, under seal “RPS” *vide* Seizure Memo Ex. PW-3/A. He further confirmed having

proceeded to the house of the appellant with the father of the prosecutrix 'M' and having arrested the appellant therefrom. He testified, further, that, after he had deposited the seized articles with the MHCM, Const. Ramesh Katare (PW-14) reached the police station with the appellant, and received a copy of the appellant's M.L.C. (Ex.PW-4/A), and three sealed parcels, which were seized by him *vide* seizure memo (Ex.PW-9/A) and deposited in the *Malkhana*. ASI Rajpal Singh further confirmed having had the statement of the prosecutrix, under Section 164 Cr.P.C., recorded by the learned M.M. and having had her ossification test done, the report of which was exhibited as Ex.PW-11/F. He also confirmed having sent all the exhibits to CFL, Hyderabad. He correctly recognized the bed-sheet, mattress and blouse (at Ex.P3, P4 & P5), which were shown to him in court.

17. In cross-examination, PW-11 ASI Rajpal Singh deposed that he had requested certain public persons to join in the investigation, of which only PW-8 Rahis Ahmad obliged. He categorically denied the allegation that 'M' had been raped by her father Bilat Shah, as well as the allegation that the roof of the house of the prosecutrix could be accessed from any of the neighbouring roofs. He confirmed having found blood on the roof, though he did not send any sample thereof to the FSL.

18. We may note, here, that the ossification test report, dated 19th August, 2000 of the prosecutrix 'M' (Ex. PW-11/F) estimated her bone age as between 12 years and 14 years. Unfortunately, however,

the radiologist who carried out the said test, Dr. Shipra Rampal, was never arraigned as a witness, for reasons best known to the prosecution. The correctness and veracity of the ossification test report was never, therefore, confirmed in evidence during trial. We cannot, therefore, on the basis of the said ossification test report, treat 'M' as being 12 to 14 years of age, contrary to the statements of 'M' and of her father, that she was 10 years of age. In this context, we may note, here, that, following earlier decisions on the point, the Supreme Court, in its recent judgment in *Mukarrab v. State of U.P.*, (2017) 2 SCC 210, held that the ossification test report could not be regarded as providing a conclusive indicator of age.

19. PW-12 SI Kaushal Ganguli, who was posted as S.I. at PS Samaipur Badli in August, 2000, confirmed having been appointed IO in the present case, in September, 2000, and having got the exhibits sent, through Const. Anil Kumar (PW-9), to the FSL. On the basis of his testimony, the FSL report and the serological report annexed thereto were exhibited as Ex. PW-12/B and Ex. PW-12/A, respectively.

20. PW-13 ASI Rajbala confirmed having received a *rukka*, through Const. Ramesh Katare (PW-14), on 17th August, 2000, and having recorded the FIR (Ex. PW-11/E) on the basis thereof.

21. PW-14 Const. Ramesh Katare confirmed having reached Shraddhanand Colony, on 17th August, 2000, along with ASI Rajpal (PW-11), where they came to know that 'M' had already been taken to the hospital. He further confirmed the seizure, from the spot, of blood-

stained clothes, including one mattress, one bed-sheet and one blouse, of the lifting of blood from the spot with the help of a cotton swab, and of converting all these articles into separate parcels, sealed and seized *vide* seizure memo Ex.PW-3/A. He further deposed that the appellant was arrested, and thereafter, taken to the hospital, by Const. Anil Kumar Ex.PW-9, and himself, and that, after the medical examination of the appellant, the doctor handed over two sealed parcels, to him, bearing the seal of the hospital, which he handed over to ASI Rajpal, who seized the articles *vide* Seizure Memo Ex.PW-9/A. He correctly identified the bed-sheet, mattress and blouse, when shown to him in court.

Medical/Hospital evidence

22. PW-1 Dr. Kawaljeet Banga, Chief Medical Officer, BJR hospital proved, during trial, the MLC of the prosecutrix 'M', which was, therefore, exhibited as Ex. PW-1/A. The MLC recorded that the hymen of the prosecutrix was torn, the tears were "oozing", and that the vagina of the prosecutrix admitted the tip of one finger. It also noted that vaginal smear had been taken, and the fact that the underclothes and frock of the prosecutrix were soaked with blood. The only external injury noted, on the person of the prosecutrix was, however, an abrasion over her right forearm. These particulars were reiterated, by Dr. Banga, in evidence during trial.

23. On the body of the aforesaid MLC of the prosecutrix 'M', Dr. Seema, Senior Resident, Gynaecology, had entered a comment that the prosecutrix was "fit for statement". Her signature, on the said MLC,

was proved by PW-6 Jai Bhagwan Sharma, Record Clerk in the hospital, who deposed, during trial, that, though Dr Seema had left the hospital, and her present whereabouts were unknown, he could identify the signature on the MLC, as he had seen her writing and signing in the ordinary course of his duties. He was not cross-examined, despite grant of opportunity.

24. PW-4 Dr. SA Francis, CMO at the hospital, identified the signature of Dr. Naveen Gupta on the MLC of the appellant (Ex. PW-4/A), though Dr. Gupta had, thereafter, left the services of the hospital, and his whereabouts were unknown. The said MLC is unremarkable, except for the observations, thereon, that there was no “obvious external injury” to be seen on the appellant, and that the final impression, recorded thereon, was that there was “no clinical evidence to suggest that the appellant was not capable of doing sexual act”.

Forensic evidence and related witnesses

25. The only witness, from the FSL, was AK Srivastava (PW-16), who carried out forensic analysis on the five sealed parcels, relating to the present case, which were received in the FSL on 31st October, 2000 and marked to him. Mr. Srivastava proved, in his evidence during trial on 8 October, 2003, his report (Ex. PW-12/B), as well as the serological report, dated 21st November, 2002 (Ex. PW-12/A), both of which were prepared by him. He was not cross-examined, despite grant of opportunity.

26. The biological report of the FSL (Ex. PW-12/B) indicated presence of blood on the skirt of the prosecutrix, the bedsheet, the blouse alleged to have been used to wipe the blood on the roof of the appellant's premises, the mattress, the cotton wool swab (obviously) and the blood sample itself. No semen was detected on any exhibit, except the underwear of the appellant. The serological report (Ex. PW-12/A) found the blood, detected on all the exhibits, to be of 'A' group and the blood grouping of the semen found on the underwear of the appellant, was also found to be of 'A' group. Serological analysis of the blood sample could not be performed, as the sample had putrified; similarly, the cotton wool swab, on which the sample found on the floor of the roof of the premises in which the appellant was residing, was also non-reactive. In these circumstances, the serological analysis, carried out by the FSL, is of little assistance to this court in the present case, as, no injury having been found on the person of the appellant, the blood, found on various exhibits, could not be his, and blood grouping of the prosecutrix 'M' was never carried out. In the absence of serological analysis of the blood group of 'M', the reports of the FSL are of little value, in determining the culpability of the appellant, for the offence of having committed rape on the prosecutrix, to any appreciable extent.

27. We express our dismay at the fact that no opinion was sought, from Mr. Srivastava (PW-14), during trial, regarding the contents of the reports of the FSL, or with respect to any explanation thereof. We, therefore, can only go by the said reports, as they stare us in the face.

Statement of the appellant under Section 313, Cr.P.C.

28. The appellant, in his statement recorded under Section 313 of the Cr.P.C., denied each and every allegation against him and, in respect of the initial statement of 'M', as recorded by ASI Rajpal Singh, and the reports of the FSL, professed ignorance. He insisted that the prosecution witnesses had deposed falsely against him, and that he was completely innocent.

Defence Witnesses

29. The appellant led the evidence of three defence witnesses (DWs). DW-1 Ramjano deposed that, in the month of August for years earlier, the prosecutrix admitted and stated, in the presence of others, that her father had committed rape upon her, and that, on hearing this, she (i.e. DW-1) called the father of the prosecutrix from his office and slapped him. She deposed, further, that she called the police, who also reached the spot and belaboured the prosecutrix's father, but that he said something in Bihari, taking the name of the appellant. She insisted that the appellant had not raped 'M'. She reiterated these facts in cross examination. DW-2 Raju supported the testimony of DW-1, by deposing, during trial, that, in August 2000, at about 9:45 PM, he found that the father of the prosecutrix had been *gheraoed* by a crowd outside the shop of DW-1 and, on enquiry, learnt that Balit Shah (PW-3) had raped 'M', on hearing which he, too, slapped Balit Shah. He further deposed that, after some time, Parvati arrived there and took Balit Shah home. However, in cross

examination, Raju (DW-2) admitted that he had implicated Balit Shah at the instance of other people in the locality, even while insisting that the appellant had not committed rape on 'M'. DW-3 Srinivas Choudhury, another neighbour, deposed that, on the night of 15th August, 2000, while on the way back from the residence of his sister, he met Balit Shah, who offered him liquor. He further deposed that, on the next day, i.e. on 16th August, 2000, he saw the prosecutrix 'M' working normally at 10 AM, even while admitting, in cross examination, that he did not speak to her.

The impugned judgement

30. Having recounted the facts of the case, as well as the evidence of various witnesses, and having heard arguments advanced by learned counsel before him, the learned ASJ proceeded to reason as under:

(i) It was settled, in law, that, in cases of rape, the testimony of the prosecutrix was, by itself, sufficient to sustain conviction, where the testimony was clear, cogent, consistent and convincing, as it was reasonable to assume that no girl would falsely implicate a person as having taken sexual advantage of her.

(ii) The learned ASJ had, after questioning the prosecutrix (who was 10 years old at the time) and inviting answers from her, satisfied herself that the prosecutrix was able to understand the questions and respond, to them, properly and intelligently. It was only thereafter that the statement of the prosecutrix was recorded, first, under Section 164 of the Cr.P.C. and, thereafter in the court during trial. The evidence of the prosecutrix was

also clear, cogent and consistent. As such, there was no justification to discard or reject her statement.

(iii) Besides providing particulars of the incident, 'M', deposing as PW-2, also stated that she had narrated the incident to Parvati (PW-7). Parvati corroborated the evidence of the prosecutrix, and deposed that, when she approached the prosecutrix, lying on the road, she was informed, by the prosecutrix 'M', that the appellant had committed rape on her. She denied the suggestion, put her in cross examination, that 'M' did not disclose, to her, the name of her assailant.

(iv) In view of the specific suggestion, put to Bilat Shah (PW-3), that the rape, of his daughter, had been committed by Arvind and Srinivas, the depositions, by the DWs, that the prosecutrix had been raped by her father, appeared to be an afterthought. There was, moreover, no independent evidence, of any witness, or otherwise, supporting such a stand.

(v) The minor contradictions and discrepancies, in the statements of 'M' seen in juxtaposition with the evidence of Parvati (PW-7), could not affect the veracity of the testimony of the prosecutrix, or the truthfulness of the case. Besides, the fact that the prosecutrix 'M' was examined in court when she was just 10 years of age, and had suffered rape, explained the existence of discrepancies and contradictions in the statement. Reliance was placed, in this regard, on the judgements of the Supreme Court in *Leela Ram vs State of Haryana*, (1999) 9 SCC 525, *Rammi vs State of MP*, (1999) 8 SCC 649, *Tehsildar Singh vs State of UP*, AIR 1959 SC 1012, *Appabhai vs State of*

Gujarat, JT 1988 (1) SC 249, Sukhdev Yadav vs State of Bihar, JT 2001 (7) SC 597 and Krishna Mochi vs State of Bihar, 2002 A.D. (SC) 45, which proscribed the court from taking undue cognizance of minor contradictions and inconsistencies in the statements of prosecution witnesses, and to consider, instead, whether the contradictions and inconsistencies were so material that they went to the root of the matter. Besides, the prosecutrix ‘M’ was not, during trial, confronted with her earlier statements under Section 161 or 164 of the Cr.P.C.

(vi) The prosecution witnesses were not shown to have been inimical to the appellant, so as to discredit their evidence.

(vii) The testimony of the prosecutrix ‘M’ stood corroborated by other testimonies on record; on the other hand, there was no evidence which could contradict the testimony of the prosecutrix, regarding the commission of rape, on her, by the appellant.

(viii) In view of the above, the charge of criminal intimidation of the prosecutrix ‘M’, also stood proved against the appellant.

31. *Vide* separate order, dated 25th March, 2004, the learned ASJ held that the crime committed by the appellant, on ‘M’, was gruesome, and that “no amount of punishment would be sufficient, as his conduct was inhuman and barbaric”, thereby disentitling him to any mercy. Holding that the punishment awarded to him was required, in the facts of the case, to be exemplary and deterrent in nature, the learned ASJ sentenced the appellant to life imprisonment and fine of ₹ 10,000/–,

with default simple imprisonment of one year, for the offence punishable under Section 376 of the IPC, and with rigorous imprisonment of 7 years, with fine of ₹ 10,000/–, and default simple imprisonment of one year, for the offence under Section 506 of the IPC, stipulating, further, that the sentences would run concurrently, and the appellant would be entitled to the benefit of Section 428 of the Cr.P.C.

32. Challenging his conviction, under Section 376 and section 506 of the IPC, and the sentences awarded to him, by the learned ASJ, therefor, the appellant is an appeal before us.

Submissions on behalf of appellant and respondent

33. Ms. Rakhi Dubey, appearing for the appellant, initially drew our attention to DD Entry No 9 A, dated 17th August, 2000 (Ex. PW-11/A), which noted that, at 10:25 AM that day, ASI Shravan Singh, PCR, had informed that, at F-19/5, Masjid Wali Gali No 10, Shraddhanand Colony, the prosecutrix 'M' had been raped by her father and their neighbour. She further sought to submit that it was unbelievable that anyone would commit rape in a room where two other persons were sleeping, and relied on the fact that, in the MLC of the prosecutrix 'M', no injuries were found on her private parts (which, we may state, is contrary to the record, as the MLC recorded multiple hymeneal tears which were oozing). Neither, she sought to point out, was semen, or blood, of the appellant, detected on the clothes of the prosecutrix. She, therefore, submitted that it would be

unfair and unjust to convict her client on the basis of the sole and uncorroborated testimony of the prosecutrix ‘M’.

34. *Per contra*, learned Additional Public Prosecutor (APP), appearing for the State, reiterated the reasoning contained in the impugned judgement of the learned ASJ, and submitted that, in view of the deposition of the prosecutrix ‘M’, which did not suffer from any infirmity, the learned ASJ had rightly convicted the appellant, and that his judgement did not deserve any interference.

Analysis

35. The “star witness” of the prosecution, in the present case – as, almost inevitably, in all such cases – is the prosecutrix herself. Being the sufferer-victim of the atrocity allegedly perpetrated by the accused-appellant, her evidence becomes doubly significant; it is essential, therefore, that, at the outset, the value, and worth, to be accorded to her testimony, is assessed.

36. We have had occasion to ponder, very recently, over the issue of credibility of the evidence of child witnesses and have, after analysing authoritative pronouncements thereon, culled out the following principles [in our judgement, delivered on 24th May, 2018, in *Crl Appeal 773/2015 (Sanjay Kumar Valmiki vs State)*]:

- (i) There is no absolute principle, to the effect that the evidence of child witnesses cannot inspire confidence, or be relied upon.

(ii) Section 118 of the Indian Evidence Act, 1872 discounts the competence, of persons of tender age, to testify, only where they are prevented from understanding the questions put to them, or from giving rational answers to those questions, on account of their age.

(iii) If, therefore, the child witness is found competent to depose to the facts, and reliable, his evidence can be relied upon and can constitute the basis of conviction.

(iv) The Court has to ascertain, for this purpose, whether (a) the witness is able to understand the questions put to him and give rational answers thereto, (b) the demeanour of the witness is similar to that of any other competent witness, (c) the witness possesses sufficient intelligence and comprehension, to depose, (d) the witness was not tutored, (e) the witness is in a position to discern between the right and wrong, truth and untruth, and (f) the witness fully understands the implications of what he says, as well as the sanctity that would attach to the evidence being given by him.

(v) The presumption is that every witness is competent to depose, unless the court considers that he is prevented from doing so, for one of the reasons set out under Section 118 of the Indian Evidence Act, 1987. It is, therefore, desirable that judges and Magistrates should always record their positive opinion that the child understands the duty of speaking the truth, as, otherwise, the credibility of the witness would be seriously affected, and may become liable to rejection altogether.

(vi) Inasmuch as the Trial Court would have the child before it, and would be in a position to accurately assess the competence of the child to depose, the subjective decision of the Trial Court, in this regard, deserves to be accorded due respect. The appellate court would interfere, therewith, only where the record indicates, unambiguously, that the child was not competent to depose as a witness, or that his deposition was tutored. Twin, and mutually opposing, considerations, have to be borne in mind, while ascertaining the competency of a child witness to justify. On the one hand, the evidence of the child witness has to be assessed with caution and circumspection, given the fact that children, especially those of tender years, are open to influence and could possibly be tutored. On the other hand, credibility is attached, to the evidence of a competent child witness, as children, classically, are assumed to bear no ill-will and malice against anyone, and it is, therefore, much more likely that their evidence would be unbiased and uninfluenced by any extraneous considerations.

(vii) It is always prudent to search for corroborative evidence, where conviction is sought to be based, to a greater or lesser extent, on the evidence of a child witness. The availability of any such corroborative evidence would lend additional credibility to the testimony of the witness.

37. Having examined the depositions of the prosecutrix 'M', during trial as well as under Section 164 of the Cr.P.C., we find no reason to discredit either. We find that the learned ASJ has put, to the prosecutrix 'M', the requisite questions, and elicited answers, from

her, thereto, so as to satisfy herself regarding the capability of 'M' to testify, and we find no infirmity in the conclusion, of the learned ASJ, on the basis of the responses of 'M' to her queries, that she was a capable and credible witness. We have also perused, minutely, the statement of the prosecutrix, under Section 164 of the Cr.P.C., as well as during trial, and we find them to be corroborative, *inter se*, in all material particulars. The prosecutrix clearly testified, in both the statements, that the appellant had, on the night between 16th and 17th August, 2000, entered her room, undressed her and committed "*galat kaam*" ("wrong acts"), with her, whereafter he carried her to the roof of his house and repeated the act. There is no inconsistency, whatsoever, in the said statements of the prosecutrix 'M', regarding the commission, by the appellant, of the said offence, first in the room of the prosecutrix and, thereafter, on the roof of his house. We may note that we are not scanning the two statements with a magnifying glass, so as to ferret out any minor inconsistencies between them. We can never be unmindful, in a case such as this, of the fact that the prosecutrix was a 10 year old child, who had been subjected to what would, possibly, be the worst trauma that she would ever have the misfortune to suffer. So long, therefore, as her depositions, under Section 164 of the Cr.P.C. and, thereafter, during trial, *were consistent in all material particulars*, they command credibility and acceptance. Significantly, the Supreme Court has gone to the extent of holding that insistence on corroboration, in such cases, would amount to adding insult to injury, and would be a disservice to the child-prosecutrix, and the ignominy that she has already had to undergo.

38. That the prosecutrix had been subjected to rape, stands borne out by her MLC (Ex. PW-1/A), which was proved by PW-1 Dr Kawaljeet Banga. It was clearly stated, in the MLC, that her hymen was torn, the tears were “oozing”, and that her vagina admitted the tip of one finger. Moreover, her underclothes and frock were soaked with blood. The biological report of the FSL (Ex. PW-12/B), as proved by AK Srivastava (PW-16), who had prepared the said report, also indicated presence of blood on the skirt of the prosecutrix, the bedsheet as well as the blouse alleged, by the prosecutrix, to have been used by the appellant to wipe blood from the spot on the roof. Given the fact that ‘M’ was only 10 years of age at the time, these factors conclusively establish the commission of rape, on her.

39. Once the fact of commission of rape, on ‘M’ also stands established by medical evidence, we are sanguine that her deposition, under Section 164 of the Cr.P.C. and, later, during trial, inexorably fasten the guilt and liability, therefor, on the appellant. Though it is hardly required, we may note that, at the first available opportunity, after the commission, on her, of the said atrocities, when she was found on the road by Parvathi (PW-7), the prosecutrix informed her of the commission of rape, on her, by the appellant. The suggestion, put to her, that her deposition was incorrect, was categorically denied by PW-7 Parvathi. The finding of blood, on the frock and undergarment of the prosecutrix, as well as the bedsheet and mattress, recovered from the roof of the appellant’s premises, as also the blouse, belonging to the sister-in-law of the appellant, alleged to have been used by the

appellant to wipe off the traces of blood from the spot, also add credibility to the testimony of the prosecutrix.

40. For the same reason, we find no cause to differ with the finding, of the learned ASJ, that the appellant had, indeed, threatened 'M' with dire consequences, were she to disclose the fact of the atrocities committed on her, to anyone. In any event, this aspect has lost significance, as the appellant has already suffered the sentence, awarded to him, by the learned ASJ, under Section 506 of the IPC.

41. Given the fact that human blood was found, on the mattress, bedsheet and blouse, recovered from the roof of the appellant's premises, it was for the appellant, under Section 106 of the Indian Evidence Act, 1872, to explain the same. No such explanation, however, is forthcoming in the statement of the appellant, recorded under Section 313 of the Cr.P.C.; neither has any explanation be intended, in this regard, before us, by learned counsel appearing for the appellant. The incapability, of the appellant, to explain these findings, would also invite a necessary inference that the allegation of the prosecutrix 'M' was true.

42. We are not inclined to accord any significance to the submission, of Ms. Rakhi Dubey, that the prosecutrix 'M' was raped by her father. To us, the suggestion appears both ill taken and preposterous. No suggestion, to the said effect, was put to Bilat Shah (PW-3), when his evidence was recorded during trial. DW-2 Raju, who deposed, to the said effect, in his examination-in-chief, admitted, in cross examination, that he had done so at the instance of other

people in the locality. In any event, in view of the clear statements, of the prosecutrix 'M', that the appellant was her violator, any suggestion, implicating anyone else for the said offence, merits rejection at the outset.

43. We find no reason, therefore, to interfere, far less differ, with the finding, of the learned ASJ, that the appellant was guilty of having committed rape on the prosecutrix and, subsequently, of having threatened her with dire consequences, in case she were to disclose the fact of commission of rape, on her, to anyone else.

44. Neither do we find any reason to interfere with the sentence awarded to the appellant by the learned ASJ. Ecclesiastically as well as temporally, child rape is inexcusable. No leniency, or mercy, can be shown to the violator of the body of a child of tender years, who is yet to savour the first fragrance of adolescence. It is for this reason that the statute, too, treated such an offence as one of its kind, and carved out a separate substantive provision to deal therewith, in clause (f) of Section 376 (2) of the IPC [as it stood prior to its amendment with effect from 3rd February, 2013 *vide* Section 9 of the Criminal Law (Amendment) Act, 2013]. Child rape is the ultimate indicator of the reality, often unnoticed, that rape is an offence less of passion and more of power.

45. Rape, of any kind and on anyone, is an anathema in a civilised society; when perpetrated on a young child, however, it betokens a depravity, in the perpetrator, which is ingrained in his psyche, and which altogether disentitles him from any leniency, in law, or the right

to cohabit, in society, with his brother. Law, after all, is an instrument which aims at social order, and aberrant elements, where the aberrations transgress all excusable limits, would inherently be destructive thereof. The perpetration of social order would necessarily require, therefore, the removal of such elements from the societal fabric, if the warp and weft thereof are to remain intact.

46. Resultantly, we find no reason to differ with the learned ASJ, in the matter of the sentences awarded, by him, to the appellant.

Conclusion

47. As a sequitur to our discussion hereinabove, the conviction of the appellant, under Section 376(2) (f), as well as under Section 506, of the IPC, are maintained, as are the substantive sentences of imprisonment as well as fine, as awarded, by the learned ASJ, to the appellant, for the said offences. However, the default sentence, (in case of non-payment of fine), would stand reduced to three months' simple imprisonment each, for the offences committed under Section 376 (2) (f) and Section 506 of the IPC.

48. Subject to the above limited modification in the default sentence, the appeal is dismissed.

**C.HARI SHANKAR
(JUDGE)**

**S. P. GARG
(JUDGE)**

MAY 29, 2018
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